DECISIONS

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GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JULY, 1885, TO JUNE, 1886.

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* On page 565 of this decision, line 4 from bottom, read "proper" for "property."

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*The words, "the date on which the township plat was filed," in line 7 of this decision, should be read in line 6, after the date November 2, 1883.

† On page 409 of this decision, in line 34, read "contended" for "intended."

‡ In line 13 of this decision read "1878" for "1873."

§ In line 23 of this decision read "1866" for "1886."

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

TIMBER TRESPASS.

In determining the amount of damages resulting from "boxing" trees for turpentine, the injury, present and prospective, inflicted upon the trees should be included.

Acting Secretary Muldrow to Commissioner Sparks, July 1, 1885.

I am in receipt of your letter of the 15th of June last, inclosing report of Special Agent Griffin, dated June 4, 1885, relative to the matter of the measure of damages in case of trespass by "boxing" trees upon the public lands for turpentine.

For years past the Department has at intervals been called upon to examine into cases of turpentine trespass presented for its action, and has, as a general rule, recommended suit for the recovery of the value of the material taken. Experience, however, clearly shows that such action has entirely failed to accomplish the suppression of such unlawful operations. Parties against whom judgments have been obtained have continued to violate the law even upon an enlarged scale, defying the agents of the Government to their faces; and other parties in the immediate vicinity have entered upon the work of destruction, in no way deterred by the punishment previously visited upon their neighbors.

The report of Agent Griffin, full and explicit as it is, simply corroborates the information already received from other sources, that a pine forest, when used as a "turpentine orchard," is doomed to entire destruction. A "box" or gash is cut into the side of a tree, perhaps 10 inches wide and 6 inches deep, and of such a shape as to catch and retain a considerable quantity of the crude turpentine gum. The next year another "box" is cut at another point in the circumference of the tree, and so on. Besides this, the tree is subjected to a "chipping" process, the bark being cut through down into the woody portion, for 12 or 18 inches above the upper edge of the "box," in order to keep a fresh bleeding surface continually exposed. In four or five years the life of the tree is exhausted. Even should the process of "boxing" be

discontinued, decay will ensue from the action of the weather and worms upon the portion of the wood already exposed. There can be no healing process and no future growth to a pine tree once tapped by the turpentine gatherer's ax. Drippings of gum accumulate in the "boxes" and about the root of the dying tree. From the carelessness of some traveler, or from lightning striking some tree in the forest, fires originate and the entire timber is consumed. After its destruction the land will be covered in a few years with a growth of worthless scrub oaks, rendering it entirely valueless.

In view of these considerations, I concur in your opinion that the measure of damages heretofore estimated in such cases, based upon the value of the material procured, is insufficient to indemnify the Government for the actual loss resulting from the boxing of trees for turpentine; and you are hereby authorized and directed to assess upon depredators of this class, hereafter, a measure of damages which shall include the injury, present and prospective, inflicted upon the trees which have been subjected to the operation.

Agent Griffin's report is returned herewith.

SWAMP INDEMNITY.

THE STATE OF ILLINOIS.

The opinion of the Court of Claims that the question of the right of the State to locate indemnity scrip outside of its limits and to swamp lands in the odd-numbered sections lying within the granted limits of the Illinois Central Railroad, is *res judicata*, is adopted by the Department.

Acting Secretary Muldrow to Commissioner Sparks, July 1, 1885.

Under date of February 13, 1884, my predecessor, Mr. Secretary Teller, transmitted to the Court of Claims for its consideration, agreeably to the provisions of the second section of the act of March 3, 1883 (22 Stat., 485), the matter of "the claim of the State of Illinois to locate swamp indemnity scrip outside of the State, and to the swamp lands in the odd-numbered sections lying within 6 miles on each side of the line of the Illinois Central Railroad, together with the papers in the case."

And under date of December 10, 1884, agreeably to the request of said court, dated November 25 preceding, this Department transmitted "certified copies of the papers enumerated in the paper accompanying the request, relating to the case No. 12, 'The State of Illinois *v.* The United States.'"

Copy of said court's opinion having been certified to this Department under date of the 16th ultimo for its "guidance and action," I accordingly herewith transmit said opinion, which will govern the future action of your office, if any.

You will observe that the court express the opinion that it is not competent for this Department to re-open the claims of the State of Illinois specified in the aforesaid letter of February 13, 1884, although the court express no opinion touching the correctness of our respective predecessors' decision.

Reference being had to decision rendered by my predecessor, Mr. Secretary Kirkwood, October 19, 1881, *in re* State of Illinois (1 L. D., 508), for a résumé of the action of your office and this Department in the premises, recital of the same herein is thereby obviated.

COURT OF CLAIMS.

Department Case No. 12.

The State of Illinois *v.* The United States.

Findings.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. That after the passage of the act of September 28, 1850 (9 Stat., 519), the Government of the United States continued to dispose of, and in fact did dispose of to individuals, large quantities of the swamp and overflowed lands in the State of Illinois.

On the 31st day of March, 1858, Hon. Jacob Thompson, then Secretary of the Interior, decided that the State of Illinois was not entitled to locate swamp indemnity lands outside the limits of the said State, under the provisions of the act of March 2, 1855; said decision was affirmed by the following successive Secretaries of the Interior: Hon. Caleb B. Smith, May 8, 1861; Hon. W. T. Otto (acting Secretary), March 12, 1863; Hon. O. H. Browning, February 8, 1868; Hon. C. Delano, February 2, 1874, and Hon. S. J. Kirkwood, October 19, 1881.

II. That subsequently to the passage of the said act of September 28, 1850, large quantities of swamp and overflowed lands in the State of Illinois were located with military bounty land warrants and scrip, and among other swamp and overflowed lands so located were 5,763.13 acres situated in Clay County, Illinois.

III. That pursuant to the decisions of the Secretaries of the Interior the indemnity certificates issued in the State of Illinois since March 31, 1858, by the Land Office of the United States have expressly declared that the land to be located thereunder must be public land of the United States within said State.

IV. That there are no public lands of the United States in the State of Illinois subject to be taken by, or located with, swamp indemnity certificates.

V. That the location of the line of railroad in the State of Illinois, authorized by the act of Congress approved September 20, 1850 (9 Stat., 466) was certified by the president and the secretary of said company, known as the Illinois Central Railroad Company, on December 11, 1851; that said certificate was filed in the General Land Office on February 13, 1852, and was approved by the Secretary of the Interior on February 20, 1852. That included within the sections of land designated by the odd numbers, lying within 6 miles of the line of railroad so located, are certain swamp and overflowed lands, for which the State

of Illinois claims indemnity under the provisions of the acts of Congress approved March 2, 1855, and March 3, 1857.

VI. That on the 19th day of September, 1850, the President of the United States, by executive order, suspended and reserved from sale the lands for 6 miles on each side of the now Illinois Central Railroad for not to exceed six months, and by further orders, of date February 25, 1851, September 4, 1851, December 31, 1851, continued the said suspension and reservation until June 30, 1852. That on the 3d day of April, 1852, by a proclamation of the President of that date, the said lands were restored to entry and offered for sale. The power of the President so to suspend the sale of lands had been theretofore several times exercised; among others once in the year 1828 and once in 1844, as well as in other cases.

VII. That on the 20th day of November, 1855, Hon. Robert McClelland, then Secretary of the Interior, decided that the State of Illinois was not entitled, under the provisions of the act of September 28, 1850, to the swamp and overflowed lands lying in the odd-numbered sections of land within 6 miles of each side of the line of the Illinois Central Railroad; that said decision was affirmed by Hon. C. Schurz, subsequent Secretary of the Interior, May 2, 1878, June 28, 1880, and, after reference to the Attorney-General for an opinion, again affirmed by said Secretary March 2, 1881.

VIII. That at the time of the passage of the act of September 28, 1850, the United States owned large tracts of public lands in the State of Illinois, unsurveyed and unappropriated, and unaffected by pre-emption or homestead claims, which lands were swamp and overflowed, and rendered thereby unfit for cultivation. Also, that tracts of such swamp lands were situate in the odd sections within 6 miles on either side of the Illinois Central Railroad as afterwards located; also tracts of such swamp lands situate between the 6-mile and 15-mile limits of said railroad, as located.

IX. That the United States, on March 2, 1855, and for some considerable time thereafter, owned public lands in the State of Illinois of the class subject to entry at $1.25 per acre, and disposed of all of the same since said last-named date except an amount heretofore located under swamp-land certificates, and that the United States has still in other States and Territories public lands unappropriated and unreserved, and not interfered with by pre-emption or homestead claims.

X. That the lands described as lying in township 5 and mentioned in the second part of the petition, were situate in Clay County, in the State of Illinois, and were swamp and overflowed on the 28th of September, 1850; and the same were duly selected and claimed by the State of Illinois as swamp and overflowed; that the same were either sold or located by the United States after September 28, 1850, and before March 3, 1857, and the State of Illinois claimed idemnity on the same, which the Department refused upon the ground that the same were situate within the 6-mile limits of the Illinois Central Railroad, and for that reason did not inure to the State under the swamp-land grant.

XI. That in the year 1883 the State of Illinois caused to be selected the N. ½ of the NW. ¼ of Sec. 17, T. 4 N., R. 5 east, in the county of Clay, in the State of Illinois, as swamp land, under the grant of September 28, 1850; that the same had been sold by the United States; that the State asked indemnity therefor, and it was refused by the Commissioner of the General Land Office, upon the ground that the same lies within the 6-mile limits of the grant to the Illinois Central Railroad.

XII. That there is still claimed by the State of Illinois tracts of land as indemnity land under the swamp-land indemnity acts of Congress, and a cash indemnity under the aforesaid acts.

XIII. That the Department of the Interior instructs its special agent to examine the tracts of land in Illinois upon which land indemnity is claimed, and to make report upon the same to the Department; that this practice has been followed for many years and continues up to the time of the filing of the petition herein.

XIV. That the Department has once allowed indemnity on a tract in the odd sections within 6-mile limits of said railroad. S. ½ NW. ¼, Sec. 35, T. 4 N., R. 5 E.

Opinion.

DAVIS, *J.*, delivered the opinion of the court:

By an act approved September 28, 1850, swamp and overflowed lands unfit for cultivation were granted to the States wherein they were situated, to be drained and reclaimed. These lands not being definitely located, were in many instances innocently taken up by individuals, who in due course received title therefor from the land office. To remedy the difficulties which necessarily followed these double titles, Congress, in 1855 (March 2, 1855, 10 Stat., 634), confirmed the patents issued to individuals, and granted to the States the purchase-money received for swamp lands sold, or if the lands had been located by warrant or scrip then indemnified the States by giving them the right to locate "a quantity of like amount upon any of the public lands subject to entry at $1.25 per acre, or less." The States claimed the right under this act to receive scrip which might be located upon any vacant public lands subject to entry at $1.25 per acre, or less, no matter where situated; but Mr. Hendricks, then Commissioner of the General Land Office, declined to issue any indemnity scrip not on its face confined to location within the borders of the State receiving it. His decision was affirmed by Secretary Thompson, and has since been adhered to by succeeding Secretaries of the Interior.

The second ground of complaint is based upon the construction by the Interior Department of an act passed eight days prior to the swamp-land act, and which gave to the State of Illinois, to aid in the construction of the Illinois Central Railroad, the even-numbered sections on either side of that road, the odd-numbered sections, retained by the Government, being advanced to double minimum price and reserved from sale by the President until 1852. The State claims the swamp lands in these odd-numbered sections, or indemnity therefor, as granted to it by the act of September 28, 1850 (the "swamp-land act"), notwithstanding the advance in price and the reservation of the lands by the President from sale or location. Secretary McClelland, in 1855, decided adversely to this claim of the States, and his ruling has since been regarded by the Department as conclusive.

The question of the jurisdiction and power of this court acting under the Bowman act (March 3, 1883, 22 Stats., 485) upon claims transmitted by the Executive Departments is met upon the threshold of this case and has been presented by counsel with great care and ability both upon the argument of the motion to dismiss and upon the final hearing.

The Government cannot be sued without its consent, and may affix to that consent such conditions as it chooses, any resulting hardship being remediable only by the law-making power. The act under which this case is sent here empowers us to consider those matters pending in the

Executive Departments which are transmitted by the heads of those Departments, and which are not barred by the provisions of any law of the United States. It is clear that this claim is pending in the Department of the Interior within the meaning of the act in so far as to give this court jurisdiction to consider it, and to report its findings to the Secretary for his guidance. (Jackson *v.* The United States, 19 C. Cls., 508.)

In the *McClure Case* (19 C. Cls., 23), decided at the last term, the nature and extent of the jurisdiction conferred upon this court by the Bowman act were fully considered, and the conclusion was reached that section 1093 of the Revised Statutes operates upon the act, and bars in this court any demand against the Government in which a final judgment has been rendered. The result of the reasoning in that case is, that the transfer of a claim from one of the Departments to this court does not carry with it an increase of power over the matter in controversy, and if the head of Department be himself without jurisdiction or power to aid the claimant the latter's legal position is not bettered by the transfer. The Bowman act is exceptional and peculiar in its provisions, and the jurisdiction conferred by it is very different from that granted by sections 1059 and 1063 of the Revised Statutes, being in its nature advisory.

As was said by this court in the McClure case; the intention of Congress in passing the act "seems to have been not to resuscitate claims which had previously been forever wholly barred from settlement, and not to open old outlawed and dead issues, while it was affording assistance and relief to the Departments in the investigation of claims alive and under consideration therein." The opinion in the case of Jackson (19 C. Cls., 504) also proceeds upon this theory, and closes by directing the clerk to certify to the Secretary of the Treasury, not that the decision made by his predecessor was or was not correct, but that he had "no power to open the claim for readjustment on its merits." What, then, is the power of the Secretary of the Interior over the case at bar, one branch of which was decided by Secretary Thompson in 1858, and the other by Secretary McClelland in 1855?

As early as 1825 Mr. Wirt, then Attorney-General, in a letter to the Secretary of the Navy, said that he had understood it to be a "rule of action prescribed to itself by each Administration to consider the acts of its predecessors conclusive as far as the Executive is concerned." The Supreme Court in the case of the Bank of the Metropolis, decided in 1841 (15 Peters, 401), limited the right of an executive officer to review his predecessor's decisions "to mistakes of fact arising from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced;" in 1849, Mr. Attorney-General Toucey held (5 Op., 29) that the principle of *res judicata* applied to claims "thus deliberately considered and rejected;" his successor, Mr. Reverdy Johnson (5 Op., 240), ruled that the decision of a Secretary of the Interior, "whether right or not," could not be overruled by his successor; and these decisions were followed consistently by other Attorneys-General, among them Mr. Black (9 Op., 300 and 387); Mr. Stanbery (12 Op., 169 and 356) Mr. Hoar (13 Op., 33 and 226); Mr. Akerman (13 Op., 387); Mr. Bristow (13 Op., 457); and Mr. Williams (14 Op., 275). Even the opinion of Mr. Attorney-General Bates, in the Hot Springs case (10 Op., 61), cited as a departure from this line of authorities, does not seem to be such, but if it be, Mr. Bates retraced his steps the next year in the Dart case (10 Op., 255), wherein he reviewed and followed the opinions of his predecessors.

In 1864 (Lavallette *v.* The United States, 1 C. Cls., 149) this court decided "that the head of a Department cannot, in a matter involving judgment and discretion, reverse the decision and action of his predecessor even in a matter relating to the general affairs and management of the business of the Department," and the Supreme Court held in Stone *v.* The United States (2 Wall., 535) that one "officer of the Land Office is not competent to cancel or annul the act of his predecessor;" finally, this court, at the last term, in Jackson's case, followed the path so clearly defined by sixty years of consistent rulings, and held that the Secretary of the Treasury could not reopen a claim adjusted by his predecessor.

It is contended on behalf of the claimant that the decisions of the Secretaries were in their nature judicial, not administrative, and so beyond their power and jurisdiction, and further, that the precise limited question now presented has not been decided, that precise question being (to quote from the brief) "Will the Department issue a certificate simply reciting the words of the statute of March 2, 1855, as to authority to locate land in lieu of certain 5,763 acres heretofore located, which was also sold by the United States, situate in Clay County, Illinois, leaving the legal effect of such certificate to be hereafter tested by submission to some court of competent jurisdiction?"

We cannot agree that the decisions of the Secretaries upon the questions of statutory construction involved in this case were beyond their power to make; it is a necessary daily duty of administrative officers to construe the laws by virtue of which they officially exist, which prescribe their duties and limit their powers. How far these decisions, necessarily made in the discharge of official duty, are binding upon others, need not now be considered, as they clearly are binding upon the successors and subordinates of these officers, until reversed by competent authority, and such authority has not been given to this court by the Bowman act. The decisions and opinions already cited in relation to the power of one executive officer to reverse the ruling of his predecessor sprung from questions involving interpretations of the law, and in Jackson's case this court described the ruling of the Secretary which could not be reopened by his successor as one upon "a question of the construction of a statute."

Nor is the matter presented here so limited, as the complainant contends, or confined to any specific lot of land. The Secretary of the Interior describes it as the "claim of the State of Illinois to locate swamp land indemnity scrip outside of the State, and to the swamp lands in the odd-numbered sections lying within 6 miles on each side of the Illinois Central Railroad," and this submission cannot be limited or changed by the claimant. The Secretary requests the findings of this court not in relation to the Clay County lands alone, but upon the broad question of the right of the State to the lands described or to indemnity scrip not confined to location within the State. Further, the decisions of Secretaries Thompson and McClelland were general in their intention and application covering all lands within the description of the acts, and, while inchoate as to specific lots until defined, these rulings attached to each section as soon as located and found to fall within the acts of Congress.

It is urged that the adoption of the Revised Statutes created a new state of the law which brings the questions up as *res nova*, annulling the prior decisions and making a new grant of lands and indemnity. The Revised Statutes are the legislative declaration of the law on the 1st day of December, 1873, and we can go back of them only to explain ambiguity (United States *v.* Bowen, 10 Otto, 508), but we cannot see

that the enactment of 1874 nullified all rights which had vested prior thereto under the various statutes as theretofore construed by competent authority; the enactment was for aid and simplicity in the future and was not intended to tear up the past or to annul all that had gone before.

We are of opinion that the Secretary of the Interior has not authority to re-open the claims of the State of Illinois specified in his letter to this court dated February 13, 1884, and in this view of the case we express no opinion as to the correctness of the decisions made by his predecessors.

The clerk will certify a copy of this opinion to the Secretary of the Interior for his guidance and action.

PRACTICE—ATTORNEY—NOTICE.

JOHNSON *v.* GJEVRE. (ON REVIEW.)

Notice of appeal served upon the contestant's attorney of record is equivalent to notice served personally upon the contestant, and jurisdiction so acquired may not be defeated by an averment that the employment of counsel did not extend beyond a certain stage in the proceedings.

Acting Secretary Muldrow to Commissioner Sparks, July 2, 1885.

In the case of Hans Johnson *v.* Endre J. Gjevre, involving the homestead entry of Gjevre for certain lands in the Grand Forks district, Dakota, the Department on August 20, 1884, rendered a decision adverse to Johnson. (3 L. D., 156.)

On May 5, 1885, there was filed in this Department a motion for reconsideration on behalf of Johnson. As grounds for such motion, it is alleged by him under oath that he had no notice of the pendency of the case before the Department at the time said decision was rendered. He employed, according to his statements, Messrs. Bennett & O'Keefe, counsel, to represent him before the local office and your office, "but had no attorney employed to represent him before the honorable Secretary of the Interior, and did not know this appeal had been taken until about October 10, 1884."

The anomalous nature of this motion calls for a disposition upon its merits and aside from any question arising from the fact that the decision was rendered by my predecessor, and through lapse of time has become final.

From an examination of the record, it appears that the case when before your office was decided in favor of Johnson, and that Gjevre appealed from such decision. Upon the notice of such appeal appears the following indorsement: "Service of the within instrument admitted by a true copy this 5th day of February, 1884. Bennett & O'Keefe." On June 26, 1884, Messrs. Curtis & Burdett, of this city, as attorneys for Gjevre, filed an argument in the case with proof that notice thereof had been duly served upon Johnson through said Bennett & O'Keefe.

It thus becomes apparent that when the case was before this Department for consideration, the ordinary evidence of due notice upon counsel for the adverse party was of record and appeared sufficient. Rules of Practice 104, 5, 6 provide for service of notice upon the attorney of record, instead of the party in interest, and such provision is in accord with the general practice in the courts of law. Notice so given is equivalent to notice upon the party himself and jurisdiction so acquired may not be defeated by an averment that the employment of counsel did not extend beyond a certain stage in the proceedings.

The contestant, through suit, instituted by his attorneys, Bennett & O'Keefe, brings the defendant into the local office to respond to certain charges against his entry. On the hearing the contestant is successful and defendant appeals. The case comes up for examination before your office with said attorneys again representing contestant, and a like favorable result for contestant, whereupon the defendant again appeals, serving notice thereof upon the attorneys who had instituted and thus far prosecuted the suit against him. From the effects of such notice there can be no legal escape. The right of the defendant to carry his appeal to a final adjudication was quite as great as the right of the contestant to bring suit in the first instance, and of such right the contestant was bound to take notice and make due provision for, in the matter of employing counsel and prosecuting to a close the contest he had himself set on foot.

In addition to the foregoing, it should be noticed that Johnson admits knowledge of the appeal in October, 1884, but yet no steps were taken by him toward securing his alleged right to be heard until the May following. This fact alone would raise a strong presumption against the good faith of his present claim.

The motion is dismissed, and the papers filed in support thereof transmitted herewith.

PRE-EMPTION—SECOND FILING.

HANNAH M. BROWN.

A second filing allowed when the first proved invalid through no fault of the pre-emptor.

Acting Secretary Muldrow to Commissioner Sparks, July 2, 1885.

I have considered the appeal of Mrs. Hannah M. Brown from your refusal, of April 22, 1885, to restore her pre-emptive right, she having heretofore exercised the same as to a tract of land, which by the decision of this Department was awarded to one Zinkand, and her declaratory statements filed thereon canceled. See case of Zinkand *v.* Brown (3 L. D., 380).

Mrs. Brown now says that her filing on the Zinkand tract was made in entire good faith and she persisted in claiming said tract because she

honestly believed she was entitled to it. She insists that, inasmuch as she never has had the benefit of a pre-emptive right, she should not be debarred from the same because of her futile filing on the land.

Whilst the record in the case of Zinkand *v.* Brown discloses the fact that Mrs. Brown did not file declaratory statement on said tract until more than one month after the filing of Zinkand had been placed of record, she claimed settlement the same day that he did. The settlement claimed, however, was shown not to have been made by her in person, but by her son, who shortly afterwards proceeded with the erection of a house and other improvements on the land, in her behalf. She moved into this house on its completion and continued to reside there up to the time she attempted to make final proof and entry, which was protested against by Zinkand, to whom was ultimately awarded the land by virtue of his prior actual settlement.

All this confirms Mrs. Brown's assertion of good faith and honesty of purpose; for it is not to be supposed that a person will incur the expense and trouble of so improving and residing upon a tract of land, the right to which is claimed by another, unless satisfied that the claim of that other was merely pretentious.

When the law restricted persons, otherwise properly qualified, to "one pre-emptive right," it meant a right to be enjoyed in its full fruition; not that a fruitless effort to obtain it should be equivalent to its entire consummation.

So when the law declares that a party having filed a declaration of intention to claim such right as to one tract of land should not file a second declaration as to another it meant the filing on a tract open to such filing and whereon the pre-emptive right thereby claimed could ripen into an entry.

Mrs. Brown very clearly has not enjoyed the "one pre-emptive right" to which she is entitled, for the simple reason that she erroneously placed her filing upon land which, it has been judicially determined, was not properly subject thereto, becaused covered by a superior claim. Consequently, her pre-emptive right could not be completed and her filing was futile and of no effect.

Had she placed the latter upon land subject to the same and whereon her pre-emptive right could have been completed, and then wilfully or negligently abandoned the tract, she would have brought herself within the inhibition of the second clause of section 2261 of the Revised Statutes. But as it is she has done nothing for which she should be deprived of her rights under the pre-emption law.

The foregoing construction of the law, uniformly made in this Department, has been several times affirmed by the United States Supreme Court and is not now to be controverted.

Your judgment is reversed and Mrs. Brown will be allowed to exercise her pre-emptive right as prayed.

PRACTICE—REVIEW.

THE RENAULT GRANT.

A motion for review not filed within the period prescribed, nor based upon newly discovered evidence will not be entertained.

Acting Secretary Muldrow to Commissioner Sparks, July 3, 1885.

On the 22d of April last counsel for A. N. de la Mothe filed a brief, entitled "Application for patent to land in Kaskaskia district, Illinois," followed on the 7th of May by notice of a motion for review of my predecessor's decision of 18th February last, in the matter of the Renault grant, situated in Townships 4 and 5 S., Ranges 9 and 10 W. of the third principal meridian in the State of Illinois.

That decision was to the effect that in view of the information in possession of the Department as to the status of the claim, the condition of the lands, and of the doubt respecting the authority of your office to issue a patent for the same, the decision of your predecessor declining to issue such patent should be affirmed.

The decision of the Department having been final, and no motion for review having been filed within the period of thirty days prescribed by Practice Rule 77, the present motion, set for presentation this day, not being based on newly discovered evidence, must be denied, without reference to the question as to the binding force of the decision of a former head of the Department upon his successor.

PRACTICE—CERTIORARI.

WILLIAM JOHNSON.

Where an entry was canceled without notice and appeal denied because not filed in time such proceeding will be reviewed on certiorari.

Acting Secretary Muldrow to Commissioner Sparks, July 6, 1885.

I have considered the application of William Johnson for an order directing you to certify to this Department the proceedings in relation to the cancellation of his timber-culture entry, No. 994, Huron, Dak., for the NW. ¼ of Sec. 14, T. 113, R. 75, and also the denial by your office of his right of appeal from such action.

Said entry was made January 22, 1883, and on November 2, 1883, on report of Special Agent Burke, your office, by letter to the register and receiver, directed said entry, together with quite a number of others known as the Spencer entries, to be held for cancellation; allowing the entrymen sixty days within which to apply for a hearing and show cause why their entries should not be canceled. Notice of this rule was directed, with the others, to Johnson, at Fort Sully, Dak., it, appar-

ently, having been assumed that he was one of the garrison at that post. This notice never was received by him, because he was actually a resident of Michigan and never had been at Fort Sully.

On January 15, 1884, the local officers informed your office that said parties had been duly notified and no appearance by or for them had been entered.

In the same month M. L. Strong, an uncle of Johnson, having accidentally heard of the order to hold said entry for cancellation, directed Messrs. Burtt, Ayres & Crofoot, attorneys, to look into the matter and take proper steps to protect the interests of Johnson. Accordingly, on January 25, 1884, these gentlemen wrote to the register and receiver requesting a suspension of action as to Johnson's entry; stating that he had no notice or knowledge of the Commissioner's order; that his entry had been made in good faith, which would be shown as soon as the necessary proofs could be received from Johnson, who was then in Michigan and had been written to on that day.

By letter of January 25, 1884, your predecessor, on the report of the register and receiver, ordered said entry, with others, to be canceled, and the parties to be notified that sixty days would be allowed for an appeal. This letter was received at the local office January 29, 1884, and, notwithstanding the appearance and application of Burtt, Ayres & Crofoot in behalf of Johnson, the notice of cancellation and right of appeal was, as before, forwarded, with the other notices, to Fort Sully, and of course not received by him, or his attorneys. On February 4, 1884, the proofs to sustain Johnson's entry were received from him and same day filed with the register and receiver, who, the next day, forwarded them to your office. On April 8, 1884, the register and receiver reported that due notice had been given to Johnson, with the others, and no appeal had been filed, whereupon, by letter of April 29, received at the local office May 5, 1884, the said cases were closed. It thus appears that Johnson received no notice of the rule to show cause, nor of the cancellation of his entry and of his right of appeal. Mr. Ayres, one of the attorneys, deposes that his firm was not notified of said cancellation; but that afterwards, in August, 1884, whilst looking up another matter, he accidentally discovered the cancellation. Supposing Johnson's affidavit, filed February 4, 1884, had been overlooked at the Land Office, on August 13, 1884, he addressed a letter to the Commissioner calling his attention to the same and asking its consideration. On September 2, 1884, that officer replied that the application of Johnson for a hearing "was noticed in connection with other papers in the case," but not considered, because filed too late.

After the receipt of this letter, on October 11, 1884, Johnson appealed from the action of the Commissioner, but, by letter of February 19, 1885, the latter refused to entertain said appeal, because not filed in time. Notice of this refusal was transmitted to said attorneys February 26, 1885, whereupon, on March 13, 1885, the present application was filed and was transmitted by your letter of 11th instant.

If the foregoing allegations are true, and they are sustained by the testimony submitted, a great wrong has been done Johnson, which your predecessor refused to investigate by hearing or permit an appeal from. It is to meet such cases that the supervisory power of this Department was established, and it has been properly invoked in Johnson's behalf.

On receipt hereof you will certify and transmit to this Department all the proceedings in relation to said matter, in order that such action may be had as may seem right and proper in the premises.

PRIVATE CLAIMS.

ANTONIO VACA.

The decision of the Court of Claims holding that the issuance of certificates in satisfaction of the grant exhausted the jurisdiction of the Department will govern further action in said case.

Acting Secretary Muldrow to Commissioner Sparks, July 7, 1885.

On the 25th of February, 1884, my predecessor, Secretary Teller, transmitted to the Court of Claims for its consideration, as provided by section 2 of the act of March 3, 1883 (22 Stat., 485), the matter of the private land claim of Antonio Vaca, deceased.

I am now in receipt of the opinion of said court, certified to this Department under date of June 8, 1885, for its guidance and action. Said opinion is transmitted herewith, and will govern your office in any further action which may be found necessary in the course of business with reference to said claim.

You will observe that the court find that your office, having issued one set of certificates under the grant, has exhausted its authority under the law, and cannot issue duplicates, and that this Department is without further power in the matter.

It is not necessary at this time to recite the facts in the case. I inclose herewith a copy of my predecessor's letter of February 25, 1884, by which the matter was submitted to the Court of Claims for its action, to be filed in your office with the opinion of said court.

COURT OF CLAIMS.

Department Case No. 13.

John Ledyard Hodge and Andrew H. Sands *v.* The United States.

Opinion.

DAVIS, *J.*, delivered the opinion of the court:

By act of Congress (February 28, 1823, 3 Stat., 727), a certain land grant was, in 1823, confirmed to Antonio Vaca, since deceased, and whose legal representatives in this matter the claimants allege them-

selves to be as legatees of one Andrew Hodge, jr., who obtained title to the grant in 1836. No steps to locate or satisfy the grant seem to have been taken until 1872, when W. H. Hawford purchased the claim at an administrator's sale of this part of Andrew Hodge's estate, the sale being ordered by a parish court in the State of Louisiana, which apparently had jurisdiction in the premises. Hawford thereupon applied for certificates of location in satisfaction of the grant, which, in due course, were issued to him and have passed into the hands of third parties. Some of these certificates have been located upon the public lands and some are still outstanding and not located. In 1883 the claimants applied for satisfaction of the same grant and were refused by the surveyor-general because of the prior settlement with Hawford; they appealed to the Department of the Interior, and, in accordance with the Bowman act, the Secretary has transmitted the matter to this court for our opinion upon several points, one of which is immediately presented by the motion of the defendants, now under consideration, that the court shall certify to the Secretary of the Interior that upon the issue of the certificates to Hawford the Department became *functus officio.*

It appears to be substantially admitted, at least for the purposes of this motion, that the proceedings under which Hawford obtained title, although regular on their face and calculated to deceive the officers of the Department, were in reality void by reason of lack of jurisdiction in the local parish court to reopen the Vaca succession and sell this asset, and that the claimants' title, although it has lain dormant nearly fifty years, during which innocent parties have obtained interests under the Hawford certificates, is still paramount, so that the Department should issue to them new certificates of location, or at least deliver to them those certificates already issued which may hereafter come into the defendants' possession through an application for their location or otherwise.

If the claimants' allegations are well founded they probably have a remedy against Hawford, and if they have been injured by the laches or error of Government officers, they may perhaps have a claim for indemnity which will be recognized by Congress; but under the motion now made and under the provisions of the Bowman act we have to decide at this time not upon the rights of the claimants, but upon the power of the Secretary.

The statute provides (11 Stat., 294) that where a private land claim has been confirmed by Congress, but has not been located and remains unsatisfied, the appropriate surveyor-general shall "issue to the claimant or his legal representatives" a certificate of location. Hawford made application under this act, his title was on its face valid, and scrip was issued which certified that Vaca "or his legal representatives" were entitled to locate certain quantities of land. This scrip was sent to the surveyor-general, who delivered it to Hawford, relying upon the apparently good title set up by him. Perhaps this was an error which leaves the United States liable in damages to the claimants, but it was none the less an exercise of the power given by the act and exhausted that power. It either was or was not the duty of the surveyor-general to decide in whom the title to the certificate rested; if it was his duty, then the performance of it is not reviewable by his successor; if the decision of that question was not by law imposed upon him then the issue of the certificates running on their face to Vaca or his legal representatives, even if delivered by mistake to one not entitled to receive them, was an exercise of all the power the statute gave him. The statute allows the Land Office to issue one set of certificates, and only one, in satisfaction

of these grants; it does not authorize that office to correct errors by the issue of duplicate sets, and any wrong done or injury inflicted by the mistaken delivery must be remedied in the courts or by Congress.

It is our opinion that the Department of the Interior is without further power in the matter, and the motion is allowed. The clerk will certify a copy of this opinion to the Secretary of the Interior for his guidance and action.

FORFEITED RAILROAD LANDS.

Instructions under the act declaring a forfeiture of certain lands granted to aid in the construction of a railroad from Portland to Astoria and McMinnville in the State of Oregon.

Commissioner Sparks to register and receiver, Oregon City, Oreg., July 8, 1885.

The act of Congress of January 31, 1885, "To declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," provides as follows:

That so much of the lands granted by an act of Congress entitled "An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May 4, 1870, as are adjacent to and coterminous with the uncompleted portions of said road and not embraced within the limits of said grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made.

SEC. 2. 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 who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption, or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said pre-emption, homestead, or other laws, as the case may be, from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed 160 acres of the same, at the price of $1.25 per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefit of these rights: *Provided*, That the price of the even-numbered sections within the limits of the said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to $1.25 per acre.

SEC. 3. That the act of March 3, 1875, entitled "An act for the relief of settlers within railroad limits," is hereby repealed.

A portion of the lands along and lying north of that portion of the constructed road between Portland and Forest Grove, and therefore

"embraced within the limits of said grant for the completed portions of said road," are also "adjacent to and coterminous with the uncompleted portions of said road" between Forest Grove and Astoria.

The grant of so much as lies within conflicting limits applied equally to both portions of the definitely located lines, thus limiting the volume of the grant for either portion of the road to the extent that the same land fell within the limits of the other portion.

The question presented by this condition of the grant is whether the act of January 31, 1885, contemplated the forfeiture of the whole of the original grant of lands "adjacent to and coterminous with the uncompleted portions of said roads," irrespective of so much as falls within the 20-mile limits of the constructed portion, or whether the act intended to reserve from forfeiture all the lands within the latter limits irrespective of the portion that is adjacent to and coterminous with the uncompleted road.

Construing the whole act it appears to me that Congress intended to reserve from forfeiture the lands within granted limits along the whole of the constructed portion of the road. For the present, therefore, the restoration of lands under the act of January 31, 1885, will be limited to the lines shown on the diagram, which is prepared in accordance with the foregoing view.

Your attention is called to the provisions of the act protecting the rights of actual settlers and allowing such as are not entitled to make entry under existing laws to purchase, within one year, not to exceed 160 acres at $1.25 per acre.

The persons who, under the provisions of the second section of the foregoing act, have a preference right of entry of restored lands, are those who, on January 31, 1885, were actual settlers in good faith on the lands claimed by them, and are qualified to make the entry applied for. The preference right may be exercised within six months from date of promulgation of these instructions.

If any such person is not entitled to make entry under the homestead, pre-emption, or other laws, he may purchase, within one year from date of the act, not exceeding 160 acres of the land embraced in his settlement or occupation, at the price of $1.25 per acre.

Persons applying for the preference right of entry under the homestead, pre-emption, or other general laws, or for the right of purchase under the special provisions of this act, will be required to prove their actual settlement and occupation of the lands so claimed.

Such proof must be made to your satisfaction, and may be by affidavit executed before you, corroborated by witnesses, setting forth the date of settlement, the facts relative to actual occupation of the land, and the nature, extent, and value of improvements.

Final proof under the settlement and improvement laws will be made in the manner provided under these laws respectively.

In case of purchase under the act, you will, upon your acceptance of

the required proof, and the payment of the purchase price, issue the usual certificate and receipt as in other cash cases, noting on each that the entry is allowed under act of January 31, 1885.

The price of all lands within restored limits is $1.25 per acre, but the same are not subject to sale at ordinary private cash entry.

You will give public information by posting notice in your office, and as a matter of news through the press in your district, that the restored lands are subject to settlement and entry as provided in said act.

Approved.

H. L. MULDROW,
Acting Secretary.

MINING CLAIM—IMPROVEMENT.

LITTLE PET LODE.

The allowance of an entry is erroneous where the applicant did not at the time of application, or within the period of publication, file the certificate of the surveyor-general showing the expenditure of $500 upon the claim.

Acting Secretary Muldrow to Commissioner Sparks, July 9, 1885.

I have considered the appeal of J. Henry Weil, John Coleman, and Fingley S. Wood, applicants for patent for the Little Pet lode claim, from the decision of your office, dated August 30, 1884, holding for cancellation mineral entry No. 986, California mining district, and Leadville land district, Colorado.

It appears that said parties made application for patent for said claim on October 20, 1881, and notice thereof was given by publication and posting, as required by law. During the period of publication, Henry Ambler, P. M. Gallagher, and Edward O. Hare, claimants of the "Deposit lode," filed their adverse claim and protest against the issuance of patent to said Weil and his co-claimants. On January 17, 1882, there was filed in the district land office the certificate of the clerk of the district court of Colorado, duly signed, sealed, and dated the same day, showing that "there is now a suit or action, *now filed* in said court, involving the right of possession to that portion of the Deposit lode which is in conflict with the Little Pet lode."

There was filed with the register on January 24, 1882, a second certificate from the same clerk, duly signed and sealed, in which he certifies that "there was no suit or action of any character whatsoever pending in said court involving the right of possession to any portion of 'Little Pet' mining load or claim; and that there has been no litigation before said court affecting the title to said mining load or claim, or any part thereof for two years and eleven months previous to and including January 16, 1882, other than what has been finally decided in favor of" Weil *et al.*

On February 14, 1882, said entry was allowed. On March 8, 1882, the claimants of the Deposit lode filed in the district land office a protest against the issuance of patent upon the Little Pet claim, upon several grounds, to wit:

(1) That no mineral had been discovered by the locators of the Little Pet claim or their successors in interest, within the limits of their location.

(2) That the applicants had not expended $500 in labor and improvements on the claim.

(3) That the premises in conflict were not the property of the claimants, but belonged exclusively to the protestants.

The protestants also aver that the reason that they did not commence suit upon their adverse claim within thirty days was because their counsel was seriously ill.

Your office, on December 16, 1882, held that it was only necessary to pass upon the question whether the required value in labor and improvements had been expended upon said claim, and that the record failed to show that any certificate of the United States surveyor-general showing that the required labor or improvements had been expended upon said claim had been filed in the case. It was also shown by the report of the United States deputy mineral surveyor, relative to his survey of said claim, that there had not been expended thereon in labor and improvements the value of $500. It also appeared that the portion relative to the value of labor and improvements in the certificate of the United States surveyor-general accompanying the plat of survey and field-notes of said claim was crossed out. It was, therefore, decided by your office that, unless the proper certificate of the surveyor-general was filed with the register, the action of the district land officers in allowing the entry was erroneous, and such entry, in view of the protest and adverse claim, could not be confirmed, but in the event that said certificate was duly filed the register and receiver were directed to order a hearing to determine the nature, extent, and value of the improvements made by the applicants for patent and their grantors. No appeal appears to have been taken from said decision.

On January 25 the certificate of the United States surveyor-general, dated January 23, 1883, was filed with the register, to the effect that the value of labor and improvements upon the Little Pet claim is not less than $500.

Your office, however, on August 30, 1884, held that said certificate was not duly filed, and that said mineral entry ought to be canceled under the decision of your office dated December 16, 1882, but that, owing to the peculiar wording of said decision, "it may have been misunderstood by the claimants or their attorneys," and, therefore, an additional period of thirty days was allowed for an appeal.

The appellants insist that, although the surveyor-general's certificate was not filed in due time, yet since the improvements were actually

made upon the claim prior to entry, and the certificate filed as soon as called for, the entry should not be canceled. It is provided in section 2325 of the Revised Statutes (*inter alia*) that "The claimant at the time of filing his application or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors." This requirement of the law was not complied with, and, although the register, as he states, "overlooked" it, the allowance of said entry was erroneous. The decision of your office is accordingly affirmed.

CONTEST—PREFERENCE RIGHT OF ENTRY.

DUPRAT *v.* EWING.

Under section 2 of the act of May 14, 1880, the preferred right of entry accrues not by virtue of any prior claim the contestant has to the land, but through the fact that he has successfully contested the entry and paid the costs of contest.

Acting Secretary Muldrow to Commissioner Sparks, July 11, 1885.

I have considered the case of Frank Duprat *v.* William Ewing, on appeal by the former from your predecessor's decision of October 17, 1884, holding for cancellation his homestead entry of the S. ½ of NE. ¼ and N. ½ of SE. ¼ of Sec. 2, T. 2 N., R. 32 E., La Grande district, Oregon.

As long ago as April 18, 1876, Ewing filed pre-emption declaratory statement No. 1228 for certain lands in said Section 2.

On the 22d of August, 1881, one Arthur G. Webb filed pre-emption declaratory statement No. 3219, claiming settlement August 20, 1881, for a tract in large part the same as that covered by Ewing's filing, and exactly the same as that described above.

In July, 1882, Webb offered final proof, which was accepted, and on the 29th of that month his entry was allowed and final certificate issued to him.

Subsequently, upon application of Ewing, a hearing was ordered to determine the facts as to Webb's residence and improvements upon the land. Your office, moreover, directed that at said hearing inquiry be also made as to Ewing's compliance with the pre-emption law. The hearing resulted in a recommendation by the local officers. and a decision by your office (August 16, 1883), that the filing of *both parties* be canceled, upon the ground that neither of them complied with the law in the matter of residence, cultivation, and improvement. From this decision both parties appealed to the Department, which (February 21, 1884) affirmed said decision. In pursuance thereof Ewing's filing and Webb's pre-emption entry were canceled by your office letter of February 29, 1884, the same being noted on the records of the local office March

14, 1884 (being the earliest, or among the earliest, acts of the local officers on the morning of that day).

Afterwards, about half-past 9 o'clock on the morning of that day, as noted upon the records of the local office, Frank Duprat made homestead entry No. 2711 for the tract which had been covered by Webb's entry, to wit, the S. ½ of NE. ¼ and the N. ½ of SE. ¼.

Five days later, on the 19th of the same month, Ewing's application to make homestead entry for the S. ½ of NE. ¼, the NW. ¼ of SE. ¼, and lot 7 (fractional NE. ¼ of SE. ¼) reached the local office, and was there rejected for conflict with the homestead entry of Duprat. It will be observed that Ewing's application covers the same land embraced in Duprat's entry, except one forty (NE. ¼ of SE. ¼). Said application was accompanied by the proper affidavit, sworn to before the deputy clerk of Umatilla County, at 8.30 a. m., of March 17, 1884.

In this affidavit Ewing claimed residence upon the tract (in a good dwelling-house which he had erected) since the preceding September. His application having been rejected by the local office for conflict with Duprat's homestead entry of March 14, he appealed to your office.

Your predecessor decided that "Ewing could receive no credit on account of his settlement prior to the cancellation of Webb's entry; but having contested said entry and procured the cancellation of the same, he is entitled to a preference right of entry under the provisions of the act of May 14, 1880." He therefore held Duprat's homestead entry for cancellation for conflict with such preference right.

It is from this decision of your office that Duprat now appeals.

The question at issue in the case is one solely of construction of law, to wit: Does the act of May 14, 1880, apply under the circumstances hereinbefore set forth?

The second section of the act in question says:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which the land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said land.

Ewing's agency in bringing about the cancellation of Webb's entry, I think, clearly brings him within the purview of the section of the law quoted, and entitles him to the benefits of its provisions. The litigation in which he was engaged with Webb was in all its essential features a "contest" within the meaning and intent of the law, initiated in the same manner, conducted before the same parties, governed by the same rules, appealed from to the same tribunal as all other contests. Ewing, inasmuch as he contested the pre-emption claim of Webb, was a "contestant." The law, however, does not use this term, but says "any person," which certainly includes Ewing. He possessed all the qualifications and had performed all the duties required by law to entitle him to its benefits; *i. e.*, he had "contested," had "paid the land

office fees" (costs of contest), and was the party who had been instrumental in procuring the cancellation of Webb's fraudulent entry.

The fact that the hearing and investigation which brought about the cancellation of Webb's entry also resulted in the loss to Ewing of his pre-emption right cannot make any difference. The fact remains that, except for Ewing's contest, Webb's entry would not have been canceled, or at least that the cancellation was the result of Ewing's action. The latter having at the same time, by the cancellation of his filing, lost his pre-emption right, he next proceeded to make his claim under the homestead law, invoking the benefit of the act of May 14, 1880, as a preference claimant. This he had a perfect right to do, and his application being within the thirty days prescribed by said act, he has the first right. His entry should be allowed and held superior to that of Duprat, so far as they cover the same lands.

For the reasons given, your office decision awarding to Ewing the preference right to make entry of the tract covered by his homestead application of March 17, 1883, and holding Duprat's entry for cancellation, is affirmed.

HOMESTEAD—ACT OF JUNE 15, 1880.

SIMPSON *v.* FOLEY.

An application to purchase under section 2 of the act of June 15, 1880, in case of *pending* contest, should not be carried to cash entry until after the right of appeal allowed to adverse parties has expired.

Purchase under this act may be allowed after cancellation, provided the subsequent right of another is not disturbed.

In case of contest against an entry the right of purchase exists until final judgment in favor of the contestant.

Acting Secretary Muldrow to Commissioner Sparks, July 11, 1885.

I have considered the case of Alexander Simpson *v.* Timothy Foley, involving the right to the SW. ¼ of Sec. 12, T. 106 N., R. 56 W., Mitchell land district, Dakota Territory, as presented by the appeal of Simpson from the decision of your office, dated August 15, 1884, rejecting his application to contest cash entry No. 10309, made by said Foley, under section 2 of the act of June 15, 1880 (21 Stat., 237).

The record shows that said Foley made homestead entry No. 3093 for said tract at the Sioux Falls land office, in said Territory, on May 10, 1880; that afterwards a change was made by which the land fell within the limits of said Mitchell land district, and another homestead entry, No. 14570, was made for said tract on October 26, 1880, by Alexander M. Simpson; that said last-named entry was contested by Andrew D. Simpson, brother of Alexander M. Simpson, on October 19, 1881, and the entry adjudged forfeited by the register and receiver on December 3, 1881, from which no appeal was taken. On October 25 George W.

Scott filed his affidavit of contest against Foley's said entry, charging abandonment, and said entry was declared forfeited by the district land officers on December 7, 1881, from which no appeal was taken.

Foley made said application to purchase said tract on May 23, 1883, and on June 6, 1883, Alexander Simpson, the father of Alexander M. and Andrew Simpson, filed his said application to contest the right of Foley to purchase said tract under the second section of said act. On August 4, 1883, your office allowed the application of Foley to purchase, and dismissed both the contest of Simpson and Scott, subject, however, to the right of appeal.

On August 14, 1883, before the expiration of the time for appeal, said cash entry was allowed. This was clearly irregular and contrary to the established rules of this Department. On April 14, 1884, several affidavits in support of Simpson's application to contest Foley's right to purchase were transmitted to your office. Said affidavits tend to show that Scott was incompetent to make entry for said tract, since he had exhausted both his pre-emption and homestead right, and there was already one timber-culture entry in said section; that Foley had relinquished his right to said tract, which was indorsed upon the duplicate receipt and was purchased from Foley by one Pidge, and by him sold to said Scott and Jerome Terry, his partner, on January 20, 1883; that Terry presented said relinquishment at the district land office with his application to enter said tract as a homestead, which was rejected and the relinquishment returned; that subsequently Foley was induced to purchase said tract for the benefit of said Scott and Terry, who advanced the necessary funds; that Foley conveyed said tract to said Scott and Terry for the sum of $400, and that Simpson has been living on said land with his family since December 10, 1882, and has improvements on the tract valued at more than $800.

On August 13, 1884, your office again considered the case for the reason that the names of the two Alexanders were confounded in the former decision of your office, and held said entry for approval, and dismissed Simpson's application for contest.

The appellant insists upon three grounds of error, to wit:

(1) Error in not canceling Foley's entry when the relinquishment was presented.

(2) Error in allowing Foley to purchase said tract after he had relinquished his entry and delivered it into the hands of the purchaser.

(3) Error in not ordering a hearing and giving Simpson the position of contestant.

It is clear that Foley's homestead entry segregated said tract, and, while it remained of record the land covered thereby was not subject to any other disposal. Whitney *v.* Maxwell (2 L. D., 98); Davis *v.* Crans *et al.* (3 L. D., 218). It is also true that Simpson could acquire no rights or equities by going upon land covered by the homestead entry of another. McAvinney *v.* McNamara (3 L. D., 552); Pressy *v.* N. P. R.

R. Co. (2 L. D., 551); Probst *v.* Whyte (10 C. L. O., 240). It does not appear that Simpson made any attempt to contest Foley's homestead entry, but quietly waited in the expectation that he would be able to reap the benefit of Scott's contest.

The second section of said act of June 15, 1880, limits the right of purchase under said act to the original entrymen and "persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by bona fide instrument in writing," and provides that this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

It is not shown that Foley attempted to transfer said land to any one prior to the allowance of his cash entry, and no other person is claiming as transferee the right to purchase under said act.

This Department decided June 5, 1882, in the case of John W. Miller (1 L. D., 83), that a purchase under said act can be made after cancellation, provided it does not interfere with a subsequent right; and it has been uniformly held that even if contest had been commenced against an entry made prior to June 15, 1880, the entryman had a right to purchase under the second section of said act at any time prior to the final judgment in favor of the contestant. Gohrman *v.* Ford (8 C. L. O., 6); Whitney *v.* Maxwell (*supra*); Bykerk *v.* Oldmeyer (10 C. L. O., 122); Pomeroy *v.* Wright (2 L. D., 164).

It is not alleged that Foley ever delivered his relinquishment to Simpson, or received a single dollar from him, nor has Simpson any valid adverse claim within the provision of said act.

A careful examination of the decision of your office does not disclose any error therein, and the same is accordingly affirmed.

TIMBER TRESPASS.

GEORGE W. ARWOOD ET AL.

Under the act of March 3, 1875, the use of timber from public lands by railroad companies is limited to timber from adjacent lands taken for the purpose of construction.

Acting Secretary Muldrow to Attorney-General Garland, July 13, 1885.

Accompanying this will be found copy of letter, dated the 6th instant, from the Commissioner of the General Land Office, with the documents therein enumerated, relative to alleged public timber trespass upon certain described lands in Missouri.

The lands in question were believed to have been fraudulently entered under the homestead law, for lumbering purposes. Pending decision as to the validity of the entries no action was taken by this Department relative to the trespasses; but the entries, after due hearing,

having been canceled, it is now proper that the question of the right of the entrymen to despoil of timber the lands thus fraudulently entered should be disposed of.

The reports (herewith inclosed) of the special agents show the following cases of alleged trespass:

George W. Arwood, of Washburn, Mo., 49,873 feet of oak timber; Andrew J. Stewart, of Washburn, Mo., 50,000 feet; John Durham, of Exeter, Mo., 50,000 feet; Anderson R. Salmon, of North Springfield, Mo., 370,000 feet.

The logs were delivered by the parties named at the saw-mill owned and operated by said Salmon, where they were mainly manufactured into railroad timber and sold to agents of various railroad companies as follows, as nearly as the special agent could estimate:

To G. W. Turner, for the Saint Louis and San Francisco Railroad Company, 77,000 feet; to H. F. McDaniel, for the Atchison, Topeka and Santa Fé Railroad Company, 154,000 feet; to C. P. Johnson, for the Kansas City, Springfield and Memphis Railroad Company, 102,700 feet. The remaining portion being sold in the general market.

The alleged trespassers *now* claim to have cut the timber in question under authority granted to railroad companies by the act of March 3, 1875 (18 Stat., 482). But there is no evidence that they placed any reliance upon such authority at the time of the transaction; at the time the investigation was made no such claim was set up; in carrying out the provisions of that act it would not have been necessary to make entry of the lands from which timber for the use of the railroads was cut; all of which shows clearly that the idea of claiming immunity under said act was an afterthought, devised as a defense against threatened punishment for the fraudulent appropriation of the timber in question.

Furthermore, the Saint Louis and San Francisco Railroad was completed at the date of the cutting of the timber in question. Consequently that road was excluded from the benefits of said act, which permits any right-of-way railroad to take only the "material, earth, stone, and timber necessary for the *construction* of said railroad."

As to the Atchison, Topeka and Santa Fé Railroad, and the Kansas City, Springfield and Memphis Railroad, no copies of the appointment of the parties named as their agents were ever filed in this Department, as required by circular approved thereby March 5, 1883. Nor does it appear that the timber taken was applied in the *construction* of the railroads. If so applied, the railroad companies, in the opinion of this Department, far exceeded their rights under this act, as the lands from which the timber in question was cut was beyond the terminal limits of the Kansas City, Springfield and Memphis Railroad; and under the most liberal interpretation of the term do not lie "adjacent" to the Atchison, Topeka and Santa Fé Railroad.

The only shadow of a claim for immunity could arise under the "Chaf-

fee decision," rendered by this Department February 8, 1883 (1. L. D., 625). But it seems to me that such liberality of interpretation, amounting to almost unlimited privileges, as are allowed to right-of-way railroads under that ruling, are not warranted by law, and is liable to result in detriment to the interests of settlers already upon the lands, or of persons desiring to settle in future upon such lands, entirely disproportionate to the benefit which they are likly to derive from the railroads which have thus been permitted to despoil the lands of their timber.

In view of the facts set forth, this Department concurs in the recommendation of the Commissioner, and would respectfully request that you direct the United States attorney for the proper district, if, in his judgment, upon examination he shall deem it for the interests of the United States to institute civil action against said Arwood, Stewart, Durham, and the several railroad companies named, to recover the value, after manufacture ($15 per thousand), of the timber cut and removed by them; and as the said Salmon is reported insolvent, and as without his testimony the evidence against the other parties named might prove insufficient, that he be used as a witness.

FORT REYNOLDS MILITARY RESERVATION.

SAMUEL ALDRED.

Under the act of June 19, 1874, authorizing the disposition of this reservation, the Commissioner of the General Land Office is vested with jurisdiction to determine questions arising on the refusal of a purchaser to pay in accordance with the terms of the appraisement.

Assistant Secretary Jenks to Commissioner Sparks, July 15, 1885.

I have examined the matter presented by your office letter of February 27, 1885, relative to the application of Samuel Aldred to purchase the SW. ¼ of SE. ¼ of Sec. 11, T. 21 S., R. 62 W. sixth principal meridian, Pueblo, Colo.

The matter came before your office in the form of an appeal from the action of the local office rejecting said application to purchase. The land in question is a part of what formerly constituted the Fort Reynolds military reservation, the appraisement and sale of which was authorized by act of Congress, approved June 19, 1874 (18 Stat., 85). On the tract in question were certain houses, stables, and corrals, which were appraised at $315, and which the applicant refuses to pay for, giving as a reason for his refusal that they have been removed, and are not now on the land. Your office neither acted upon the appeal from the local office nor expressed an opinion on the questions involved, but has submitted the case for departmental instructions. The case as before me presents no facts, except such as are contained in the allegations of applicant, relative to the present condition of the land and

buildings, and there is therefore no sufficient basis for intelligent and satisfactory departmental action. The facts on this point should be fully ascertained, if not already in the possession of your office. Moreover, the matter is one clearly within the scope of your authority and jurisdiction in connection with the disposal of the public lands, subject to appeal should your decision be adverse to applicant.

The case is remanded for examination by your office of all the facts involved in the case, and decision thereon.

HOMESTEAD—RESIDENCE.

COLLAR *v.* COLLAR.

Bona fide residence cannot be maintained upon two different tracts at the same time.

Assistant Secretary Jenks to Commissioner Sparks, July 15, 1885.

I have considered the case of Squire T. Collar *v.* Layton Collar, involving the right to the SW. ¼ of Sec. 10, T. 113 N., R. 63, Huron district, Dakota Territory, as presented by the appeal of the latter from the decision of your office dated July 2, 1884, holding for cancellation his homestead entry, No. 6589, covering said tract, and allowing the former to make pre-emption cash entry for the same.

The record shows that Squire T. Collar filed his pre-emption declaratory statement, No. 5662 (Mitchell series), upon said tract on June 24, 1881, alleging settlement same day; that on May 25, 1881, Layton Collar filed his pre-emption declaratory statement, No. 5285 (Watertown series), upon the SE. ¼ of said section, alleging settlement thereon May 21, 1881, and on August 14, 1882, made cash entry No. 2769 for said tract.

On March 4, 1882, Layton Collar made homestead entry No. 6589 (Watertown series) for said SW. ¼ of said section; December 22, 1882, Squire T. Collar gave notice of his intention to make proof and payment for said tract before the district land officers on February 1, 1883; January 30, 1883, Layton Collar filed his protest against the allowance of Squire T. Collar's proof and payment for said tract, and on February 23, 1883, Layton Collar offered his commutation proof, and Squire T. Collar filed his protest against the same, and thereupon a hearing was ordered upon both protests, and evidence taken under stipulation of parties. Upon the testimony offered by both parties, the district land officers rendered their joint opinion in favor of Layton Collar, and Squire T. Collar duly appealed.

It appears that the appeal was mislaid, and Layton Collar was permitted by the register and receiver, on February 20, 1884, to commute said homestead entry No. 6589 to cash entry No. 7554 for the same land. July 2, 1884, your office considered the case and reversed the decision

of the district land officers, upon the ground that Layton Collar was attempting to acquire title to two distinct tracts, under the pre-emption and homestead laws, when he was required to reside upon the land in order to complete title. It was also held in said decision that the preponderance of the testimony showed that Squire T. Collar had complied with the requirements of the pre-emption laws as to residence, cultivation, and improvements up to the time when he made final proof, on March 22, 1882, and which was not accepted, because the purchase money was not paid, and that he had shown a sufficient excuse for not remaining upon said tract from that date up to the date of contest, and that said Squire T. Collar should be permitted to make entry of said tract.

It is quite unnecessary to review in detail the large mass of testimony in the case, some of which is contradictory, and a large part of it irrelevant. It is clear that Layton Collar's commutation cash entry was improperly allowed. He could not have a bona fide residence upon two different tracts at one and the same time. (Rufus McConliss, 2 L. D., 622.)

Your office held the homestead entry No. 6589 of Layton Collar for cancellation; but that entry had been commuted to cash entry No. 7554, and the latter entry should also be canceled.

With the above modification said decision is affirmed.

PRE-EMPTION—JOINT ENTRY.

DOYLE *v.* DION.

It appearing that both claimants had settled upon the tract prior to survey, and that each had recognized the right of the other by an agreed boundary line a joint entry is allowed.

Secretary Lamar to Commissioner Sparks, July 18, 1885.

I have considered the case of Edward J. Doyle *v.* Antoine A. Dion, involving the right to the NW. ¼ of SW. ¼ of Sec. 9, T. 154 N., R. 65 W., Devil's Lake district, Dakota, as presented by the appeal of Doyle from the decision of your office, dated December 17, 1884, awarding the parties a joint entry of said tract under section 2274 of the Revised Statutes of the United States.

The record shows that said Dion filed his pre-emption declaratory statement No. 131 upon the SW. ¼ of said Section 9 on November 2, alleging settlement thereon March 9, 1883; and that said Doyle filed his pre-emption declaratory statement No. 126 for the N. ½ of the SE ¼ and the SE. ¼ of the SE. ¼ of Sec. 8, and the NW. ¼ of the NW. ¼ of Sec. 9, in said township and range, on November 2, alleging settlement thereon March 21, 1883.

The township plat of survey was filed in the district land office on November 2, 1883.

It appears that Dion gave due notice of his intention to make proof and payment on February 25, 1884, and that Doyle on the same day filed his protest against the acceptance of Dion's proof and payment for the tract in controversy, claiming to be the first legal settler. Thereupon a hearing was duly held, at which both parties appeared and offered testimony. Upon the evidence submitted the register and receiver rendered their joint opinion, on May 13, 1884, in favor of Dion, and Doyle duly appealed.

On December 17, 1884, your office modified the decision of the district land officers, and awarded a joint entry of the tract in controversy, upon the ground that both parties settled upon the tracts embraced in their respective declaratory statements prior to survey, and have improvements upon the tract in controversy, and that there was a boundary line agreed upon by said parties which divided said tract, and that each party recognized the right of the other to the land on his side of said line.

The improvements prior to the Government survey upon the tract in question were very meager, but at the date of contest each party had some improvements upon this particular tract. The cases cited by appellant's counsel do not appear applicable to the case at bar. In the present case the boundary line of the prior settler appears to have been distinctly marked, and the parties agreed to the same. It would seem that the proper way to adjust the rights of the parties is to allow a joint entry of the tract in dispute, under said section 2274. The decision of your office is accordingly affirmed.

CERTIORARI—RELINQUISHMENT.

JACOB SCHAETZEL.

Certiorari will not lie to review proceedings where from the application it is apparent that substantial justice has been done.

All rights of the entryman cease with voluntary relinquishment.

Secretary Lamar to Commissioner Sparks, July 18, 1885.

I have considered the application of Jacob Schaetzel for a certiorari in the matter of the appeal of Job Marsden from the register and receiver's action dismissing his contest against Schaetzel's timber-culture entry, No. 364 (Springfield series), of the SW. $\frac{1}{4}$ of Sec. 5, T. 102 N., R. 59 W., Mitchell district, Dakota.

It appears that Schaetzel made said entry of the tract in question November 27, 1878. Under date of November 29, 1881, Marsden initiated contest against said entry, alleging Schaetzel's failure to comply with

legal requirements in point of breaking and cultivation of the tract Hearing was had January 17, 1882, agreeably to published notice, but defendant failed to appear. He having, however, filed motion for rehearing upon the ground that he had not been duly notified of said hearing, the receiver allowed him "to submit defense by way of affidavits with leave to contestant to file counter-affidavits."

Marsden having failed to file an application to enter said tract with his affidavit of contest, the same was dismissed January 3, 1883, agreeably to circular instructions of December 20, 1882, (9. C. L. O., 198), issued under authority of the rule laid down by the Department in the case of Bundy *v.* Livingston (*Idem*, 173). Such action was had notwithstanding the fact that Marsden had meantime, to wit, December 25, 1882, filed a supplemental affidavit together with an application to enter said tract.

Schaetzel having relinquished his entry the register and receiver canceled the same July 2, 1884, and thereupon the same day allowed one George Best to file declaratory statement No. 22998 for the tract in question.

Marsden having been first formally notified September 25th of the dismissal of his contest, appealed from such action September 27, 1884, upon the ground that he had filed the prerequisite application before the promulgation of said circular of December 20, 1882, and prior to the dismissal of his contest. Thereupon your office allowed his entry, in view of the fact that he had not had opportunity to contest said entry anew by reason of the register and receiver's failure to duly notify him of the dismissal of his contest.

All parties having been advised, December 24, of your office decision of December 13, 1884, Schaetzel appealed therefrom January 24, 1885, and the register transmitted the appeal to your office per letter dated February 23 ensuing, whereupon your office rendered decision May 1, 1885, holding that when Schaetzel relinquished his entry July 2, 1884, "he ceased to be a party in interest," and denying his right of appeal.

Wherefore he applied for certiorari, agreeably to rules 83 and 84 of Practice, alleging "that his property is now in jeopardy," and that "he is morally responsible for the safety thereof."

It has been repeatedly held by this Department that certiorari is not a writ of right, but it lies within the discretion of the tribunal to which the petition therefor has been addressed; and where such petition shows on its face that substantial justice has been done, the same will be denied. See Hilliard on New Trials, 689.

Although there may have been irregularity of procedure throughout the premises, it is not competent for petitioner to interpose such plea, having no status therein by reason of his voluntary relinquishment. Substantial justice having been done him, I am of opinion that his petition should be denied, and accordingly return the same herewith, together with the accompanying papers.

MINING CLAIM—APPLICATION.

SNOW FLAKE LODE.

A mere application to make entry, not properly followed up, confers no exclusive rights upon which others are bound to wait indefinitely.

Adverse claimants must assert their rights within the period of publication, for, on failure so to do, all matters which might have been tried under the adverse proceedings will be held as adjudicated in favor of the applicant.

Acting Secretary Jenks to Commissioner Sparks, July 20, 1885.

After survey No. 1002 of the Old America lode, Lake City, Colo., on June 14, 1882, application was made for patent for the same and publication commenced. Before the expiration of the sixty days, however, it was suspended at the request of the applicants, for what reason is not shown.

After survey No. 1183, on October 5, 1882, application was made at the same office for patent for the Snow Flake lode by T. C. Stevens *et al.* Upon due compliance with all the requirements of the law, and no adverse claim having been filed, on March 26, 1883, mineral entry 672 therefor was made, and same day the papers were transmitted to your office.

By the surveyor's plat it appears that a portion of the Snow Flake claim lies within the exterior limits of the Old America survey No. 1002; and because of this fact, on June 23, 1884, Acting Commissioner Harrison directed said entry to be held for cancellation to the extent of the supposed conflict. From this action an appeal was taken, on which the case is now before me.

Only an application to make an entry of the Old America lode had been filed; failing to give the proper notice, the applicants did not place themselves in a position which required, or gave opportunity to others to adverse their claim. The mere application, not properly followed up, conferred no exclusive rights to the premises which others were bound to wait upon indefinitely.

The case is different with regard to the Snow Flake claim. All the pre-requisites of the law were complied with; due publication was made whereby adverse claimants were notified to come in; failing to do so within the proper time, the entry was made as matter of course. Thereafter other parties were precluded from setting up adverse claim in their own behalf for the premises, for it is considered that where notice was properly given all matters which might have been tried under the adverse proceedings are treated as adjudicated in favor of the applicants; and all controversies touching the same are to be held as fully settled and disposed of, as though judgment had been regularly rendered in their favor. Therefore, so far as the Snow Flake claim is concerned, there was no adverse pretension or conflict on the part of the Old America claim which your office was called upon to take notice of. There being, then, no adverse claim, the issuing of patent is a matter

between the Government and the Snow Flake claimants only. A mere survey and futile application for patent by another party, for part of same claim, is not considered, under the circumstances of the case, any reason for withholding the patent.

The decision of your office is reversed.

PRACTICE—CERTIORARI.

JOHN WALDOCK.

An applicant for land is entitled to the judgment of the General Land Office as to the validity of his claim, and to a consideration of the testimony filed in support thereof.

Where it appears that the local office did not transmit the evidence filed by applicant, and appeal was denied, the proceedings will be reviewed on certiorari.

Assistant Secretary Jenks to Commissioner Sparks, July 20, 1885.

I have considered the application of counsel for John Waldock, dated 3d instant, to have certified to this Department, under Rules of Practice, Nos. 83 and 84, the record of the proceedings in the case of the cancellation of cash entry for the N. ½ of the SE. ¼, NE. ¼ of SW. ¼, and SE. ¼ of NW. ¼ of Sec. 23, T. 27 S., R. 12 W., Larned land district, Kansas, made by Florence L. Copeland, and also "all the papers in said cause, including protest and all the applications of the said Waldock and the affidavits in support thereof in the said local land office, to prevent the allowance of the filing of Ransom S. Bowers, and proof" for said tracts, and also requesting an order to be issued to allow said Waldock to complete payment for said land and receive a patent therefor.

The application is defective in that it is not verified as required by Rule 84 (*supra*) and no copy of the decision of your office dated June 2, 1885, is furnished, but an excuse is given therefor, that no one was in the local land office to furnish the same.

It appears that Florence L. Copeland filed her declaratory statement, No. 1593, upon said tracts on September 29, 1882, alleging settlement thereon September 20, 1882. On March 28 she made proof and on March 31, 1883, made her first payment (receipt 1007) under the second section of the act of May 28, 1880 (21 Stat., 143). On August 31, 1883, said entry was canceled upon the report of a special agent of your office, and sixty days allowed in which to show cause why the same should be reinstated. On January 6, 1885, said Bowers filed his declaratory statement upon said tracts, and on June 2, 1885, your office directed the district land officers to accept his proof in support thereof.

On June 11, last, there was transmitted to your office an application for a writ of certiorari, and an appeal from said decision of June 2, 1885, directed to this Department. On June 30, last, your office returned said application and refused said appeal on the ground that Waldock was not a party to the case between the Government and Copeland and had no standing in his own right. It is alleged by said

Waldock "that the said decision was obtained from the honorable Commissioner by criminal inducement on the part of Ransom S. Bowers, whereby on the part of said Bowers' the land office at Larned, Kans., or a clerk therein, by such inducement withheld and suppressed the affidavits, showings, and applications of said Waldock to secure his rights to said land," and prevented the same from being transmitted to your office. Accompanying said application are the *ex parte* affidavits of J. C. Ellis, John Waldock, and N. B. Freeland, tending to support the above allegations.

If it be true that affidavits were filed in the local office in support of the application of Waldock, there does not seem to be any good reason why the same were not promptly transmitted to your office. It has been uniformly held by this Department that a party is not entitled to a writ of certiorari as a matter of right, but whether the order prayed for shall issue rests in the sound discretion of the proper tribunal. (Reuben Spencer, 3 L. D., 503.)

From the affidavits presented it appears that a part of the record relative to the status of said tracts was not transmitted to your office when said decision of June 2, 1885, was rendered, although they had been previously filed in the local land office. Clearly the district land officers had no right to retain such papers. The applicant filing the same was entitled to the judgment of your office upon the validity of his application to purchase and a consideration of the testimony in support thereof.

From the foregoing it would seem that the case presented calls for the exercise of its supervisory power by this Department. You will therefore direct the district land officers to transmit to your office all papers filed in their office relative to Mr. Waldock's application for said land and forward the same to this Department, together with the papers and copies of the decisions of your office relative to the cancellation of said entry, and you will cause all action to be suspended relative to the filing of said Bowers, or the allowance of proof by him, if his proof has not already been made, and, in case Bowers has made entry of said tract, you will suspend the same, until further advised by this Department.

HOMESTEAD—ACT OF JUNE 15, 1880.

NORTHERN PACIFIC RAILROAD COMPANY *v.* BURT. (ON REVIEW.)

Application to purchase under the act of June 15, 1880, reserves the land from the entry of another.

Assistant Secretary Jenks to Commissioner Sparks, July 21, 1885.

I have considered the application of Charles H. Lefever for a reconsideration of departmental decision of April 21, 1885 (3 L. D., 490), in the case of the Northern Pacific Railroad Company *v.* Elizabeth E. Burt, involving the title to the S. ½ of SW. ¼ of Sec. 3, and S. ½ of the SE. ¼ of Sec. 4, T. 8 N., R. 2 E., Helena land district, Montana.

By said decision the claim of the company was rejected to the tract in Sec. 3, and Mrs. Burt was allowed the right to purchase said land under the act of June 15, 1880 (21 Stat., 237), or, "if she should so elect, she should be permitted to show residence and cultivation for the necessary period to complete the five years required by law, when said entry may be reinstated and final proof made thereon." Said decision further held that Mrs. Burt's application, dated April 12, 1883, reserved the land embraced therein from entry until the final adjudication of her claim. It appears from the original entry papers—which were not with the record when said decision was made—that Lefever's homestead entry, No. 2110, dated May 30, 1883 (not May 3), covered the NE. ¼ of the SE. ¼, and the SE. ¼ of the SW. ¼ of said Sec. 4. It was intended to cancel said entry only to the extent that the same was in conflict with the tracts embraced in Mrs. Burt's prior application. The application reserved the land from entry and Mr. Lefever could acquire no legal rights or equities until the same was finally adjudicated. As the cancellation of said entry, so far as the same conflicts with said application, will leave the other two tracts non-contiguous, if Mr. Lefever shall prefer, his whole entry may be canceled without prejudice, or amended so as to include other vacant public land contiguous to the uncanceled tracts to the amount of 160 acres.

Said decision is accordingly modified.

DESERT LAND ENTRIES.

INSTRUCTIONS.

Commissioner Sparks to Special Agent James A. George, July 22, 1885.

I am in receipt of your letter of the 4th instant, submitting observations upon desert land entries in Wyoming. You state that such entries are made upon lands not desert in character, and upon lands in respect to the character of which you are in doubt; also that they are made of subdivisions of sections along streams for the purpose of controlling the water, and thereby of controlling the back country.

The law declares what lands shall be regarded as desert lands under the act. They are lands which will not, without irrigation, produce some agricultural crop, and the Commissioner of the General Land Office is to make the proper decision and determination. It has already been decided that hay is an agricultural crop. Lands therefore which naturally produce grass sufficient to make hay are not desert lands within the meaning of the law. Lands that are partly agricultural and partly desert cannot be entered under the desert act. The lands entered must be wholly of a desert character. No person is obliged to take an entire section. He can choose a smaller area if he desires, but the land entered must be of the proper character in each of its subdi-

visions. The entry must also be in a compact form. Contiguity is not compactness. Entries are not permissible in small subdivisions along streams to control the water supply.

In making your investigations you will carefully and thoroughly examine the land, note its situation, general features, and particular character, and if you find it non-desert you will obtain conclusive evidence of that fact. The testimony of persons who know the land and are familiar with the character of similar land, should be obtained.

Where lands are found to be desert in fact, you will report fully in respect to reclamation, or the want of it, the facilities for reclamation, and all facts bearing upon the question of compliance with law.

If you find entries irregularly made for the purpose of fraudulently controlling water or access to other lands, you should specifically report the facts so found.

An important feature of your inquiries will be the ascertainment of the fact whether the entries are actually made by the persons in whose names they appear, and for their own exclusive use and benefit, or whether they are made by the procurement or in the interest of others and to control and monopolize great quantities of land. The law restricts entries to six hundred and forty acres to any one person, and evasions of the law for the acquisition of a greater acreage by any person or corporation must be discovered and suppressed. Transfers, assignments, and agreements to sell or convey, made before patent has issued, are to be inquired into and evidence thereof obtained.

The control of the land entered is a matter to be particularly embraced in your reports. Who claims the land, who uses it, and for what purpose, whether it is a part of some inclosure of public lands, are subjects for special mention. The connection between such parties and the entrymen must be ascertained. When you find that entries have been falsely made, that perjury and subornation of perjury have been committed, or that a conspiracy to defraud the United States is developed, you will secure the proper evidence for a criminal prosecution of the guilty parties.

You should take up a range of entries along the valleys of streams or elsewhere, and examine each entry in detail without waiting for special instructions in particular cases.

RULES OF PRACTICE, REVISED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 24, 1885.

SIR: I have the honor to submit herewith, for your consideration and approval, a revised draft of the rules of practice in cases before the district land offices, the General Land Office, and Department of the Interior, embracing such modifications and additions as deemed by me subservient of the good of the practice and public service.

Very respectfully,

WM. A. J. SPARKS,
Commissioner.

HON. L. Q. C. LAMAR,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, August 13, 1885.

SIR: I have considered the revised draft of rules of practice in land cases, submitted by your letter of June 24, 1885, and have, with slight modifications, adopted the same for promulgation, to take effect 1st proximo. The final official draft is herewith inclosed for the files of your office.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., August 13, 1885.

The following rules of practice for the government of proceedings in this Department and subordinate offices in land cases are hereby prescribed, to take effect September 1, 1885. Proceedings under former rules of practice will not be prejudiced by anything herein contained.

L. Q. C. LAMAR,
Secretary.

RULES OF PRACTICE.

I.

PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

1.—*Initiation of contests.*

RULE 1.—Contest may be initiated by an adverse party, or other person, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim.

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.

RULE 3.—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.

2.—*Hearings in contested cases.*

RULE 4.—Registers and receivers may order hearings in all cases wherein entry has not been perfected and no certificate has been issued as a basis for patent.

RULE 5.—In case of an entry or location, on which final certificate has been issued, the hearing will be ordered only by direction of the Commissioner of the General Land Office.

RULE 6.—Applications for hearings under Rule 5 must be transmitted by the register and receiver, with special report and recommendation to the Commissioner for his determination and instructions.

3.—*Notice of contest.*

RULE 7.—At least thirty days' notice shall be given of all hearings before the register and receiver, unless, by written consent, an earlier day shall be agreed upon.

RULE 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.

4. It must describe the land involved.

5. It must state the register and receiver's number of the entry, and the land office where, and the date when, made, and the name of the party making the same.

6. It must give the name of the contestant, and briefly state the grounds and purpose of the contest.

7. It may contain any other information pertinent to the contest.

4.—*Service of notice.*

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.

RULE 10.—Personal service may be executed by any officer or person.

RULE 11.—Notice may be given by publication alone, only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service cannot be made. The party will be required to state what effort has been made to get personal service.

RULE 12.—When it is found that the prescribed service cannot be had, either personal or by publication, in time for the hearing provided for in the notice, the notice may be returned prior to the time fixed for the hearing, and a new notice issued fixing another time of hearing, for the proper service thereof, an affidavit being filed by the contestant showing due diligence and inability to serve the notice in time.

5.—*Notice by publication.*

RULE 13.—Notice by publication shall be made by advertising the notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and, if no newspaper be published in such county, then in the newspaper published in the county nearest to such land. The first insertion shall be at least thirty days prior to the day fixed for hearing.

RULE 14.—Where notice is given by publication 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, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land for at least two weeks prior to the day set for hearing.

6.—*Proof of service of notice.*

RULE 15.—Proof of personal service shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service.

RULE 16.—When service is by publication the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or fore-

man attached thereto, showing that the same was successively inserted the requisite number of times and the date thereof.

7.—*Notice of interlocutory proceedings.*

RULE 17.—Notice of interlocutory motions, proceedings, orders, and decisions shall be in writing, and may be served personally or by registered letter through the mail to the last known address of the party.

RULE 18.—Proof of service by mail shall be the affidavit of the person who mailed the notice, attached to the post-office receipt for the registered letter.

8.—*Rehearings.*

RULE 19.—Orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings.

9.—*Continuances.*

RULE 20.—A postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing—

1. That one or more of the witnesses in his behalf is absent without his procurement or consent;
2. The name and residence of each witness;
3. The facts to which they would testify if present;
4. The materiality of the evidence;
5. The exercise of proper diligence to procure the attendance of the absent witnesses; and
6. That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed;
7. Where hearings are ordered by the Commissioner of the General Land Office in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the Government.

RULE 21.—One continuance only shall be allowed to either party on account of absent witnesses; unless the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses.

RULE 22.—No continuance shall be granted when the opposite party shall admit that the witnesses would, if present, testify to the statement set out in the application for continuance.

10.—*Depositions on interrogatories.*

RULE 23.—Testimony may be taken by deposition in the following cases:

1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office

2. Where the witness resides more than 50 miles from the place of trial, computing distance by the usually traveled route.

3. Where the witness resides out of, or is about to leave, the State or Territory, or is absent therefrom.

4. Where, from any cause, it is apprehended that the witness may be unable or will refuse to attend; in which case the deposition will be used only in event that the personal attendance of the witness cannot be obtained.

RULE 24.—The party desiring to take a deposition under Rule 23 must comply with the following regulations:

1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

2. He must file with the register and receiver the interrogatories to be propounded to the witness.

3. He must state the name and residence of the witness.

4. He must serve a copy of the interrogatories on the opposing party, or his attorney.

RULE 25.—The opposing party will be allowed ten days in which to file cross-interrogatories.

RULE 26.—After the expiration of the ten days allowed for filing cross-interrogatories, a commission to take the deposition shall be issued by the register and receiver, which commission shall be accompanied by a copy of all the interrogatories filed.

RULE 27.—The register and receiver may designate any officer authorized to administer oaths within the county or district where the witness resides to take such deposition.

RULE 28.—It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out, and the answers thereto to be inserted immediately underneath the respective questions, and the whole, when completed, is to be read over to the witness, and must be by him subscribed and sworn to in the usual manner before the witness is discharged.

RULE 29.—The officer must attach his certificate to the deposition, stating that the same was subscribed and sworn to by the deponent at the time and place therein mentioned.

RULE 30.—The deposition and certificate, together with the commission and interrogatories, must then be sealed up, the title of the cause indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

RULE 31.—Upon receipt of the package at the local land office, the date when the same is opened must be indorsed on the envelope and body of the deposition by the local land-officers.

RULE 32.—If the officer designated to take the deposition has no official seal, a proper certificate of his official character, under seal, must accompany his return.

RULE 33.—The parties in any case may stipulate in writing to take depositions before any qualified officer, and in any manner.

RULE 34.—All stipulations by parties or counsel must be in writing, and be filed with the register and receiver.

11.—*Oral testimony before other officers than registers and receivers.*

RULE 35.—In the discretion of registers and receivers, testimony may be taken near the land in controversy before a United States commissioner or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers. (See Rules 36 to 42, inclusive.)

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on the papers, in the same manner as provided in case of depositions by Rules 29 to 32, inclusive.

4. On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves. (See Rules 50 to 53, inclusive.)

5. No charge for examining testimony in such cases will be made by the register and receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under Rules 54 to 58, inclusive.

7. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under Rule 27, cannot act on the day fixed for taking the testimony or deposition, the testimony or deposition, as the case may be, will be deemed properly taken before any other qualified officer, at the same place and time, who may be authorized, by the officer originally designated, or by agreement of parties, to act in the place of the officer first named.

12.—*Trials.*

RULE 36.—Upon the trial of a cause the register and receiver may, in any case, and should in all cases when necessary, personally direct the examination of the witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion by the officers upon any point connected with the case.

RULE 37.—The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved by any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

RULE 38.—In pre-emption cases they will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim, and the exact status of the land at that date as shown upon the records of their office.

RULE 39.—In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 40.—Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party.

RULE 41.—No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objection is made to testimony offered, the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the Commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning.

RULE 42.—Upon the day originally set for hearing, and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in short-hand, the stenographer's notes must be written out and the written testimony then and there subscribed by the witness, and attested by the officer before whom the same is taken.

13.—*Appeals.*

RULE 43.—Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)

RULE 44.—After hearing in a contested case has been had and closed, the register and receiver will in writing notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for an appeal from their decision to the Commissioner, the notice to be served personally or by registered letter through the mail to their last known address.

RULE 45.—The appeal must be in writing or in print, and should set forth in brief and clear terms the specific points of exception to the ruling appealed from.

RULE 46.—Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

RULE 47.—No appeal from the action or decisions of the register and receiver will be received at the General Land Office unless forwarded through the local officers.

RULE 48.—In case of a failure to appeal from the decision of the local

officers, their decision will be considered final as to the facts in the case, and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.

2. Where the decision is contrary to existing laws or regulations.

3. In event of disagreeing decisions by the local officers.

4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

RULE 49.—In any of the foregoing cases the Commissioner will reverse or modify the decision of the local officers or remand the case at his discretion.

RULE 50.—All documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon; and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver; but access to the same under proper rules, so as not to interfere with necessary public business, will be permitted to the parties in interest, or their attorneys, under the supervision of those officers.

14.—*Reports and opinions.*

RULE 51.—Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific references to the postings and annotations upon their records.

RULE 52.—The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the Commissioner of the General Land Office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

RULE 53.—The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

15.—*Taxation of costs.*

RULE 54.—Parties contesting pre-emption, homestead, or timber-culture entries, and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

RULE 55.—In other contested cases each party must pay the costs of taking testimony upon his own direct and cross examination.

RULE 56.—The accumulation of excessive costs under Rule 54 will not be permitted, but where the officer taking testimony shall rule that a course of examination is irrelevant, and checks the same under Rule 41, he may, nevertheless, in his discretion, allow the same to proceed at the sole cost of the party making such examination.

RULE 57.—Where parties contesting pre-emption, homestead, or tim

ber-culture entries establish their right of entry, under the pre-emption or homestead laws, of the land in contest, by virtue of actual settlement and improvement, without reference to the act of May 14, 1880, the cost of contest will be adjudged under Rule 55.

RULE 58.—Registers and receivers will apportion the costs of contest in accordance with the foregoing rules, and may require the party liable thereto to give security, in advance of trial, by deposit or otherwise, in a reasonable sum or sums, for payment of the costs of transcribing the testimony.

RULE 59.—The costs of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers directly or indirectly.

RULE 60.—Contestants must give their own notices and pay the expenses thereof.

RULE 61.—Upon the termination of a trial, any excess in the sum deposited as security for the costs of transcribing the testimony will be returned to the proper party.

RULE 62.—When hearings are ordered by the Commissioner or by the Secretary of the Interior, upon the discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will be provided from the contingent fund for the expenses of local land offices.

RULE 63.—The preliminary costs provided for by the preceding section will be collected by the register and receiver when the parties are brought before them in obedience to the order of hearing.

RULE 64.—The register and receiver will then require proper provision to be made for such further notification as may become necessary in the usual progress of the case to final decision.

RULE 65.—The register and receiver will append to their report in each case a statement of costs and the amount actually paid by each of the contestants, and also a statement of the amount deposited to secure the payment of the costs, how said sum was apportioned, and the amount returned, if any, and to whom.

16.—*Appeals from decisions rejecting applications to enter public lands.*

RULE 66.—For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands, the following rules will be observed:

1. The register and receiver will indorse upon every rejected application the date when presented and their reasons for rejecting it.

2. They will promptly advise the party in interest of their action, and of his right of appeal to the Commissioner.

3. They will note upon their records a memorandum of the transaction.

RULE 67.—The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office. Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five for the return of the appeal.

RULE 68.—The register and receiver will promptly forward the appeal to the General Land Office, together with a full report upon the case.

RULE 69.—This report should recite all the facts and the proceedings had, and must embrace the following particulars:

1. A statement of the application and rejection, with the reasons for the rejection.

2. A description of the tract involved and a statement of its status as shown by the records of the local land office.

3. References to all entries, filings, annotations, memoranda, and correspondence shown by the record relating to said tract, and to the proceedings had.

RULE 70.—Rules 43 to 48, inclusive, and Rule 93, are applicable to all appeals from the decisions of registers and receivers.

II.

PROCEEDINGS BEFORE SURVEYORS-GENERAL.

RULE 71.—The proceedings in hearings and contests before surveyors-general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

III.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE AND SECRETARY OF THE INTERIOR.

1.—*Examination and argument.*

RULE 72.—When a contest has been closed before the local land officers, and their report forwarded to the General Land Office, no additional evidence will be admitted in the case unless offered under stipulation of the parties to the record, except where such evidence is presented as the basis of a motion for a new trial or in support of a mineral application or protest; but this rule will not prevent the Commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

RULE 73.—After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

RULE 74.—When a case is pending on appeal from the decision of the register and receiver, or surveyor-general, and argument is not filed before the same is reached in its order for examination, the argument will be considered closed, and thereafter no further arguments or motions of any kind will be entertained except upon written stipulation duly filed, or good cause shown to the Commissioner.

RULE 75.—If, before decision by the Commissioner, either party should desire to discuss a case orally, reasonable opportunity therefor will be given in the discretion of the Commissioner, but only at a time to be fixed by him upon notice to the opposing counsel, stating time, and specific points upon which discussion is desired; and, except as herein provided, no oral hearings or suggestions will be allowed.

2.—*Rehearing and review.*

RULE 76.—Motions for rehearing before registers and receivers, or for review or reconsideration of the decisions of the Commissioner or Secretary, will be allowed in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

RULE 77.—Motions for rehearing and review, except as provided in Rule 114, must be filed in the office wherein the decision to be affected by such rehearing or review was made, or in the local land office for transmittal to the General Land Office; and, except when based upon newly-discovered evidence, must be filed within thirty days from notice of such decision.

RULE 78.—Motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay.

RULE 79.—The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal.

RULE 80.—No officer shall entertain a motion in a case after an appeal from his decision has been taken.

3.—*Appeals from the Commissioner to the Secretary.*

RULE 81.—An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions, and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

RULE 82.—When the Commissioner considers an appeal defective he will notify the party of the defect, and if not amended within fifteen

days from the date of the service of such notice, the appeal may be dismissed by the Secretary of the Interior and the case closed.

RULE 83.—In proceedings before the Commissioner in which he shall formally decide that a party has no right of appeal to the Secretary the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary, and to suspend further action until the Secretary shall pass upon the same.

RULE 84.—Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

RULE 85.—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.

RULE 86.—Notice of an appeal from the Commissioner's decision must be filed in the General Land Office, and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

RULE 87.—When notice of the decision is given through the mails by the register and receiver, or surveyor-general, 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, before reporting to the General Land Office.

RULE 88.—Within the time allowed for giving notice of appeal, the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

RULE 89.—He may also, within the same time, file a written argument, with citation of authorities, in support of his appeal.

RULE 90.—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

RULE 91.—The appellee shall be allowed thirty days from the expiration of the sixty days allowed for appeal in which to file his argument.

RULE 92.—The appellant shall be allowed thirty days from service of argument of appellee in which to file argument strictly in reply; and no other or further arguments or motions of any kind shall be filed without permission of the Commissioner or Secretary and notice to the opposite party.

RULE 93.—A copy of the notice of appeal, specification of errors, and all arguments of either party, shall be served on the opposite party within the time allowed for filing the same.

RULE 94.—Such service shall be made personally or by registered letter.

RULE 95.—Proof of personal service shall be the written acknowledgment of the party served, or the affidavit of the person making the service attached to the papers served, and stating time, place, and manner of service.

RULE 96.—Proof of service by registered letter shall be the affidavit of the person mailing the letter attached to a copy of the post-office receipt.

RULE 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

RULE 98.—Notice of interlocutory motions and proceedings before the Commissioner and Secretary shall be served personally or by registered letter, and service proved as provided in Rules 94 and 95.

RULE 99.—No motion affecting the merits of the case or the regular order of proceedings will be entertained, except on due proof of service of notice.

RULE 100.—*Ex parte* cases and cases in which the adverse party does not appear will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

RULE 101.—No person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address, and the name of the party whom he represents; nor shall any person who has heretofore appeared in a case be entitled to a notice unless within fifteen days after being requested to file such statement he shall comply with said requirement.

RULE 102.—No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

RULE 103. When the Commissioner makes an order or decision affecting the merits of a case or the regular order of proceedings therein, he will cause notice to be given to each party in interest whose address is known.

4.—*Attorneys.*

RULE 104.—In all cases, contested or *ex parte*, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

RULE 105.—All notices will be served upon the attorneys of record.

RULE 106.—Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him, and notice to the attorney will be deemed notice to the party in interest.

RULE 107.—All attorneys practicing before the General Land Office

and Department of the Interior must first file the oath of office prescribed by section 3478 United States Revised Statutes.

RULE 108.—In the examination of any case, whether contested or *ex parte*, and for the preparation of arguments, the attorneys employed, when in good standing in the Department, will be allowed full opportunity to consult the record of the case and to examine the abstracts, plats, field-notes, and tract-books, and the correspondence of the General Land Office or of the Department relative thereto, and to make verbal inquiries of the various chiefs of divisions at their respective desks in respect to the papers or status of said case; but such personal inquiries will be made of no other clerk in the division except in the presence or with the consent of the head thereof, and will be restricted to the hours between 11 a. m. and 2 p. m.

RULE 109.—Any attorney detected in any abuse of the above privileges or of gross misconduct, upon satisfactory proof thereof, after due notice and hearing, shall be prohibited from further practicing before the Department.

RULE 110.—Should either party desire to discuss a case orally before the Secretary opportunity will be afforded at the discretion of the Department, but only at a time specified by the Secretary or fixed by stipulation of the parties, with the consent of the Secretary; and in the absence of such stipulation, or written notice to opposing counsel, with like consent, specifying the time when argument will be heard.

RULE 111.—The examination of cases on appeal to the Commissioner or Secretary will be facilitated by filing in printed form such arguments as it is desired to have considered.

5.—*Decisions.*

RULE 112.—Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.

RULE 113.—The decision of the Secretary, so far as respects the action of the Executive, is final.

RULE 114.—Motions for review before the Secretary of the Interior and applications under Rules 83 and 84 shall be filed with the Commissioner of the Land Office, who will thereupon suspend action under the decision sought to be reviewed, and forward to the Secretary such motion or application.

None of the foregoing rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

L. Q. C. LAMAR,
Secretary.

APPLICATIONS FOR SURVEY.

MARTIN V. LANDON.

Applications for changes or extensions of surveys of lands lying along a river, the course of which is variable, will only be granted after the most careful inquiry.

Secretary Lamar to Commissioner Sparks, July 22, 1885.

I have examined the matter presented by your letter of the 30th ultimo, relative to the petition of Martin V. Landon and others, settlers of Blencoe, Monona County, Iowa, asking a survey of certain lands in T. 82 N., R. 45 W., Iowa, which they allege are unsurveyed.

You state that an examination of the plats of the original surveys in T. 82 N., R. 45 W., Iowa, and Ts. 22 and 23 N., R. 11 E., Nebraska (townships lying opposite each other on either side of the Missouri River), made it apparent that the lands in question were unsurveyed.

Being without information as to the extent or cause of the apparent omission in the original survey, which it appears was made in 1853, you, under date of May 6th last, addressed a letter to the United States surveyor-general of Nebraska and Iowa, furnishing him with such data as your office possessed, and directing him to go in person, or send a competent deputy to the locality, to make a careful examination of the lands, the position of the river, past and present, to obtain affidavits from parties conversant with the facts, and such additional details relating to the question at issue as might be obtainable. Pursuant to these instructions, the surveyor-general sent a deputy to the ground to make the required investigation. His report on the subject was transmitted by the surveyor-general to you under date of June 11, 1885, and is before me. He took the testimony of the settlers upon and near the lands in question, one of whom was in that locality when the original surveys were made.

He also carefully and thoroughly examined the topography of the lands and surrounding country, and has submitted diagrams of the same. The report, with its exhibits, is intended to show the condition of the lands and the position of the river at the date of the original survey and subsequently, as well as the present configuration of the river and the lands lying east thereof in the locality mentioned.

Said deputy surveyor concluded from all the facts gathered by him that the course of the main channel of the Missouri River was not, at the date of the original survey, east of the lands in question, as would appear from the old plat, but that it was then practically the same as it is now. He says: "No evidence can be found that the main channel ever had its course where the pond is located. The main channel is to-day near the Nebraska side, and was in about the same relative location at the time the surveys in the States of Iowa and Nebraska and surrounding land were made." The pond or slough referred to occu-

pies a position corresponding to what was represented on the plat of original survey as the main channel of the river, and on or near it, so far as it extends, the original survey terminated. The surveyor-general, in his letter of transmittal, expresses the opinion that the lands in question were surveyable at the date of the original survey, and that the lines of public surveys should now be extended over said unsurveyed lands.

You find the facts well authenticated that the lands are unsurveyed, having been omitted in the original survey; that they are occupied by actual settlers who should be protected in their rights by virtue of a survey under the direction of your office and the supervision of the United States surveyor-general of Nebraska and Iowa, and that they should after survey be allowed to make entries of their claims in the regular manner.

It is well known that the Missouri River is a changeable and almost constantly changing stream, and, therefore, applications for changes or extension of surveys of lands lying thereon should be treated with extreme caution. Such course seems to have been followed in this case, as shown by the preliminary examination ordered and made; and I think the facts developed are such as to warrant your recommendation and the making of the survey as asked.

The size and evident age of the timber, found to cover much of the lands in question, is of itself evidence that said lands were, in 1853, surveyable, as they now are. After a careful examination of all the facts I concur in your recommendation, and the survey may be made.

DESERT LAND ENTRIES.

INSTRUCTIONS.

Final proof must show compliance with the law in form and spirit, and that the crop raised is the result of reclamation.

Commissioner Sparks to Charles Bradbury, Battle Creek, Idaho, July 23, 1885.

Referring to your letter of April 9, 1885, you are advised that final proof on desert land entries must show that the land has actually been reclaimed from a desert state to an agricultural condition. The raising of a crop *without* irrigation is not evidence of reclamation. But where land would not, without artificial irrigation, produce any agricultural crop, it must be reclaimed by conducting water upon it and upon every subdivision of it. There must be a proprietorship of sufficient water to continue the irrigation and make the reclamation perpetual. And the reclamation must be proven by evidence showing its manner and extent, and the results attained, as indicated in the forms of proof prescribed by official regulations.

LIBRARY DEPARTMENT OF THE INTERIOR

I shall require evidence that the law has been complied with in form and spirit. I do not think the fact that crops *can* be raised is established until it is shown that crops *have* been raised, and it must also be shown that the raising of the crop is the result of a reclamation without which the crop could not have been raised.

The purpose of the desert-land act is not to enable persons to acquire title to six hundred and forty acre tracts of public land by mere formalities and constructive compliance with law. The purpose is to secure the actual and permanent reclamation of land which in a natural state is unproductive. This, it was assumed, would involve an expense that persons entering a single quarter section could not be expected to incur. Inducement was therefore held out by the offer of title to a square mile of land in consideration of the cost and labor required to be expended upon it in order to bring it into a productive condition. That cost and labor is a part of the price of the land—a price to be paid to the public by the purchasers in serving a public benefit while reaping a private advantage.

The question before me in any case is one of evidence. Has the stipulated service been performed? Has the land been actually reclaimed? If it has, proof can easily be furnished, and there can be no hardship in requiring that proof to be conclusive.

PRACTICE—APPEAL.

ATLANTIC AND PACIFIC RAILROAD COMPANY *v.* PATE.

A decision of the General Land Office that the railroad company has no claim to the land which has been withdrawn for its benefit should not preclude the company from the right of appeal.

Where, on application for certiorari, it appeared that the right of appeal was improperly denied, the writ was not granted, but the allowance of appeal directed.

Secretary Lamar to Commissioner Sparks, July 28, 1885.

On June 12 last your office rendered a decision involving the right to the S. ½ of the NE. ¼ of Sec. 33, T. 18 S., R. 1 E., M. D. M., San Francisco, Cal., and allowed Edmond Pate to amend his homestead entry No. 6355, for lands in section 34, made November 19, 1884, so as to include said tract in section 33.

Said decision states that the tract which Mr. Pate desires to substitute for lands in section 34 is within the thirty-mile or indemnity limit of the grant of July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company. The withdrawal of the odd-numbered sections for the benefit of said company was ordered by your office letter of April 22, 1872, which was received at the local office May 2, 1872.

In said decision it is also stated that the records of your office "show no entry or filing to have been made for said land, nor is it alleged that

any claim thereto was subsisting at the date of the railroad withdrawal," and it was held that the company had no claim whatever to the land, and "has no right to appeal from this action," and that the resident attorneys would be notified by your office.

On the 3d instant the resident attorneys for said company filed in your office, in accordance with Rule No. 114, an application to have the proceedings relative to said application to amend certified to this Department under Rules of Practice Nos. 83 and 84, and that said attorneys may be permitted to file an argument upon the merits of the questions involved in said decision.

The sole question to be determined is, whether the applicant has made such a showing as will entitle it to the order prayed for.

Rule 83 provides that in proceedings before the Commissioner, in which he shall formally decide that a party has no right of appeal to the Secretary, the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary, and to suspend further action until the Secretary shall pass upon the same.

Rule 84 provides how applications under Rule 83 shall be made.

Rule 103 provides that "when the Commissioner makes an order or decision affecting the merits of a case, or the regular order of proceedings therein, he will cause notice to be given to each party in interest whose address is known."

It is clear that said decision of your office was made upon the merits of the case. It adjudged that said company had no claim to the land and that Pate should be allowed to enter the land, and also advised the attorneys of said company of said decision, thereby recognizing the company as a party in interest. It is true that so much of said decision as refused the company a right of appeal was irregular and premature, because made before the company had offered to file any appeal from the same.

Every party in interest should have his day in court, and the decision of your office that the company has no claim to the land which has been withdrawn for its benefit should not preclude the company from filing an appeal should it desire so to do. It is deemed unnecessary and inadvisable to express any opinion upon the merits of the decision of your office as to the effect of said withdrawal, or the rights of the company to select lands within the limits of the same. It is clear, I think, that the company should have an opportunity to be heard in the premises. It is not necessary to grant the order prayed for, but said company will be allowed to file an appeal from said decision in your office within the time prescribed by the Rules of Practice after the receipt of notice hereof, and the case will duly be transmitted to this Department.

TOWNSITE ENTRY—MINIMUM PRICE.

KINGMAN TOWNSITE.

Townsite entries under section 2387 are in the nature of pre-emption entries, and payment therefor is required at the same rate as though the land was purchased by a pre-emptor.

The term "minimum" does not mean $1.25 per acre, but the *least* price at which lands are to be sold.

Commissioner Sparks to register and receiver, Prescott, Ariz., July 29, 1885.

I have this day considered a motion to modify my decision in the matter of the townsite application of the town of Kingman (or Middleton) Ariz., dated July 20, instant, filed by W. A. Coulter as attorney for the said townsite.

The purpose of this motion is to enable the proper officer to enter the land covered by said townsite at the rate of $1.25 per acre, instead of at the rate of $2.50 per acre, as directed by my said letter.

The town of Kingman is located upon Sec. 24, T. 21 N., R. 17 W., which township is within the granted limits of the Atlantic and Pacific Railroad. The even sections of this grant are held for sale at the rate of $2.50 per acre, under section 2357 United States Revised Statutes.

It is contended in this motion that under section 2387 Revised Statutes, under which the town of Kingman is sought to be entered, and which provides for the entry of land for the use and benefit of the inhabitants of towns, the proper officer may "enter at the proper land office and at the minimum price the land so settled and occupied," and that the "minimum price" is $1.25 per acre.

I cannot place such construction on the words "minimum price." The terms "minimum" and "double minimum" are used as matters of convenience in this office, and in its dealings with the local offices. The term minimum does not mean $1.25 per acre, but the least price at which lands are to be sold. Thus under the graduation act the minimum price of the land varied according to the length of time the land had been in the market. Agricultural land, under the pre-emption law, is subject to sale at $1.25 per acre, except when in the reserved limits of a railroad grant; when its price once becomes $2.50 per acre, this price is the minimum price for which it can be purchased.

In the case of abandoned reservations, the minimum price of the land is not necessarily $1.25 per acre, but the price at which it shall have been appraised by proper persons. What is termed the double minimum price in the office circular is really the minimum price at which the land to which it attaches can be purchased.

This will appear conclusive by reference to the act of Congress approved March 3, 1853, by which the pre-emption laws were extended to sections reserved or to be reserved on the lines of railways, in which act it is provided "that the price to be paid *shall in all cases* be $2.50

per acre, or *such other minimum price* as is now fixed by law, or may be fixed upon lands hereafter granted."

Townsite entries under sections 2387 *et seq.* are in the nature of pre-emption entries, and the party making the entry is required to make payment at the same rate that he would have had to pay had he entered the land as a pre-emptor. I see no occasion to modify my decision as already communicated to you, and it will therefore remain undisturbed

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ATTORNEYS AND AGENTS.

Under section 5498 of the Revised Statutes a person holding the appointment of United States commissioner will not be admitted to practice as an attorney or agent before the Department.

Secretary Lamar to Neil Dumont, Washington, D. C., July 29, 1885.

Your application to be admitted to practice as attorney and agent before this Department having been rejected by the officer to whom such applications in the ordinary course of business are referred, has at your request been carefully considered by me.

It is stated in your application that you are a notary public for the District of Columbia, also a United States commissioner and examiner in chancery. The first position you hold by appointment from the President and the other two from the supreme court of the District.

The application was refused because it was held that you were precluded by said appointments from practicing before the Department because of the provisions of section 5498 Revised Statutes.

That section provides that "every officer of the United States, or person holding any place of trust or profit or discharging any official function under or in connection with any Executive Department of the Government of the United States," who acts as agent or attorney directly or indirectly in the prosecution of any claim against the Government shall be punished by fine or imprisonment, or both.

On September 15, 1880, this Department rejected the application of Ewell Dick, a United States commissioner, to be admitted to practice before it, holding that his said office brought him within the inhibitions of said section. The ruling then established commands the approbation of my judgment and will not be changed.

Congress, by the authority vested in it by section 2 of article 2 of the Constitution, has given to the United States circuit courts the power to appoint United States commissioners, and from time to time, by various acts, has prescribed and added to their duties, until now they possess powers, some concurrent with and others second only to those of the judges of the courts themselves; indeed in some respects, as in relation to the supervision of certain elections, powers which the judges of the courts cannot exercise. These powers are well defined and most ex-

tensive, many quasi-judicial in character, intimately connected with the proper administration of justice; others executive in their nature, charged with the duty of guarding the integrity of the elective franchise where Congress has power to legislate touching the same. Appointed by the Federal authority, discharging duties relating almost alone to the Federal Government, with powers derived alone from that source, paid by it for their public official acts, they are, in my opinion, clearly officers of the United States and within the inhibitions of section 5498 of the Revised Statutes.

The fact that the applicant is a commissioner of the supreme court of this district does not alter the case, inasmuch as said court is clothed with the powers of a United States circuit court.

Entertaining these views, I do not deem it necessary to determine how far the holding of the offices of notary public or examiner in chancery would affect your application, but because you are a United States commissioner refuse the application.

PRE-EMPTION ENTRY—REQUIREMENTS OF THE LAW.

KURTZ *v.* HOLT.

It is immaterial whether the intending pre-emptor purchases improvements already upon the land or causes the same to be made after settlement and filing.

It is not essential that the pre-emptor should in person cultivate his claim.

In this case the value of the improvements, preparations for a permanent home, and residence after final proof are held as evidence of good faith, and therefore excuse temporary absences from the land.

Secretary Lamar to Commissioner Sparks, July 22, 1885.

I have considered the case of William B. Kurtz *v.* Elizabeth J. Holt, as presented by the appeal of Mrs. Holt from the decision of your office of November 24, 1884, holding for cancellation her pre-emption cash entry for the S. ½ of the SE. ¼ and SE. ¼ of SW. ¼ of Sec. 23, and the NE. ¼ of NW. ¼ of Sec. 26, T. 3 N., R. 2 E., B. P. M., Boise City, Idaho.

May 6, 1882, Mrs. Holt filed declaratory statement alleging settlement on the same day. November 8, 1882, she made cash entry after due notice, and final certificate issued thereon. April 11, 1883, Kurtz filed an affidavit as the basis for contesting said entry, setting forth in substance failure to improve the claim and reside thereon as required by law. A hearing was thereupon ordered and the testimony therein submitted August 16, 1883.

The evidence shows the following state of facts: Mrs. Holt purchased the improvements placed on this land by one Rolls, a former settler, paying therefor the sum of one thousand dollars. Said improvements consisted of a house with two rooms, a barn twelve by fourteen feet, another building ten by twelve feet, one mile of fencing, twenty acres

under cultivation, eighty acres cleared of sage brush, and a good well. After the purchase Mrs. Holt filed her declaratory statement, and between the date of her filing and that of final proof she procured the cultivation of three acres in corn, built a small chicken-house, and made some slight repairs on the barn. As to residence, it appears that the pre-emptor, who is a widow, fifty-six years of age, and a milliner by occupation, was, at the time she made her filing, engaged in her business at Boise City, about three miles from the land. She placed in the house bedding and household furniture sufficient for occupancy, and swears that she took up her permanent residence on the land the day after filing, and was there as often thereafter as possible during the summer, staying in the house, however, but four nights, and eating meals there but eight or nine times. Was there some whole days and parts of days. During this time she was carrying on her business in Boise City, in a rented building, boarding with her brother and paying therefor, but having no home except that upon the land, which she testifies she had purchased as a permanent home for herself. She had no family and no way of making a subsistence other than by her trade, and at the time of the hearing was residing on the land. This recital of facts is in substance the testimony of Mrs. Holt, but it is uncontradicted upon any material point, and upon this condition of facts it is urged that the entry should be canceled. In addition to the foregoing, however, Mrs. Holt testifies that prior to final proof she called upon the receiver of the local office and submitted to him a full statement of the facts pertaining to her residence, and requested information as to whether it was sufficient under the law, and was told by him that she could prove up on showing her good faith in the matter. One of her witnesses on final proof testified at the hearing that the final proof was made before the receiver, in the absence of the register; that when the matter of residence was reached a question arose as between the witness and the claimant whether under the circumstances he could truthfully testify that her residence had been continuous. The matter was thereupon discussed in the presence and hearing of the receiver, the officer taking no part in the conversation, though in the opinion of the witness the receiver was at that time fully advised of the true nature of the residence made by Mrs. Holt. Attached to the "opinion" of the local officers appears a statement of the receiver to the effect that the testimony of Mrs. Holt and her witness, so far as it charges him with full notice and knowledge of the character of Mrs. Holt's residence, is untrue, though he states that she did apply to him for information as to the time when she could make proof and payment.

Under the pre-emption law it is immaterial whether the settler, in pursuit of title, purchases substantial improvements already existing upon the land or causes the same to be made after settlement and filing. So that the improvements belong to the intending pre-emptor the law is satisfied. Gaberel *v.* Guerne (2 C. L. L., 598). Hence this contest

must fall so far as it involves any question as to the improvements of the pre-emptor.

In the matter of cultivation it is also immaterial whether the pre emptor in person tills the soil or procures it to be done by others, good faith being as well evidenced by one act as by the other; it therefore is apparent that the cultivation shown by Mrs. Holt is satisfactory.

But it is urged that the residence made by the pre-emptor is so far short of the requirements of the law that the entry must be canceled, notwithstanding her compliance in the matters of improvement and cultivation is admitted. It must be remembered that the pre-emption law is silent as to the period of inhabitancy to be required under its provisions, and that the term of six months is only fixed in order that good faith in this respect on the part of the pre-emptor may thus be assured. Uninterrupted presence on the claim even during that term is not, however, required, absences being excused when consistent with good faith on the part of the settler. In this case the amount expended for improvements, the preparation made for a permanent home, and residence following final proof, necessarily lead to a conclusion favorable to the entire good faith of the pre-emptor, and no interest of the Government can now be subserved by setting aside the entry.

The decision of your predecessor is therefore reversed and the contest dismissed.

TIMBER TRESPASS.

WILLIAM GRANT ET AL.

The United States will not permit trespass upon unearned odd-numbered sections lying within the limits of a railroad grant.

Secretary Lamar to Attorney General Garland, July 22, 1885.

Accompanying this will be found copy of letter, dated June 16, 1885, from the Commissioner of the General Land Office, together with other documents, therein enumerated, relative to trespasses alleged against William Grant and others, in cutting and removing timber from certain-described lands belonging to the United States, in Washington Territory, and within the primary limits of the grant to the Northern Pacific Railroad Company.

From the papers in the case it appears that during the summer of 1878 a sawmill was erected on the NE ¼ of the NE ¼ of Sec. 29, T. 3 N., R. 8 E., Washington Territory, by William Grant, of The Dalles, Oregon, and John H. Stone and Henry S. Davis, both of Ainsworth, Washington Territory, under the firm-name of "Grant & Stone." The site of the mill was leased for ten years, by said Grant, Stone, and Davis, from one Albert S. Estabrook, who claimed it under pre-emption declaratory statement filed by him October 24, 1878, but who has never yet made final proof.

About September, 1878, said sawmill owners proceeded to cut timber on parts of sections 8, 17, 18, 20, 21 and 29; and operations have been continued to the present time, either by the members of said firm or by the following named persons in their employ or interest, to wit: Arthur C. Phelps, Levi Estis, George Broughton, R. L. Creaves, James C. Forbes, Hugh B. Bosthwick, and Walter F. Frain—as set forth in the several reports herewith transmitted.

The amount of timber estimated to have been cut upon the sections named is 14,346,812 feet, board measure; whereof 5,297,112 feet was cut upon the *even* sections, and 9,549,700 feet upon the *odd* sections. In addition to the above, 1500 cords of wood were cut (in 1879) from said Sec. 20, by said Grant, Stone and Davis.

The timber, after manufacture into lumber at the mill of Grant & Stone, was transported in a flume to the Columbia river, and shipped to various points. The major portion of it was sold to the Northern Pacific Railroad Company or the Oregon Railroad & Navigation Company for the construction and repair of their roads; a smaller portion was disposed of in the general market.

As to the lands in the *even* sections above named: Upon a portion of them declaratory pre-emption statements were filed, but the pre-emptors have never improved or occupied said tracts except for logging purposes. Upon a portion of them homestead entries have been made, but the entries have been canceled; or (in one case) the entryman has left his land and his present whereabouts is unknown; or (in one case) the entryman failed to present proof of being a citizen.

As to the lands in the *odd* sections above named: On the 26th of February, 1883, my predecessor, in requesting the special agents of this Department to carefully separate the cases of trespass upon odd sections within the granted limits of railroads from those committed upon even sections, expressed the opinion that "there can be no propriety in the United States' prosecuting cases of trespass on odd sections of land within railroad limits, *whether earned or unearned* (1 L. D., 626). This ruling was based upon the decision of the Supreme Court in the case of Schulenberg *v.* Harriman (21 Wall., 44).

Judge Deady, of the U. S. District Court for Oregon, however, in the case of the United States *v.* Childers, (12 Federal Reporter, 586—June 27, 1882,) points out the fact that the language of the grant to which the Schulenberg-Harriman decision referred was widely different from that of the grant to the Northern Pacific Railroad, and holds that in the latter case Congress—

"Did not intend to part with the title to the lands until and only so fast as they were earned by the completion of the work. . . . The legal title to the *unearned* portions of this grant—the odd-numbered sections opposite to which the road has not been completed and accepted—is still in the United States."

While this Department does not consider itself necessarily bound by the decisions of the several U. S. Circuit and District Courts, it may

yet be permitted to remark that in its opinion the language quoted above conveys a correct interpretation of the statute bearing upon the case at bar.

My predecessor's opinion (cited *supra*) concludes thus:

"There is no legal reason why any railroad company, when its grant of lands by Congress is a present one, can not institute proceedings against a trespasser on its lands, since no valid objection could be raised on the trial of such case on account of want of title in the company, inasmuch as title to the company can be questioned only by the United States."

The trouble with this conclusion is that in many cases the railroad company, being the principal beneficiary by the trespass, is therefore in no way interested in instituting legal proceedings against the trespasser, but on the contrary deeply interested that such proceedings shall not be instituted. Of this condition of affairs the case at bar is a conspicuous example. In this case it is noticeable further: although the lands trespassed upon were within the granted limits upon the map of general route, yet upon the map of definite location they fall outside of both granted and indemnity limits, and will therefore finally of necessity revert to the United States, with their value destroyed or largely diminished by the loss of the timber of which they have been denuded for the benefit of the railroad companies.

This Department would therefore respectfully request, in accordance with the recommendation of the Commissioner, that you direct the U. S. Attorney for the proper district to institute criminal proceedings against the said William Grant (the principal owner of the sawmill and the master-spirit among the trespassers); and civil suit against said Grant and the other parties named, jointly, (including the Northern Pacific Railroad Company and the Oregon Railroad and Navigation Company,) to recover the value, after manufacture, of the whole amount of timber reported cut upon both the even and the odd sections hereinbefore described; also civil suit against Grant, Stone and Davis to recover the full market value of the 1500 cords of wood cut and removed therefrom by them.

CHARACTER OF LAND.

ROBERTS *v.* JEPSON.

Proof that neighboring lands contain oil is not sufficient to defeat an entry of land returned as agricultural.

Secretary Lamar to Commissioner Sparks July 22, 1885.

I have considered the case of Westley Roberts *v.* Thomas W. Jepson, involving the status of Lots 4 and 5, and the W. ½ of the SW. ¼ of Sec. 12, T. 4 N., R. 20 W., S. B. M., Los Angeles district, California, as presented by the appeal of Roberts from the decision of your office dated August 15, 1884, holding that said tracts are agricultural in character.

The record shows that Jepson filed his pre-emption declaratory statement No. 1076 for said tracts on November 10, alleging settlement thereon September 13, 1875. The right to said tracts was contested with Mrs. M. F. Wilburn, and finally decided by this Department in favor of Jepson on December 21, 1881, (9 C. L. O., 133).

On March 23, 1882, Jepson gave due notice that he would make final proof before the county clerk of Ventura county, in said State, on May 2, 1882. On May 1, 1882, said Roberts filed in the district land office a notice of his claim to said tracts by virtue of his location of the same as an oil claim, and asked that a hearing be ordered to determine the true character of the land. The hearing was duly held, commencing on August 8, 1882, at which both parties appeared in person and were represented by counsel. On September 13, 1883, the register and receiver rendered their joint opinion "that the preponderance of the testimony is in favor of the agricultural character of the land, and that Jepson be allowed to make payment for the same on the proof herewith submitted."

Roberts appealed from the decision of the district land officers, and your office, on August 15, 1884, affirmed the decision of the register and receiver as to the character of said tracts, on the ground that "the contestant Roberts has failed to prove that oil or mineral of any kind exists on the land."

It is not pretended that any oil has been discovered on the tracts in question; on the contrary, the contestant swears that no oil has been discovered on said tracts, and the return of the United States surveyor-general does not represent the tracts as oil or mineral lands. The contestant, however, insists that other lands in the vicinity contain oil, and, therefore the tracts in controversy should be considered oil or mineral lands.

Such contention cannot be maintained.

Since these tracts were returned by the United States surveyor-general as agricultural, the burden of proof is upon the contestant to show their mineral character; and, as was said by this Department in Dughi *v.* Harkins, (2 L. D., 721,) "he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develope minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character." (See also Hooper *v.* Ferguson, 2 L. D., 712).

A careful examination of the testimony shows that the contestant has failed to establish the character of the land as oil land, and, therefore, subject to location under the mineral laws.

The decision of your office is accordingly affirmed.

PRE-EMPTION ENTRY—HEARING ON SPECIAL AGENT'S REPORT.

GEORGE T. BURNS.

That only a portion of the dwelling-house of the pre-emptor is upon the land claimed will not defeat his right to purchase.

Improvements purchased of a former occupant inure to the benefit of the pre-emptor.

While the pre-emption law requires residence, both personal and continuous, certain temporary absences may be excused; but where the pre-emptor holds office and votes in another county he will be estopped from asserting continuous residence upon his claim.

In case of hearing ordered upon a special agent's report, as to the character of a pre-emption entry, the burden of proof is upon the Government, and the circular of April 22, 1885, is modified accordingly.

Secretary Lamar to Commissioner Sparks July 25, 1885.

I have considered the appeal of George T. Burns from the decision of your office, dated December 16, 1884, refusing to set aside the order holding for cancellation his pre-emption cash entry No. 14,166, covering the W ½ of the NW ¼ and the W ½ of the SW ¼ of Sec. 18, T. 46 N., R. 25 W., Marquette land district, Michigan.

The record shows that Burns filed his pre-emption declaratory statement No. 649 upon said tracts on February 28, alleging settlement on February 1, 1882, and, after due notice, made his final proof before the register on September 6, 1882, and on March 12, 1883, made his final affidavit before the deputy clerk of the circuit court of Delta County in said State, and final certificate issued same day. On March 31, 1884, a special agent of your office reported that Burns had failed to cultivate any of said land; that he had made no improvements on the land, except one end of a log building, which was put up for the occupation of persons engaged in getting out logs; that he had never actually resided upon the land and had only been upon the same a few times since the date of his filing. Upon the agent's report, your office, on April 14, 1884, held said entry for cancellation and allowed Burns sixty days within which to apply for a hearing. Application was made and hearing was duly had before the register and receiver on September 13, 1884.

Upon the testimony submitted the register and receiver rendered their joint opinion that "the residence and cultivation of the tract in question by the said Burns were not of such an extent and character as constituted a full compliance with the pre-emption law." On December 16, 1884, your office examined the record and testimony in the case, and held that the evidence showed that Burns did not act in good faith in making said entry; that he has not complied with the law as regards residence and cultivation, and that his entry should be canceled. The testimony shows that Burns was a duly qualified pre-emptor, that he paid for said land at the rate of $2.50 per acre on account of the same being within the limits of a railroad grant; that he is a single man, and was, at the time of his alleged settlement and entry, general manager for the

N. Ludington Lumber Company in carrying on an extensive lumber business at several points.

It appears from Burns' testimony that he served as a soldier in the late war forty days less than three years, and that he made pre-emption, instead of homestead, entry, because he could not live on the land continuously for the time required by law to perfect his homestead claim. He swears that he settled upon said land in good faith, and intended to cultivate it after clearing off the timber and make it his home. He admits that he put up the dwelling-house and other buildings with the men in the employ of said company for the double purpose of making a home for himself and furnishing a sleeping place for the men in the employ of said company while working on the adjacent lands of the company. The fact that only one portion of the building was upon the tract, or the additional fact that he purchased the improvements from the company, can make no difference. Lindsey *v.* Howes (2 Black, 554) Silver *v.* Ladd (7 Wall., 219); Lansdale *v.* Daniel (10 Otto, 113); Pruitt *v.* Chadbourne (3 L. D., 100).

Burns further swears that he did not file for said land simply to strip it of its timber; that he was a poor man, with no income except his salary; that he was not away from the land in the months of December, 1881, January, February, March, and April, 1882, at any one time to exceed two weeks; that he was absent in May, "driving logs," but was back upon the land in June and July. He also testifies that neither the N. Ludington Company nor any other party ever had any interest, present or prospective, in said land. He admits that he was elected supervisor for the township of Escanaba, Delta County, in April, 1881, and was re-elected in 1882, and that no one questioned his right to hold the office on account of having established his residence on said tracts in Marquette County. He swears that the improvements were worth from two hundred and fifty to three hundred dollars, and that he cut no timber on the land except for clearing and building purposes until more than five months after he had paid for the land, which was in September, 1882. Burns is corroborated on material points by two witnesses. Only two witnesses were introduced on the part of the Government, and there is no material contradiction in the testimony, except as to the value of the timber cut upon the tract.

It appears from an inspection of the final proof that it should not have been received by the district land officers. In answer to the fourth question, "How much of the land have you broken and cultivated since settlement, and what kind of crops have you raised?" Burns responded, "None." Again, the pre-emption affidavit was not made until March 12, 1883, before an officer of a different county from that in which the land is situated, and no sufficient explanation is given therefor. There can be no question that the pre-emption laws require a residence, both continuous and personal, upon the land by the person who seeks to enter it. When, however, a sufficient excuse is given for temporary

absences, which does not appear in the present case, the entryman will be considered constructively residing upon the land. Bohall *v.* Dilla (114 U. S., 47); Sandell *v.* Davenport (2 L. D., 157); Conlin *v.* Yarwood (2 C. L. L., 593); James H. Marshall (3 L. D., 411).

But it is shown that Burns was supervisor of a township in another county and performed the duties of the office in 1881 and 1882, and that he voted in said township in the spring and fall of 1882. By the law of Michigan (Howell An. Stat., 781 and 782) no one could hold said office unless he was an inhabitant of the township, and, when Burns accepted the office and voted in said township he asserted that his residence was in the township of which he was an officer. He could not be a *bona fide* inhabitant of two places at one and the same time, and is, therefore, estopped from asserting that his residence was continuous upon the land covered by his entry.

Burns cannot plead ignorance of the law as to the qualifications of supervisors. He is presumed to know the law, and the fact that he was superintendent of a large and flourishing lumber company would indicate that he was a man of more than ordinary intelligence. After a careful consideration of the testimony and the record in the case, I am unable to find that Burns made said entry in good faith.

In the case at bar the entry was held for cancellation under the provisions of your office circular of April 10, 1884, allowing the entryman sixty days to make a written application for a hearing. Subsequently the practice was changed in accordance with circular instructions from your office, dated May 8, and approved by this Department on May 9, 1884, relative to hearings ordered upon special agents' reports, in which it is stated, "These hearings are ordered as a part of the proceedings upon an inquiry instituted by the Government into the validity of alleged fraudulent or illegal entries. The purpose is to give entrymen full opportunity to be heard in defense of their claims."

On April 22d last this Department approved another circular letter, quoting the above, and directed that "claimants at such hearings will be required to submit their testimony first, subject to cross-examination and rebuttal." Such a requirement, where the entry has been regularly perfected and the final certificate issued, is not in harmony with the established rules of judicial procedure, and does not appear to be necessary to insure a just enforcement of the laws. Blackstone (vol. 3, page 303) says that the "proof is always first upon that side which affirms the matter in question," and it has always been held, as a general rule, that fraud is never presumed, unless such circumstances are shown as will legally justify such an inference. That frauds are frequently practiced under the land laws cannot be doubted; and that individuals and corporations who practice these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious. But, as was said by Justice McLean, in 9 Pet. U. S., 682, "Such acts cannot alter the established rules of evidence, which

have been adopted as well with reference to the protection of the innocent as the punishment of the guilty." (Wharton's Ev., chap. 7, and secs. 1248 and 1249; Greenleaf's Ev., sec. 78; The United States *v.* The Southern Colorado Coal Company, 2 L. D., 79.)

In the case of Franklin L. Bush *et al.* (2 L. D., 788) this Department held, quoting the Le Cocq cases, (*Ibid.*, 784) that where a special agent reports non-compliance with the mining law in the matter of expenditures, notice should be given the mining claimants that a hearing will be had, and the special agent should be directed to produce witnesses to sustain his report. The reports are not evidence, but simply the basis upon which the hearings are ordered. Where the special agent has reported an entry, upon which final certificate has regularly issued, illegal or fraudulent, and a hearing has been ordered under the circular of May 8, 1884, he should offer the proof in support of his allegations, after which the entryman should present his defense.

The circular approved April 22, 1885, above referred to, should be so amended as to conform to the views herein expressed.

The decision of your office is accordingly affirmed.

TIMBER TRESPASS.

MONTANA IMPROVEMENT COMPANY.

The United States may protect its unsurveyed lands from trespass.

The only right a land-grant railroad has to timber through a region of unsurveyed country is the right to procure timber for construction purposes from adjacent lands.

Whether under the second section of the act of July 2, 1864, the railroad company is authorized to use timber from the public lands in the erection of depots, station-houses, etc.—Query.

Secretary Lamar to Commissioner Sparks, July 25, 1885.

The Department is in receipt of your predecessor's letters dated respectively March 19 and June 28, 1884, the former forwarding report dated March 3, 1884, from Special Agent William F. Prosser; the latter transmitting communication, dated June 18, 1884, from one S. H. Williams, of Noxon, Montana Territory, all relating to the operations of the Montana Improvement Company.

"The Montana Improvement Company, Limited," is an organization incorporated under the laws of Montana Territory, having a capital stock of two millions dollars ($2,000,000). Of this amount, $1,000,100 (one share more than one-half, thus constituting a controlling interest) is held by the Northern Pacific Railroad Company. Of the remainder, the greater part is held by the firm of Eddy, Hammond & Co., of Missoula, Montana, who are the chief managers of the Montana Improvement Company. One of the partners of the firm, Mr. E. L. Bonner, is president of said company.

The Montana Improvement Company has a contract with the Northern Pacific Railroad Company to supply the latter with all the timber, lumber, cord-wood, and other material made of timber, between Miles City, Montana, and Wallula Junction, Washington Territory (between which points said railroad is now completed), a distance of nine hundred and twenty-five miles. It has secured, by arrangement with the railroad company, the control of all the timber on railroad lands between the two points named. It claims control also of all the timber on *government lands* within railroad limits, for the same distance. Agent Prosser, in his report, says:

"Whilst in Missoula I was told by Mr. A. B. Hammond, of the firm of Eddy, Hammond & Co., who is one of the principal managers of the Montana Improvement Company, that Mr. E. L. Bonner, the President of the company, together with Mr. Maginnis, the delegate in Congress from Montana Territory, and Mr. C. B. Sanborn, the land agent of the Northern Pacific Railroad, had called in person upon the Honorable Secretary of the Interior, in Washington, D. C., and that they had received permission and authority from him to cut all the timber they might require from government land—at least where the land was not surveyed."

A letter (copy enclosed) from Honorable B. H. Brewster, Attorney General, to this Department, under date of February 2, 1884, contains substantially the same statement, with additional particulars:

"I desire to call your attention to the matter of Eddy, Hammond & Co., a firm carrying on business in the town of Missoula, and who are large contractors and lumber dealers. During the construction of the Northern Pacific Railroad they were under contract to supply ties. It appears that they obtained permission from the Department of the Interior to erect sawmills on the reservation" (Flathead Indian) "and to use the timber—the stipulation being that so soon as the road was completed to Portland, Oregon, they should leave. The road has long been completed, but the firm insists on keeping their mills on the reservation. They are running night and day, or were during the summer and fall, and are getting out ties enough to last for some years, besides sawing lumber, using the same in their own business. They are cutting out all the available timber."

The wrong perpetrated upon settlers, and persons who may hereafter desire to settle upon the even sections reserved by the government, is clearly shown by the following extract from the letter of S. H. Williams (copy herewith):

"There are a few men here that represent themselves as the Montana Improvement Company—Eddy, Hammond & Co., Missoula, M. T. . . . They have from two to three thousand men here, steadily chopping the government timber, and sawing it up into lumber and shingles for their own benefit, and pocketing the proceeds themselves; and if anybody else wants any to fence with, or use on their place, or for firewood, they make a terrible fuss about it, and threaten to put them in states-prison. . . . . If I can read right I don't think the law allows them to destroy public timber as these men are doing—and they charge an outrageous price for their lumber, too."

The injustice to other mill-owners and lumber-dealers is strongly portrayed in the special agent's statement that the Northern Pacific Railroad charges the Montana Improvement Company, for transporting lumber from Spokane Falls to Endicott, $23 per carload, while all other parties are charged $47 per carload; and that the Improvement Company threatens to bring about the prosecution of all sawmill owners who cut timber from either government or railroad land, excepting such as will carry on their business in subordination to and as employes of the Improvement Company—while to these the said company guarantees the same indemnity from prosecution by the government which the company asserts has been pledged to itself. In this way all other lumber manufacturers and dealers throughout this vast extent of territory have been compelled to become tributary to the Improvement Company or to suspend operations and go into bankruptcy.

There is not upon the records of this Department any authorization or document of any sort granting to the Montana Improvement Company any such permission as it claims to have received. Indeed, the officers of the company do not claim to have received anything more than a verbal permission from the Secretary of the Interior. It does not appear from what Secretary of the Interior such verbal permission was received, nor does it appear with any exactness what the terms of such permission were—if indeed any permission of any kind was given. Whatever they may have been, it is clear, from the Honorable Attorney General's letter of February 2, 1884, that said company has far exceeded them. In any event, the Secretary of the Interior is simply an executive officer, whose duty it is to see that the laws are executed. He is not himself at liberty to violate the law, nor can he authorize any one else to violate the law. If, even in accordance with permission received from him, the men constituting the Montana Improvement Company have violated the law, they are none the less amenable to the law for such violation; for such permission could not render lawful anything that the statute expressly forbids.

The agent says that the great difficulty in connection with this matter—

"Lies in the fact that most of the land where it is being cut is unsurveyed. It is difficult, indeed impossible, to determine properly the rights of settlers, of the railroad company, or of the government, where no survey has been made of the lands upon which the timber has been cut."

It is plain that the right to protect from trespass the unsurveyed lands of the United States must reside *somewhere.* It can not reside in the railroad company, for its right even to the alternate sections can not attach until survey shall show which sections are odd and which are even; consequently not until after such survey can it exercise any authority over any portion of the land. Until survey, all those lands are under the control of the United States, and the United States may pro-

tect them from trespass, either by an individual trespasser or by the railroad company. The only right a land-grant railroad has to timber, etc., through a region of unsurveyed country is such as pertains to all railroads under the general right-of-way, including the right to procure timber for construction purposes from "adjacent" lands.

Possibly there have been cases in which timber cut from unsurveyed lands within granted limits has been cut by or for a railroad, in which the government waived its full legal rights in the premises, and exacted remuneration or penalty for but one-half the timber taken—estimating the amount cut upon the granted and the ungranted sections to have been equal. But such waiver could not invalidate its right over all lands yet unsurveyed. In the language of section 47 of the circular instructions of your office to timber agents, approved by my predecessor June 1, 1883, "The purpose of the government is to prevent the unlawful taking of timber from *all* government lands *until the title to such lands has actually passed from the United States.*"

Of course no such question as that above discussed can arise with reference to the large amount of timber which (it is alleged) has been cut by the Montana Improvement Company for other purposes than the construction of the Northern Pacific Railroad.

You request from the Department instructions relative to the matters contained in Agent Prosser's report—which says, among other things:

"It is also desirable that specific instructions be furnished as to whether or not lumber used in the building of depots, station-houses, shops, woodsheds, etc., by the Railroad Company is properly included in the timber which it is allowable to take for 'construction purposes' from the public lands."

I can not discover, from an examination of the records of the Department, that this question has ever been decided. The language of the portion of the granting act bearing upon this point is as follows (Act of July 2, 1864—13 Stat., 365):

"The right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth stone, timber, etc., for the construction thereof."

That is, manifestly, for the construction of the "road." It has unquestionably been the custom of the various railroads, however, to make use of the public timber, if needed, for the construction of depots, etc., the same as for ties or bridges; and it is perhaps at least questionable whether a restrictive interpretation of the statute could properly be insisted upon.

The principal difficulty in connection with this matter is found in the fact that in reality no case is presented in a shape to justify action, either in the form of a suit, criminal or civil, or of a demand upon either the Montana Improvement Company or the Northern Pacific Railroad Company. The statement is made in general terms that extensive depredations have been committed; but no definite charge is presented. It would

certainly avail little to make a vague demand upon the companies named for—no specific sum, on account of the cutting of an indefinite amount of timber, cut in Montana Territory, or Washington Territory, or somewhere else, at some time unstated, by individuals unknown.

With a view to putting an end, as speedily as possible, to the extensive depredations alleged by the special agent and others to have been committed and to be still in progress by the companies named, you are directed to take prompt and vigorous measures to ascertain the amount of timber already cut by them, or by other parties for them, on government land—on even sections where surveyed, and upon both even and odd sections where unsurveyed—with a careful report, as set forth in the blank forms of special agents' reports sent out by your office, of all particulars as to amounts, dates, witnesses, etc.: and on receipt of such reports you will transmit the same to the Department with your recommendation in each case.

I shall at once transmit a copy of this letter, enclosing Agent Prosser's report, to the Honorable Attorney General, accompanied by a request that he take prompt measures to put a stop to further operations of the Montana Improvement Company and of the Northern Pacific Railroad Company upon even sections of surveyed lands, and upon all unsurveyed lands—leaving the matter of the punishment of or reimbursement for past depredations for future consideration and action.

TIMBER CULTURE ENTRY.

BERNARD MCCABE.

Entries in the proportion of one hundred and sixty acres for every six hundred and forty acres may be allowed in sections containing an excess over the technical acreage of a section where the sub-divisional survey of said section will permit.

Secretary Lamar to Commissioner Sparks, July 25, 1885.

I have considered the appeal of Bernard McCabe from your office decision of November 7, 1884, holding for cancellation his timber culture entry No. 3563 of Lots 1 and 14 of Sec. 30, T. 20 S., R. 8 E., Salina district, Kansas.

It appears that on October 4, 1879, one P. B. McCabe made timber culture entry No. 2690 of Lot 27 of Sec. 30, etc. containing forty acres.

June 18, 1883, one Russell C. Harris made timber culture entry No. 3483 of lots 23, 24, 25 and 26 of Sec. 30, etc. aggregating one hundred and sixty acres.

November 14, 1883, the appellant, B. McCabe, made the aforesaid timber culture entry in question of eighty acres, which, together with the foregoing entries aggregate two hundred and eighty acres of land thus entered in said section 30.

These entries having been allowed by the register and receiver, your office advised them by said letter of November 7, 1884, that "Not more

than one hundred and sixty acres or approximating thereto can be entered in any one section under the timber culture law, no matter what the area of the section may be;" that therefore and also by reason of P. B. McCabe's prior entry of forty acres Harris' entry would be held for cancellation to the extent of forty acres; that Harris might either elect which portion he would retain, or he might relinquish his entry and make another; and that Bernard McCabe's entry was held for cancellation on account of the aforesaid prior entries.

Wherefore B. McCabe appealed from such action, alleging that he had been informed that said section 30 contains 1,421.68 acres: and that the seven lots entered as aforesaid do not aggregate one quarter of the section.

The records of your office show that said section does contain 1,421.68 acres, which is subdivided into lots containing forty acres each, barring the westernmost tier of lots, which contain somewhat less. These seven lots contain forty acres each, and hence these entries do not aggregate one-quarter of said section, which is 355.42 acres.

The action of your office was based upon the theory that the timber culture act restricts entries thereunder to the technical quarter-section or one hundred and sixty acres, more or less, in any one section, "no matter what the area of the section may be."

It will be observed, however, that the discussion or consideration of such question is obviated in this case; inasmuch as scrutiny of the township plat discovers that the lots in question are so situate that not more than a quarter of any six hundred and forty acres of said section has been so entered.

I am therefore of opinion, that both appellant's entry and Harris' should be allowed to stand intact upon the record, so far as the objection in question is concerned.

The decision of your office is accordingly reversed.

PRE-EMPTION—ACT OF JUNE 3, 1878.

CHAMBERLIN *v.* DRUCKER.

In the case of conflict between a pre-emptor and a purchaser under the act of June 3, 1878, where it appeared that the pre-emptor filed prior to settlement, and had not settled at the time application to purchase under said act was made, it was held that the filing was no bar to the sale under said act and should be canceled.

A single woman who marries after filing declaratory statement and prior to final proof waives the right of pre-emption.

Secretary Lamar to Commissioner Sparks, July 28, 1885.

I have considered the case of J. D. H. Chamberlin *v.* Cina A. Drucker, involving the SE ¼ of NE ¼, and Lot 1 of Sec. 5, and Lots 3 and 4 of Sec. 4, T. 1 N., R. 2 E., H. M., Humboldt, California, on appeal by Chamberlin from your office decision of May 7, 1884.

The record shows that Miss Drucker made pre-emption filing for the tract May 18, 1882, alleging settlement on the 1st of the same month.

On the 15th of November, 1882, Chamberlin filed application under the provisions of the act of June 3, 1878, (20 Stat., 89,) to purchase said tract as timber land. On the 27th of January, 1883, a summons issued from the local office to be served upon Drucker, calling upon her to appear before the register and receiver on the 5th of March, 1883, and show cause, if any there be, why Chamberlin should not be allowed to enter the land in question. A copy of said summons was delivered to Miss Drucker January 30, 1883.

On the day named therein both parties appeared in person and by counsel, and the hearing proceeded on the question of the pre-emption applicant's good faith and compliance with the law in the matter of settlement, inhabitancy and improvement. Upon the evidence adduced, the register and receiver rendered their joint opinion "that Miss Drucker had not made a legal settlement on the land she claims, prior to filing her declaratory statement, or prior to the application and sworn statement of J. D. H. Chamberlin under act June 3, 1878, and that the land should be awarded to said Chamberlin."

Your office reversed the judgment of the local office, rejected Chamberlin's application to purchase, and allowed the declaratory statement of Miss Drucker to stand, subject to her ability to make proof and payment in conformity with the law and regulations.

After a careful examination of the evidence, I am unable to conclude that Miss Drucker made such settlement and improvement as the pre-emption law requires. Henry J. Bridges testifies that he on or about May 1, 1882, at the request of Miss Drucker, visited and viewed the land, taking with him one N. D. Young, who knew and could show him the location of the tract. They did nothing upon the land. A few days after he had conversation with Young about making improvements on the land, and paid him $20, for the purpose of having improvements made. In doing this he acted for Drucker. He was next on the land May 14 and 15, 1882, Miss Drucker and others being with him. No improvements had yet been made by Young, nor did they on the days named perform any act of settlement. An old cabin stood on the land. They visited this, and were in it, but did nothing to indicate that applicant claimed it. She was next on the land in June. This was after her filing, and no act of settlement had yet been performed.

She was next there in October following, and not again until about the 15th of January, 1883, when she moved into a small house which one Samuel Strong, who lived on land adjoining, had built for her shortly before. The construction of this house, which was commenced in December, 1882, a month or more after Chamberlin's application to purchase, and seven months after her filing, was, so far as the evidence shows, the first act of settlement by Miss Drucker on the tract. Prior to that time, she

had never slept nor eaten upon the land, nor had she performed any act thereon which could properly be construed as an act of settlement, or as notice to the public of her intention to claim the land.

On the facts as presented by the testimony in the case, I must conclude that the showing as made by Miss Drucker herself is such as to make it clear beyond a reasonable doubt that she failed to meet the requirements of the pre-emption law as to settlement prior to filing, and further that she had performed no act of settlement prior to Chamberlin's application to purchase, and therefore at that date had no valid pre-emption claim.

Her filing must consequently be canceled. It may here be added that on the 7th of January, 1884, Chamberlin made affidavit before the register of the land office, C. F. Roberts, (one of the officers before whom the hearing was had,) in which he averred that since the date of the contest, to wit, on the 20th day of November, 1883, Cina Drucker married one Frank Beckwith, and that she and her husband are residing at the city of Eureka, California.

If this be true, the pre-emption claimant has waived and forfeited her right to make entry of the land in question, even had her right been sustained in this contest.

Section 2259 of the Revised Statutes restricts the right to make pre-emption to such persons as are respectively the head of a family, a widow or a single person. Miss Drucker, if married, does not fall within any of the classes mentioned, and is not a qualified pre-emptor. See cases of Rosanna Kennedy, (10 C. L. O., 152;) and Sarah A. Edwards, (3 L. D., 384.)

Counsel for Miss Drucker acknowledged service of a copy of the affidavit referred to on the day on which it was made (January 7, 1884,) and have filed nothing in reply, though a year and a half has elapsed.

It may further be remarked that the testimony taken at the hearing went wholly to the question of Miss Drucker's good faith and compliance with the law, and contains nothing to show whether the land in dispute is of a character making it properly subject to entry under the act of June 3, 1878. I shall therefore not pass upon the question of Chamberlin's right to purchase, further than to direct the cancellation of Miss Drucker's filing, thus clearing the record so that his application may be reinstated and he be allowed to purchase, provided it is shown that the land is of the character contemplated by said act of June 3, 1878. The decision of your predecessor is reversed.

PRACTICE—NOTICE; PRE-EMPTION—SETTLEMENT.

ELLIOTT *v.* NOEL.

Motion to dismiss an appeal, because not filed in time, will not be entertained where it appears that the appellant did not have written notice of the adverse decision.

A slightly marked pre-emption settlement made upon densely timbered land, as a basis for a claim covering part of two quarter sections, is not notice as to the extent of the claim outside of the quarter section upon which the settlement is located.

Secretary Lamar to Commissioner Sparks July 28, 1885.

The case of William H. Elliott *v.* Mac Noel has been considered on appeal by Noel from the decision of your office dated June 6, 1884, wherein his pre-emption filing was held for cancellation, so far as it relates to the S ½ of the NE ¼ of Sec. 25, T. 59, R. 18, Duluth, Minnesota.

Elliott filed a motion requesting this Department to dismiss the appeal on the ground that it was not filed within the time prescribed by the Rules of Practice.

The record shows that the local officers verbally informed Noel's attorney of the action of your office of June 6, 1884. Noel's appeal was filed August 16, 1884, being the sixty-first day after notice. (See Rule 86 of Practice.)

Rule 17 of Practice, however, provides that notice of decisions shall be in writing, and as the local officers erred in not complying with the rule, the motion to dismiss will not be entertained.

Elliott filed declaratory statement No. 3046 May 3, 1883, covering the S ½ of NE ¼ and N ½ of SE ¼ of Sec. 25, alleging settlement April 27, 1883.

Noel filed declaratory statement 3070 June 3, 1883, for the NE ¼ of said section, alleging settlement May 3, 1883, and advertised to make final proof November 28, 1883, in support of his claim.

November 27, 1883, Elliott filed an affidavit setting forth the conflict of claims between Noel and himself relative to the S ½ of the NE ¼, and alleging his prior settlement and claim to the tract.

On January 3, 1884, a hearing was held to determine the respective rights of the parties. Noel postponed final proof until the question at issue should be settled.

The evidence is, that the lands are situated in a locality which is well covered with timber, access to which is had by means of a trail that leads up to and by the tracts in question.

Elliott it appears first visited the tract claimed by him on April 27, 1883, and cleared the timber, consisting of about four trees, and brush from a space three or four rods square; he then went to Duluth, distant about seventy-five miles, which he reached May 3, 1883, and filed his declaratory statement for the land. He then returned May 20, 1883, and enlarged the clearing and erected a house about June 4, 1883, on

the NE ¼ of SE ¼ of Sec. 25. The original clearing was situated in the timber a few rods from the trail.

Noel inspected the NE ¼ and surroundings, and finding no evidences that it was claimed by any one, made his settlement May 3, 1883, by clearing a space on the S ½ of the NE ¼, and May 10, 1883, erected a house thereon. The evidence is, that Noel was at this time ignorant of the claim of Elliott to this or any other tract in the vicinity. Both parties have improved and continue to hold possession of the tracts, upon which are situated their respective houses.

The question presented for my consideration is an unusual one, particularly as both parties appear to have acted in good faith towards each other in their settlement of the tracts claimed.

Prior to May 3, 1883, when Elliott made his filing of record in the local land office, on which date Noel made settlement, Noel had no means of ascertaining what tracts Elliott contemplated including in his claim. In fact, Noel was entirely ignorant that Elliott intended settling in that locality, so far as the record in the case shows. In his inspection of the NE ¼, Noel perceived no indications of settlement, and on May 8, 1883, commenced his settlement, immediately followed by substantial improvements thereon.

Elliott, on making his settlement on the N ½ of the SE ¼ hurriedly absented himself from the tract for the purpose of recording his claim in the local land office, but without having taken any pains to place any mark or monument on the tract described in his declaratory statement filing to indicate that he intended to claim the S ½ of the NE ¼, which in his absence would have placed an intending settler on his inquiry. So far as the public was concerned up to May 3, 1883, the intention of Elliott as to what forties his claim was intended to cover was locked in his own breast. His clearing on the NE ¼ of the SE ¼ might have been used by him as the basis of a selection to suit his convenience after his inspection of the local office records May 3, 1883; so that an intending settler in his absence could not determine which of the forties surrounding the NE ¼ of the SE ¼ Elliott really intended to cover.

Again even if Noel had perceived the clearing made by Elliott April 27, he would under the circumstances have been justified in concluding that it was intended as a settlement of the SE ¼, for the reason that the records of the land office show that, prior to May 3, 1883, such quarter section was vacant.

The evidence is, that subsequently to making the original clearing, Elliott, in returning to his claim, was enabled to discover its whereabouts only after a close search. This being the fact, how can Noel, who was in ignorance of the claim of Elliott, be held during the absence of the latter to have been better able to discover such an indication of settlement?

The case being strongly exceptional, forms an exception to the general poctrine that any act of settlement is sufficient to put a subsequent set-

tler upon his notice, and to compel him to inquire as to the real boundaries of the first settler's claim, before risking a settlement that may possibly conflict therewith. Elliott had marked only the SE ¼ and left the neighborhood. Noel went upon the NE ¼, and on that subdivision really established the first settlement, simultaneously as to date with the declaratory filing of Elliott. Till that moment no certain priority could be claimed and on that date the settlement claim attached to the land by personal seizin, while the filing was merely a declaration that it was the intent to include it in the settlement upon the other quarter section.

Under the circumstances the claim of Noel for the S ½ of the NE ¼ will be held as prior to that of Elliott.

The declaratory statement of Elliott, so far as it relates to the S ½ of the NE ¼, will be permitted to stand, subject to the final proof of Noel.

Your predecessor's decision is reversed.

REVIEW.

ST. PAUL & SIOUX CITY R. R. CO. *v.* THE UNITED STATES.

On motion for review of departmental decision rendered April 27, 1885 (3 L. D., 504), the Secretary of the Interior refused to reconsider said decision, and dismissed the motion July 28, 1885.

MINERAL APPLICATIONS—SCHOOL LANDS.

ORDER OF SUSPENSION.

Acting Secretary Jenks to Commissioner Sparks, July 30, 1885.

In reply to your inquiry of the 10th ultimo respecting the scope of Departmental order of 24th March last, directing you "to suspend all action relative to mineral applications for school lands in the Territories until further instructions," I have to advise you that the same was not intended to refer to claims initiated upon unsurveyed lands which may possibly by subsequent survey be found to lie in a school section, but was directed to a possible question as to whether or not mineral lands as such are exempt from the reservation of 16th and 36th sections for the support of schools.

STATE SELECTION—DOUBLE MINIMUM LANDS.

INSTRUCTIONS.

Commissioner Sparks to register and receiver Los Angeles, California, July 9, 1885.

On the 18th ult., a letter was addressed you signed by the Assistant Commissioner of this office in the matter of State indemnity school selection R. & R. No. 827, embracing one hundred and sixty acres double minimum land, selected in lieu of three hundred and twenty acres single minimum deficiency, which selection was found defective because a part of the deficiency had previously been satisfied by a selection of eighty acres of single minimum land, leaving a balance of two hundred and forty acres single minimum, and you were instructed that the State would be allowed to elect whether it will accept one hundred and twenty acres of the land selected, or make a new selection of other land. This action was inadvertently taken, the questions at issue not having received authoritative consideration. These questions are 1st, whether double minimum land can be selected as indemnity for single minimum losses? 2nd, whether defective selections can be allowed to be made of record at the local office, the land held out of market subject to control under the selection, and the State be permitted at some future time to amend its selection or to abandon the part not in conflict and select and acquire control over another tract, and so to continue this practice indefinitely?

The records of this office are incumbered with great numbers of invalid selections made by agents of the State. It is apparent that much injustice may be done both to the government and to persons having rights under the public land laws, through such irregular practice. A selection defective in part is invalid as a whole upon the face of the record, and such selections must not hereafter be allowed by you.

Upon the first question raised, it is "the Departmental rule governing in all cases of such selections" that double minimum lands cannot be taken in lieu of single minimum deficiencies. State of Florida, (10 C. L. O. 110).

In 1875, Acting Commissioner Curtis of this office (4 C. L. O., 86,) expressed the opinion that the State might be permitted to take half the quantity of double minimum lands (if outside of railroad limits) in satisfaction of losses in sections sixteen and thirty-six. While this view is apparently equitable, it needs the sanction of law to authorize its application. I find no such authority in the statutes of the United States or in the laws of California. The grant to the State was in specific sections and indemnity is allowed for the area of deficiencies. It is the rule that such deficiencies may be satisfied from other lands equivalent in price and quantity.

It would doubtless be competent for the State to accept one acre of double minimum land in satisfaction of two acres of single minimum deficiency, but I do not find that the legislature has ever consented to such arrangement. It appears that the State surveyor general has made and accepted such selections, but it is quite apparent that the State may hereafter choose to repudiate his acts as unauthorized, and refuse to be bound by them. For this office to permit the unauthorized practice to continue is to lay up claims against the United States for future embarrassment when, perhaps, all public land in the State has been disposed of.

You will hereafter refuse to allow indemnity selections to be made of double minimum lands, whether within or without railroad limits, in lieu of single minimum deficiencies.

The letter to you of the 18th ult. is hereby withdrawn and revoked.

STATUTORY RIGHT OF ENTRY.

RICHARDSON *v.* LINDEN.

In view of the departmental rule prohibiting clerks in local offices from making entries of public lands, the acceptance of such employment is a waiver, for the time being, of any statutory right to make such entry.

The statutory right to make an entry however is not defeated because the son of the entryman is, at such time, chief clerk of the local office.

Secretary Lamar to Commissioner Sparks July 22, 1885.

I have examined the case of Mrs. Frances T. Richardson *v.* James Linden, involving the SE. ¼ of Sec. 27, T. 154, R. 64, Devil's Lake, Dakota, on appeal by Richardson from your office decision of January 20, 1885, holding her homestead entry for cancellation.

Briefly, the facts are as follows:

Township plat having been filed September 29, 1883, Mrs. Richardson, on the 1st of October, 1883, made soldier's homestead entry of the tract described. On the 12th of October, 1883, Linden made pre-emption filing for the same tract, alleging settlement August 12, 1883. On the 3d of January, 1884, Mrs. Richardson initiated contest and a hearing was regularly ordered and had, the result of which was a decision, rendered June 30, 1884, by the register and receiver, favorable to contestant.

On appeal, your office reversed that decision, held the homestead entry of Richardson for cancellation and allowed the pre-emption filing of Linden to stand subject to his showing full compliance with the law within the lifetime of his filing. Since the case came before me on appeal, Linden, the appellee, has filed a relinquishment of all right, title and claim which he may have had under his declaratory statement, No. 104, to the land in question. Said relinquishment is now in the case, having been forwarded by your letter of the 23d ultimo. This

removes all conflict and leaves Mrs. Richardson's rights under her homestead entry to be determined independently of any questions save her qualification to make the entry, and her compliance with the law.

On the first of these, your office passed and the conclusion reached was made the reason for the decision holding the homestead entry for cancellation. Your predecessor found that Mrs. Richardson had a son living with her, who was, at the time she made her entry as a soldier's widow, chief clerk in the local office where the entry was made.

He held in effect that this fact disqualified her for making a homestead entry for the land which she claims, and was sufficient cause for cancellation of the entry.

As authority for such action he cited circular instructions of your office, dated August 23, 1876, (2 C. L. L., 1448) issued pursuant to directions contained in a decision made August 3, 1876, by Mr. Secretary Chandler, in the case of State of Nebraska *v.* Dorrington, (2 C. L. L., 647). Said decision and circular prohibited local officers, their clerks and employees, and those intimately and confidentially related to such officers, or employees, from making entries of public lands at the district offices over which they have control, or in which they are employed.

As to those holding positions in a local office, either as register or receiver, or as clerk, or employee, the regulation is evidently a good one, as well for the protection of the officer or employee from charges tending to affect official integrity, such as collusion and consequent mal-administration, as on the ground of public policy and for the good of the public service. Persons who in the face of such regulation accept any of the positions indicated, by doing so waive for the time being any statutory right which they might otherwise have to enter lands in the district in which employed, and a violation of the regulation might subject the person guilty thereof to censure or even dismissal from office. But I am unable to see how any rule or regulation can in a case like this be made to defeat a statutory right.

Mrs. Richardson made her application October 1, 1883, to enter under the provisions of the act of June 8, 1872, (now embodied in sections 2304 to 2309, U. S. Revised Statutes,) and on the same day the fees were accepted and the entry was allowed. As a soldier's widow she came within the purview of Section 2307, which provides that, "In case of the death of any person who would be entitled to a homestead under the provisions of section 2304, his widow, if unmarried, . . . shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained." She possessed all the qualifications required by the law for making just such an entry as she did make. It appears, however, that at the date of her entry her son was a clerk in the land office where the entry was made, having been appointed such on Saturday, September 29, 1883. Her entry was made on the Monday following. Only one day inter-

vened, and that was Sunday. The entry could not have been made earlier than Saturday, September 29th, for the township plat was filed on that day.

There does not therefore appear to have been much time or opportunity for collusive action, even had it been contemplated. But such action is not charged or even intimated, and certainly is not to be presumed. Mrs. Richardson exercised a statutory right which she had, and which was not destroyed by the employment of her son at the land office.

In accepting the office he could, and did under the regulation herein referred to, waive for the time being any statutory right which he may have had to enter lands within the jurisdiction of said office, but it was not in his power, even if he so desired, to waive any right which another might have under the law. His mother, the homestead claimant, was therefore a qualified applicant, and had neither surrendered nor forfeited the right which the homestead law gave her.

On the other hand, she asserted it in the forms and through the methods prescribed by the law and the regulations. Having so done, the fees having been accepted and the entry allowed, the only thing remaining to be done by her in order to get full title to the land covered by said entry was to in due time show compliance with the law in the manner therein prescribed, as to residence and cultivation.

It is in evidence in the case that Mrs. Richardson has resided upon the tract continuously since her entry, and that she has thereon improvements to the value of about $500. After the usual notice, she on the 4th of October, 1884, offered homestead proof with a view to commuting, paying cash and receiving patent under the provisions of Section 2301 of the Revised Statutes. Said proof was received without protest or objection from any quarter. Having been qualified to make the entry, it will stand, and the proof appearing to be satisfactory, I see no objection to allowing applicant to commute her homestead entry, pay for the land and receive final certificate. The decision of your office is modified accordingly.

INDEMNITY SCHOOL SELECTIONS.

CIRCULAR.

Commissioner Sparks to registers and receivers, July 23, 1885.

Indemnity school selections should be so presented that the tract selected may be connected with a specific section or subdivision of a section as the basis of the selection, in order that the validity of the selection with reference to its basis may be determined with directness and without complication. This rule should be observed in every case in which a part of the 16th or 36th section, granted for school purposes, is lost to the State and indemnity allowed by law; but where the 16th

or 36th section does not exist in place as land in a township, for the reason that the township is fractional because of the closing of the surveys according to bases, meridians, correction lines or State boundaries, or because of the existence of large bodies of water, such as oceans, gulfs, bays, bayous, and lakes, it will not be necessary to describe the basis further than to describe the fractional township, in its class, as containing more than a section, a quarter of a township, one-half of a township, or three-quarters of a township. In the latter class of selections, where practicable, not less than 40 acres, or the area of the tract selected, should be used as a basis. Where it occurs that a fraction in quantity of less than forty acres remains as the basis for a selection in a fractional township, or a section or part of a section lost to the State, a specific subdivision, containing a quantity equal to the basis or a little more or less, may be selected and the State will be credited in the final adjustment of the grant with the balance in her favor, if any such balance should then be found to exist.

It having been represented that in the State of California the local officers in some of the districts cannot with certainty certify to the validity of the bases used for indemnity school selections on account of the complicated condition of land affairs in the State and imperfection of their records, the registers and receivers therein are directed, upon the filing of applications to make such selections to certify as to the dates of filing thereof and the condition of their records as to tracts selected and the bases used, and forward the applications to this office by special letters for instructions. They will withhold approval of the applications and refuse to receive the legal fees until advised by this office that the selections may be admitted.

Approved.

L. Q. C. LAMAR,
Secretary.

PRE-EMPTION ENTRY—GOOD FAITH.

ANDREW J. HEALEY.

Though continuous residence is required of the pre-emptor, temporary absences, which do not impeach good faith, are excused.

No fixed rule can be formulated as to what shall constitute good faith. The facts and circumstances surrounding each case should be carefully considered, and if the acts of the entry-man do not clearly indicate bad faith the entry should not be forfeited.

After the completion of an entry the burden of proof is upon the party alleging its invalidity.

Secretary Lamar to Commissioner Sparks, July 25, 1885.

I have considered the appeal of Andrew J. Healey from the decisions of your office dated November 16, 1883, and December 4, 1884, holding for cancellation his pre-emption cash entry No. 1282, covering the SW.

¼ of Sec. 6, T. 4 N., R. 32 E., W. M., La Grande land district, Oregon, and also the appeal of D. W. Bailey, John J. Balleray and the American Mortgage Company of Scotland from the decision of your office dated February 15, 1884, refusing to permit them to intervene as *bona fide* purchasers and allowing said parties to be heard only as relators "to maintain the validity of said entry."

The record shows that Healey filed his pre-emption declaratory statement No. 3397 upon said tract on December 22, alleging settlement thereon December 19, 1881. After due notice, he made his final proof, before the county clerk of Umatilla county, Oregon, on January 5, 1883, which was accepted by the district land officers and cash certificate No. 1282 was issued on January 10, same year. The receiver's duplicate receipt shows that said tract contains 158.24 acres, and that Healey paid $395.60, being at the rate of $2.50 per acre for said land.

On November 2, 1883, a special agent of your office reported that said entry was made in bad faith; that there was no improvement upon the tract except an uninhabitable house and twenty acres broken near the same, and that in May, 1883, Healey made a warranty deed of said land to D. W. Bailey, an attorney at law in Pendleton, Oregon, for the sum of $875.

Thereupon your office held said entry for cancellation, on November 16, 1883, and allowed Healey sixty days within which to show cause why his entry should not be canceled.

On January 22, 1884, the receiver transmitted to your office several affidavits tending to support the validity of said entry. On February 15, 1884, the register and receiver were directed to order a hearing in the case and to notify all of the parties in interest, including those claiming the right to intervene, of the time and place for holding the same.

The hearing was duly held on April 26, 1883, at which the said special agent appeared for the government, and the claimant and intervenors appeared in person and by counsel.

Upon the testimony taken at said hearing the register and receiver rendered their joint opinion that the claimant has failed to show compliance with the requirements of the pre-emption laws and that his entry is invalid and should be canceled. On December 4, 1883, your office approved the action of the district land officers, and refused to change its former action in the premises, upon the ground that the claimant had failed to comply with the requirements of the law as to residence, and that his proof and entry were made in bad faith.

There are seven grounds of error assigned, which may be briefly grouped under two heads:

1st. That your office erred in finding that the claimant has acted in bad faith, and failed to comply with the law as to residence.

2d. In failing to protect the rights of Healey's assignees, who claim to be *bona fide* purchasers for a valuable consideration.

It is fairly shown by the testimony that Healey was a duly qualified pre-emptor; that he settled upon said tract on December 18, 1881, erected a small box house, eight by ten feet, with a flat roof, a small window and a floor, the back part of the house eight feet and the front nine and one half feet high, and placed therein a cooking stove, wool mattress, two stools and the necessary cooking utensils; that his family resided continuously upon the land from March 15, until October 15, 1882, with the exception of an occasional visit to the town of Pendleton, and that Healey was with his family on said tract on an average about four days in each month during that time.

It further appears that prior to filing his said statement upon said tract, Healy made inquiry of the register of the district land office as to the requirements of the pre-emption laws as to residence upon the land, stating to him that he was a mechanic, and dependent upon his labor to provide means to support his family and pay for the land and the improvements that he would be required to make upon said tract, and that, if the law required him to live continuously on the land, he could not file for the tract. The register informed Healey that the government did not require continuous residence in such a case, and that if he would do his best and show good faith all would be right.

It is shown in the final proof that the improvements consisted of a house, an out-house, a chicken house and twenty acres broken, but that no agricultural crop had been raised on the land. The testimony taken at the hearing does not tend to contradict the final proof in any material point, unless it is in regard to the residence of the entryman. That Healey made said entry for his own use and established his residence upon the land in good faith, is shown, I think, by a fair preponderance of the evidence.

It is true that he carried on his trade as a boot and shoe maker in the town of Pendleton, some fifteen miles from the land, from the date of his settlement on the land until he made his final proof, but it does not appear that he at any time intended to abandon the land, prior to the date of his final proof, and the sale of said tract was some four months after his entry.

Mr. Healey testifies (Ev. p. 3), in answer to interrogatory No. 11. "Were you upon your land from the 15th day of October, when you say your family left there, until the 11th day of January, 1883, when you made your final proof, if so, how often?"

Answer: "My family was absent about three weeks, and then they returned to their home again on the land and I did also, with them, and to the best of my recollection I probably spent about five days from the 15th of October up to the time that I made my final proof."

As an additional evidence of good faith, it is shown that Healey, after making said entry, made a contract for a wire fence around said tract, at a cost of two hundred and eighty dollars, which was only partially performed, but Healey actually paid for the fence built about

seventy dollars. Healey also swears that he brought a man to his claim to dig a well and was told that it would cost two hundred dollars to insure water, and for that reason he did not make the attempt. Again, it is shown that Healey rented his house in the town of Pendleton to his cousin, with whom he boarded most of the time when in town, but it does not appear that Healey had or claimed any other home than the one at his pre-emption claim. It is sought to discredit the testimony of Healey by proving contradictory statements to said special agent, some nine months after the date of said entry. These statements, however, only go to the extent of his residence and improvements upon said tract, and are substantiated only by the testimony of the special agent. Mr. Healey admits having a conversation with the agent at the time specified, and swears that he was considerably excited at the time and made some statements that upon reflection he became satisfied were incorrect, and expected to correct them when said agent came back, as he had promised to do.

The special agent, however, corroborates Mr. Healey in material matters. He found the house still standing upon the land and evidences of the breaking of the twenty acres, as stated by the entryman and his witnesses. Besides, in answer to the inquiry as to the good faith of the entryman, the agent swears, "From what I have since learned of Mr. Healey's character, I have no reason to doubt his faith in complying with the law, as he was informed of it. But I will say this further, that I do not think from the facts stated that he has complied with the law."

It has been often held by this Department that, while the pre-emption laws require a residence both continuous and personal upon the tract, yet a settler may be excused for temporary absences which do not impeach his good faith. Lauren Dunlap. (3 L. D., 545); Goodnight *v.* Anderson (2 L. D., 624)

In Bohall *v.* Dilla (114 U. S., 51), it is said, "The settler may be excused for temporary absences caused by well founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion and by engagement in the military or naval service. Except in such and like cases the requirement of a continuous residence on the part of the settler is imperative." No fixed rule can be formulated as to what shall constitute good faith. The facts and circumstances surrounding each case should be carefully considered, and if the acts of the entryman, as shown by the evidence, do not clearly indicate bad faith, the entry should not be forfeited. Conlin *v.* Yarwood (2 C. L. L., 593); Eugene J. De Lendrecie (3 L. D., 110); James H. Marshall (ibid., 411).

It is clear that when the entryman offers his proof and payment for the land covered by his entry, he must show to the complete satisfaction of the register and receiver, that he has made settlement, residence and improvement, required by the pre-emption laws, and after the en-

try is complete the burden of proof is upon the party alleging its invalidity. Ballard *v.* McKinney (1 L. D., 483); Wharton's Evidence, Chap. 7..

In the case at bar, besides the testimony of the two witnesses to the final proof, Healey is corroborated by the testimony of A. L. Coffey, who attended said hearing at the request of said agent, but was examined by the entryman, and also by the testimony of James H. Raley, who swears that he was on said tract several times from the date of settlement to the date of entry, and found the family of Healey residing thereon, and saw evidences of improvement as stated by the entryman. Said agent was the only witness examined against said entry.

A careful consideration of the whole evidence and of the record in the case fails to show such a want of good faith as would warrant the cancellation of said entry, in the absence of any adverse claim.

Since the entry of Healey must be sustained, for the reasons above indicated, it will be unnecessary to consider the question of the rights of those claiming to be *bona fide* purchasers for a valuable consideration.

The decision of your predecessor is therefore reversed.

PRACTICE—REVIEW—NOTICE.

PARKER *v.* CASTLE. (ON REVIEW.)

Action on review should not be taken without full hearing accorded to all parties.

Due diligence to procure personal service must be shown before notice by publication is allowed.

The proper basis for an order of publication, the publication by advertisement, the sending of copy by registered letter, and the posting of copy on the land are all essential parts of notice by publication.

The affidavit of contest must be dated and show a continuance of the default alleged up to the date of contest.

Secretary Lamar to Commissioner Sparks, August 3, 1885.

I am asked to review and revoke the decision of Secretary Teller of February 3, 1885, affirming the decision of your predecessor of August 19, 1884, in the case of Thomas A. Parker *v.* Frederick G. Castle, involving timber culture entry No. 2277, Springfield, now Huron, Dakota Territory, March 18, 1880, for the NE. ¼ of Sec. 13, T. 110, R. 62.

Contest was initiated by Parker against said entry and notice thereof published July 24, 1883, fixing hearing for September 24, 1883. On that day counsel for defendant entered special appearance and moved to dismiss the contest for reasons filed; this motion was overruled; defendant excepted and gave notice of appeal. Testimony was submitted on the part of contestant, and on October 11, 1883, defendant filed his appeal from the denial of his motion to dismiss; this appeal was forwarded by the register and receiver October 17, 1883. On October 31, 1883, these officers were directed to transmit at once "all papers" in

said contest, which was done by letter of November 6, 1883. On November 24, 1883, the above decision of the register and receiver was reversed by your office, and the contest dismissed, it being held that the motion of defendant to that effect ought to have prevailed. On December 26, 1883, Parker, by his resident attorney, applied for a review of said decision, and on February 15, 1884, the same was reversed and the cause remanded for the joint written decision of the register and receiver, as provided for in rule 50. On April 4, 1884, Castle appealed from this decision. On March 19, 1884, the register served notice on the attorneys of Castle, that on March 1, 1884, the case had been decided in favor of contestant and said entry recommended for cancellation. On April 16, 1884, Castle appealed from this decision also. On June 19, 1884, the resident attorneys of Parker moved that the appeal of Castle from your office decision of February 15, 1884, be dismissed. On August 19, 1884, the whole case was reviewed at length, the decision of the register and receiver affirmed and both appeals of Castle dismissed. (11 C. L. O., 161.) On October 14, 1884, Castle appealed to this Department, and on February 3, 1885, said decision was affirmed generally by my predecessor, who held briefly that "the notice to the defendant of the hearing before the local officers was sufficient and that the fact of abandonment was fully proven."

On March 28, 1885, application was made in behalf of Castle for a review and reversal of this last decision, and the case is now before me on that application.

In the present aspect of the case it is not deemed necessary to review all the proceedings prior to the appeal before Secretary Teller, at the time of his affirmance of the decision of your office, and which appeal brought before him the whole record for review. Many irregularities are apparent in the proceedings, not the least of which was the consideration of the application for review by your office, on motion of Parker's attorneys, without affording the opposite party proper opportunity, though specially asked for, to obtain a copy of the *ex parte* affidavits filed with said motion, or to file his argument after obtaining same. By way of justification of this action, your predecessor states that since said decision he read the subsequently filed arguments in Castle's behalf and saw nothing therein which would have brought him to a different conclusion. Of this I have no doubt, but the procedure by which a case is first decided and argument of counsel therein considered afterwards, does not obtain ordinarily in judicial tribunals, and should not be allowed to prevail in the administration of the Land Department. Had said review been made by your office *sua sponte*, it would have been a different matter, but being on the motion of one side accompanied by *ex parte* affidavit and argument of counsel, every sense of justice and propriety demanded that ample opportunity to be heard should be afforded the opposite party.

The motion made by Castle to dismiss the contest, at the time of hear

ing, goes to the very foundation of the case and involves the integrity of the proceedings from their initiation, and goes even beyond that, because involving the right of initiation for want of jurisdiction. It presents two objections which will be considered and either one of which if sustained, having been raised at the proper time, will be fatal to the contest. One is the question of due notice to the defendant, and the other is of the sufficiency of the allegations of the contest affidavit.

In order to lay the basis for service of notice by publication, the affidavit alleges "that the present address of said Fred Castle is unknown to this deponent, and that personal service cannot be had upon him, and therefore asks that said notice may be published," etc. It is claimed by your predecessor, in his decision of August 19, 1884, that "these averments constitute a full compliance with rule 12, of practice, the statement 'that personal service cannot be had upon him,' being literally the statement required by the rule."

It is a principle as old as the common law itself, that where personal or property rights are involved in a judicial inquiry, jurisdiction cannot be acquired until due notice thereof, by personal service, is given to the party or parties interested. In the progress of events exception has been made to this general rule where property rights are involved. But the exception exists only by virtue of statutory enactment, and being in derogation of the common law right of personal service, it is universally held that it must be shown affirmatively that the statutory requirements have all been complied with, as a condition precedent to the acquiring of jurisdiction through the substituted service. The Land Department in its practice has recognized this exception which allows service other than personal.

The third section of the act of June 14, 1878 provides that parties contesting timber-culture entries thereunder shall give "such notice as shall be prescribed by rules established by the Commissioner of the General Land Office." Of those thus prescribed, rule 10 requires that personal service shall be made in all cases, when possible, if the party be resident, and shall be by delivery of notice to such person. Rule 12 provides that "notice may be given by publication alone, only when it is shown by the affidavit of the contestant, and by such other evidence as the register and receiver may require, that personal service cannot be made." These rules have in effect the force of a statute. They have been frequently passed upon by the Land Office under your immediate predecessor and by this department on appeal by Secretary Teller, as will be seen by reference to your office decisions in Hewlett *v.* Darby (1 L. D., 115); O'Dea *v.* O'Dea (2 L. D., 286); and McClure *v.* Fritze (11 C. L. O., 226), and the departmental decisions in Ryan *v.* Stadler (2 L. D., 50); Vaughn *v.* Knudson (2 L. D., 228), and Sweeten *v.* Stevenson (3 L. D., 249,)—all of which decisions were made prior to that of your office of August 19, 1884, except the case of McClure *v.* Fritze, which was decided a few days afterwards.

In all of these cases it has been uniformly held that it must affirmatively appear that proper efforts had been made to obtain personal service before publication could be resorted to, and that the acts relied upon must be stated that thereon it might be determined whether they showed the exercise of due diligence in that behalf, upon which showing alone, publication could be made.

The rule thus established and adhered to in these decisions is too well settled to admit of any question in relation thereto, or to need anything to be added in support of it. It is, however, a matter of surprise that your predecessor, in the case under consideration, should have ignored or utterly repudiated them, deciding the case adversely to their plain language. The case of Houston *v.* Coyle (2 L. D., 68), on which he bases his ruling is not applicable to the one under consideration. There personal service had been made upon the defendant, and the objection was that corroborative affidavits had not been filed with the affidavit of contest. Here there is no pretense of personal service, but a substitute therefor was sought to be availed of without complying with the necessary pre-requisites, on the performance of which depended the right to an order of publication.

With regard to the second point of the motion to dismiss, the only material and specific allegation of the contest affidavit is "that said Fred. Castle has not broken five acres of said tract within one year after date of entry." When it is recalled that this entry was made March 18, 1880, and the contest notice issued in July, 1883, it will be seen that more than two years had elapsed since the expiration of the first year, during which it is charged, the alleged default existed and no continuance of same up to date of affidavit or contest is averred. Without such averment the affidavit is insufficient to base a contest on, as has been frequently held by decisions of the Department, following and extending that of Galloway *v.* Winston (1 L. D., 169), as shown in Worthington *v.* Watson (2 L. D., 301), and Peck *v.* Taylor (3 L. D., 372).

The other allegations are either irrelevant in a contest against a timber culture entry, or are too general in character to give the defendant notice of what default he is charged with. Especially is this true with regard to the charge that the land is "wholly abandoned," which it is insisted in the decision of August 19, 1884, with more earnestness than force, "is a substantive charge of failure to comply with the law during the period mentioned." Concede the truth of this, and it is not yet specified in what respect the defendant failed "to comply with the law during the period mentioned." This contention as to the general allegation of "wholly abandoned" is not now presented for the first time, but has been made several times before, and passed upon adversely. The rule adopted in relation to it, and other general and indefinite charges, is too well settled and known in the practice of this Department to need repetition here. It is well stated in the decisions of your office in the cases of Austin *v.* Rice (9 C. L. O 151) and Gould *v.* Weisbecker (1 L D. 142).

Two decisions of more recent date would appear to have weakened this rule, but they have in fact strengthened it. In Hanson *v.* Howe (2 L. D., 220), it was held that allegations nearly similar to those in the present case, with the general assertion that the defendant had "wholly abandoned" the land were broad enough to sustain a charge of failure to comply as against the attack of a stranger to the record, though it would have been otherwise if the defendant himself had objected on the day of hearing. In Bennett *v.* Gates (3 L. D., 377), "wholly abandoned" was held to be broad enough to cover every failure to comply and to show the continuance of a specific allegation of a failure to break five acres during the first and second years to the date of contest, as here contended. This decision was made February 4, 1885, and on the eleventh of the same month, Secretary Teller virtually overruled it, stating that said decision had been made under exceptional circumstances and was not to be considered as changing the long settled rule which requires the charges in the affidavit and notice to be specific. He said "the requirements of a specific charge, including failure on the part of the entryman until the date of the initiation of the contest has been, and very properly should be, insisted upon for the purpose of avoiding the expense, delay and vexation of a hearing upon frivolous and insufficient grounds." See same case on review (3 L. D., 378). In this review I concur fully.

There are further defects in the contest affidavit of Parker, which, though not necessary to pass upon in order to determine said cause, should be referred to, inasmuch as your office has made rulings in relation thereto which have been published, and if followed would lead to confusion and mischief.

There is no date to the affidavit of contest, none to the jurat, and no endorsement to show when the affidavit was filed. On this state of facts your office held that a date was not necessary in either the affidavit or the jurat, inasmuch as the contest dated from the issue of the notice therein.

There may be instances where dates are not essential in the affidavit nor the jurat thereto, but they have not been met with or read of in my experience. Certainly in this case and in all contests where time is of the essence of the matter to be inquired about, the date, especially of the jurat, is of the first importance. Otherwise an affidavit might be made before the time when an entry was liable to contest, and reserved, trusting to the happening of the hoped for contingency when the potential allegations would be available. There are numerous decisions holding that where in a contest against a homestead entry for abandonment it was apparent the affidavit had been sworn to within six months after entry; or in a contest against a timber-culture entry for non-compliance it was sworn to within twelve months after entry, the issuing of notice after those periods would not cure these defects. It is thus seen how important the date is in the affidavit or jurat, and further that while

contests properly date from the issue of notice thereof, that fact in no wise affects the date of the affidavit or other papers filed. If this be so where the affidavit is dated prematurely, by what rule is it to be presumed in the absence of any date whatever, that if a date had been given it would have been a proper one? On the contrary, the rule is, as I understand it, that a party seeking to contest an entry must show affirmatively by his papers asserting such right, that he is then entitled to its exercise, and not leave the office to ascertain this from presumptions or assumptions; and in the absence of such showing he has failed to establish his legal status as contestant. I must hold in this case that the absence of any date whatever to either the affidavit proper or the jurat thereto is such a defect that contest cannot be sustained thereon—said objection having been embraced in the motion to dismiss.

It is further stated in said decision that "there is no evidence that a copy of the notice was posted on the land for two weeks, as required by law;" and then it is added, as matter of law, that "such posting is no part of the legal notice which in case of publication is alone the published notice," and reference is made to the office decision of Butterfield and Phelps (2 L. D. 229).

Here is error of both fact and law. The record disclosed the fact that notice was posted on the land for thirty days before hearing. The requirement that a copy of the notice shall be posted upon the land is just as imperative, under rule 14, as advertisement under rule 12. The proper basis for an order of publication, the publication by advertisement, the sending of copy by registered letter, and the posting of copy on the land, are all constituent and essential parts of "notice by publication"; and the absence of any one of these essentials makes inoperative the efficacy of the others, if the defect be not waived. See Wallace *v.* Schooley (3 L. D. 326).

The ex parte testimony of the plaintiff, having been taken in a proceeding of which defendant had no legally sufficient notice, is not to be considered. It is at best most meagre and unsatisfactory, being the single deposition of Parker, corroborated in a general way by his two attorneys of record. Whatever of weight this testimony might have had is utterly destroyed by the ex parte affidavits filed by Castle in response to those filed by Parker, with his application for review before your office. I am satisfied from the former of the good faith of Castle in his efforts to comply with the requirements of the law, even if he had not done so before contest.

The anomalous character of this case, its many irregularities and errors of law as found in the rulings of your office, the brief, inadvertent and unsatisfactory manner in which the same were affirmed so recently by my predecessor, all clearly make it a case for review of the former Departmental decision.

Said decision is hereby revoked, that of your office reversed, and the contest of Parker dismissed.

RAILROAD INDEMNITY SELECTIONS.

CIRCULAR.

Acting Commissioner Walker to registers and receivers, August 4, 1885.

Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections upon record until directed so to do.

Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land within proper sections and limits *nearest* the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

Approved:

L. Q. C. LAMAR,
Secretary.

TIMBER CULTURE—AREA CULTIVATED.

JOHNSON *v.* KONOLD.

Where the evidence showed that the entryman had in cultivation an excess over the requisite number of living healthy trees, though covering more than ten acres, the entry was held intact.

Acting Secretary Muldrow to Commissioner Sparks, August 7, 1885.

I have considered the case of Gustaf Johnson *v.* Frederic C. H. Konold, involving timber culture entry of defendant, made May 4, 1874, upon the SE. ¼ of Sec. 10, T. 100, R. 40, Des Moines land district, Iowa, on appeal by Johnson from your office decision of October 29, 1884, adverse to the contestant.

Defendant proved up his timber culture claim March 5, 1883, and obtained his final certificate, No. 11, for the same. On May 1, 1883, the contestant filed in the local office an affidavit of contest, alleging in substance as follows: That he is well acquainted with the tract of land in controversy; that the contestee herein did not cultivate or protect the timber on said claim, nor replant it after it had been burned during the years 1879, '80, '81, and '82; that there is but nine acres of this claim upon which any trees of value can be found; that upon said nine acres there are but two thousand (2000) living and healthy trees; and that the whole number of trees, living and dead, upon the quarter section is four thousand six hundred and forty (4,640). He further asked, under the 35th Rule of Practice as amended December 28, 1882, that the proof be taken before the clerk of the district court of Osceola county, Iowa. At the same time, he also filed his application to enter the same lands, under the timber culture act of June 14, 1878.

This affidavit, together with an application for instructions, was, on June 1, 1883, sent up to your office, which on June 13, 1883, instructed the local land officers to order a hearing in the case. In this hearing there were certain little irregularities, all of which appear to have been waived, and the case was finally submitted on its merits.

The testimony in the case is somewhat conflicting. The gist of the contestant's evidence as shown by the testimony of himself and four other witnesses goes to support the affidavit of contest. On the other hand, the testimony of the contestee and some five or six witnesses is to the effect that there were about twenty-five or thirty thousand trees planted on the section, covering a tract of about forty acres; that the trees had been cultivated and protected as well as circumstances would permit; that in one or more instances the fire broke into the timber grove and did some destruction; that in many instances the trees, which had been burned over, sprouted up again the next year, and became thrifty and healthy trees; and that there are now about eight thousand (8000) trees in good condition on the whole tract, many of them from fifteen to twenty feet tall, covering at least fifteen or twenty acres.

In view of the conflicting testimony, and recognizing the universal rule of evidence, "That the burden of proof is upon the party holding the affirmative of the issue," under which rule the contestant must make out by a fair preponderance of the testimony a satisfactory case of failure to comply with the timber culture act, and which I think he has failed to do, I see no error in your office decision before mentioned. I accordingly affirm the same, and direct the contest to be dismissed.

ENTRY IN EXCESS OF QUARTER SECTION—VOIDABLE.

CHARLES HOFFMAN.

In fractional sections an entry must approximate one hundred and sixty acres as nearly as practicable.

An entry in excess of a quarter section is not void, only invalid as to such excess.

The land embraced within an entry which covers more than a quarter section is reserved from the appropriation of another until such excess is relinquished or the entry canceled.

Secretary Lamar to Commissioner Sparks, August 7, 1885.

I have examined the appeal of Charles Hoffman from the decision of your office dated September 26, 1884, rejecting his application to make homestead of the S. ½ of the NE. ¼ of Sec. 5, and the S. ½ of the NW. ¼ of Sec. 4, T. 112 N., R. 67 W., Huron land district, Dakota Territory.

It appears from the record, that on May 17, 1882, Martin L. Hursh made homestead entry No. 19,965 (Mitchell series) for the NE. ¼ of said section 5, containing 230.14 acres, which was commuted to cash entry No. 4143 on September 13, 1883, by Naomi Hursh, widow of the deceased entryman. Said cash entry was inadvertently allowed by the district land officers, as the original homestead entry of Hursh had been suspended by your office letter of August 9, 1883.

April 26, 1884, your office advised the register and receiver that because they had allowed said cash entry while the homestead entry was suspended, Mrs. Hursh would be allowed an additional sixty days in which to elect which contiguous tracts she would retain.

On October 2, 1884, the register reported that no action had been taken on said decision of April 26 by said party.

On December 1, 1882, John W. Gosslee made homestead entry No. 1373 for the NW. ¼ of said section 4, containing 230.66 acres, and the same was suspended by your office on August 9, 1883.

On May 8, 1884, Gosslee relinquished the S. ½ of his tract and on May 14, 1884, Claud R. Gosslee made timber culture entry No. 5,119 for the tract so relinquished, which was also relinquished by him on July 10, 1885.

On September 26, 1884, said Hoffman made his said application, which was rejected by the district land officers, because the land applied for was already covered by said homestead entries. On appeal your office affirmed the decision of the district land officers.

Since Claud R. Gosslee has filed his relinquishment for the tract embraced in his timber culture entry, it will be unnecessary to consider any of the specifications of error except the first, which is as follows: error "in holding the entries of Hursh and Gosslee a bar to another entry while they remain extant upon the records."

It is strenuously insisted by counsel for the appellant that the prior

entries of Hursh and Gosslee were void *ab initio*, because each covered much more than the law allowed. Such contention is untenable. The land was subject to entry under the homestead laws, and said homestead entries were allowed by the district land officers acting within the scope of their jurisdiction. The whole entry was not void, only invalid as to the excess over one hundred and sixty acres When the entryman relinquished the excess, the entry for the remainder became validated. Until the relinquishment of the particular tract necessary to approximate the entry to one hundred and sixty acres is filed in the district land office, or the entry canceled, the land covered thereby is not subject to entry by any other applicant.

It was decided by the United States Supreme Court in the case of Wilcox *v.* Jackson (13 Peters, 511), that the register and receiver in deciding upon pre-emption claims acted judicially, and that while acting within the sphere of their jurisdiction, their judgment is conclusive when it comes collaterally into question, so long as it is unreversed. The same court, in Elliott *et al. v.* Peirsol *et al.*, (1 Peters, 340,) held that "where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

The authorities cited by the counsel for the appellant do not militate against the doctrine above stated. In the case of Benjamin C. Wilkins (2 L. D., 129), this Department reviewed at length the several statutes pertaining to the subject and held that "a 'quarter section' of public land is under the homestead laws one hundred and sixty acres. In fractional sections, an entry must approximate one hundred and sixty acres as nearly as practicable" But in that case the Department did not hold the entry to be void, as is asserted by counsel for the appellant, on the contrary, the entryman was allowed sixty days from notice of the Departmental decision to relinquish the excess covered by said entry.

It was clearly irregular to allow said cash entry while the original homestead entry of Hursh was suspended. But that error can not avail the applicant, for the land applied for was not public land at the date of his application. It was also error to allow said timber culture entry while the prior application of Hoffman was still pending, but since said entry has been relinquished, I see no objection in allowing Hoffman's application for the S. ½ of the NW. ¼ of said section 4, subject to any valid adverse rights.

It does not appear that Mrs. Hursh has relinquished the excess of land covered by her cash entry. She will be allowed thirty days from notice hereof to so relinquish as to approximate her entry to one hundred and sixty acres, and upon her failure to do so, her entry should be canceled.

With the above modification, your decision is affirmed.

RAILROAD GRANT—PRIVATE CLAIM.

ATLANTIC & PAC. R. R. CO. *v.* MCCABE.

MCCABE *v.* NICHOLS.

The land in controversy was at the date of the railroad grant and of definite location reserved, being then within the claimed limits of an unadjudicated Mexican grant. The Department will not take action upon an appeal from an interlocutory decision.

Secretary Lamar to Commissioner Sparks, August 7, 1885.

I have considered the case of the Atlantic and Pacific Railroad Company *v.* H. E. McCabe *vs.* S. M. Nichols, involving certain lands in Sections 28 and 29, T. 8 N., R. 34 W., S. B. M., San Francisco, California, on appeal by the railroad company and by McCabe from your office decision of March 12, 1883. A brief history of the facts is as follows:

The land falls within the twenty miles or granted limits of the grant as claimed by the railroad under the act of July 27, 1866 (14 Stat., 292). A map of the definite location of the railroad opposite said land was filed August 15, 1872, and was followed by withdrawal of the odd numbered sections December 9, 1874.

The land was also within the claimed limits of the Rancho Mission de la Purisima, as surveyed in November, 1874, by W. H. Norway, and was by decision of your office of date May 31, 1881 awarded to the rancho claimant. That decision was, however, reversed by this Department July 19, 1882, in a decision holding that the modified survey of said rancho, made by Norway in June, 1875, excluding the land in question, was the correct survey, and directing that patent issue in accordance therewith. Patent issued accordingly, October 12, 1882, for said Purisima rancho. The northern boundary of said rancho as patented forms the southern boundary of the triangular piece of land now known as public land in township 8, in which the tracts in dispute lie. Said triangle of public land has for it northern boundary Rancho Todos Santos de San Antonio, patented December 20, 1876, and for its western boundary Rancho Jesus Maria, patented September 7, 1871.

The Railroad Company claims in effect that said land was not within the claimed limits of any of the ranchos named, either at the date of the act (July 27, 1866,) making the grant to the railroad, or at the date (August 15, 1872,) when the map of definite location of said road was filed, and therefore that the tract in dispute in Sec. 29 was not excepted from the grant, but passed to the company.

In behalf of claimant Nichols, it is averred that the land in contest was originally within the exterior boundaries and formed a part of the Todos Santos Mexican grant, and was not finally excluded from said grant until December 20, 1876, when patent issued for said rancho. Hence, the railroad company, whose right under its grant did not attach prior to August 15, 1872, (date of definite location) could not attach to this land, it being then in reservation.

In behalf of McCabe, as between him and the railroad company, it is averred that the land in question was excepted from the railroad grant, by reason of its being within the claimed limits of the Mission de la Purisima.

In a decision made by this Department on the 23d of July, 1873, adopting the views of the then Assistant Attorney General for the Department, presented on the 21st of the same month the question as to conflicting surveys and boundaries of several ranchos lying contiguous and in the vicinity of the lands in question, (among them Rancho la Purisima,) was very fully discussed.

In that decision it was held and very distinctly announced that Rancho la Purisima was a *sobrante* grant; that many grants had theretofore been made by the authorities from the lands of the Purisima Mission, among them the Lompoc, Mission Vieja, Santa Rita, Todos Santos and Los Alamos, and that the residue was sold and then granted to the purchaser.

Upon this theory, said residue was the sobrante which passed under the Purisima grant, its quantity and boundaries depending upon the location of the colindantes, or adjoining ranchos. The necessary conclusion from that finding, it seems to me, must be one of two things—either the land in question was within the Todos Santos claim, or it was within the Purisima claim. In either case it was excepted from the railroad grant.

My predecessor, Secretary Teller, in his decision of July 19, 1882, (1 L. D., 234,) considering the question of survey and boundary of Rancho de la Purisima, construed and applied the term "*sobrante*," as used in Departmental decision of July 23, 1873, and held that while La Purisima might be regarded as *sobrante*, in the sense that it applied to the surplus land limited by the lines of the surrounding ranchos, it could not be regarded as *sobrante* in the sense that it included or was intended to include any lands lying outside of and beyond the exterior limits of the surrounding ranchos. On this point he used the following language: "It can not be claimed that the Secretary meant by such language to hold that La Purisima could be extended beyond the interior lines or sides looking toward each other of the surrounding grants named by him."

He further observed that the decree of confirmation was for lands "bounded by the Ranchos Lompoc, Santa Rita, Todos Santos and Las Alamos." In this sense he seems to have recognized the *sobrante* character of the Purisima grant.

Upon a full consideration of that branch of the case before me which relates to the claim of the railroad company to any portion of the land involved, under the grant of July 27, 1866, I am led to the conclusion that said land was at the date of said grant and of definite location of the line of road in reservation, as being within the claimed limits of an unadjudicated Mexican grant, and consequently that it was excepted from the railroad grant.

As to the contest between McCabe and Nichols, whose claims are in conflict as to Lots 4 and 5 and the NE. ¼ of SE. ¼ of Sec. 29, T. 8 N., R. 34 W., it appears that the first named claims under soldier's declaratory the above described land in connection with the W. ½ of SW. ¼ of Sec. 28, and that the latter claims the same land in Sec. 29, and in addition thereto the E. ½ of NE. ¼ of Sec. 29 as a homestead, he having made entry. Your office decision allowed McCabe's soldier's filing to be placed of record, but held that if he should desire to make entry after filing, it would be necessary for him to first contest the entry of Nichols. From this McCabe appealed, claiming that Nichols and not he should be made contestant.

In the argument in the case as before me it is brought to my attention that McCabe within time presented his application to make homestead entry pursuant to his soldier's declaratory, and that, his application having been rejected because of the prior entry of Nichols, he appealed to your office. On that state of facts and in that case the relative rights of McCabe and Nichols will necessarily be considered by your office, if they have not already been there adjudicated, and the whole case as thus presented may ultimately call for Departmental action on appeal.

For this reason I deem it unnecessary and unwise to pass at this time upon the question raised between them and now before me, especially as it is rather interlocutory in its character. The case as presented to your office on the last appeal will involve the consideration of the contest on its merits in every particular.

I therefore remand the case, without decision except as to the claim of the railroad company, which I decide to be invalid, and to that extent your office decision is affirmed.

COAL LAND ENTRY.

LEZEART *v.* DUNKER ET AL.

In case of an application to purchase under Section 2347, without having filed declaratory statement, no rights are acquired by virtue of alleged prior possession, as against adverse claimants who filed within the statutory period.

The effect of reservations for school purposes where sections sixteen and thirty six contain mineral will not be considered where the locations are made prior to survey.

Secretary Lamar to Commissioner Sparks, August 7, 1885.

I have considered the case of Luman H. Lezeart *v.* Ernst Dunker, Phil Harleman, John Rechman, John Wellbome, Fanny G. Roberts, and Josiah W. Tripp, composing an association, also Charles P. Pixly and John G. Feiro, as presented by the appeal of Lezeart from the decision of your office dated October 6, 1883, rejecting his application to

purchase as coal land the W. ½ of the NW. ¼ of Sec. 36, and the W. ½ of the SW. ¼ of Sec. 25, T. 21 N., R. 116 W., Evanston land district, Wyoming Territory.

It appears from the record that the approved township plat of survey was filed in the local land office on April 7, 1882.

On May 12, 1882, said association filed its coal declaratory statement No. 36, for the W. ½ of Section 25, the E. ½ of the NE. ¼ and the E. ½ of the SE. ¼ of section 26, the W. ½ of the NW. ¼ of section 36 and the E. ½ of the NE. ¼ of Sec. 35, Tp. 21, N., R. 116 W., alleging possession and location on June 9, 1877.

On June 1, 1882, John G. Feiro filed his coal declaratory statement No. 46 for the SW. ¼ of Sec. 25, in said township, alleging possession and location on March 26, 1881.

On June 6, 1882, Charles P. Pixly, by his attorney in fact, Edward Carroll, filed his coal declaratory statement No. 69, for the NW. ¼ of Sec. 36, in said township, alleging possession and location on May 10, 1881.

On July 24, 1882, Lezeart filed his said application to purchase under Section 2347 of the Revised Statutes of the United States.

On the same day Lezeart filed his affidavit, duly corroborated, setting forth the fact of the prior adverse filings; that he made said application to purchase in good faith; that he came into peaceable possession of said tract on March 9, 1881, and has by his agent ever since remained in possession thereof; that he has expended in labor and improvements in developing mines on said tract the sum of four hundred and eighty dollars, and he therefore asks a hearing to determine the rights of the several parties claiming said tract. A hearing was duly held at which said parties appeared either in person or by attorney and offered testimony. Upon the evidence submitted, the district land officers decided in favor of Lezeart, and on appeal your office reversed their decision and held Lezeart's application to purchase for rejection. From said decision of your office, Lezeart duly appealed.

The grounds of error insisted on by the appellant are:

1st. That Lezeart was the only person in possession of the tract in controversy prior to and since the township plat of survey was filed in the district land office up to the date of said contest.

2d. That Lezeart had a preference right of entry of said tract for sixty days from the date of the filing of the township plat of survey in the district land office, and that any filing prior to the expiration of said sixty days could confer no rights as against him.

3rd. That if contestants acquired any rights to said property, they must assert them as intervening claimants.

The evidence shows that Lezeart, about March 16, 1881, made a contract with Edward Carroll to locate and improve a coal claim. Some time during the same month, Carroll located the claim for Lezeart, upon the tracts in controversy. Carroll swears that about two months afterwards Lezeart refused "to put up some money," and said that he did

not know as he wanted any interest in coal land, and that "he did not think there was anything in it," so Carroll took Lezeart's notice down and put Mr. Pixly's notice in place thereof. It does not appear that Lezeart ever saw the land, except when passing over it in a railroad car in June, 1882, and his testimony in many respects is contradictory and unsatisfactory. It is not shown by a fair preponderance of the testimony, that the adverse claimants did not have possession and make the required improvements as alleged by them. Lezeart made his application under section 2347 of the U. S. Statutes, and he acquired no rights by virtue of his alleged prior possession as against the adverse claimants, who filed their declaratory statements within the time prescribed by law. A portion of the land applied for by Lezeart is within section 36, which was reserved for the purpose of being applied to schools in said Territory. (Section 1946 U. S. Revised Statutes.) It will be unnecessary to discuss the question as to the effect of said reservation where sections sixteen and thirty-six contain mineral, but no locations have been made thereon prior to survey, for the reason that in the case at bar the locations were made prior to the filing of the township plat of survey in the local land office, and your office was advised on July 30th last, that such locations prior to survey were not intended to be included in the order of suspension dated March 24, 1885.

Said decision of your office is accordingly affirmed.

RAILROAD GRANT—PRIVATE CLAIM.

SOUTHERN PAC. R. R. CO. *v.* CUMMINS.

Legal sub-divisions of odd-numbered sections within railroad limits, lying upon the original boundaries of a rancho, the major portion whereof are without such boundaries inure to the railroad grant.

Acting Secretary Muldrow to Commissioner Sparks, August 10, 1885.

I have considered the motion for a review of Departmental decision of February 14, 1884, in the case of the Southern Pacific Railroad Company, Branch Line, *v.* David S. Cummins, involving the NW. ¼ of Sec. 25, T. 1 N., R. 10 W., S. B. M., Los Angeles district, California.

The decision in question found, upon your office's statement of fact, that the said NW ¼ was "within the exterior or claimed limits of the Rancho Addition to San José, as surveyed by U. S. Deputy-Surveyor Thompson in August, 1868; but was subsequently excluded therefrom by Wheeler's survey thereof, made in October, 1874, (pursuant to Departmental decision of September 20, 1872, in the case of Dalton *v.* Haines et al.,) which survey was approved and patented by your office December 4, 1875."

Said motion urges, however, (inter alia) that as to the N. ½ of the NW. ¼ of said section, such finding was an inadvertence; inasmuch as the

Department has since found by its decision of March 3, 1884, in the case of the said company against Shorey, (11 C. L. O., 11,) that only the minor portion of the N. ½ of the NE. ¼ of the aforesaid section 25 was within said rancho, as surveyed by the said U. S. Deputy-Surveyor Thompson.

Scrutiny of your office records shows that the major portion of the two forty-acre tracts comprising the said N. ½ of the NW. ¼ of the said section 25 is without the claimed limits of said rancho, and under the rule that invariably obtains in such cases, the said tracts inure to the railroad grant.

As stated in the Shorey case: "Your (office) decision was based upon the invariable rule that all legal subdivisions of odd-numbered sections within railroad limits, lying upon the original boundaries of a rancho, the major portion whereof are without such boundaries, inure to the railroad grant."

Inasmuch as the said N. ½ of the NW. ¼ in question unquestionably falls within such category, said motion is accordingly granted to the extent specified.

REVIEW.

CLEAVES *v.* FRENCH.

Application for review of departmental decision of April 30, 1885 (3 L. D. 533), denied by Acting Secretary Muldrow August 10, 1885.

PRACTICE—PENDING CONTEST.

DURKEE *v.* TEETS.

Two contests should not be allowed at the same time against the same entry, but an affidavit of contest offered during the pendency of another suit should be received and considered upon the disposition of the pending case.

Secretary Lamar to Commissioner Sparks, August 17, 1885.

In the case of George W. Durkee *v.* Edward Teets, involving the SW ¼ of Sec. 28, Tp. 113, R. 60, Huron, Dakota, wherein the Department, under date of April 30, 1885, (3 L. D. 512,) ordered a hearing, a motion for review has been filed on behalf of Teets.

Reference to the decision in question shows that Teets made homestead entry for the land described, and that during the pendency of a contest, concerning said land, which arose between Teets and one Campbell, Durkee began a contest against Teets on the allegation of abandonment. It was held that the local office properly allowed Durkee to file his affidavit of contest, but erred in allowing him to proceed with his suit before the Campbell contest was finally determined; but that

as the latter contest had in the meantime been determined favorably to Teets a hearing should be had on Durkee's allegation of abandonment.

Against this decision it is urged that the pendency of the Campbell contest barred the initiation of contest by Durkee, or in other words two contests should not be permitted at the same time against the same entry, and that therefore the order for a hearing should be vacated.

The decision in effect is in keeping with the doctrine upon which the motion rests, for it was expressly stated therein that no action should have been allowed on Durkee's affidavit until after the pending suit was disposed of, but when such case was out of the way there then existed no obstacle to the allowance of the second contest; and said decision in ordering the hearing went no farther than to recognize the right of Durkee to file his affidavit of contest and have it considered when the record was cleared of pending contests.

The motion is dismissed.

RAILROAD GRANT—PRIVATE CLAIMS.

SOUTHERN PACIFIC R. R. CO. *v.* NIMMO.

At the date the grant became effective the tract in question was reserved, being then included within the alleged limits of a private claim.

Acting Secretary Muldrow to Commissioner Sparks, August 20, 1885.

I have considered the motion for a reconsideration of Departmental decision of February 7, 1884, in the case of the Southern Pacific Railroad Company, Branch Line, *v.* John Nimmo, involving the NW ¼ of the NW ¼ of Sec. 11, T. 1 S., R. 10 W., S. B. M., Los Angeles district, California.

The decision in question was rendered under authority of departmental decision of February 5, 1883, in the case of the said company *v.* Eberle, (1 B. L. P., 63) and it was not until the Department had rendered the same, denied motion for review thereof, and decided several cases thereunder, that the genuineness of the certificate of the United States district court, referred to in the Eberle decision, was called in question. That was done in this wise:

Under date of October 10, 1883, your office transmitted supplemental brief of Henry Beard, of counsel for said company in this and sundry cases involving certain lands situate in townships 1 N., R. 9 W., and 1 S., R. 10 W., S. B. M., Los Angeles, California, accompanied with a paper purporting to be a certified or office copy of a certain decree or order of the United States district court for the southern district of California made under date of November 21, 1867, *in re* The United States *v.* Henry Dalton, which copy is a duplicate of another on file in your office as part of the record in the Rancho Azusa case, (certified

sometime by the deputy clerk of said court, no date being given,) barring, however, the word "*jurisdicti on*," which occurs in the latter instead of "*prosecution*," as in the former copy.

The decision in the Eberle case was based upon the hypothesis that the Hancock or Thompson survey of said rancho was subject to the provisions of the 2d section of the act of July 1, 1864, (13 Stat., 332,) since, as stated in said decision, said surveys "had neither been approved by any of the United States district courts of California, nor by the Commissioner of the General Land Office, at the date of the approval of the act in question, and as proceedings for the correction of said surveys were 'pending on the passage of this act in one of the said district courts,' it is quite manifest in the light of such express provisions that at the date the railroad grant became effective, the tract in question was claimed in the proper tribunal to be part of a Mexican grant, and that the claim was *sub judice*, pending the adjustment of the same."

Such discrepancy having been thus called to the attention of this Department, it directed your office per letter of March 3, 1884, to "procure and forward to this Department so soon as practicable a duly authenticated copy of the original order in question, and ascertain whether there be any indications of erasure or alteration upon the face of the court's record."

Agreeably to said direction, your office per letter of April 7, 1884, transmitted (inter alia) duly certified copy of said court's order or decree, certified March 19, 1884, which appears in form following:

"At a stated term of the District Court of the United States, District of California, held in the City of San Francisco, on Thursday, November 21st: A. D. 1867. Present Hon. Ogden Hoffman, U. S. Dist. Judge.

THE UNITED STATES
v.
HENRY DALTON. } 121 S. D. L. C.

The motion to dismiss the proceedings herein was this day called for hearing. Mr. E. L. Gould appearing on behalf of claimant and R. F. Morrison, Esq., Assistant U. S. District Attorney, on behalf of the United States; and after hearing counsel, it is decreed that the claimants exceptions and all proceedings upon the survey herein be dismissed *for want of prosecution*, and that the papers and proceedings in such survey be remitted back to the Surveyor-General for the District of California."

Accompanying said certificate is a letter from the clerk of said court, dated March 24, 1884, to the surveyor-general for California, stating that the court record bore "no mark of erasure or of having been tampered with."

The company's resident attorney urges that the court's action rendered the surveyor-general's approval of the Hancock survey of the Azusa rancho in January, 1860, a finality; and that such approval in-

validated the Thompson survey of said rancho, as was held by this Department January 4, 1882, *in re* Rancho Alisal. (1 L. D., 198.)

The question therefore arises: What effect, if any, does this change of action have upon the theory of the Eberle and kindred cases?

It is true that both the Alisal and Azusa surveys were in court under the act of June 14, 1860, (12 Stat., 33;) and that the survey of the former was approved December 9, 1865, and the exceptions to the latter were dismissed December 9, 1864, as recited in the Eberle case.

Upon such state of facts it is true the Department held in the Alisal case that a survey made and approved prior to the passage of the act of June 14, 1860, duly published and ordered into the United States district court thereunder and pending at the date of the passage of the act of July 1, 1864, was final; and in the language of the court in United States *v.* Halleck (1 Wall., 454,) "'whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there can be none since its passage.' Having jurisdiction to approve the survey, its decision was final as to its correctness."

It is contended, in behalf of the company, that if the court had dismissed the survey proceedings for want of *jurisdiction*, it would have thereby recognized that of the Land Department, whereto it remitted the same for adjustment agreeably to the provisions of the aforesaid act of 1864; whereas, the court having dismissed said proceedings "for want of *prosecution*," it thereby virtually recognized its own jurisdiction and denied that of the Land Department, whose function was simply ministerial, its province being merely to forthwith issue patent (as of course) according to the survey approved by the United States surveyor-general pursuant to the provisions of the 5th section of the act of June 14, 1860. And that, in this view, this latter action rendered such approval of the Hancock survey in the year 1860 a finality, and invalidated the Thompson survey, which it was not competent for the Department to order.

But it will be observed that granting the fact that such proceedings were dismissed for want of prosecution, and that the Hancock survey was the only authoritative or competent and conclusive survey, excluding, as it did, the tract in question, the substantial fact remains, nevertheless, that at the date the railroad grant became effective, and until September 20, 1872, the question touching its competency and accuracy was actually being contested and said tract claimed in the proper tribunal to be part of said rancho. Hence such claim was *sub judice* pending the adjustment of the same, and the tract excepted thereby from the operation of the railroad grant.

"Undoubtedly a tract of land embraced within a Mexican or Spanish grant claim at the date a railroad grant becomes effective, is excepted from the operation of the same; because such tract cannot be regarded as forming a part of the 'public lands' of the United States, as such

term is defined by the U. S. Supreme Court in the Newhall-Sanger case." Atlantic and Pacific R. R. Co. *v.* William Fisher, (1 L. D. 406).

"As before stated, the company's grant became effective April 3, 1871. The Hancock survey of said rancho was not approved and patented by your office until May 29, 1876, and Eberle applied to make homestead entry of the tract June 23, 1881. I am, therefore, of the opinion that the tract in question was reserved from the operation of the company's grant, and that the same formed a part of the public lands subject to homestead claim when Eberle applied to enter the same as such." Eberle case, *supra.*

As was said by the Department in its decision of May 24, 1881, in the matter of Henry Dalton's application to purchase, under the 7th section of the act of July 23, 1866 (14 Stat., 218,) certain lands alleged to have constituted a portion of the original grant of Azusa, but excluded from the final survey thereof: "After prolonged controversy, . . . this Department sustained the Hancock survey September 20, 1872, and the plat thereof was approved by your office on May 29, 1876."

Thus it again appears that the Department has invariably considered said tract to have been *sub judice* or reserved from the operation of the railroad grant at the date the same became effective. I must therefore decline to disturb my predecessor's decision in question. The motion is accordingly denied.

OREGON DONATION.

LOUISA A. BUCHANAN.

In every case of application under section 5 of the act of July 17, 1854 the General Land Office should render decision; and in the absence of appeal such decision will become final.

Where the application is allowed by the district office and such action approved by the Commissioner of Land Office the papers should be transmitted to the Department for final action.

Departmental instructions of June 27, 1877, modified.

Acting Secretary Jenks to Commissioner Sparks, August 22, 1885.

On the 30th ultimo, your office transmitted to this Department the papers relative to the application of Louisa A. Buchanan, formerly Louisa A. Pregg, to be permitted to locate one hundred and sixty acres of land in Washington Territory, under the fifth section of the act of July 17, 1854. (10 Stat., 305.)

Said application was filed in the district land office of Vancouver in said Territory on June 17, 1885, and was "rejected for the reason that the mother of the petitioner has had the benefit of the Donation Act and that petitioner is not an orphan within the meaning of the act of July 17, 1854."

On June 19th last, the petitioner filed an appeal to your office from

said decision. In said letter of transmittal it is stated, "I am of the opinion that the register and receiver were right in their action in this case, and therefore I recommend that the same be sustained. This expression of views, I regard as simply advisory, and under no circumstances in my judgment can it become final, under the law, until sanctioned by the Department, and therefore I forward the papers in this case direct to you, without notice to the local office, notwithstanding said appeal."

It is provided in said act that due proof shall be made to the satisfaction of the district land officers, "subject to the decisions of the Secretary of the Interior."

That proviso does not prohibit your office from rendering a decision upon the correctness of the judgment of the register and receiver upon the proof submitted by the applicant. Ample authority for such action may be found in Section 453 of the U. S. Revised Statutes, which provides 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 any wise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the Government."

The action of your office is based upon the departmental instruction found in the case of the orphan children of Robert and Ellen Owen, decided on June 27, 1877. Those instructions are hereby modified, and your office will render a decision upon every application presented under said section, and in case the application is rejected and the party appeals, the case will be duly transmitted to this Department for final action. If no appeal is filed, the decision of your office will become final. The district land officers should be duly notified of the decisions of your office and the applicants advised of their right of appeal.

If the application is allowed by the district land officers, and their action is approved by your office, the papers in the case should be transmitted to this Department for final action.

The papers in the case at bar are herewith returned, for action by your office in accordance with the views herein expressed.

MINERAL LAND.

SANTA CLARA M'G ASSOCIATION *v.* SCORSUR ET AL.

On the evidence submitted it is held that the land in question is more valuable for the mineral it contains than for agricultural purposes.

Acting Secretary Jenks to Commissioner Sparks, August 24, 1885.

I have considered the case of the Santa Clara Mining Association of Baltimore *v.* Giacomo Scorsur, B. Scorsur, and Michael Sadielovich, involving the character of the land of certain portions of Secs. 30 and 31, T. 8 S., R. 1 E., of Secs. 25 and 36, T. 8 S., R. 1 W., and of Sec. 1, T. 9

S., R. 1 W., M. D. M., San Francisco, California, on appeal by the contestants from the decision of your office of December 18, 1884, affirming the register and receiver's action adjudging the tract to be mineral.

The only question presented by the papers in the case is one of fact, as to whether the land involved is more valuable for mineral purposes or for agriculture.

The testimony, which I have carefully examined, is voluminous and exhaustive.

It appears that prior to the commencement of this contest the receiver of the Santa Clara Mining Association of Baltimore applied to file an application of said company for the lands in contest in this case, which application was refused by the register, for the reason that a portion of the land embraced therein had been applied for by parties under the homestead and pre-emption laws, and that patent had already issued to one Pedro Montoyo for the NE ¼ of Sec. 25, T. 8 S., R. 1. W., thereof.

Thereupon the present contest was initiated before the register and receiver, excepting therefrom said tract so patented to Pedro Montoyo aforesaid.

The testimony shows that the lands in question are located about sixty miles southeast of San Francisco, within a few miles of the city of San Jose, in Santa Clara County, adjoining the Capitancillos creek, and stretching out in a southeasterly direction therefrom, embracing 957.32 acres. That the country is rough and mountainous, cut into by numerous deep, precipitous gulches and canons, and covered to a great extent by dense brush, chaparral and scrub oak. That there are occasional patches of fairly good soil, varying from one to twenty acres in extent, but that the great mass of the soil is thin, and unfit for cultivation. That the land is situated in a mineral belt embracing within four miles the "Guadalupe," "New Almaden" and "Henriquita" quicksilver mines, all noted for the amount of quicksilver produced from them. That immediately to the northeast of said lands lies the Guadalupe mine, also the property of the Santa Clara Mining Association. That from said Guadalupe mine there extend in a southwesterly direction, three distinct ore bearing zones, penetrating and passing through said Section 30 of the lands in controversy. That several of the tunnels of the Guadalupe mine penetrate Lots 7 and 8 of said land to a distance of three or four hundred feet; that many car-loads of cinnabar have been taken from these tunnels, and that within ten years some forty or fifty thousand flasks of metal have been taken from the lands south of the Capitancillos creek. That the company has spent $1,500,000 on its whole claim and that $100,000 of that sum have been expended in developing the mineral resources of the public land in question. Some seventeen witnesses, including civil engineers, surveyors, mining experts, practical miners, assayers, mining engineers, the deputy county assessor, and neighboring farmers, all acquainted with the land, testi-

fied, on the part of claimants, that the formation of these lands is similar to that of the surrounding mineral bearing lands; that numerous specimens, produced in evidence, from croppings in various parts of sections 30 and 31, contained mineral, or indications thereof; that each lot and each ten acres of each lot is more valuable for mineral purposes than for agriculture, and that, as a fact, agriculture had been prosecuted thereon to a very limited extent. The witnesses on the part of contestants were principally neighboring farmers, none of whom claimed to be mining experts. Their testimony is to the effect that several tracts have been cleared and cultivated; that much more of the land is fit for cultivation, and is more valuable for agriculture than for minerals.

It is urged, in view of the fact that this land adjoins certain quicksilver mines, it would have been worked long ago if it had any mineral value, and that the bad faith of the company in this matter is shown by the fact that they have so failed to work said land. This would be a weighty objection were it not for the further fact that for the past seven or eight years—since 1875—the company has been actively engaged in developing the mineral resources of these lands and the lands immediately adjoining them on the northeast.

The testimony is conclusive that the land is more valuable for minerals than for agriculture. The decision of your office is therefore affirmed.

PRACTICE—REVIEW—NOTICE.

CONK *v.* RECHENBACH.

Notice of a motion for review should be given within the time allowed for filing such motion; but as the rules of practice are not explicit in such requirement a failure to thus serve notice will not defeat the consideration of a motion for review after due notice.

Acting Secretary Jenks to Commissioner Sparks, August 24, 1885.

In the case of Rebecca Conk *v.* Ferdinand Rechenbach, involving the W. ½ of the SW. ¼ of Sec. 25, and the E. ½ of the SE. ¼ of Sec. 26, T. 6 N., R. 12 E., M. D. M., Sacramento, California, wherein a decision was rendered November 17, 1884, a motion for review has been filed on behalf of Rechenbach.

Against the consideration of said motion it is urged in a counter-motion to dismiss that no notice of said motion for review was given.

It appears that the motion for review was filed by non-resident attorneys, and though filed in time, no notice thereof was then given. In March, 1885, after the time for filing a motion for review had expired, resident counsel for Rechenbach served upon Mrs. Conk's attorneys a copy of their argument in support of the motion for review, and allege in a letter that a copy of the original motion was furnished with said argument.

Rule 76 provides that motions for review will be allowed in accordance with legal principles applicable to motions for new trials at law, "after due notice to the opposing party."

Rule 77 provides that such motion, except when based upon newly-discovered evidence, "must be filed within thirty days from notice of such decision."

Rule 99 provides "that no motion affecting the merits of a case or the regular order of proceedings will be entertained except on due proof of service of notice."

While it is apparent that said motion should not be considered except after due notice to the adverse party, it may be observed that, although said notice is required under the rules of practice, said rules do not explicitly state the time when service of such notice shall be made, though providing that the motion itself shall be filed within thirty days following notice of the decision. A fair construction of rules 76 and 77 would, however, seem to require that notice of a motion for review should be given within the time allowed for filing such motions.

The attorneys for Mrs. Conk apparently rely upon the failure of counsel for Rechenbach to give the proper notice and therefore have not made any response to said motion upon its merits. But taking into consideration the ambiguity pointed out in the rules of practice, together with the fact that the motion for review, aside from notice, was properly filed, I am of the opinion that the motion to dismiss should be denied. You will therefore inform the parties herein that said motion to dismiss is overruled, and that the usual time after notice of this decision will be accorded to counsel for Mrs. Conk to file answer to the argument of Rechenbach's attorneys on the motion for review, and for reply thereto.

NATURALIZATION—COUNTY COURTS OF COLORADO.

JOHN SKELTON.

The county courts of Colorado, as organized under the constitution and statutes of the State, are authorized by virtue of section 2165 of the Revised Statutes to admit an alien to citizenship.

Secretary Lamar to Commissioner Sparks, August 26, 1885.

I have considered the appeal of John Skelton from your predecessor's decision of May 27, 1884, pursuant to previous action of September 25, 1880, refusing to accept the final certifiate of naturalization issued by the county court of Saguache county, Colorado, as proof of citizenship in support of his final homestead entry No. 76, March 16, 1880, for the S. ½ of NE. ¼, NW. ¼ of NE. ¼ and NE. ¼ of NW. ¼ Sec. 9, T. 45 N., R. 6 E., Del Norte district.

The sole question presented by the appeal is, whether or not the said court was authorized to admit an alien to citizenship, under section 2165 of the United States Revised Statutes.

That section provides for the taking of the oaths required by law, "before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common law jurisdiction, and a seal and clerk."

The county courts of Colorado it is admitted are courts of record, having common law jurisdiction and a seal, and the question is narrowed to the inquiry whether or not each of them has a clerk within the meaning of the provision cited.

By the constitution of Colorado (Art. VI; Sec. 1—General Statutes, 1883, 48), the judicial power is "vested in a supreme court, district courts, county courts, justices of the peace, and such other courts as may be created by law for cities and incorporated towns."

Section 22 of the same Article (p. 51) provides for the election of a county judge in each organized county, "who shall be judge of the county court of said county, whose term of office shall be three years, and whose compensation shall be as may be provided by law."

Section 23 makes them courts of record and gives the legislature, with certain restrictions, power to regulate their jurisdiction.

Section 28 (p. 52) prescribes that "all laws relating to courts shall be general and of uniform operation throughout the State; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform."

By general legislation provision is made for the jurisdiction and regulation of the county courts, for the seal, the clerk, the fees and com pensation of the judges and clerks, etc.

Paragraph 505 (p. 248) is as follows: "The county commissioners for each and every county, wherein no seal has been provided for the county court of such county, shall at once provide a seal for such court, but any court possessing no seal may use a scrawl for a seal, until a seal shall be provided as aforesaid; and in any case where the county court is using the territorial seal of the probate court, the county commissioners shall provide a new and proper seal."

Paragraph 495 (p. 245) provides that: "The judges of the said county courts may each appoint a clerk, whose powers and duties shall be similar to the powers and duties of the clerks of the district courts, and he shall receive such fees and compensation as is now or may be hereafter provided by law. Or if any of the said judges prefer so to do, they may elect to perform the duties of clerk and receive the compensation and fees therefor, and in such cases all processes issued from said court shall be issued by and in the name of the judge thereof, and under the seal of said court. If any clerk shall be appointed as aforesaid he shall qualify and give bonds as clerks of the district court are required to do, and be subject to the same liabilities as are or may be provided by law."

In the case before me your office held that as no clerk had been appointed by the county judge, but he was himself performing the duties of clerk under this act, the court of which he was such judge and clerk was not a court having a clerk, and was without jurisdiction to administer the oath of naturalization.

To sustain this ruling the causes of *ex parte* Cregg (2 Curtis, 98), State *v.* Whittemore (50 N. H., 550), and State of Nebraska *ex rel.* Fossler *v.* Webster County Judge (7 Neb., 469), are relied on, in which it was held that "a court without any clerk distinct from the judge of such court is not a court 'having a clerk' within the meaning of the United States Statute."

Admitting the weight of authority of these decisions—although in the case of Whittemore, (50 N. H., supra.,) the court while relying on the decision in Cregg's case, expressly stated that Judges Clifford and Clark in the U. S. Circuit for the District of New Hampshire, in case not reported, had recently given a directly contrary decision—it is proper to examine the cases themselves in view of the laws creating the tribunals, and determine therefrom whether or not the present matter comes within the same reasons and restrictions.

In Cregg's case the oath was taken in the police court of the city of Lynn, and it is set forth in the decision that "in the act for organizing the court the justice is directed to keep a fair record of all proceedings therein." In the New Hampshire case the statute is not set out but the opinion recites that "the counsel for the State are understood to admit that the police court of Nashua had no other clerk than the justice of that court." And the decision, as before stated, was rested entirely upon the case of Cregg. In the Nebraska case the decision rests also upon that reported in 2 Curtis, it being specially recited that by the laws of the State "no authority is given for the appointment of a clerk for the county judge."

These then were all cases arising under laws which had not authorized the appointment of clerks, nor provided fees and compensation therefor, nor specified duties which they as officers of the court must perform. The fair record of proceedings necessary to make these tribunals courts of record was to be made by the judge as part of his own official duty. It is not shown and consequently Judge Curtis decides that beyond this these duties did not extend. And he looks to the "act for organizing the court" to determine its character. This is important. It is true he discusses the reasons for the requirement of a separate officer whose duty it shall be as such clerk to record the proceedings, and holds that the judge recording such proceedings as a part of his judicial duty is not such officer.

When we look at the Colorado act we find the office of clerk provided for and its separate duties and compensation fixed by reference to the general law. The act organizing the court is the constitution itself, supplemented by the legislative provisions required thereby and not

conflicting therewith. If the statute conflicts with the constitution, it is void. Now, the constitution provides that the organization of all these county courts shall be uniform, as well as their powers, jurisdictions, proceedings and practice, and the force of their judgments and decrees. Pursuant to these indispensable requisites the legislature gave them organization. First the judge is elected and qualified. Next he may appoint a clerk, who shall likewise qualify. Their duties, fees and compensation are entirely distinct and separate. The court is then ready to proceed as organized. But the judge, if he prefer, "may elect to perform the duties of clerk, and receive the compensation and fees therefor." Now, if any county court may by its organization be said to have a clerk, then by the constitution all must have—else their organization is not uniform as required. The intent of the legislature must be considered as having been to give each a clerk so as to answer this requirement. It is not essential that any particular person be designated for appointment. That is matter for the judge under the power granted by law. He can not be presumed to have the power to enlarge or diminish the jurisdiction of his own court of which he is but an officer. The organization exists by virtue of the constitutional and legislative provision, and the offices are essential to its capacity to act. A vacancy may exist in one of those offices, but a person lawfully designated may act therein. They are no less offices because thus specially filled. So if there be a competency for the judge to elect to fill the office of clerk by performing its duties, he does so by virtue of such permitted election and not by command or permission of the statute to dispense with the office itself.

The same construction must apply to this as to paragraph 505, with regard to the seal. This speaks of a "court possessing no seal," and provides for its want—but would such court be declared outside the provision of section 2165, if it used the temporary "scrawl" substituted by the act? I think not. Yet it is precisely in meaning like the other. In the one case, "a seal," in the other "a clerk" is to be provided, being authorized by the law. In both cases the manual instrument is recognized as not being actually present. But the court "may use a scrawl," and the judge "may elect to perform the duties of clerk." It would be sticking in the bark to say that in either case the essential thing, the agent or instrument necessary to the separate office or function, is not found in the organization of the court.

But suppose it be held that such court has no clerk, and the jurisdiction fails. The judge appoints a clerk and jurisdiction at once attaches. An alien to-day is naturalized and the next hour the judge dismisses the clerk and elects to take the duty on himself. The jurisdiction again vanishes. Is it not almost absurd to say that by such slight acts merely of the performance of duties under a law required by the constitution to give uniformity to all courts of like grade and like uniformity to their proceedings, judgments and decrees "severally," the weight, sanction and authority of

judicial acts—nay, the very organization of the court itself may change, and the individual seeking his right at the portals of justice shall lose the fruit of his endeavor, by an after-discovery of this transitory and illusive condition? This could never have been intended. The act of organization must be looked into to find the fact of jurisdiction, and if the act clothes the county court with the character of a tribunal to which this jurisdiction attaches, it must attach whenever its offices are filled with persons competent to perform the duties and receive the pay attached separately thereto—whether such performance be by one or another individual.

With equal force it may also be said that such incongruity could not reasonably exist as that the jurisdiction should be found in one county in a court of precisely the same constitutional grade as that of another not having jurisdiction.

It may be objected that the form of certificate in this case has omitted therein or stricken out the words "and clerk" in the recital of the character of the court. This is not in itself material if the jurisdiction be otherwise shown. The recital is not proof of the fact, and attestation is specially required to be made by the judge in such cases by paragraph 495, a fact which intimates that without such authority he would probably be called upon to attest as clerk.

However this may be Skelton's rights as a citizen arise from his having taken the oath, not from the certified entry of his admission by the court and if it be shown that he did so, it is sufficient (Campbell *v.* Gordon, 6 Cr., 176).

I conclude therefore that the appeal should be sustained. And this action appears to accord with your predecessor's own view as expressed in this case, to the effect that while he has doubt as to the construction of law adopted by your office, he prefers to have the opinion of this Department before reversing the practice hitherto maintained. Said decision is accordingly reversed.

TIMBER CULTURE ENTRY.

MOREHOUSE *v.* CAREY.

An entry will not be allowed upon a section that contains from forty to eighty acres of marshy land covered with a dense growth of small trees of the character used for domestic and farm purposes.

Secretary Lamar to Commissioner Sparks, August 27, 1885.

I have considered the case of E. A. Morehouse *v.* Patrick Carey, involving the latter's timber-culture entry No. 19, made June 20, 1881, for the S. ½ of the NW ¼ and the E ½ of the SW ¼ of Sec. 6, T. 17 N., Range 18 E., Yakima land district, Washington Territory, on appeal by Carey from the decision of your office of January 23, 1884, holding his

entry for cancellation, for that the entry was illegal and should be canceled.

The contest was initiated on the 29th of August, 1882, by E. A. Morehouse, on his affidavit alleging that "there is about sixty acres of timber growing upon said section 6, consisting of alder, quaking aspen, and balm." The entry was made under the act of June 14, 1878, which requires that the section of land specified in the timber-culture entry should be "composed exclusively of prairie lands or other lands devoid of timber." The question to be decided in this case involves the construction of the phrase in the above-named act, "lands devoid of timber," and whether the land entered by Carey comes under that description.

The testimony in the case shows that there is a tract of somewhat marshy land, variously estimated at from forty to eighty acres, in the section in controversy, covered with a dense growth of small timber of the kind and quality mentioned in the affidavit of contest; that the trees are in size from two to ten inches in diameter; that there have been about sixty-five hundred rails and a considerable quantity of firewood cut therefrom; that there is sufficient timber yet remaining for several thousand more rails; that there is from ten to fifteen acres of this timber on the tract entered by Carey; and that the timber grown thereon has been such as has been recognized in that neighborhood as sufficient for ordinary farm and domestic use.

It is true, the testimony further shows that a great deal of this timber is, as is contended by Carey, the contestee herein, "shrubs and brush"; but I think that under a proper construction of the act in question, the facts, as shown by the testimony in the case, warrant the conclusion that this said section is not "composed exclusively of prairie lands or other lands devoid of timber."

Your decision is accordingly affirmed.

AMENDMENT OF ENTRY.

MATHIAS FLOREY.

It appearing that through error in the local office the entry was recorded for land not included within the application, and that the land applied for was covered by subsequent filings the entry was allowed to stand as recorded.

Secretary Lamar to Commissioner Sparks, August 27, 1885.

I have considered the appeal of Mathias Florey from your office decision of June 2, 1884, refusing to allow amendment of his timber culture entry No. 9690 so as to embrace a different tract of land from that described in his original application and entry papers.

It appears that his entry was made July 31, 1882, at the Mitchell, Dakota, office for the S½ of NW¼ and the N½ of SW¼, Sec 28,

T. 110 N., R. 66 W., and that the land in question has since been transferred from the jurisdiction of the Mitchell office to that of the Huron office. Appellant desires to amend so that his entry may embrace the S½ of NE¼, and the N½ of SE¼, same section, in lieu of the land above described as his original entry. As a basis for his application he makes the following allegations: That in copying and transferring the records from the Mitchell to the Huron land office his entry was by error marked on the tract book under the description by which he now desires to enter, instead of by the description contained in his entry papers; that owing to this inaccuracy the parties employed by him to break five acres were misled and did the breaking on the tract which he now seeks to enter; that one Ebenezer Noyes has been allowed to file pre-emption declaratory statement for the NW¼ of said section 28, and that Benjamin F. Warren has been allowed to make homestead entry for the SW.¼ of same section, thus completely covering the tract described as his original entry, each of said parties thus taking one half thereof.

He states that both Noyes and Warren have acted in good faith and have valuable improvements upon the land covered by their filing and entry respectively, they as well as he having been misled by reason of error on the part of the local office.

In view of the foregoing, he asks to be allowed to amend his entry as indicated herein, as he will thereby get land which is vacant and which has no improvement upon it except the breaking done by him. Your office, holding that there was no mistake in describing the tract originally selected, denied his application, and directed the suspension of the subsequent homestead entry of Warren, and also that the pre-emptor be notified.

This, I think, is a case where amendment may very properly be allowed. The allegations above set forth are sustained by the record. The confusion is clearly due to errors made by the local office.

Though appellant will not under his amended entry get the land described in his original application, nor that which he primarily intended to take, yet to avoid conflict with parties whose rights seem inferior to his, but who have acted in good faith, he is willing to amend his entry and take an adjoining tract, which, as before stated, is vacant. The matter seems to be one solely between the applicant and the United States. No one will be injured by the change. On the other hand, the pre-emptor and the homestead entryman will respectively be relieved of conflict pending through no fault of theirs.

So far as your office decision is concerned, it presents nothing which, in my opinion, would under the circumstances amount to a sufficient reason for denying the application to amend as desired. Said decision is therefore reversed.

PRE-EMPTION—SECOND FILING.

GEORGE OSHER.

A restoration of the pre-emption right denied where the record showed the applicant to have made one filing under which, through his own fault, he failed to make final proof.

Secretary Lamar to Commissioner Sparks, August 27, 1885.

I have considered the appeal of George Osher from the decision of December 12, 1884, wherein your office held that he was not entitled to a further exercise of the pre-emptive right.

The record shows that said Osher filed a declaratory statement for the NW. ¼ of Sec. 24, T. 116, R. 53, Watertown, Dakota, on August 25, 1879, alleging settlement on the same day.

May 28, 1883, Osher executed an affidavit, setting forth that in July, 1879, he placed certain improvements on the land above described and that two or three months later he was informed by one Hoskins that he (Osher) had filed a declaratory statement for said tract; that he subsequently learned "a George Osher had filed D. S. for the same." "That deponent never signed a pre-emption declaration or any paper purporting to be such; that he did not sign the D. S. filed in the land office, nor did he know of the existence of such an instrument till he received the information from said Hoskins; that he verily believes such filing was fraudulently made and that his name was forged by some party unknown to him. That one Lars Hooede has since made cash entry of the above described tract." On this statement Osher asked that his pre-emptive right be restored to him if it has been affected or in any way impaired "by such fraudulent filing by an unknown party."

In submitting this affidavit the local office expressed the opinion that a fuller explanation of the purpose of the applicant in making the improvements on the tract should be required before the case was considered.

Acting upon this suggestion, your office accordingly on December 1, 1883, directed the local office to call upon Osher to file further affidavits in full explanation of the matter, allowing him opportunity to show any facts tending to establish his good faith.

September 11, 1884, Osher filed an affidavit, in which he states that he settled on the land aforesaid in the spring of 1879, and "sent in his declaratory statement" therefor, but that it was rejected on account of a prior homestead declaratory statement filed for said land. That he did not know of the rejection of his declaratory statement until several weeks after it was sent in; that he thereafter supposed he could not hold the land, but remained there, because he had built a house on the land, until he could find another claim. That he did not know that said declaratory statement was filed after its rejection in the spring,

but now believes it to have been so filed by one Frank Hoskins, a partner of his at that time, who never informed affiant of such action. Hence, believing that he had no filing for the tract or right thereto he abandoned the same.

On the showing thus made your office December 12, 1884, refused Osher's application and the case is now before the Department on his appeal.

Since the case left your office Osher has forwarded an additional statement, under oath, alleging among other things that he commenced to improve said land in the spring of 1879, and filed therefor early in the July following; that he was informed that said filing was rejected on account of a prior homestead declaratory statement of record. Believing that his declaratory statement was destroyed when rejected, or at least that its rejection made it invalid, he supposed that a filing in his name of August 25, 1879, must be either a forgery, or filed by some person without his authority, changing the date of settlement, and now thinks such filing, if made, was at the instance of Hoskins, who informed him of its existence in September, 1879, while he, the affiant, was living on the land. That learning of the rejection of said filing he determined to abandon the land, which he afterwards did, voluntarily and for no consideration.

In an affidavit dated May 29, 1885, and duly corroborated, one John K. Gjerstad attacks the good faith of Osher, alleging that said Osher on December 4, 1883, filed for the NW. ¼ of Sec. 20, T. 128, R. 61, Aberdeen, Dakota, alleging settlement May 20, 1883; that said Osher with part of his family lives on the last described tract, while keeping the rest of his family on the land first claimed, which is in fact held and farmed for the benefit of said Osher. That Lars Hooede, who made cash entry of the land last referred to, is the father-in-law of Osher, and made such entry for benefit of said Osher. That after Hooede made final proof, he transferred the land to the wife of Osher. In explanation of his appearance in this case, Gjerstad says that he is a claimant for the said NW. ¼ of Sec. 20, the land last filed upon by Osher.

The matters thus alleged by Gjerstad can not be considered in the form and manner now presented, and are only referred to as properly the subject of recital.

A review of the various statements made by Osher, furnishes conclusive reasons for the rejection of his application. At first he denied outright having ever made or filed a declaratory statement for the land, though admitting that Hoskins told him that a filing was of record in his (Osher's) name shortly after having settled on the tract. The explanatory affidavits filed subsequently in substance contradict the first, showing as they do that he did in fact file for the land, and that he left it after having been informed that he had a filing of record for said land without making any effort to ascertain his actual rights thereto under the law.

The decision of your office is affirmed.

PRE-EMPTION—NATURALIZATION—SECOND FILING.

ROSS *v.* POOLE.

A pre-emptor must possess the pre-requisite personal qualifications at date of settlement.

A declaration of intention to become a citizen, made by the father, during the minority of the son, will not confer rights of citizenship upon the son under section 2172 of the Revised Statutes.

A second filing permitted where the first was illegal.

Secretary Lamar to Commissioner Sparks, August 27, 1885.

I have considered the case of William Ross *v.* John Poole, involving the N. ½ of the SE. ¼ of Sec. 13, T. 157, R. 56, Grand Forks district, Dakota, on appeal by Ross from your office decision of May 31, 1884.

Ross filed pre-emption declaratory statement No. 2880 for the tract February 11th, alleging settlement February 4, 1882. Poole made homestead entry No. 6622 of the tract January 12, 1883.

It appears that Ross was born in Erin Township, Province of Ontario, Canada, on or about July 26, 1861, and that he emigrated to the United States in December, 1881. His father also came to this country some time in 1881, and declared his intention to become a citizen of the United States December 31, 1881. Ross avers that having been advised by counsel he believed that his father having so declared during his minority it was competent for him to file by virtue thereof.

Your office decision, however, awarded the land to Poole, for the reasons that Ross was not a qualified pre-emptor either at the date of his settlement or filing, that he did not become such until after Poole's entry, and that he filed for the tract prior to settlement.

Upon Ross' appeal in the first instance, this Department under date of January 27th last concluded its consideration thereof in this wise: "It appears that the local officers transmitted to you Poole's final proof, which you have returned to them with instructions to allow final certificate thereon, if the same is satisfactory to them; but as it does not appear from the case, as now presented, that Poole commuted his entry to cash, or how otherwise he was allowed to make final proof upon his entry in a little more than a year from its date, and as this Department can not without inspection of the papers consider and adjudge the same and the pertinent questions raised by the appeal, you will order the return of all the papers in the case from the local office, and when received transmit them to this Department."

Pursuant to the foregoing direction, your office, per letter of February 20th last, transmitted Poole's final commutation proof. It appears to be regular in all respects, and shows him to be a qualified homesteader and that he has complied in good faith with legal requirements. Hence, he is entitled to a patent for the tract in question, unless Ross has the paramount right thereto.

Now, as touching Ross' personal qualifications, it will be observed that he did not declare his intention to become a citizen until June 29, 1883. Such declaration availed him nothing, because Poole's adverse right had intervened January 12th preceding, the date of his entry: nor can he invoke the provisions of section 2172 of the Revised Statutes; for although both he and his father are dwelling in the United States, it does not appear that his father was duly naturalized during his son's minority, but that he merely filed the statutory preliminary affidavit, declaring his intention to become a citizen.

It has been repeatedly held by this Department, notably in the case of McMurdie *v.* Central Pacific R. R. Co., (3 C. L. O., 36,) that a pre-emption claimant must possess the pre-requisite personal qualifications at date of his settlement upon the land claimed; and that the doctrine of relation can only be invoked to preserve a right, but not to create one. "A pre-emptor has always been required to show his qualifications. A patent for land relates back to the inception of the claim therefor; hence it must be a valid claim at its inception; because the doctrine of relation, whether applied to prevent a forfeiture, or in patents to preserve the patentee's title, is only invoked to preserve a right, and not to create one." See also Kelly *v.* Quast, (2 L. D., 627,) and Mann *v.* Huk (3 Id., 452).

Inasmuch therefore as Ross failed to cure such material defect prior to the initiation of Poole's right in the premises, and as it has been shown also that he filed prior to settlement, I am of opinion that his filing is a nullity. Moore *v.* Robbins (96 U. S., 530.) Your office decision holds in conclusion with respect to Ross' pre-emptive right: "It may be stated that should this filing be canceled Ross may again exercise the pre-emption privilege, in view of the fact that he was not personally qualified to make the first." I affirm said decision.

MINING CLAIM—PROTEST—WAIVER.

ST. LAWRENCE M'G CO. ET AL. *v.* ALBION CONSOL. M'G CO.

An allegation that the claim is not properly bounded by the survey stakes but includes part of protestant's patented mine, raises an issue on a matter of administration which may be examined through the office of the surveyor general and any errors corrected if found.

Patent may issue upon the filing of a waiver of the adverse claim in the local office without ascertaining whether the pending judicial proceedings on such claim have also been abandoned and the suit dismissed by the court.

Secretary Lamar to Commissioner Sparks, August 27, 1885.

I have considered the case of the St. Lawrence and Richmond Mining Companies *v.* The Albion Consolidated Mining Company, involving the right of the latter to proceed with its application for patent for the claim known as the Albion No. 1 Lode, Eureka District, Nevada, filed

in the local office July 9, 1878, and stayed by filing of the adverse claim of the St. Lawrence Mining Company August 30, 1878.

Suit was duly commenced, and is still pending, no final judgment having been certified to the district office thereon.

No adverse claim was filed by the Richmond Company, and its objection is based upon a protest filed May 13, 1881, alleging that the stakes set to mark the claim as surveyed do not correctly bound the tract on the ground, but include a small portion of the patented Tip Top mine, the property of said protestant.

Your office decided April 7, 1883, that this protest was sufficient to authorize a hearing before the local office as to the fact of discrepancy; but on the 21st of the same month that ruling was modified and the protest dismissed, on the ground that a further examination did not disclose a *prima facie* showing of conflict, and the allegation was not sufficiently clear to justify such order for hearing. The company appeals.

It is only necessary to suggest in disposing of this question, without deciding as to the status of the company as a proper contestant on such an issue, that it is a matter of ordinary administration relating to the question of possible error in the survey, and may be corrected by proper examination through the office of the surveyor general, if any inaccuracy shall be discovered.

The question as to the St. Lawrence Company comes up on appeal from your predecessor's decision of April 7, 1883, declining to recognize a waiver of the said company's claim filed in the district office January 15, 1880, and refusing to permit entry of the claim of the Albion Company offered to be made on the 3d of November, 1882, and rejected by the register and receiver.

The decision was to the effect, (1), that no waiver was filed by the legal board of trustees of the St. Lawrence Mining Company; that if officers *de facto*, the same persons were also officers of the Albion Company, and their fraudulent act purporting to waive the claim for the benefit of the latter company, could not make valid and binding the act as to the latter as "third persons without knowledge;" and, (2), that, without reference to the authority of the board no waiver in the land office alone of a claim pending in court under section 2326 of the Revised Statutes could release the bar of jurisdiction and stay of proceedings; but that such waiver must be made in the court itself, and be thence formally communicated to the land department.

At date of decision proceedings in *quo warranto* were pending on appeal in the supreme court of California to determine the right and authority of the persons claiming to constitute the board of trustees of the St. Lawrence Company in this transaction, and your office anticipated the decision of the court in finding upon that point, which was finally decided December 10, 1883, (64 California, 373,) in favor of the said persons, and contrary to the finding of your predecessor.

The waiver was therefore filed by the proper representatives of the company, and the question of their status *de facto* is not before me.

The second question consequently becomes sole, to wit:

Has the land department a right to proceed and issue patent, upon the filing of a waiver of adverse claim in the office of the register and receiver, without first ascertaining that the judicial proceeding has also been abandoned, and the suit properly dismissed by the courts?

Whatever has been said heretofore and whatever might be said on this subject, the precise point seems to have been considered by the U. S. Supreme Court in Richmond Mining Company *v.* Rose (114 U. S., 576), decided 4th May last, involving portions of the same Ruby Hill mining ground of which these claims form a part.

After deciding the general proposition that all questions should be decided by and belong to the court, and holding that the stay operates till final judgment, the court seem to have comprehended the possibility of certain exceptions, under the peculiar wording of the statute, and say:

"What, then, is meant by the phrase 'all proceedings shall be stayed until the controversy is settled or decided by a court of competent jurisdiction, or the adverse claim waived?'

"We can imagine several ways in which it can be shown that the adverse claim is waived without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument signed by the contestant and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and contest."

Here is an affirmative declaration by the highest judicial tribunal, setting out one of the several ways (others also being given) in which waiver may be shown without invading the jurisdiction, and leaving the case still pending in court. This, I think, settles the legal construction as to the intendment of the statute.

It only remains to be seen whether or not the instrument, filed by the St. Lawrence Mining Company in this case, answers to the instrument described by the court. If so, it would seem that the stay is removed, and its filing, in the language of the court, "might authorize the land officers to proceed."

Without fully reciting the verbiage of this document, which is on file, it is sufficient to state that it was signed by the president under corporate seal of the company; that it was addressed to the register and receiver of the Eureka office and to all persons and companies interested or claiming any interest in said Albion No. 1 lode, or mining location; that it fully described the application, the protest and adverse claim with reference to location and dates of filing, and specifically withdrew and directed the local officers to cancel all protests, objections and other opposition to the issue of patent to the Albion Company on such lode. It was accompanied by authenticated copy of a proper resolution of the

board of trustees of the St. Lawrence Company, authorizing the waiver and abandonment.

To this may be added the fact that by authority of a resolution of the board of trustees, adopted the same date, January 7th, 1880, the said Company also made on the 9th of that month a deed of conveyance to the Albion Company of all interest in the Albion claims and locations.

There can, I think, be no doubt that the documents filed constitute a sufficient and valid waiver to justify the resumption of proceedings by this department; and as the stay is removed by express sanction of law, I do not regard the disputes and disagreements of factional parties, claiming to represent possible interests in the St. Lawrence Company and preventing a dismissal of the suit in court, as proper ground for refusing to consider the Albion application on its merits, when the authority of the parties to make the waiver has been thus conclusively settled by the judicial tribunals. If the stay is removed, the duty of administration revives.

I therefore reverse your predecessor's decision, in view of the present aspect of the case, and remand the same for further action by your office.

MINING CLAIM—RES JUDICATA.

SOUTHWESTERN M'G CO. *v.* GETTYSBURG LODE CLAIM.

It being apparent upon the face of the record that mistake has occurred in the decision of a former head of the Department, and that it is impossible to execute said decision, the rule of *res judicata* will not prevent an examination and disposal of the case on its merits.

Secretary Lamar to Commissioner Sparks, August 27, 1885.

Referring to the Assistant Commissioner's report of 14th March last, you are advised that I have considered the application of the Southwestern Mining Company for a review of departmental action of December 18, 1883, and March 3, 1885, declining to disturb your predecessor's ruling of July 23, 1883, to the effect that as all controversy respecting the title to the Gettysburg mine appeared to have been settled by the acquisition of both claims by the Southwestern Company, he was disposed to waive whatever of informalities might appear in the record and approve the entry for patent. As preliminary to this proposed action, the register and receiver were instructed to call upon the manager of said company for certified copies of the alleged conveyances, showing such transfer of interest, and to notify all other parties in interest that upon receipt of such proof the entry would be so approved.

The attorney for the Southwestern Company having protested against such disposal of the case and filed an abstract of title exhibiting the present interest of the said company, the departmental rulings of December 18, 1883, and March 3, 1885, were made.

By the report of March last, it appears that your office, in examining the abstract filed with the protest and application for supervisory action on the 6th of October, 1883, assumed that the conveyances therein purported to cover all the interests of the fourteen original claimants under the alleged location of the Gettysburg lode, in whose names the certificate of purchase constituting the entry was issued.

This it appears is a mistake, two of said persons never having made, so far as shown, any conveyance whatever of their original claims. It is also clear to my mind that the whole force and intent of the acquiescence of the Department in the waiver of any informalities whatever rested, and were so expressed, upon the supposed fact that all parties in interest would and did desire to accept a patent, if the same could be based upon the pending proceedings, and thus avoid the necessity for a new application, cancellation of the admitted entry, and consequent delay, and possible future conflict. Such consent, however, on the part of the Southwestern Company, whose interest was, in terms, recognized by your office and the Department, is positively disclaimed.

It is therefore apparent upon the face of the record that mistake has occurred, and that it is impossible to execute the decision. And such being the case, there is no rule of *res judicata* to prevent an examination and disposal of the whole case on its merits. Having heard counsel upon the foregoing, and reaching this conclusion, I accordingly direct the continued suspension of the matter, until the further order of the Department, with a view to allowing re-argument upon the questions:

(1) Whether or not such validity attaches to the initiatory proceeding, in view of the apparently conflicting interests, as to allow patent to issue thereon; and

(2) Whether or not such substantial compliance with law is shown as would authorize a waiver of informalities in case it be found that the adverse proceedings constitute in themselves no bar to the claim of the applicants.

ENTRY—PURCHASE OF IMPROVEMENTS—PRACTICE.

CLEVELAND *v.* DUNLEVY.

The purchase of the improvements and possessory right of a homesteader confers no preference right of entry upon the purchaser as against a prior adverse settlement.

Where suit is pending as to the right of entry and one of the parties thereto during the pendency of such suit charges the other with abandonment since the hearing therein, such charge will be heard on the termination of the pending case.

Secretary Lamar to Commissioner Sparks, August 28, 1885.

I have considered the above entitled case, involving the right to the NE. ¼ of Sec. 5, T. 111 N., R. 59 W., Huron land district, Dakota Territory, as presented by the appeal of Cleveland from the decision of

your office dated June 5, 1884, holding for cancellation his homestead entry No. 1775, covering said tract.

The facts, as shown by the record, are as follows:

On June 26, 1882, George M. Bartholomew filed his soldier's homestead declaratory statement No. 3331 for said tract and on December 29, same year, made homestead entry No. 1573 of the land in controversy. Bartholomew's relinquishment of said tract was filed in the district land office on January 23, 1883, by Cleveland, who, on the same day, made homestead entry No. 1775, for the land in question. On the day following, Dunlevy made homestead entry No. 1781 of said tract, alleging settlement thereon November 27, 1882. Upon the application of Cleveland, your office, on August 8, 1883, directed that a hearing should be held to determine the rights of the respective parties. The hearing was duly held and upon the evidence submitted the register and receiver decided that when said relinquishment was filed in the district land office, Dunlevy's claim intervened and operated as a bar to the claim of Cleveland. On appeal, your office affirmed the decision of the register and receiver, as above stated.

It is shown by the testimony that Dunlevy settled upon said tract after the filing of said declaratory statement, but prior to the date of Bartholomew's entry, and continued to reside thereon up to the time of said hearing. Dunlevy's improvements consist of a house eight by ten feet, with an addition of equal size, a barn twelve by twelve feet, and twenty-two acres of breaking, all worth about $170.00.

Cleveland is shown to have purchased the improvements of Bartholomew, although he had not paid any portion of the purchase money, and he claims said tract by reason of said purchase and Bartholomew's relinquishment, which was filed by him. Cleveland's improvements are valued at about $225.00.

It is quite clear that Cleveland could acquire no rights as against Dunlevy by the purchase of Bartholomew's improvements and possessory claim. The land was not segregated when Dunlevy settled upon it, and his right was subject only to Bartholomew's claim, which was relinquished prior to the expiration of three months from the date of Dunlevy's settlement. Cleveland does not claim that he was an actual settler upon the land until May 10, 1883, while it appears that Dunlevy was an actual settler from November 27, 1882. It was irregular to allow Dunlevy's entry while the entry of Cleveland was extant upon the records of the district land office. It appears that after the decision of the register and receiver in said case, an affidavit was offered by said Cleveland, signed by himself and corroborated by two witnesses alleging that since the time of said hearing, Dunlevy has abandoned said land. Said affidavit was rejected by the register, because the witnesses signed with a pencil, and an appeal was taken to your office. The affidavit is insufficient, if it was intended as an affida-

vit of contest, because the length of time of the abandonment is not stated.

Your office decision held that said allegation was immaterial, and that your office would not consider in the case at bar any question of abandonment arising since the trial.

There can be no question that Cleveland has the right to contest said entry upon the ground of abandonment after the adjudication of the present case by this Department. In view, however, of the said allegation of abandonment by Dunlevy, Cleveland's entry will remain suspended for sixty days to enable him to initiate a contest against Dunlevy's entry, and in case Cleveland fails to commence said contest within the time specified and prosecute the same successfully, then his entry should be canceled.

The decision of your office is modified accordingly.

PRE-EMPTION—SETTLEMENT—RELINQUISHMENT.

TILTON *v.* PRICE.

A pre-emptor can acquire no rights to a tract of land by settlement and residence thereon while the same is occupied and under the control of another.

A relinquishment takes effect immediately upon being filed, and the tract so relinquished becomes at once public land and subject to entry by the first legal applicant.

When a relinquishment, accompanied by application for entry or filing, is transmitted for the consideration of the General Land Office and the relinquishment is held valid, under the act of May 14, 1880 the land is open to entry at the date of filing said relinquishment and the right of the applicant relates back.

Secretary Lamar to Commissioner Sparks, August 28, 1885.

I have considered the case of Alvarado D. Tilton *v.* Charles M. Price, on appeal by Tilton from your office decision of July 12, 1884, holding for cancellation his pre-emption declaratory statement No. 10,255, for Lots 3, 4, 5 and 6 of the NW. ¼ Sec. 6, T. 112, R. 75 W., Huron, Dakota Territory.

The facts as shown by the record are as follows: On October 9, 1882, Charles M. Price filed pre-emption declaratory statement 25, for the NW. ¼ of said Sec. 6, which included Lots 3, 4, 5, 6, 11, 12, 13 and 14, and contained 316.43 acres, alleging settlement April 1, 1882; and on May 4, 1883, the local officers at Huron permitted him to make cash entry No. 2845 for the entire quarter.

On April 17, 1884, your office, upon receiving, through the local office, a petition of Tilton, alleging that on May 23, 1883, he settled on Lots 3, 4, 5 and 6 of said quarter—said lots being an excess of one hundred and fifty-seven acres—established his residence and made val

uable improvements thereon, and praying that the cash entry of Price as to the excess be set aside, and *his* filing for said Lots 3, 4, 5 and 6 allowed, transmitted to the local office at Huron a letter containing the following instructions, relative to the land in controversy:

"You will notify Price that he will be allowed to elect what portion of the land embraced in his entry he will retain, the same to be in a compact form, to approximate 160 acres, and to be that portion upon which his residence and principal improvements are located."

Upon being notified, as required by said instructions, Price, on May 27, 1884, relinquished his entry as to said Lots 3, 4, 5 and 6, applied for a repayment of the purchase money for the same, and at the same time applied to enter said lots under the homestead law, submitting in support of his homestead application an affidavit, corroborated, to the effect that he made settlement in good faith on the entire quarter of said section, and commenced improvements on Lots 3, 4, 5, and 6; that he continued to cultivate and improve the same, and at that time had nearly thirty acres under cultivation, his improvements and crop being valued at $500; that he built a house and commenced his residence on said tract May 25, 1884. On May 27, 1884, Tilton asked to be allowed to file his pre-emption declaratory statement for said Lots 3, 4, 5 and 6, alleging settlement May 28, 1883, which application was rejected on the ground that he could acquire no rights by a settlement on a tract of land, which, at the time of his settlement, was covered by a cash entry.

On June 11, 1884, your office canceled the entry of Price as to said lots 3, 4, 5 and 6, and gave him the preference right to enter said lots under the homestead law, holding that, under the rules, his said application of May 27th could not be considered. On June 18, 1884, the local office noted the cancellation of Price's entry, and permitted him to make homestead entry 8644, for said Lots 3, 4, 5 and 6. On June 19, 1884, Tilton was allowed by the local office to file pre-emption declaratory statement No. 10,255, for said lots 3, 4, 5 and 6, alleging settlement June 4, 1884. From this action of the local office, in accepting and putting to record the said pre-emption declaratory statement of Tilton, Price duly appealed to your office, which on July 12, 1884, sustained the appeal of Price, and held for cancellation the aforesaid pre-emption declaratory statement of Tilton. Thereupon, Tilton duly appealed the case to this Department.

This case is governed by three well-settled principles of law:

First. A pre-emptor can acquire no rights to a tract of land by settlement and residence thereon while the same is occupied and under the control of another. "The right of pre-emption only inures in favor of a claimant when he has performed the conditions of actual settlement, inhabitation, and improvement. As he cannot perform them when the land is occupied by another, his right of pre-emption does not extend to it." Atherton *v.* Fowler (96 U. S., 513). Hosmer *v.* Wallace (97 *ib.*, 575), and numerous departmental decisions.

Second. A relinquishment takes effect immediately upon being filed in the local office, and the land so covered by the entry thus abandoned, at once becomes *public land*, and is subject to entry by the first legal applicant. Sec. 1 act of May 14, 1880 (21 Stat., 140); Whitford *v.* Kenton (3 L. D. 343); Glaze *v.* Bogardus (2 *ib.*, 311); Wm. C. Young (*ibid.*, 326).

Third. When a relinquishment accompanied by application for entry or filing is transmitted for the consideration of the General Land Office, and the relinquishment is adjudged valid, by virtue of the first section of the act of May 14, 1880, the land becomes subject to disposal at the date of filing it, and the right of the applicant relates back. Sim *v.* McGrew (2 L. D., 324); Commissioner's instructions of January 12, 1883 (10 C. L. O., 223).

Applying the law as herein set forth to the facts in this case, it will be seen that at the time Tilton went upon the land and made his alleged settlement thereon, he was, in the eyes of the law, a trespasser; consequently, he could acqure no rights under a settlement made upon the land May 28, 1883, inasmuch as the cash entry of Price was still intact. Neither could he acquire any rights to the land under a settlement made thereon June 4, 1884, under the third rule above stated.

Price appears to have acted in good faith in all his proceedings. He was permitted by the local officers to enter the entire quarter aforesaid, and they accepted his money for the same. Upon being notified that he could not hold more than one hundred and sixty acres of the tract under the pre-emption law, he immediately relinquished the excess, and *at the same time* applied to enter such excess under the homestead law, this being the only method he could pursue to retain the fruits of his labor and expenditure of money on such excess. This application of Price should have been allowed under the third rule above stated, and because of his superior equity. His relinquishment was adjudged valid and his application accompanying the same related back to the date of the filing thereof.

It is difficult to see how or in what manner a pre-emptor's right could attach to the land between the relinquishment and the filing of the homestead application, as they appear to have been made simultaneously. Under the supreme court decisions and numerous departmental rulings applicable to this case, I think that the facts herein clearly warrant the conclusion that at the time Price made his homestead application he was the first legal and equitable applicant, and was, therefore, entitled to enter the land in controversy.

Barring the modification indicated above, your office decision is affirmed. Tilton's pre-emption declaratory statement will be canceled, and the homestead entry of Price allowed to stand as of the date of May 27 1884.

PRACTICE—ATTORNEY—NOTICE.

HOPKINS *v.* DANIELS ET AL.

The laws of Dakota do not forbid an attorney to administer the necessary oath to his client in a contest affidavit.

A stranger to the record will not be heard to allege the want of due notice to the defendant.

Secretary Lamar to Commissioner Sparks, August 28, 1885.

I have considered the case of Fletcher W. Hopkins v. John H. Daniels, as presented by the appeal of John H. Pratt from your office decision of July 25, 1884, overruling his motion to dismiss the contest initiated by Hopkins against Daniels' timber culture entry No. 5379 (Sioux Falls Series) for the SE. ¼ of Sec. 6, T. 109 N., R. 62 W., Huron, Dakota, and also his motion to review and modify your office decision herein of May 21, 1884.

On August 31, 1880, Daniels made timber culture entry for said tract, and January 5, 1883, Hopkins instituted contest, alleging forfeiture and non-compliance with the law, offering at the same time his application to enter the land under the timber culture laws. Service by publication was had, on contestant's affidavit, "that the present address of said John H. Daniels is unknown to this deponent, and that personal service cannot be had upon him," and testimony taken, Daniels not appearing. November 22, 1883, the register and receiver rendered judgment in favor of contestant and held the entry of claimant for cancellation, from which judgment and holding no appeal has been taken.

March 17, 1884, one John H. Pratt filed contest against the same tract through the inadvertence of the local officers. March 29, 1884, said Pratt withdrew his contest and offered the relinquishment of said Daniels, whereupon the entry was canceled and the homestead entry of Pratt placed of record.

May 21, 1884, Fletcher W. Hopkins by direction of your office letter of that date was allowed the preference right to enter the land. Subsequently Pratt filed in your office his motion to dismiss said contest, and upon being informed by your office letter of June 30, 1884, that you had already disposed of said case by awarding to Hopkins the preference right of entry, filed his further motion to review and modify your decision of May 21, 1884, on the grounds following, to wit:

1. "That there was inadvertent error of law in not dismissing said contest and denying to Hopkins a preference right of entry, because,

a. The contest was void, the affidavit upon which it was based having been acknowledged before N. D. Walling as notary public, the said Walling being then, and ever since has been, the said Hopkins' attorney; and,

b. Due notice of the contest was not issued.

2. That the entry made by John H. Pratt on March 29 last should be allowed to remain intact."

The first objection is not well taken. In a recent decision by this Department it was held, after a thorough discussion of the subject, that the Dakota code does not forbid an attorney to administer the necessary oath to his client in a contest affidavit. (3 L. D., 248.)

The second objection is also not well taken. It is urged by Pratt that Daniels did not receive due notice of the contest. If such fact be true, it lies with Daniels to take advantage of it. It is not urged that Daniels complains of want of due notice. Pratt could not be injured by want of due notice in this contest. Daniels' relinquishment was filed pending final action upon Hopkins' contest. The filing of a relinquishment under such circumstances must reasonably be presumed to be a result of the contest. It inures therefore to the benefit of contestant and closes the case and renders further consideration of the contest proceedings unnecessary. Pratt, therefore, can not be heard, at this state of the case, to urge an objection that might be urged only by Daniels. Your decision is affirmed.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

SAINT PAUL, M. & M. R. R. CO.

A railroad company is not authorized under the act of June 22, 1874, to relinquish unselected lands lying within the indemnity limits of the grant and select other lands in lieu thereof.

Secretary Lamar to Commissioner Sparks, August 31, 1885.

I have considered the above entitled case, involving certain lands in Fergus Falls land district, Minnesota, (aggregating about 1,291.75 acres, particularly described in your predecessor's decision of July 1st, affirmed by him in his decision of July 15, 1884, to which reference is hereby had,) on appeal by the company from said decisions.

The company claims, as successor of the St. Paul and Pacific Railroad Company, the lands in question, by virtue of the act of March 3, 1857, (11 Stat., 195,) and the amendatory act of March 3, 1865 (13 *id.*, 526). The St. Paul and Pacific R. R. Company relinquished (it seems at the request of your office) certain odd numbered tracts lying within the twenty miles or indemnity limits, which, it is alleged, had been thereby granted, but subsequently settled upon by homestead and preemption claimants; and thereupon, March 28, 1873, selected the tracts in question agreeably to the provisions of the act of June 22, 1874 (13 Stat., 194).

Your office rejected, and held for cancellation said selections, for the reason " that the tracts for which indemnity is claimed were all within

the twenty miles or indemnity limits of the grant for said company and had never been selected by it."

Inasmuch as the relinquishments for which indemnity is claimed were made by the company at the request of your office, with an understand ing that indemnity would be allowed under the act of June 22, 1874, and as up to the date of said selections the uniform ruling of your office and of this Department was in favor of such selections, it is strongly urged by the company that Congress, when it passed the remedial act of June 22, 1874, legislated with special regard to said rulings of your office and of this Department, and, recognizing their binding force and effect, provided a special means of relief.

Seven grounds of error are alleged in the appeal from your said office decision. Without taking up and dealing particularly with each separate alleged error, it is sufficient herein to say that this case comes within the rule of law laid down by this Department in the case of the St. Paul and Sioux City R. R. Company *v.* the United States, decided April 29, 1885, (3 L. D., 504,) wherein it is stated that, "Under the act of June 22, 1874, a railroad company is not authorized to relinquish unselected lands lying within the indemnity limits of its grant and select other lands in lieu thereof." See in support of this rule the decisions therein cited.

I see no reason for reversing the rule above stated, and accordingly affirm your office decisions relative to this case and direct said selections to be canceled.

Mining Regulations for the District of Alaska.

Department of the Interior,
Washington, July 28, 1885.

1. In pursuance of the eighth section of the act of Congress approved May 17, 1884, entitled "An act to provide a civil government for Alaska," (23 Stat. 24), it is hereby prescribed that the rules and regulations of the General Land Office and Department of the Interior governing the administration of the mining laws of the United States be adopted for and extended to the district of Alaska, so far as the same may be applicable.

2. Notices required by mining laws and regulations to be published in a newspaper nearest the claim, may, until newspapers are established in Alaska, be published in some suitable newspaper or newspapers printed in Washington Territory, to be designated by the *ex-officio* register of the land district of Alaska.

3. No public lands other than specific mineral claims are subject to survey or disposal in said district.

4. The *ex-officio* register, receiver, and surveyor general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsi

bilities of similar officers and persons under general statutes of the United States.

5. The Commissioner of the General Land Office will from time to time direct the *ex-officio* land officers in the proper discharge of their official duties, and will exercise the same general supervision over the execution of the laws as are, or may be, exercised by him in other mineral districts.

L. Q. C. LAMAR,
Secretary.

Approved:
GROVER CLEVELAND.

PRIVATE CLAIM—INDEMNITY SCRIP.

HEIRS OF AMBROSE LANFEAR.

The act of June 2, 1858, does not authorize the issue of scrip for any part of a confirmed claim, which at the date of its location was not in conflict with a prior confirmation.

Said act while confirming generally the decisions in favor of claimants, made by the commissioners named therein, does not necessarily include a claim specifically confirmed by a prior private act.

Though the government under its confirmatory act and patent has relinquished its title to the tracts for which indemnity is sought, certificates of location therefor will not issue if it appears that such land was in fact never granted and hence not lost.

Secretary Lamar to Commissioner Sparks, August 28, 1885.

I have considered the appeal filed by the attorney for the heirs of Ambrose Lanfear from the decision of your office, dated October 5, 1883, holding for cancellation twenty-one certificates of location dated July 13, 1882, and numbered from 433 A to 433 U inclusive, for the amount of 1141.34 acres. The record shows that said certificates were prepared and transmitted to your office on July 13, 1882, by the surveyor general for Louisiana, under the provisions of the 3d section of the act of June 2, 1858, (11 Stat., 294,) in favor of Ambrose Lanfear or his legal representatives, and were intended to be in part satisfaction of the private claim of "the children of Paul Toups."

Under the 4th section of the act approved March 3, 1807, (2 Stat., 440,) the old board of commissioners for the eastern district of the territory of Orleans confirmed said claim as follows: "No. 74. The children of Paul Toups claim a tract of land situate in the County of Acadia at the place called *les Coteaux de France* at about the distance of three and a half leagues from the western bank of the Mississippi, containing eighteen arpents in front and a depth of two leagues and a half. Paul Toups, the father of the claimants, obtained from the Baron de Carondelet a regular warrant of survey for this land in the year

1796, for the purpose of establishing a vacherie, and the conditions of the warrant of survey having been complied with on his part. Confirmed." This confirmation was signed by the three members of the board, and was embraced in the report of said board to Congress on January 9, 1812. American State Papers, (2 Green 324).

It appears that the private claim (No. 529) of Daspit St. Armand conflicted with the claim of the Toups children. See American State Papers (3 Green 225). The claim of St. Armand was confirmed by act of Congress approved May 11, 1820, (3 Stat., 573).

Both of said claims were surveyed by United States deputy surveyor Maurice Hauke and the surveys were approved by the surveyor general for Louisiana on May 5, 1855. On August 18, 1856, Congress passed an act (11 Stat., 473,) confirming the surveys of said claims by name in favor of Ambrose Lanfear. Said act contained the following proviso:

"*Provided*, that such confirmation shall only be construed into a relinquishment of title on the part of the United States, and shall not affect the rights of any third person claiming title either under adverse title or as pre-emptor: *And provided further*, that any person or persons, who are now settled on the said lands, or any portion of the lands embraced in the said surveys, shall be entitled to have and maintain an action to test the validity of said surveys and the extent of the said claims of the children of Paul Toups, and of Daspit St. Armand, numbers seventy-four and five hundred and twenty-nine, and to have the same determined judicially in the same manner as though the land on which they are settled had been surveyed as public land, and they had been permitted to enter the same by way of pre-emption, it being the true intent and meaning of this act, that no person who would be now entitled to a right of pre-emption to any part of the said land, if the same were the property of the United States, shall be deprived of the same, unless it is judicially decided that the said surveys were made in conformity with the legal right of the said Ambrose Lanfear, under the said confirmation."

A patent was issued to Lanfear on August 7, 1876, for the lands covered by the surveys of both claims, under the provisions of section 2447 of the Revised Statutes of the United States. On March 13, 1876, the district land officers, under the provisions of section 6 of the act of March 3, 1831, (4 Stat., 492,) considered the question of conflict between said claims as shown by the surveys thereof, and decided that the children of Paul Toups were entitled to the land in conflict, by reason of a prior confirmation. Upon the application of the heirs of Lanfear, certificates of location for 1690.47 acres were issued on October 24, 1879, as indemnity for the reduction of the St. Armand claim.

The certificates of location under consideration were prepared as indemnity for all of the Toups' claim, northeast of Bayou Crocodile, embracing sections 120, T. 13 south and 37, T. 14 south of range 20 east.

In a contest in the courts of Louisiana, between Lanfear and H. L. Hunley, it was decided by the District Court, that Lanfear as the successor of Paul Toups and of Daspit St. Armand "has no title to the

land making part of the Coteaux de France, situate north of Bayou Crocodile, and upon which defendant has acquired pre-emption rights." This decision was affirmed by the Supreme Court of the State, and on appeal by Lanfear was affirmed by the Supreme Court of the United States. (4 Wall., 204).

The heirs of Lanfear having been advised by your office on November 21, 1881, that, after the adjustment of the pre-emption claims, "only a few scattering lots will remain," sent to your office their deed of relinquishment, in favor of the United States, of all their estate and interest in and to any part of said sections one hundred and twenty and thirty-seven, upon the express condition, however, that they should receive indemnity for the lands thus relinquished. On October 5, 1883, your office held said certificates of location for cancellation, as above stated, and the heirs of Lanfear duly appealed.

The grounds of appeal are—

1st, Error in holding that indemnity under the third section of the act of June 2, 1858, can not apply to claims confirmed by the old board of commissioners, acting under the authority conferred by the third section of the act of March 3, 1807.

2d, Error in holding that Lanfear's heirs are estopped by the record, or by the conduct of their ancestor from claiming the relief intended by said act of 1858.

3d, Error in holding that the patent issued on the approved survey of the Toups claim was a location and satisfaction thereof.

4th, Error in holding that said act of 1856 was not a confirmation of the Toups' claim, as surveyed by the United States, within the meaning of section three of said act of 1858.

5th, Error in holding that the applicants for relief could not relinquish to the United States the scattered fractions covered by the patent and take indemnity therefor.

The contention is, that the claim of Paul Toups was confirmed by the old board under the act of March 3, 1807, re-confirmed and located under the private act of August 18, 1856, and still again re-confirmed under the second section of the act of June 2, 1858, and, hence, it comes within the provisions of the third section of the last named act and is entitled to the indemnity provided therein.

The second section of the act of June 2, 1858, confirmed the decisions in favor of land claimants, made by P. Grimes, Joshua Lewis and Thomas B. Robertson, commissioners appointed to adjust private land claims in the eastern district of the territory of Orleans, and the third section of said act provides,

"That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same in whole or in part has not been located or satisfied, either for want of a specific location, prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which

such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same in whole or in part remains unsatisfied, to issue to the claimants, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied."

It is well settled that "if a right is asserted against the government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it." Charles River Bridge *v.* Warren Bridge (11 Pet., 420, 536); Dubuque & Pacific R. R. Co. *v.* Litchfield (23 Howard, 66, 88); Slidell *v.* Grandjean (111 U. S., 413).

It can not strengthen the case of the appellants that said deed of relinquishment has been tendered, for it was held by this Department in the case of Rudolphus Ducros, decided March 12, 1874, (1 C. L. O. 38,) that said act of June 2, 1858, does not authorize the issue of scrip for any part of a confirmed claim, which at the date of its location was not in conflict with a prior confirmation, and that the Ducros claim was located and satisfied by the United States survey thereof. The same ruling was adhered to by this Department in the case of John Dejan (8 C. L. O., 43).

It is, however, strenuously insisted that since said claim was re-confirmed and located by said private act of 1856, it is therefore within the provisions of the act of June 2, 1858. This contention can not be maintained.

It was expressly provided in said act of 1856, that the confirmation therein should be only a relinquishment of title on the part of the United States, and should not affect the rights of any third person claiming title either under adverse title or as a pre-emptor. The act of 1858 confirms generally the decisions in favor of land claimants made by the commissioners named therein, but it does not necessarily include the Toups' claim confirmed by the act of 1856. The latter act confirms the claims specifically named and in accordance with its terms the rights of all parties were adjudicated prior to the passage of the act of 1858. Besides, as we have seen, the courts of Louisiana and the Supreme Court of the United States, in the case of Lanfear *v.* Hunley (supra), have decided that the private act of confirmation did not enlarge the grant, and the Toups' claim did not extend to the north of Bayou Crocodile. It is true, that the United States, under said confirmatory act and its patent, has relinquished its title to the tracts in said sections, but no good reason is shown why the government should issue certificates of location, as indemnity for land never granted, and which, therefore, was never lost.

It is unnecessary to consider the validity of the act of June 21, 1860, (12 Stats., 866,) repealing the second section of the act of 1858, for the reason that the latter act gives no authority for the issuance of the certificates of location applied for. The decision of your office is accordingly affirmed.

TIMBER CULTURE ENTRY—REPAYMENT.

THOMAS C. DUNCAN.

An entry made without actual knowledge as to the character of the land is at the risk of the entryman, and repayment will not be allowed in the event of the relinquishment thereof when the land is found untillable.

Acting Secretary Jenks to Commissioner Sparks, August 31, 1885.

I am in receipt of your office letter of November 8, 1884, transmitting the papers relative to the appeal of Thomas C. Duncan from your office decision of July 9, 1884, refusing his application for the cancellation without prejudice of his timber culture entry No. 1826, for Lots 5, 6, 7 and 8, Sec. 32, T. 111 N., R. 71 W., Huron, Dakota, and for the return of the fees thereon paid.

The facts are as follows:

Duncan made said entry on April 2, 1883. On or about October 15, 1883, he executed a relinquishment of said entry, and applied to your office to be allowed to make a new entry without prejudice upon some other tract and for the repayment of the fees thereon.

In support of this application he filed his affidavit, setting forth "that at the time of making said entry he was informed by a land agent of Highmore, who represented that he was well acquainted with the tract of land in section 32, township and range above stated, that the same was a fine tract of land and agricultural in character;" that relying upon these statements affiant made said entry; that about thirty days ago he sent his brother to do the breaking on said tract; that said brother returning informed him that the tract was totally unfit for agricultural purposes, and for the growing of trees; that he could not find five contiguous acres fit for breaking; that the tract was covered with large bowlders, rocks, and gravelly knolls; and that it was broken and very hilly. The breaking thereupon was not done. This affidavit was corroborated by that of his said brother.

On this statement of facts your office, by its letter "C," of November 16, 1883, denied the application. Duncan filed his motion to review, accompanied by his affidavit, setting forth that in selecting said tract he relied upon the surveyor's description of the land, as shown by the records of the Huron land office, and upon the advice of the register. The affidavits of D. L. Cadwallader and Charles S. McGill also appear, setting forth that affiants have lived for eight months in Hyde county (wherein said tract is located), are acquainted with the land in question, that it is unfit for agricultural purposes, covered with large bowlders, and that ten acres thereof cannot be cultivated. By your office letter of July 9, 1884, said application was again denied.

It appears that Duncan was in Huron, Dakota, on April 2, 1883, and there made his entry. It is not attempted to be shown that he then

visited the land, or that he has since done so, nor is any reason assigned for his failure so to do. In one affidavit he says, he relied on information obtained from a land agent; in another, he claims to have acted on information obtained from the register and from the records. He does not pretend that he has made any attempt to further comply with the law. The field notes show the land to be rolling, and the soil first and second rate in character. It was incumbent on Duncan, before making his entry, to inform himself of the character of the land. If he has voluntarily failed so to do, it must be at his own risk, and this Department cannot furnish him relief from the results of his own neglect.

Your decision is therefore affirmed.

PRE-EMPTION CONTEST.

PERCIVAL *v.* DOHENEY.

Contests to clear the record of pre-emption filings are not encouraged by the Department. The rights of the pre-emptor should await consideration until final proof is offered.

Secretary Lamar to Commissioner Sparks, August 31, 1885.

I have considered the case of George W. Percival *v.* Michael A. Doheney, involving the SE ¼ of Sec. 13, T. 154 N., R. 65 W., Devil's Lake, Dakota, on appeal by Percival from your office decision of August 6, 1884, dismissing the contest.

It appears from the record that Percival made homestead entry for the tract described, November 2, 1883, and that on the following day, November 3, the date on which the township plat was filed, Doheney filed pre-emption declaratory statement for the same tract, alleging settlement March 26, 1883. Action was brought by the homestead entryman, Percival, with a view to clearing the record of Doheney's pre-emption filing. Hearing was set for December 22, 1883, at which both parties appeared in person and by counsel. Counsel for Doheney moved to dismiss the contest, and assigned several reasons in support of said motion, the general purport of which was that the notice of contest was vague and indefinite as to the charges which contestee was expected to answer, no specific charge of any kind being made. Substantially the same allegations were made as to the affidavit upon which the notice of contest was based.

These motions were overruled by the register and receiver and the exceptions noted. The hearing of the case proceeded upon its merits, and resulted in a finding by the register and receiver favorable to contestant. On appeal to your office the decision below was objected to on every point, and especially as to the action overruling the motion to dismiss. After quite a full recital of the facts in the case as to the character of the affidavit and notice of contest, your office sustained the appeal and dismissed the contest without prejudice to either party.

Upon an examination of the case, I am satisfied that this was right. The notice of contest which issued only a few days after the pre-emption declaratory statement was filed set forth as ground of contest only the very broad and indefinite charge of "failure to comply with the law in regard to his declaratory statement." It failed to specify in what particular there had been failure. The declaratory statement itself was but a few days old. It was difficult for Doheney to know just what he would have to answer at the hearing. At said hearing considerable testimony was taken which went largely to two points, first, as to when Doheney ceased to be a minor, and, second, as to his settlement, inhabitancy and improvement.

In view of the foregoing state of facts, I refrain from expressing any opinion on the evidence. Contests of this character "to clear the record" are not encouraged by the Department. In such cases, the better practice, as a general rule, is to allow the pre-emption rights to await consideration until final proof is offered. Nichols *v.* Benoit, (2 L. D. 583.)

Especially is this true in this case, in view of the indefinite and very general character of both the affidavit and notice of contest. Doheney, the pre-emptor, may at any time, after due advertisement, offer his final proof, and when he does, all questions touching his rights under his pre-emption claim will then be open for consideration and determination. The questions presented at the hearing already had may then very properly be raised. Percival may then as an adverse claimant offer his objections and after due notice be fully heard in contest.

I affirm the decision of your office dismissing the contest without prejudice.

PRE-EMPTION—SALE AFTER ENTRY.

MORFEY *v.* BARROWS.

The sale of the land shortly after making proof and payment does not warrant a presumption against the good faith of the entryman.

In case of contradictory evidence the findings of the local office as to matters of fact are given due consideration by the Department.

Acting Secretary Jenks to Commissioner Sparks, September 1, 1885.

I have considered the case of Stephen Morfey *v.* Charles E. Barrows, involving the right to the SE ¼ of Sec. 3, T. 111, R. 60, Huron, Dakota, on appeal by Morfey from your decision of July 27, 1884, dismissing the contest.

The record shows that Barrows filed declaratory statement No. 17,661 for said tract, May 3, alleging settlement April 19, 1882; and December

8, 1882, he made proof and cash entry of the same. January 23, 1883, he transferred the same, by warranty deed, to one George W. Thompson.

Morfey made homestead entry No. 187 for said tract October 9, 1882. Affidavit having been made by Morfey (March 14, 1883,) that said Barrows had not fulfilled the demands of the pre-emption law as to residence and cultivation and that he had entered the land in question with speculative intent, an investigation was made by Special Agent William W. Burke, who (on March 20, 1883,) made report to your office recommending that a hearing be ordered. Your office ordered a hearing, which was held August 29, 1883. Upon the hearing it was shown that Barrows was a poor man, compelled to work for others to maintain existence; that he found employment, mostly with a farmer living some two miles distant from his claim, returning home at intervals and working a portion of the time upon the tract in controversy. The evidence was very contradictory, as to the frequency and length of Barrows' visits to his claim, the size and character of his house, the amount of land plowed and the quantity of crops raised. The local officers decided as follows:

"The testimony shows that Barrows hauled his lumber on the land the day he made settlement, viz: April 14, 1882. He built a house eight feet square at once. His actual residence was established on May 15, 1882. He worked for various people in the vicinity, and visited his claim as often as he could, averaging twice to three times a week. He broke five acres which he planted to corn and raised a crop. In every act of Barrows he has shown an honest intent. His poverty should not be an obstacle in the way of his exercising his rights under the law. Therefore we find for Barrows and render a decision in his favor."

Morfey appealed to your office, which (July 27, 1884,) decided as follows:

"After a careful examination I fail to find that the charges have been sustained, and affirm your decision in favor of Barrows."

From your decision the contestant appeals to the Department.

The fact that Barrows sold the land, within three and a half months after making cash entry, is adduced as furnishing grounds for the strong suspicion of speculative intent. The U. S. Supreme Court, however, in the case of Myers *v.* Croft (13 Wall., 291,) decided that "the object of Congress was attained when the pre-emptor went, with clean hands, to the land office, and proved up his right, and paid the government for the lands. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy." See also departmental decision in case of Thompson *v.* Clark (11 C. L. O., 24).

The local officers, before whom the witnesses personally appear, have the advantage over all appellate tribunals, from their opportunity to observe the appearance and bearing of the witnesses, their manner in

giving their testimony, etc.; for which reason, especially in case of contradictory evidence, the Department looks with great respect upon the conclusions of the local office as to matters of fact. In the present case I concur with the local officers in holding that the preponderance of evidence shows good faith and a compliance with the law on the part of the pre-emptor. Your decision is therefore affirmed, and the contest dismissed.

EFFECT OF PATENT.

BAKER *v.* THE STATE OF CALIFORNIA.

The erroneous certification of a tract in the place of land selected, deprives the Department of further jurisdiction over the land.

Acting Secretary Jenks to Commissioner Sparks, September 1, 1885.

I have considered the case of Thornton R. Baker *v.* the State of California, involving the NE ¼ of the NE ¼ of Sec. 24, T. 2 N., R. 9 E., M. D. M., Stockton land district, California, on appeal by plaintiff from your office decision of July 25, 1884, holding for cancellation his pre-emption declaratory statement No. 11731 for said tract.

The record shows that on May 5, 1871, the State of California, through its authorized agent, applied at the local office at Stockton to select the NE ¼ of the SE ¼ of said section, under the grant for agricultural college purposes. Act of July 2, 1862, (12 Stat., 503), and the amendatory acts of June 8, 1868, (15 *id.*, 68), and March 3, 1871, (16 *id.*, 531). This application was approved by the then register, Melville Cottle, August 11, following, who described the land as the NE ¼ of the NE ¼ of Sec. 24, T. 2 N., R. 9 E., M. D. M., and duly reported the same to your office. This said reported tract being at that time vacant public land, the selection was entered upon the records in accordance with the register's description and was approved to the State for the purposes aforesaid upon said June 17, 1873. June 27, 1873, a certified transcript of the approved list conveying the fee simple title to the lands embraced therein was transmitted to the governor of the State. It appears that patent was issued by the State of California, and under said patent the land has been transferred several times.

On November 5, 1863, Abraham F. Wilson made homestead entry No. 104 for the entire SE ¼ of said section, which entry remained intact upon the record until June 7, 1875, when it was canceled by reason of abandonment.

The record further shows that the following pre-emption filings were made upon the entire NE ¼ of said section, viz: declaratory statement No. 9032, by Sallie Potter, filed January 29, 1876, alleging settlement

the same day; declaratory statement No. 10,208, by Thomas H. Bardsley, filed May 30th, alleging settlement May 1, 1878. Also the pre-emption declaratory statement No. 11,731 of Thornton R. Baker, filed January 18, alleging settlement January 18, 1883, for the NE ¼ of the NE ¼ of said section—this being the land in controversy.

On April 11, 1884, Baker made application at the local office at Stockton to make proof and payment for the said tract covered by his pre-emption declaratory statement referred to, which application was refused by the local office, for the reason that the tract applied for appeared to have been patented by the State of California to one Helen Weire, September 22, 1883. On appeal by Baker, your office sustained the decision of the local office.

Baker in his appeal to this Department sets up four grounds of error: *First,* That the patent or list of said land to the State of California is an error, as the State applied for another tract than the one patented. *Second,* That at the time Baker settled, this land was not then listed to the State, but was vacant public land of the United States. *Third,* That the claimant under the State was cognizant of the claim and entry of Baker, and sought to take advantage of him. *Fourth,* That the case comes under the list of patents being void upon their face and over which the Land Department has jurisdiction and can issue a second patent.

None of these objections are well founded. In the case of Moore *v.* Robbins (96 U. S., 530), it was laid down as a recognized rule of law that:—

"A patent for public land when issued by the Land Department acting within the scope of its authority, and delivered to and accepted by the grantee, passes the legal title to the land. All control of the Executive Department of the government over the title thereafter ceases.

If there be any lawful reason why the patent should be canceled, or rescinded, the appropriate remedy is by a bill in chancery brought by the United States, but no executive officer is authorized to reconsider the facts on which it was issued, and to recall or rescind it, or to issue one to another for the same tract."

The case of United States *v.* Schurz (102 U. S., 378) affirmed this doctrine and went further, holding that "the delivery of the instrument of patent to the patentee is not, as in a conveyance by a private person, essential to pass the title."

In view of the facts as hereinbefore recited, and under the rule of law as above set forth, I think your office decision in this case was correct and it is accordingly affirmed.

PRE-EMPTION—SETTLEMENT—ALIEN—HEIR.

BELL *v.* WARD.

The settlement of an alien, or one who has not declared his intention of becoming a citizen, confers no right as against the valid adverse claim of another.

The wrongful removal of a settler's house, at the instance of an adverse claimant, will not affect the status of the settler's right or inure to the benefit of such claimant.

The guardian of the minor heir of a deceased pre-emptor is authorized under section 2269 of the Revised Statutes to file a declaratory statement and other papers required to complete the claim.

Acting Secretary Jenks to Commissioner Sparks, September 1, 1885.

I have considered the case of John J. Bell *v.* Edward P. Ward, guardian of Edna Rose Ward, minor heir of Frederick A. Ward deceased, as presented by the appeal of Bell from the decision of your office, dated February 13, 1885, holding for cancellation his pre-emption declaratory statement No. 3, for the W ½ of the SE ¼ of Sec. 35, T. 154 N., and the W ½ of the NE ¼ of Sec. 2, T. 153 N., R. 64 W., Devil's Lake land district, Dakota Territory, and awarding the land to the said minor heir.

It appears from the record that the township plat of survey was filed in the district land office on September 29, 1883; that Bell filed said statement on September 29, 1883, alleging settlement on July 1, 1882; that Edward P. Ward, as guardian of said heir, filed pre-emption declaratory statement No. 277, for said tracts on December 21, alleging settlement thereon February 21, 1883; and that Byron M. Smith filed Sioux half breed scrip No. 701 E, for the SE ¼ of said Sec. 35, on May 18, 1883, which was canceled by your office letter of January 29, 1885.

Due notice was given by said guardian of his intention to make proof and payment for the land, on May 30, 1884, and Bell and Smith were cited to appear at the district land office and to show cause why the proof should not be allowed. On May 23, 1884, Bell executed his affidavit, duly corroborated, protesting against the allowance of Ward's proof and payment, and claiming the land by reason of a prior bona fide settlement.

By agreement of the parties a hearing was held on July 25, 1884, to determine their respective rights, at which both parties appeared in person, with their attorneys. Upon the evidence submitted at the hearing, the register and receiver awarded the land to Bell, and, on appeal, their decision was reversed by your office, as above stated.

The grounds of error assigned are, 1st, In holding that Ward's original settlement was bona fide and valid.

2d, In holding that Ward's alleged settlement was made with the intention to claim the land under the pre-emption law, and to comply with its requirements.

3d, In overruling the decision of the register and receiver, and awarding the land to said heir.

It is shown by a fair preponderance of the testimony that Bell went upon the land in question on June 19, 1882, and put up a sod house and broke about five acres. He resided upon the land until January, 1883, when he began to build a frame house, which was completed on the 23d or 24th day of February following. Bell's improvements consist of said house and twenty-five acres of breaking, and he swears that they cost him over $200.00. At the time Bell went upon said tracts he was an alien, but he filed his declaration of intention to become a citizen on April 7, 1883.

It appears that Frederick A. Ward placed his house or shack on said tract on February 21, 1883, and the same was removed by a mob of twenty men within two hours after it was placed on the land. Bell was present when the house was hauled away. On April 22, 1883, Ward placed another house upon the land and was killed that night by armed men, who had come to move his house from the land in controversy.

There is testimony tending to show that Ward and his brother Charles were attempting to hold other claims upon unsurveyed land after the removal of the first house from the land in dispute. This testimony can have weight only as tending to show that Ward had abandoned his claim to the land upon which his house was placed.

Until Bell filed his declaration of intention to become a citizen of the United States he could acquire no right to the land as against a valid adverse claim. Section 2259 of the Revised Statutes. McMurdie *v.* Central Pacific R. R. Company (8 C. L. O., 36); Kelly *v.* Quast (2 L. D., 627); Mann *v.* Huk (3 L. D., 452).

While Bell was still an alien, Ward placed his house upon the land and claimed the same. His action was not a *forcible* intrusion upon the land, and since Bell was at that time disqualified from acquiring lands under the pre-emption laws, Ward initiated a valid settlement upon the land. Atherton *v.* Fowler (96 U. S., 513); Belk *v.* Meagher (104 id., 279); Lawless *v.* Anderson (7 C. L. O., 68); Molyneux *v.* Young (id., 107); Powers *v.* Forbes (ibid., 149). The removal of the house could not destroy his claim. It is not shown that he used any force in placing the house upon the land and the removal of the same by force in the presence of Bell can not and ought not to inure to Bell's benefit. The land was unsurveyed and uninclosed. The law was ample to protect Bell's rights, and there seems to be no excuse for the conduct of those, whose violence caused the death of the Ward brothers. A careful examination of the testimony fails to show that Ward did not make his settlement in good faith, and the peculiar circumstances attending the removal of his first shanty, taken in connection with the facts surrounding his death, would seem to furnish sufficient excuse for his absence from the land in the interim. Counsel for Bell urge that said guardian is not authorized to file a pre-emption declaratory statement for said tracts. Section 2269 of the Revised Statutes of the United States pro

vides that, "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party or one of the heirs to file the necessary papers to complete the same, but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

It is not pretended that Rose Edna Ward is not the heir of said F. A. Ward, deceased, nor that Edward P. Ward is not her guardian. The deceased initiated his claim by settlement and under the provisions of the section above quoted said guardian is clearly authorized to file the declaratory statement and all other papers to complete the claim commenced by the deceased in his life-time.

The decision of your office is accordingly affirmed.

HOMESTEAD—RESIDENCE.

FAGAN *v.* JIRAN.

Residence is neither acquired nor maintained by making occasional visits to the land.

Acting Secretary Jenks to Commissioner Sparks, September 3, 1885.

I have considered the case of Charles Fagan *v.* Wenzel Jiran, involving the NE ¼ of NW ¼, Sec. 34, T. 3 S., R. 7 E., M. D. M., Stockton land district, California, on appeal by Jiran from your office decision of August 12, 1884.

The record shows that the township plat was filed in the local office July 26, 1858; that Jiran made homestead entry No. 3854, April 23, 1883, for the aforesaid tract, and that on December 4, 1883, his application to make final proof for the same was rejected; that on the same day (December 4, 1883,) this contest was initiated on the affidavit of Fagan, alleging abandonment of his homestead entry by Jiran; and that a hearing, relative to this contest and in all respects regular, was had at the local office in Stockton, January 22, 1884.

Upon the testimony adduced at said hearing, the local office rendered a decision in favor of contestant, which decision was affirmed by your office July 12, 1884, as stated above.

The testimony in the case is clear to the effect that Jiran never established a residence on said tract. The only improvements thereon consisted of a cabin ten by twelve feet, with one door and window, and without any floor. There never was any furniture in the cabin, except a sort of platform upon which was a straw tick filled with straw, until three days after this contest was commenced, when a stove was put up, and the cabin improved a little. There was no well, but very little

plowing done, and no other attempts toward cultivation and improvement. At various times he drove out from his home in Modesto, ten miles distant, to the land, and remained over night, taking with him blankets and such other bed clothing as he desired and taking them back with him to Modesto upon his return. That he considered Modesto his home is evidenced by the fact that he took part as a voter in the incorporation of that town, some two months prior to this hearing, and also from the fact that on the 8th day of November, 1883, in a case then pending in the court of justice in Modesto, he testified that his home was in that town.

In view of all the facts as hereinbefore recited, and recognizing the universal rule of law that, "A homestead claimant can neither acquire nor maintain a residence on a tract by making occasional visits to the land," your office decision is affirmed.

REVIEW.

HUNT *v.* LAVIN.

Motion for review of departmental decision of April 29, 1885, (3 L. D., 499) denied September 4, 1885.

ACT OF JULY 23, 1866.

CALIFORNIA & OREGON R. R. CO. *v.* THE STATE OF CALIFORNIA.

The first section of said act has no reference to swamp land claims, and the highest judicial tribunal of the State has so decided.

Acting Secretary Jenks to Commissioner Sparks, September 5, 1885.

I have considered the case of the California and Oregon Railroad Company *v.* the State of California, on appeal from the decision of your office of 27th November, 1876, holding that certain lands in sections 3, 4, 9, 27 and 34, township 12 N., range 3 E., and the W. ½ of 33—13 N.—3 E., M. D. M., Marysville district, inured to the State of California under section one of the act of July 23, 1866, (14 Stat., 218).

The case has been several times suspended pending interlocutory proceedings by your office, concerning which reference is made to your office communications of August 14, 1879, October 7, 1879, and 30th July 1885.

It is sufficient for the disposition of this case to recite, that by decisions of July 15, 1879, in the case of State *ex rel.* Joseph Kile *et al. v.* Silas Tubbs (6 C. L. O., 108,) and of December, 21, 1883, State of California *ex parte* (2 L. D., 643), it was expressly held that the first section of the act of Congress of July, 1866, has no reference to swamp land claims.

This decision has been under consideration and fully concurred in by the Supreme Court of California in Kile *v.* Tubbs, (59 Cal., 191,) which settles the fact that the State herself by her highest judicial tribunal has declared against her right to the assertion of such claim.

The award to the State under this provision of the statute is accordingly overruled and the decision reversed. You are consequently at liberty to consider all claims, either of the State or of other parties, under the laws applicable to the lands, without reference to the case as presented in these proceedings.

INDIAN HOMESTEADS.

Certain entries in Michigan released from suspension.

Acting Secretary Jenks to Commissioner Sparks, September 7, 1885.

On the 14th of March, 1877, my predecessor directed a suspension of action upon certain contested Indian homestead entries in Ionia and Traverse City districts, Michigan, subsequently consolidated at Reed City. This was upon complaint and representation that the contests, made by white persons, were instituted for the purpose of taking advantage of the Indians' imperfect knowledge of the requirements of the land laws, and possibly meagre compliance, and thus after depriving them of their homes, such white persons and others in complicity with them were aiming to secure entries upon the land for their own benefit.

Investigation was directed, and upon request of the Commissioner of Indian Affairs, E. J. Brooks, then an employe of your bureau, was detailed to make personal examination. His report, dated 27th December, 1877, was submitted by letter of your predecessor January 30, 1878, with recommendation for such action and legislation as might give relief in certain irregular and anomalous cases, specially mentioned, and to all the Indian claimants generally, by making allotment of lands instead of requiring compliance with the homestead law under the act of June 10, 1872 (17 Stat., 381).

After consultation with the Commissioner of Indian Affairs, a bill was prepared and was introduced in the 46th Congress April 21, 1879, (H. R. 352), "To confirm certain entries of land by Indians," and was referred to the committee on Indian Affairs.

In the meantime and subsequently, communications of individuals, and others numerously signed, were presented to this Department, and to members of the Michigan delegation in Congress and by them referred, denying the reliability of Special Agent Brooks' report, and denying that any injustice was being done the Indians, either collectively or individually.

The Department, awaiting probable action in some form by Congress, has not released the suspension, and no legislation has been effected. I find no reference in the proceedings of Congress to any bills reported

to effect the original recommendation, and none appear to have been introduced, save the one already referred to.

The time for offer of final proof upon the homesteads has long since elapsed, and in some instances, subsequent homestead entries, made after cancellation and prior to the order of suspension, have also remained more than the seven years of limitation upon the records.

It is now unlikely that any legislation will be had affecting these particular rights. If in any case wrong has resulted to individuals by enforcement of the existing law, Congress will, undoubtedly, as it has heretofore, upon request of the Department, afford appropriate relief. But the administration of the Department ought not to be withheld from legitimate business because of possible hardship in a few isolated cases, and it is only by action and proper adjudication that these cases can now be intelligently disposed of.

I accordingly recall the former suspension, and direct a fair examination of the pending cases upon the merits of each as it shall be reached, with such notice to all parties, including notice to the Indian agent in charge, as shall be necessary to a just and right determination of conflicting claims.

As to the original right to make entry by the Indians, it seems to have been provided by regulation that a certificate of such right should be furnished by the Indian agent, and placed on file with the register and receiver. Where such certificate was given by the proper officer, it would appear to be sufficient to support the entry in its inception.

In the matter of compliance with the homestead law, your office is made, in the first instance, the proper tribunal to pass upon the proofs after their acceptance or rejection by the district officers. It is to be borne in mind that this homestead privilege upon these lands was extended to Indians, who by the treaty of 1855 (15 Stat., 621) were entitled to make selection thereof and receive patent without further conditions. With what strictness, therefore, compliance with the general homestead law shall be insisted on is a question for grave consideration in their case. Certainly no mere technical objection should be permitted to deprive them of guaranteed treaty rights, if the same can be assured to them by any reasonable construction of existing law relating to their homestead privilege.

PRACTICE—REVIEW.

BAKER ET AL. *v.* THE HEIRS OF MCLAUGHLIN.

By electing to proceed under a decision the right to reconsideration thereof is waived.

Acting Secretary Jenks to Commissioner Sparks, September 7, 1885.

In the case of Albert W. Baker and Patrick Callahan *v.* the Heirs of Francis McLaughlin, involving Lots 3, 4, and 5, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, T. 13 N., R. 6 E., Sacramento, California, an applica-

tion was filed on behalf of said heirs in the local office September 7, 1884, for a review of the departmental decision in said case of October 25, 1883. (10 C. L. O., 256).

By reference to said decision it will be seen that the homestead entry of McLaughlin for said land was attacked by Baker on the charge of illegality, and that Callahan claimed certain settlement rights on said land. It appearing from the records of your office that said McLaughlin had exhausted his right as a homesteader, prior to making the entry for this land, the Department, under date as above, affirmed the decision of your office holding for cancellation said homestead entry, but allowed the heirs of McLaughlin to prove up for said land under the pre-emption law, as it appeared that said McLaughlin had originally claimed the land as a pre-emptor and had not lost his rights as such by transmuting his filing into the said illegal homestead entry.

Under the said decision the executor of said McLaughlin proceeded to make final proof, but the local office declined to accept payment for the land, on account of certain protests made by Baker and Callahan as against the validity of McLaughlin's claim as a pre-emptor. Whereupon, your office May 7, 1884, directed the local office to order a hearing, which was accordingly had in due form on July 7, 1884.

As grounds for this application, it is alleged by said executor that Baker's affidavit attacking the entry of McLaughlin was not filed until after the death of said entryman and that such fact was only discovered during the progress of said hearing.

The right to a reconsideration of the decision in question was waived when election was made to proceed thereunder and it is now too late to assert such right under the changed conditions of the case.

It is further to be observed that notice of said application does not appear to have been served upon the adverse parties, and this also would preclude its consideration.

The application is therefore dismissed and the case is returned to you for due examination and decision on the appeal of said executor and Callahan from the decision of the local office.

KANSAS TRUST LANDS.

WENIE ET AL. *v.* FROST.

Though under the treaty of 1865 trust lands were not subject to homestead entry, such an entry made for land that also fell within the terms of the act of December 15, 1880, opening to settlement a part of the Fort Dodge military reservation, may be commuted under section 2301 of the Revised Statutes and the money so paid placed to the credit of the Indians.

Acting Secretary Jenks to Commissioner Sparks, September 7, 1885.

I have considered the case of Frederick T. M. Wenie and Frederick W. Boyd *v.* Daniel M. Frost, involving a tract situate within the Osage

Indian trust and diminished reserve lands, to wit, Lots 9, 10, 11 and 12 in Section 25, T. 26 S., R. 25 W., and Lots 14 and 15 of Sec. 30, T. 26 S., R. 24 W., Garden City (formerly Larned) district, Kansas, on appeal by plaintiffs from your office decision of April 17, 1882, rejecting their applications to file for said lots (*inter alia*).

It appears that Frost made homestead entry No. 6595 of the lots in question October 1, 1881, agreeably to the provisions of the act of December 15, 1880. (21 Stat., 311).

Boyd applied October 25, 1881, and Wenie applied November 5, 1881, to file Osage declaratory statements for the lots in question, together with Lot 6 of Sec. 26 S., R. 25 W., and Lot 13 of Sec. 30, T. 26 S., R. 24 W., alleging settlement October 22d and November 2, 1881, respectively. Both these applications were made under the provisions of the 12th section of the act of July 15, 1870, (16 Stat., 362,) and of the act of May 28, 1880, (21 id., 143,) but the register rejected said applications (on the day of their presentation) because the tracts applied for (except the said Lots 6 and 13) were embraced in Frost's homestead entry.

Said applicants having appealed from such action, your office affirmed the same April 17, 1882. Whereupon they duly appealed to this Department upon substantially the following grounds:

1. That said decision is contrary to law, inasmuch as the said act of December 15, 1880, does not contemplate the sale or disposal of any of the Osage lands embraced within the Fort Dodge military reservation under the homestead laws.

2. That if it had been so intended, provision would have been made therein for the payment of the price of said lands to the Osage Indians, and as the act contains no provision authorizing the government to reimburse said Indians for such price, said lands are not subject to homestead entry, but are subject to said declaratory statement applications under the Indian treaty, whenever said lands are put into market "as amply provided for in the laws, rules and regulations of the United States governing the disposal of said lands to actual settlers."

3. The said treaty with the Osage Indians is as sacred and entitled to as much consideration as a treaty with an independent nation, etc., citing Pine *v.* Wood, (1 C. L. L., 703.)

4. That Frost's homestead entry, barring Lot 6, (which he had applied to include therein June 17, 1882,) is null and void, and should be canceled.

Wenie having August 9, 1882, filed affidavit of contest, alleging that the tracts in question are Osage Indian Trust lands and not subject to homestead entry, and asking that a hearing be ordered to determine these alleged facts, and Frost having filed August 18, 1882, a notice of his intention to make final proof September 20th ensuing, together with his affidavit in support of his "right to commute (his homestead entry) under Section 2301 of the Revised Statutes and the act of March

3, 1879," (20 Stat., 479,) the register forwarded the same to your office by letter of August 24, 1882, for instructions. Whereupon your office, per letter of September 6, 1882, advised the register and receiver at the Larned office, as follows: "As you have been before advised, the entry of Frost was made under the act of Dec. 15, 1880, (21 Stat., 311,) the provisions of which conflict with those of the treaty of 1865, with the Osage Indians" (14 Stat., 688); that in view of the fact that by the aforesaid letter of April 17, 1882, Frost's entry had been regarded as a valid appropriation of the land covered thereby, your office deemed it unadvisable to order a hearing upon the grounds alleged by Wenie; and that in view of the pendency of his and Boyd's applications to file before this Department, Frost's application to commute should be held in abeyance until further advice.

The Commissioner of Indian Affairs having under date of April 12, 1882, addressed a letter to this Department calling attention to the apparent conflict between the 2d article of the aforesaid treaty of 1865 and the act of December 15, 1880, my predecessor, Mr. Secretary Teller, under date of May 3, 1882, submitted to the President for his consideration, and, upon his approval, transmission to Congress, copy of said letter (and accompanying maps and papers) together with draft of a bill to amend said act in harmony with the provisions of said treaty. Whereupon, the President, May 5, 1882, accordingly transmitted said communication to Congress, commending its consideration thereof; but no action was taken thereon, barring its reference to the committee on military affairs and the printing of the same.

Without discussing the *minutiæ* of the several points of exception specifically raised upon appeal touching the alleged incompetency of 'rost's entry, or attempting to reconcile the alleged conflict between e said act and treaty, it will suffice to state generally that the entry appears to have been made conformably to the express provisions of the said act of December 15, 1880, (21 Stat., 311.) It provides, to wit:

"Whereas, that portion of the Fort Dodge military reservation hereinafter described is no longer needed for military purposes: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of the Secretary of the Interior to cause all that portion of the Fort Dodge military reservation, in the State of Kansas, being and lying north of land owned and occupied by the Atchison, Topeka and Santa Fe Railroad Company for right of way for its railroad, to be surveyed, sectionized, and subdivided as other public lands, and after said survey to offer said land to actual settlers only, under and in accordance with the homestead laws of the United States: *Provided*, That the said Atchison, Topeka and Santa Fe Railroad Company shall have the right to purchase such portion of said reservation as it may need for its use adjoining that now owned by it, not exceeding one hundred and sixty acres, by paying therefor the price at which the same may be appraised under the direction of the Secretary of the Interior."

Now these lots in question, having been "surveyed, sectionized, and subdivided as other public lands," and being situate "north of land

owned and occupied by the Atchison, Topeka and Santa Fe Railroad Company," etc., as described in said act, and Frost appearing to be an actual, *bona fide* settler upon the said lots, and having offered to make proof and payment therefor in the manner prescribed by law, I am of opinion that he should be permitted so to do "under and in accordance with the homestead laws of the United States," as required by the said act of December 15, 1880.

Accordingly, upon his submission of satisfactory proof showing compliance with legal requirements, he will be required to pay through the proper local land-office the sum of one hundred and ten dollars and eighty-one cents, (being at the rate of $1.25 per acre for said lots, aggregating 88.65 acres, as delineated upon the plat approved June 22, 1881,) which sum shall be credited on the books of the Treasury to the account of the Osage Nation of Indians, agreeably to the aforesaid treaty of 1865.

Barring the foregoing modification, your office decision of April 17, 1882, is affirmed.

RAILROAD GRANT—RELINQUISHMENT.

FLORIDA RY. & NAVIGATION CO.

In view of the company's relinquishment in favor of certain settlement rights, hearings will be ordered in case of applications to enter land selected by the company, to ascertain whether the applicant is entitled to the benefit of said relinquishment.

Entries and filings may be allowed for unselected lands upon *prima facie* showin that the applicant is within the terms of said relinquishment.

Due notice of the allowance of such entries and filings will be given the company, and opportunity allowed the same to contest the settler's claim.

Secretary Lamar to Commissioner Sparks, September 12, 1885.

I have examined the appeal of the Florida Railway and Navigation Company from the instructions of your office dated January 17, 1885, to the register and receiver of the Gainesville district, Florida.

The record shows that on March 29, 1884, your office instructed the district land officers that, inasmuch as the Atlantic, Gulf and West India Transit Company, now known as the Florida Railway and Navigation Company, "under date of June 25, 1881, executed a formal relinquishment of its claim to all lands theretofore withdrawn for its benefit, upon which *bona fide* settlers had made improvements prior to March 26, 1881, . . . you will allow entries upon lands within the limits of said road, both granted and indemnity, where the allegations of the parties applying to make the same show to your satisfaction that they are covered by the terms of the relinquishment above mentioned." On July 21, 1884, your office again instructed the district land officers, in response to their request, that where the company had made selections of lands within the granted limits of its grant by act of Con-

gress approved May 17, 1856, (11 Stat., 15,) and the lists submitted appear to be regular in all respects, and parties apply to enter lands included in said lists, alleging settlement and improvement prior to March 26, 1881, hearings should be ordered to ascertain the facts concerning said alleged settlement and improvement. On November 15, 1884, the attorney for said company requested, in writing, the register and receiver to apply to your office for instructions directing them to order hearings in all cases where applications are made to make entries or file declaratory statements for tracts in the odd-numbered sections within the limits of the withdrawal for the benefit of said company. On January 17, 1885, your office, in reply to the request of the company duly forwarded, re-affirmed the former instructions, and directed the register and receiver to allow entries and filings where the applicants made a *prima facie* showing that the lands applied for are covered by the terms of the relinquishment of said company, and the same have not been selected by the company prior to the application to enter; and that where applications were made for lands embraced in the lists of selections of said company, which lists were in all respects regular, a hearing should be ordered to determine whether the applicant had made settlement and improvement in good faith prior to the date when the withdrawal for the benefit of said company became effective. Your office expressed some doubt as to the correctness of its ruling, and allowed the company to appeal to this Department. The grounds of error alleged are:

1. In holding that the relinquishment of the company was a waiver of its rights wherever settlers had made improvements prior to March 26, 1881.
2. In holding that said relinquishment expressly vested in the General Land Office the right to determine in every case, and by whatsoever method it might select, whether the applicant was entitled to equitable relief.
3. In deciding that the General Land Office has the right to determine whether the applicant is a *bona fide* settler and entitled to equitable relief, without question by the company as to the mode of procedure by which the determination is made.

It is hardly necessary to narrate all the details connected with the making of said relinquishment. A full recital of the same may be found in the decision of this Department of January 30, 1884, (2 L. D., 561). The relinquishment or waiver of the company's claim expressly covered the lands on each side of its road which "may be found by the General Land Department at Washington to be occupied by settlers who may be entitled to equitable relief up to December 13, 1875, saving and reserving to this company any and all rights of indemnity vested in the company under existing laws." On June 25, 1881, the company, in response to a request from your office, under instructions from this Department, extended "the relinquishment or waiver heretofore made

to all actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881." It was decided by this Department, in the case of the Peninsular Railroad Company *v.* Carlton and Steele, (2 L. D., 531,) that "these relinquishments, made under a full knowledge of the law and the facts, are absolute and unconditional." By the express terms of the waiver, the duty devolved upon your office to determine to whom it should apply. Said decision of your office does not deprive the company of any right. It simply allows the filing or entry to be made of record when the applicant presents with his application proof showing *prima facie* that he is entitled to the relief provided for in said relinquishment or waiver. If the company desires to contest the entries after they have been admitted to record it should be allowed to do so under the rules of practice.

Unquestionably it will be better for the settler and for the company to have their relative rights determined as speedily as possible; and to that end you are directed to instruct the register and receiver, at the end of each month or at their earliest convenience thereafter, to notify the attorney or agent of said company of the entries and filings that are within the terms of said waiver, in order that the company may take steps to contest the same should it desire to do so. A certain time should be allowed the company after the receipt of notice, say thirty days, within which it may commence proceedings against said entries.

With the above modification, your office decision is confirmed.

RIGHT OF WAY TO RAILROADS.

CIRCULAR.

Acting Commissioner Walker to registers and receivers, and special agents, August 29, 1885.

In determining the right of railroad companies having a right of way through public lands under the general right-of-way act (18 Stat., 482), or under special acts making grants of public land to aid in the construction of railroads "to take from the public lands adjacent to the line of said road," material of earth, stone, and timber necessary for the construction thereof, you will be governed by the following instructions in lieu of all former regulations, which are hereby revoked:

1. Such provisions refer exclusively to roads in the *process of construction.* No public timber or material is permitted to be taken or used for the *repair or improvement* of a road after its original completion. The right to take such timber or material ceases when the road is open to the public for general use.

2. Timber or material may be taken from the public lands only for the construction of the *road*, including roadway, bridges, culverts,

trestles and the like, but cannot be taken for the erection of stations, freight houses, fences, sheds, or other buildings or structures.

3. No public timber is permitted to be taken or used for fuel by any railroad company.

4. No railroad company is entitled to procure, or cut, or remove, or cause to be procured, cut, or removed, either by itself or through its agents or other persons, in any manner, any timber or other material from the public lands for *sale or disposal* either to *other companies* or to the *public*, or for *exportation*.

5. The right of railroad companies to take timber and other material from the public lands is restricted by law to lands "adjacent to the line of the road." This will be construed as meaning that the companies have permission to take timber and other material along the line of the road in progress of construction, and in the immediate vicinity thereof or in near proximity thereto. It will not be deemed a license to go to distant points and obtain timber to the deprivation of settlement, mining, and other rights and interests in such localities, and the impairment of the general welfare of the country over extended areas. The privilege must be exercised where the law places its exercise, viz., "adjacent to the line of the road."

6. The right to take timber and other material from the public lands for the construction of railroads is granted to railroad companies organized as provided by laws entitling them to such privilege, and to no other parties.

7. No person is authorized to cut or take timber from the public lands for the purpose of *selling* the same to railroad companies.

8. Only those persons who are the direct or duly authorized agents of a proper railroad company are permitted to obtain timber or other material for the use of such company in the construction of its road.

9. Unauthorized persons cutting or taking timber from the public lands, although for sale to a railroad company, will be deemed trespassers, and they, as well as the company receiving or purchasing the same, will be proceeded against accordingly.

10. No growing trees less than eight inches in diameter will be permitted to be cut. No tree can be cut that is not required for use for construction purposes, and all of each tree cut that can be used for construction purposes must be utilized.

11. The tops and lops of all trees must be cut and piled, and the brush removed or disposed of in such a manner as to prevent the spread of forest fires.

12. Each company, before causing the cutting or removal of timber or other material from the public lands, must file with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, also a map of its definite line of location; and, if it desires to authorize an agent or agents to cut or remove timber from the public land, such agent or agents must be properly appointed

in writing; said appointment must specifically describe the land to be cut upon, and prescribe the prohibitions and regulations contained in paragraphs 10 and 11 of this circular. Copies of all such appointments must be filed in this office in order that such persons may be regarded as agents of the company.

13. Every company, its officers, agents, contractors, and employés, will be held responsible for any unlawful taking of timber or other material and for all waste and damage.

14. Under the act of June 3, 1878, the right to cut timber from public mineral lands is reserved to the *bona fide* residents of the State or Territory in which the same are situated, and railroad companies are prohibited from cutting, or causing to be cut, any timber from such land. Persons violating this act are liable to the penalties provided by the third section thereof.

They are also prohibited from cutting timber from any land within the limits of any military park or Indian reservation, or other lands especially reserved from sale.

15. The right of any railroad company to cut timber for construction purposes, under the act of March 3, 1875, ceases at the expiration of five years after its definite location, upon any portion of said road which is not then completed.

Approved:

G. A. JENKS,

Acting Secretary.

PRIVATE ENTRY—LAND REDUCED IN PRICE.

PECARD *v.* CAMENS, AND OTHER CASES.

Where land had been once offered, then increased in price and again offered, and while in that condition declared by Congress to be subject to sale at the first price, and private entries were allowed therefor without further offering, such entries are not void, but voidable, for the want of a restoration notice, and may be confirmed by the Board of Equitable Adjudication. The case of Eldred *v.* Sexton cited and distinguished.

As section 2271 of the Revised Statutes denies the right of pre-emption on a tract theretofore disposed of, when such disposal has not been confirmed by the Land Office on account of any alleged defect therein, the parties claiming as pre-emptors herein have no standing as rightful claimants.

Secretary Lamar to Commissioner Sparks, September 17, 1885.

To the honorable the Secretary of the Interior:

In compliance with your request I have the honor to submit my views upon the appeal of Pecard, Wakefield and Spies from the decisions of the Commissioner of the General Land Office in the cases of Joseph Pecard *v.* Frank Camens, Geo. M. Wakefield *v.* Evariste Lanzon, and Augustus Spies *v.* Hermann Mohring.

September 22, 1879, Joseph Pecard located Supreme Court scrip R. 843 upon the NE¼ of the SW¼ and the W½ of the NW¼ of Sec. 2, T. 42 N., R. 35 W., Marquette district, Michigan, certificate of location R. and R. No. 686.

May 26, 1883, Frank Camens applied to file declaratory statement for the W½ of the NW¼, alleging settlement May 1, 1883, which application was rejected by the register and receiver, and on appeal the Commissioner, October 15, 1884, held the location of Pecard void *ab initio*, and no bar to the allowance of the pre-emption claim.

March 23, 1880, Geo. M. Wakefield located at the same office military warrant No. 113,286, 160 acres, act of 1855, upon the SE¼ of Sec. 28, T. 43 N., R. 34 W., R. and R. No. 5893, and warrant No. 59,410, 160 acres, same act, upon Lots 1, 2, 3, and 4, and the SW¼ of the NW¼ of the same section, R. and R. No. 5896.

February 28, 1883, Evariste Lanzon applied to file, alleging settlement January 10, 1883, for the E½ of the E½ of said section, which application was denied by the register and receiver, but admitted by decision of the Commissioner October 22, 1883, holding the location of Wakefield for cancellation as void.

April 10, 1880, Augustus Spies purchased at private sale, certificate No. 10,635, the W½ of the NW¼ and the NW¼ of the SW¼ of Sec. 3, the E½ of the E½ of Sec. 4, the NE¼ of the NE¼ of Sec. 9, and the N½ of the NE¼ and the NE¼ of the SW¼ of Sec. 10, T. 42 N., R. 35 W., aggregating 440 acres, embracing lands in both odd and even numbered sections.

May 26, 1883, Hermann Mohring applied to file for the E½ of the E½ of Sec. 4, alleging settlement May 11, 1883, which application was refused by the register and receiver, but allowed by decision of the Commissioner of 22d October, 1884, holding void and subject to cancellation the private entry of Spies.

These are test cases, involving the legal status of a large number of private entries and locations, upon the even sections within the common limits of what are known as the Marquette and State line, and the Ontonagon and State line branches of the Marquette and Ontonagon Railroad, for which a grant of lands was made by act of June 3, 1856, (11 Stat., 21,) as affected by the joint resolution of July 5, 1862 (12 Stat., 620).

To these even sections the present consideration will be strictly confined, leaving for future determination any question arising upon the disposition of the odd sections.

The 4th section of said joint resolution provides:

"That the even sections of public lands, reserved to the United States by the aforesaid act of June 3, 1856, along the originally located route of the Marquette and Wisconsin State Line Railroad Company, except where such sections shall fall within six miles of the new line of road so as aforesaid proposed to be located, and along which no rail-

road has been constructed, shall hereafter be subject to sale at one dollar and twenty-five cents per acre."

Originally, in 1853, prior to the act of 1856, the lands had been offered at public sale subject to the ordinary minimum price of $1.25 per acre, and by said act were required to be offered at public sale at the increased price of not less than $2.50 per acre before they could become subject to private entry. This re-offering had been made in 1859. After the passage of the joint resolution of 1862, the lands were treated as reduced in price by the law, and have not been since offered; and the entries in question were permitted by the district officers without having been instructed by the Commissioner to restore the lands by published notice to private entry at $1.25.

Upon the authority of the decision of the Supreme Court in Eldred *v.* Sexton (19 Wall., 189), the Commissioner held the entries void, and consequently no bar to the allowance of the pre-emption claims of Camens, Lanzon, and Mohring.

From these facts it appears that Joseph Pecard, Geo. M. Wakefield, and Augustus Spies by several private entries and locations at the proper land office contracted for certain even sections of land with the government, at the price fixed by law for these several tracts of land, and, according to the terms of the contract paid to the government the full consideration stipulated for therein. The Commissioner, by his action has annulled the contracts without their consent. To justify one party to a contract without the consent of the other to repudiate and annul it, some substantial reason must exist. That reason, as assigned by the Commissioner, is that under the ruling in the case of Eldred *v.* Sexton, (19 Wall., 189,) the cash entries were void, and, therefore, the appellees might lawfully enter upon and pre-empt the land.

There are material features which distinguish the case of Eldred *v.* Sexton from these cases and render it inapplicable.

1st. The cash entry made by Eldred, on which he founded his claim of title, had been canceled by the Commissioner of the General Land Office, and, on appeal to the Secretary of the Interior, that judgment of the Commissioner had been affirmed and that adjudication had stood unchallenged till he brought his suit.

When Eldred went into court then he had no title whatever on which to recover, unless the court should declare the action of the officers of the Land Office was without authority of law and void. The court declined to so determine, but held, on the contrary, that the action of the officers was in accordance with law, and, to justify their action, declared that one of the fundamental principles underlying the land system had been violated in permitting the cash entry before the land had been exposed to public auction at the price for which it was sold. The action of the Land Office within the scope of its powers is entitled to and receives in the courts great consideration. As Eldred's cash entry had been fully considered by the Department and canceled, it was only

necessary for the court to inquire whether there was sufficient warrant for the departmental action; and, finding in the facts such warrant, the departmental action was sustained. Had the departmental action been in favor of Eldred and a patent issued to him, quite a different question would have been presented to the court. The question, so far as the fact is concerned, would have been more nearly analogous to the question now pending; for in these cases, so far as the records show, the appellants have actually bought and paid for the lands, and their entries remain of record and uncanceled.

Another material feature of difference between these cases and that discussed in Eldred *v.* Sexton is,—

The lands now in dispute had once been offered at public auction, at the minimum price, being the price at which they were actually purchased, while in that case they had not been so offered. In Eldred *v.* Sexton the ruling is principally based upon the ground that the lands had never been publicly offered, and this is founded upon the act of 1820, which is largely the origin of the present land system. By that act an offering at public auction is made a condition precedent to the right of private entry.

Until this condition has been performed, the power of the officers of the Land Office to sell at private entry does not attach, and their action, if not cured by other provisions of the law, would be void. But, after the condition has been performed, as in this case, the power does attach, and having once been rightfully vested in the officers, unless Congress saw fit to fix some further condition by which the power would be divested, the power would continue.

No further condition is found in the statute, but it is claimed by appellees that as there was a temporary withdrawal and an increase in the price, and then a reduction to the usual minimum, a public offering should be implied as a condition which would defeat the power of the officers of the Land office, which had vested after the first public offering. If this suggestion were made and sustained, it would be a very proper one for the action of the legislative branch of the government. But a ministerial officer cannot properly add to nor subtract from the provisions of a statute in such a way as to increase his power beyond the statutory grant, or to abdicate a power conferred upon him by law.

A temporary withdrawal for any purpose (without there be express statutory command) in the administration of the land office has never been construed to require a re-offering at public auction. From the eastern line of Ohio to the Pacific Ocean land titles would be shaken if it were *now* decided that the officers of the Land Office, after a temporary withdrawal, had no power to sell lands until they had been again publicly re-offered. The uniform construction of the Department as to this is decisive. Edwards' Lessee *v.* Darby (12 Wheaton, 210); U. S. *v.* Graham (110 U. S., 221); Brown's Administratrix *v.* U. S. (113 *id.*, 568). By

the same Departmental usage change of price has never been recognized as a ground for requiring a re-offering.

Under the graduation act of 1854, although a regular succession of changes in, and reduction of price is provided for, yet no public re-offer ing is required. In the administration of the statute no second re-offer ing was ever made.

But while the departmental practice of selling public lands at private cash entry after a temporary withdrawal without a re-offering at public auction is not denied, counsel for the appellees maintain that an equivalent in practice has been observed in that it has been the custom of the Department, after each temporary withdrawal, to give a restoration notice. But a restoration notice is entirely different in its origin and purpose from a public auction.

The public auction has its origin in the act of Congress of 1820 (3 Stat., 566,) as a condition precedent to the exercise of the power to sell at private entry. Its purpose is to enhance the price above the minimum by the inspiration of competitive bidding. Johnson *v.* Towsley (13 Wall., 88).

The restoration notice had its origin in a departmental regulation made on the first day of January, 1836, which was only a rule for the guidance of the officers of the Land Office in the discharge of their ministerial duties. Its purpose was, after lands had been out of market in consequence of a withdrawal, to notify the public that the lands were again for sale at the minimum price, as they stood before the withdrawal. No competitive bidding was by it invited, nor any public auction announced. Hence, the restoration notice neither was, nor was intended to be the equivalent of the public auction provide by the statute.

A third distinguishing feature between these cases and the case of Eldred *v.* Sexton is found in the fact heretofore stated that the cash entry by Eldred had been canceled by the Department, while these cases are yet pending, and the counsel for the appellants have invoked the relief afforded by the board of equitable adjudication.

This board was organized by the act of 1846, (9 Stat., 51,) continued by the acts of 1848 and 1853, permanently established by the act of 1856, (11 Stat., 22,) and its provisions substantially incorporated into the Revised Statutes as sections 2450 to 2457 inclusive.

The necessity for this law was occasioned by the fact that through inadvertence or ignorance it was found that many instances occurred in which, without any fault of the purchaser, in the administration of the land laws, some essential step demanded by law or departmental regulation had not been observed, and Congress was frequently called upon by special acts to supply the broken thread in the title. To this board was committed the supplying of these broken threads, whenever the purchaser on his part had conformed to law and the neglect or breach had been on the part of the officers of the government.

In pursuance of the power vested in them by the act of 1846, the

members of the Board of Equitable Adjudication promulgated on the third of October, 1846, a system of rules for the administration of equity under the act, and provided for certain cases which should constitute the "first class," among which the 11th rule includes "All private sales of tracts which have not been previously offered at public sale, but where the entry appears to have been permitted by the land officers under the impression that the land was liable to private entry, and there is no reason to presume fraud or to believe that the purchase was made otherwise than in good faith."

The 13th rule provides for—"All *bona fide* entries on land which had been once offered but afterward temporarily withdrawn from market and then released from reservation, where such lands are not rightfully claimed by others."

Section 2457 of the Revised Statutes provides that patents shall issue to claimants for lands embraced in the "first class."

Rule 13 expressly includes these lands unless there were rightful claimants. Section 2271 of the Revised Statutes expressly denies the right of pre-emption "on a tract theretofore disposed of, when such disposal has not been confirmed by the Land Office, on account of any alleged defect therein."

These appellees found the lands in dispute "disposed of," but "on account of an alleged defect therein" attempted to pre-empt them. This being expressly forbidden by the statute, they *are not* "rightful claimants." The energetic language of the Court, used in the case of Niswanger *v.* Saunders (1 Wall., 438,)—"You cannot be heard to adduce proof, because you are met by the statute and not allowed to obtrude upon the existing survey by a second location; you can obtain no interest in the land to give you a standing in court," would seem to apply.

Hence, it is concluded the case of Eldred *v.* Sextion is inapplicable to the cases now under consideration.

The cash entries are not void, but voidable for want of a restoration notice.

The rules of the Board of Equitable Adjudication include them in their provisions.

By these rules, in the absence of fraud, being of the "first class," the statute declares them patentable.

These views only apply to so much of the lands as are included in the even sections and are distinctly so limited. As to the portion of the lands of Augustus Spies which were found in the odd sections, entirely different questions will arise; but as by consent of counsel only the even sections were considered in the argument, so much as may be found in *odd* sections is left for future consideration.

I am, sir, very respectfully,

G. A. JENKS,
Assistant Secretary.

Upon consideration of the foregoing cases, the errors assigned are deemed sufficient, and the decisions of the Commissioner of the General Land Office are reversed. The papers submitted by office letter of 7th February, 1885, are returned, with directions that in case appellants by their counsel file within sixty days written application for submission of the entries to the Board of Equitable Adjudication, the same be duly certified for the action of that tribunal. In the case of Spies, however, the entry in its present form, embracing both odd and even sections, cannot be considered, and the same will remain suspended until the status of the odd sections shall have been determined.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

HOMESTEAD ENTRY—GOOD FAITH.

JOHNSON *v.* JOHNSON.

The wrongful act of an entryman, whereby the settlement rights of another claimant for the same tract, were not protected by filing or entry, will not be allowed to inure to the benefit of such entryman.

Acting Secretary Muldrow to Commissioner Sparks, September 19, 1885.

I have considered the case of John E. Johnson *v.* Carl M. Johnson, involving the respective rights of both parties to the W. ½ of the NW¼ of Sec. 20, T. 6 N., R. 16 W., Bloomington land district, Nebraska, on appeal by the latter from your office decision of August 6, 1884.

On February 7, 1878, Carl M. Johnson filed his pre-emption declaratory statement No. 3885 for the NW¼ of Sec. 20, T. 6 N., R. 16 W., which pre-emption declaratory statement expired without his making final proof and payment, as required by the pre-emption laws. It appears from the evidence that some time in the latter part of January, 1879, Carl M. Johnson for a valuable consideration sold to his brother, John E., the possessory or pre-emption right to the W. ½ of the aforesaid quarter, (the same being the land now in dispute,) with the understanding that when his pre-emption filing expired, they would each enter eighty acres of the quarter (the land being double minimum in price and only eighty acres being subject to entry by any one individual under the homestead law).

Acting under this alleged contract, the validity of which will not be discussed here, John E. Johnson went upon the W. ½ of the quarter, built a comfortable house and stable, put in a well, made other improvements thereon and has continued to reside there and cultivate the tract ever since. His improvements are valued at about $300. During the years 1879, 1880, and 1881, the brothers were farming the entire quarter in partnership, the cultivated parts of each half quarter being about equal, and they divided their crops equally. During the greater part of the years 1879 and 1880 Carl M., who was a single man, maintained his

residence at the home of another brother of his on another quarter of this same section. Some time in the early part of the year 1881 he built a house on the E. ½ of the quarter, and, getting married in June of that year, moved into that house and has continued to reside there ever since.

In the meantime, the act of March 3, 1879, which allowed a party to homestead one hundred and sixty acres of double minimum land was passed. (20 Stat., 472.)

Carl M. Johnson now saw an opportunity to enter the entire quarter. On September 27, 1881, he made homestead entry No. 9334 for the entire quarter, and on March 20, 1883, after due notice, attempted to make his final proof for the same before the county judge of Kearney county, at Minden, Nebraska. This final proof was rejected, as will appear hereafter.

It is shown that John E. Johnson was not aware that his brother had made homestead entry aforesaid, until about three weeks after the date of making the same. Thereupon on February 17, 1882, he attempted to file an application in the local office for a hearing in equity to determine his rights to file for the W. ½ of said quarter. This application was reserved to await official proof of the genuineness of the certificate of the notary public before whom it was verified, and was not filed until August 21, 1882.

The local office submitted the same to your office for instructions relative thereto. On September 27, 1882, your office transmitted a reply to the local office declining to order a hearing in the premises. Your office subsequently reconsidered its former ruling of September 27, 1882, and by letter "C" of March 5, 1883, ordered a hearing to determine the respective rights of the parties herein to the land in controversy. Pursuant to said letter of March 5, 1883, a hearing was duly called for June 12, 1883.

Upon the testimony adduced at the hearing, the local office decided that the pre-emption declaratory statement No. 3885 of Carl M. Johnson "was fraudulent and should be canceled;" that "John E. Johnson never made or attempted to make an entry or filing of any kind for the W. ½ of the NW. ¼;" and that homestead entry No. 9334 for the entire quarter aforesaid, was valid and should remain intact. Upon appeal to your office this decision was modified so as to allow John E. Johnson the right to enter the W. ½ of the quarter, and the homestead entry No. 9334 of Carl M. Johnson, as to W. ½ of the said quarter, was held for cancellation. In support of your office decision are cited the departmental decisions of Dickson *v.* Schlater (11 C. L. O. 23), and Van *v.* Rhodes (*id.*, 53).

Upon a careful examination of this case, I am of opinion that your office decision should be affirmed. Carl M. Johnson has not carried out in good faith his agreement with John E. and has actually practised a fraud upon him. While this Department cannot take cognizance of a

fraud affecting the title to public lands for which patent has issued, nevertheless, under no circumstances will it permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right.

In view of all the circumstances of this case, the right of John E. Johnson to the W. ½ of the said quarter is such a right as Carl M. Johnson is bound to recognize, and the fact that he is seeking to acquire title to this W. ½ of the quarter knowing that he has no right thereto is evidence of his bad faith in the premises, and is a very material element in the determination of this case.

In the matter of residence of Carl M. Johnson upon the east half of the said quarter, I concur with your finding, and also that of the local office, in that it was insufficient, and his application to make final proof was therefore properly rejected.

Your office decision is affirmed; the final proof of Carl M. Johnson as to the E. ½ of the said quarter will be rejected, his homestead entry No. 9334 for the W. ½ of said quarter will be canceled, and for the E. ½ of the quarter will be allowed to remain intact; and John E. Johnson will be allowed to enter the W. ½ of the said quarter.

MINING CLAIM—LOCATION—IMPROVEMENTS.

SPUR LODE.

Though the alleged discovery and improvements appeared to be upon ground excluded from the claim, the applicants, on the showing made, are allowed to furnish supplemental proof.

Acting Secretary Muldrow to Commissioner Sparks, September 24, 1885.

I have considered the appeal of William G. Pell and J. Fenton Seymour from the decision of your office dated November 12, 1884, refusing to re-instate mineral entry No. 2322, survey No. 335, Central City land district, Colorado.

The record shows that on August 30, 1877, said Seymour and Pell filed in the district land office their application for patent for twelve hundred feet of the Spur Lode, Gold Hill mining district, Boulder county, Colorado. On November 6, same year, an adverse claim was filed and suit commenced against said application by the Corning Tunnel Mining and Reduction Company. On May 29, 1883, the suit was dismissed by agreement of counsel, and on June 7, same year, said entry was made as applied for by said applicants.

On May 12, 1884, your office examined the papers relative to said entry, and found that the location of said claim was based on an alleged discovery, in ground excluded from the application and entry and embraced by the Slide Lode Claim, a prior location, survey No. 224; that the Slide location was made July 30, application for patent based thereon was made November 7, 1875, and entry allowed and patent issued

on March 30, 1880; that it was not shown nor alleged that any mineral had been discovered within the claimed ground and that it appeared that the improvements certified to by the surveyor general were placed upon ground patented to the Slide Lode claim, and therefore said entry was held for cancellation. Said decision was received at the district land office on May 16, 1884, and a copy mailed to the parties in interest the same day.

On July 10, 1884, counsel for said parties entered his appearance and requested that no further action should be taken in the case until he submitted additional evidence.

On July 21, said counsel was advised of said decision, holding said entry for cancellation and on August 15, 1884, said decision was made final and the entry canceled.

On September 22, 1884, said counsel filed in your office the sworn statement of three witnesses, alleging that they were acquainted with said mine and with the improvements that have been placed thereon for the development of the same; that the Spur mine is shown by actual development to be a cross vein to the Slide mine (with which its survey conflicts) and to be a separate and distinct vein or lode from the Slide mine; that mineral has been discovered in the Spur mine, outside of the conflict with the said Slide mine; that more than five hundred dollars worth of labor and improvements have been placed upon said Spur mine, which improvements consist of developments made from the surface of the Spur mine outside of the conflict with the survey of the Slide mine, and along the course of the said Spur mine; and that the existence of the Spur mine and its continuation within the claimed ground was determined prior to the application for patent for the Spur mine, and that the amount expended for the purpose of developing the Spur lode therein was five hundred dollars. With said statement was filed an application for re-instatement of said entry, which was refused by your office on November 12, 1884, for the reason that said affidavit did not show "that a vein or lode has been found in the claimed ground, nor how or where the alleged discovery of mineral was made. . . . The allegations made being very general in character and in the nature of opinions or conclusions, unsupported by specific facts, and the allegation that five hundred dollars in labor and improvements have been placed on the claim," was not confirmed by a proper certificate from the surveyor general.

It is clear that, upon the proof presented in the first instance, the applicants were not entitled to a patent. While it appears from the certificate of the surveyor general that the requisite amount of labor and improvements has been placed upon said claim, yet said certificate also states that said improvements consist of a shaft and adit, both of which are shown by the survey to be wholly within the limits of the prior location and survey of the Slide mine. The applicants acquired no rights by virtue of the labor and improvements, as shown by their

survey. Belk *v.* Meagher (104 U. S., 279); Gwillm *v.* Donnellan (115 *id.*, 45).

But counsel insists that your office erred in not rendering a decision upon his request to stay proceedings until he should furnish additional proof. It is sufficient to state that the request was within the discretion of your office, and, hence, its refusal not a matter of appeal under the rules of practice (see Rule 81, approved August 13, 1885). I concur with the view expressed by your office that the affidavit subsequently filed is not sufficiently definite and is not in harmony with the statement in the certificate of the surveyor general, in regard to the improvements made upon said claim.

In view, however, of the allegations in said affidavit, and of the absence of any evidence showing bad faith on the part of the applicants, it would seem to be proper that the entrymen should be allowed an opportunity to furnish supplemental proof, including an additional certificate of the surveyor general, showing full compliance with the requirements of the mining laws. You will therefore direct the register and receiver to notify the applicants to furnish such proof within sixty days, and, upon receipt of the same, you will pass upon the whole proof, allowing the applicants the right of appeal.

Said decision of your office is accordingly modified.

TIMBER CULTURE—CULTIVATION—REPLANTING.

DOUGLAS *v.* JENSON.

Such method of cultivation should be adopted in each locality as will best protect and secure the growth of the trees.

Although it appeared at the hearing in 1883 that the entryman had not replanted two acres that were destroyed by fire in 1881, it being shown that he had more than the requisite number of trees on the tract of his own planting to re-set the burnt tract, and that the replanting was only postponed for the ultimate good of the trees, the entry was not disturbed.

Acting Commissioner Harrison to register and receiver, Crookston, Minnesota, July 30, 1884.

By letter of February 11, 1884, you transmitted the record of contest in the case of Wallace B. Douglas *v.* Anton Jenson, involving timber-culture entry No. 327, made April 2, 1878, upon the SW. $\frac{1}{4}$ of Sec. 22, T. 141, R., 47.

Affidavit of contest was filed September 20, 1883, alleging failure to comply with the law as to planting and cultivation. . . . . The testimony introduced in this case preponderates to show that in June, 1878, claimant broke ten acres. In 1879 he cultivated and put into wheat the ten acres broken in 1878, and again plowed the land in the fall. In 1880 he cultivated the same, dragged said ten acres nine times,

rolled it, and planted box elder and ash seeds, after marking the land four feet apart each way, planting from four to eight seeds in each place. In 1881 he cultivated the trees and hoed them all. In April of this year there was a prairie fire which killed the trees on the margin of the tract. The area thus destroyed was about two acres. He thereupon broke a piece of land around the tree tract, two acres being land on which the trees had been destroyed, and eight acres being new breaking. In 1882 defendant hoed the trees, counted the same, and found that he had enough (8600 and more) to re-set the two acres destroyed and broken in 1881, but it was thought advisable to wait for the ground to grow "tender," and to permit the young trees to grow larger before transplanting. In 1883 he cultivated the trees. He had not removed the trees, because they were not large enough. It is testified that the trees were cultivated every year since planting, that he hoed around them, but directed his men to let the weeds and grass stand between the rows to hold the snow in winter as a protection to the trees, which otherwise would be killed by frost. At the time of hearing he had eight acres in good growing healthy trees, and a sufficient number to replant the two acres destroyed. The land in Mr. Jenson's entry is shown to be subject to overflow in certain places, and that it rapidly produces grass and weeds after the water subsides.

December 18, 1883, you found from the evidence adduced that "the claimant prior to the spring of the year 1881, planted about ten acres of this land to tree seeds; that during the month of April, 1881, a portion of the trees so planted were destroyed by fire; that during the season of 1881 he plowed up two acres of the trees thus destroyed, and that up to the date of the hearing he has not re-planted the tract. Claimant himself admits that there is only eight acres of this tract planted to trees, and that from April, 1881, up to the present time he has been waiting for the ground to get 'tender,' and the trees large enough to transplant before replacing the deficiency; wherefore we are clearly of the opinion that he is in default, and that therefore timber culture entry No. 327 should be declared canceled."

From this decision the defendant appeals.

It would seem from the foregoing that the method of cultivation adopted by Mr. Jenson was followed in the case of Reynolds *v.* Sampson, Crookston, Minnesota district (2 L. D. 305), concerning which the Hon. Acting Secretary of the Interior held that "it is shown that the hoeing around the trees, and the failure to remove the grass and weeds between them, was done advisedly, and that it was the proper method of cultivation in a region where the cold winters are apt to kill the young trees unless protected by the snow caught and held by the surrounding grass and weeds. . . . The intention of the act is expressed in its title: it is to encourage the growth of timber on the western prairies; and this intention should be kept in view in determining whether or not a claimant has failed to comply with the require-

ments of the act. This is undoubtedly the true rule. It may be best to cultivate to crop or to plow up surrounding weeds and grass in some localities; but as it is shown that this is not the best method in the region where the land in contest lies, that it should be cultivated otherwise than to crop, and that defendant employed the best method to protect the young trees and secure their growth, it is clear that he is within both the letter and the spirit of the law."

Concerning the failure to replant the two acres destroyed by fire, it is shown that he had more than the requisite number of trees on the tract, of his own planting and cultivating, and that after such destruction the mere matter of properly distributing them resulted, and it would seem that he in good faith only postponed this for the ultimate good of the trees. He should not be held responsible for the results of the incendiarism nor the destruction caused by the floods. See Curtis *v.* Griffes, (1 L. D. 175).

In view of the foregoing, I am of the opinion that the claimant should be permitted to complete his entry, as the facts presented do not warrant this office in holding said timber-culture entry No. 327 for cancellation, and therefore dismiss the contest subject to appeal. . . . .

NOTE.—The foregoing decision was affirmed by Acting Secretary Muldrow, September 26, 1885.

TIMBER ENTRY—ACT OF JUNE 3, 1878.

WOOLWAY *v.* DAY.

Under this act the claimant must show by a fair preponderance of testimony, that the land sought to be entered is valuable chiefly for timber, and is unfit for cultivation.

Acting Secretary Muldrow to Commissioner Sparks, September 26, 1885.

I have considered the case of Christopher J. Woolway *v.* Eugenie E. Day, involving Lots 3 and 4, Sec. 3, T. 17 N., R. 16 W., and the S. ½ of the SW. ¼ of Sec. 34, T. 18 N., R. 16 W., M. D. M., San Francisco, Cal., on appeal by Miss Day from your office decision of April 5, 1884, rejecting her application to purchase said tracts under the timber law, "on account of the adverse claim of Woolway."

The plat of T. 17 N., R. 16 W., was filed June 27, 1878, and that of T. 18 N., R. 16 W., filed October 1, 1868.

Your decision above referred to treats as immaterial the chief element in the case, viz: The character of the land. Under the act of June 3, 1878, (20 Stat., 89,) the claimant must show by a fair preponderance of testimony, that the land sought to be entered is "valuable chiefly for timber, and is unfit for cultivation." This she has failed to do. She herself testifies that she never saw the land at all. This fact of itself, does not determine anything; but it raises a strong presumption against

her. Her two witnesses testify that the land is unfit for cultivation and can be used only for its timber. One of these witnesses is a bookkeeper, and does not claim to be any judge of the quality of land. On the other hand the testimony of Woolway and his witnesses is to the effect that nearly all this land can be plowed after the timber is cut off; that in fact about half the timber from the lots in T. 17 N. was cut off several years ago, and that this part may with very little labor be prepared for crop; that all the tract not suitable for plowing may be made good land for grazing.

Viewing the testimony as presented, I think that the claimant has failed to show that the land in controversy is of the character contemplated in the said act of June 3, 1878; and for this reason, and for the further reason indicated in your office decision, her said application will be rejected. See Rowland *v.* Clemens (2 L. D., 633); Crooks *v.* Hadsell (3 L. D., 258).

The decision appealed from is modified in accordance with the views herein expressed.

DESERT LAND ENTRY.

R. W. Makinson.

Positive testimony as to irrigation, improvements, and condition of land before original entry required. The case of Rivers *v.* Burbank cited and distinguished.

Acting Secretary Muldrow to Commissioner Sparks, October 2, 1885.

I have considered the appeal of R. W. Makinson from your office decision of December 4, 1884, rejecting his application to enter under the desert land act of March 3, 1877, (19 Stat., 377,) the SW. ¼ of the SE. ¼, Sec. 23, T. 9 S., R. 45 E., La Grande, Oregon.

Said decision finds that the land described had previously to the date of appellant's application been partially irrigated, and that an agricultural crop had been raised thereon, and holds that on such facts the tract is not properly subject to entry under the desert land act. The case of Rivers *v.* Burbank, decided by this Department February 7, 1883, (9 C. L. O., 268,) is cited as authority for the conclusion arrived at.

In that case the land in dispute, if ever desert within the meaning of the law, had been reclaimed by irrigation as much as thirteen years prior to the passage of the desert land act.

At the date of said act, and at the date of Burbank's application, the tract was in no sense desert land. He found it arable and in a condition for the raising of crops. It had been made so by the acts of others, under an occupancy long anterior to his. So far as his claim was concerned, it was immaterial whether or not it had ever been desert land. It was sufficient to know that it was not such when he came to occupy it and to apply for it as desert land.

In the case under consideration, the facts so far as they appear are quite different in character, and I do not find the proofs sufficiently explicit to warrant the expression of an opinion as to whether the application of Makinson is such an one as should be rejected under the law as interpreted in the case cited as authority for your office decision.

It does not appear by positive testimony who conducted the water and made the improvements on the land, how much of it had been reclaimed, or what kind of crop had been raised thereon. Neither does applicant's affidavit in the case state what his intention was in connection with such acts of reclamation as were performed prior to the date of his application.

I deem information on these points quite essential to a correct and proper conclusion in the case. I therefore return the papers herewith, and you will direct the register and receiver to call upon claimant for such affidavits and testimony, including his own, as will fully present the facts on the points suggested.

When such additional testimony shall have been procured and filed in the case, you will again transmit the same to this Department for further and final action.

HOMESTEAD—ABANDONMENT.

BURKHOLDER *v.* SKAGEN.

It is not a sufficient excuse for abandonment that it was brought about through the erroneous advice of neighbors, and rights so lost cannot be recovered by a return to the land.

Acting Secretary Muldrow to Commissioner Sparks, October 2, 1885.

I have considered the case of C. L. Burkholder *v.* Albert O. Skagen, as presented by the appeal of Burkholder from the decision of your office dated July 1, 1884, dismissing his contest against Skagen's homestead entry No. 2755, covering the NW. ¼ of Sec. 14, T. 153 N., R. 54 W. Grand Forks land district, Dakota Territory.

It appears from the record that Skagen made said entry on June 17, 1881. On August 11, 1882, notice issued upon the affidavit of Burkholder, charging abandonment, and personal service was had upon Skagen on June 23, 1883. July 27, 1883, was set for the trial of the contest. Both parties appeared at the trial before the register and receiver in person and were represented by counsel. There is no conflict in the testimony. It is shown that Skagen went upon the tract before entry, and broke one or one and a half acres of ground. While on the land Skagen slept in a tent. He went to Norway on November 1, 1881, intending to return in March, 1882. His object in going to Norway was to bring back with him his mother; but when Skagen arrived in Norway he swears that his mother was sick and blind. and she did not re-

turn with him. Skagen returned to Dakota in June 1882, and the reason given by him for not returning in March as he intended is that he was sick when he got to Norway, and hence he was unable to return as soon as he expected. When Skagen came back he did not return to the land until March, 1883, when he went upon the tract by the advice of the receiver, built a house, dug a well, and worked for a man for the use of his team with which he broke five or six acres. He has been upon the land nearly all the time since March, 1883. The excuse offered by Skagen for his absence after his return from Norway is that his neighbors told him that he had lost his homestead right by reason of his long absence, and he knew no better until he was advised by the receiver to return to the land and make it his home.

Upon the evidence submitted the register and receiver found that from the date of said entry until after the initiation of contest Skagen did not reside on the land nor comply with the requirements of the homestead laws; that his failure was due to the erroneous advice received from his neighbors, but that on account of his good faith the land should not be taken from him. Upon appeal your office held that Skagen "never prior to contest established a *bona fide* residence on the land," that his failure to comply strictly with the law was due to sickness and bad advice, and that equity and justice demand that his claim should not be taken from him.

It is conceded by the finding of the district land officers and by the decision of your office that Skagen did not establish a *bona fide* residence prior to March, 1883, nearly two years from the date of said entry. When he left for Norway he had no intention of returning until March, 1882, and at that time he had no residence upon the tract. True he was a single man, and however commendable his action in going to Norway for his mother may seem, it cannot be considered a sufficient excuse for failure to comply with the beneficent provisions of the homestead law. It has been repeatedly held by this Department that until residence is established in good faith excuses for absence will not be received. (Harris *v.* Radcliffe (2 L. D., 147); George W. Shippard (*id.*, 154); Plugert *v.* Empey (*id.*, 152); Amly *v.* Sando (*id.*, 142).

It does not appear that Skagen made any effort to establish a residence prior to March, 1883, and it is difficult to understand why he should be so anxious to bring his aged mother from Norway when he had provided no home for her when she should arrive. The counsel given him by his neighbors is no excuse for his abandonment, and the advice given him by the receiver can confer upon Skagen no rights which had already been forfeited. Upon a careful examination of the whole case I am of the opinion that the allegation of the contestant is sustained, that the excuse offered for the claimant's laches is insufficient, and that said entry should be canceled. Said decision is therefore reversed.

PRACTICE—HEARING.

SMITH *v.* EDELMAN.

As the action taken was based upon an *ex parte* showing without bringing the parties to issue before the local office, upon the questions of fact set up as a basis for adjudication, a hearing is ordered.

Acting Secretary Muldrow to Commissioner Sparks, October 2, 1885.

I have considered the appeal of David H. Smith from the decision of your office of June 6, 1884, holding for cancellation his timber-culture entry No. 1471, Dalles City, Oregon, made January 7, 1884, for S. ½ of SW. ¼, SW. ¼ of SE. ¼, and NE. ¼ of SW. ¼, Sec. 4, T. 6 S., R. 22 E., and admitting the amendment of the timber-culture entry No. 1441, of Lewis G. Edelman, originally made December 14, for SE. ¼ of NW. ¼, and Lots 3 and 4 of section 5, so as to stand as the SE. ¼ of NW. ¼, and Lots 3 and 4 of said section 4, thus excluding Smith's right of entry in that section.

Edelman filed his application to amend January 11, 1884, having made affidavit on the 4th of that month before E. W. Sanderson, a notary public in the county where the land lies, nearly one hundred miles from the district office. Smith's affidavit, filed with his application on the 7th of January, appears to have been made before the same notary public on the same day, viz., January 4th. With the application of Edelman to amend is a statement of Sanderson, sworn before the register, to the effect that on that day he made survey for each of these parties of the land applied for by each; that Edelman had been misled by an improper survey when making his original application, and misdescribed his land—locating it in section five instead of section four; that he considered him to have been an actual settler since the original date; that Smith was aware of the claims of Edelman, and heard read his affidavit in support of his application to amend, and knew of his intention so to apply, and that on the next morning Smith started in person to the land office for the purpose of reaching it before the receipt of Edelman's papers, which he succeeded in doing, and so sought to prevent the allowance of the correction of the error.

January 11, 1884, the register transmitted to your office the application to amend, recommending its allowance; and on February 21 it was allowed by a brief *pro forma* letter, without mention of the entry of Smith.

April 29, 1884, this action was rescinded for conflict with Smith's entry of record, and the register was directed to return the orginal application of Edelman, No. 1441, without amendment, for the reason that "an amendment can not be allowed to the exclusion of intervening rights."

May 12, 1884, the register returned the application with the amend-

ment already endorsed, the same having been executed March 24, 1884, pursuant to original instructions, before the issuance of the order rescinding the same; and stated that the equities appeared to be clearly on the side of Edelman, as he had improved the tract in good faith; and as there seemed to be no rule of practice providing for a contest, instructions were requested as to his proper recourse, if any.

Without more, your office again adjudged the case by letter of 6th June, 1884, held Smith's entry for cancellation, and re-instated the amendment of Edelman.

Smith appeals; alleging want of priority in Edelman, want of notice of and opportunity to be heard as to allegations of mistake and improvement; want of truth in such claim of improvement, and negligence on the part of Edelman in making mistake as to his entry, if such mistake was made. Also alleging that he has, himself, having made his entry in good faith, plowed the ten acres required of a timber-culture claimant, while Edelman has no improvement on the land except a few furrows plowed.

It is clear that the fundamental rule of judicial action, first to hear and then to judge, has been violated in this shifting course of *ex parte* decision without bringing the parties to issue before the local office upon the questions of fact set up as a basis for adjudication. I accordingly reverse the decision without prejudice, and direct a hearing upon all the facts, including the present status of the land claimed by each as to the matter of breaking and cultivation as required by law.

SCHOOL LAND—SETTLEMENT BEFORE SURVEY.

THOMAS E. WATSON.

A settler on unsurveyed land, which upon survey, is found to be in a school section, may perfect title under either the homestead or pre-emption laws, but such right is not transferable.

Commissioner McFarland to register and receiver, Spokane Falls, Washington Territory, August 12, 1884.

I am in receipt of the register's letter of the 29th ultimo, in which he asks instructions in the matter of homestead entry No. 3761, made by Thomas E. Watson, December 19, 1883, for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 16, T. 19 N., R. 4 E.

You report that the plat of survey of said township was filed in your office April 2, 1875. That Thomas M. May filed declaratory statement No. 849 for said tracts May 6, 1875, alleging settlement December 7, 1871, and re-filed on said land December 17, 1883. That Watson bought the improvements of May just prior to making his entry, and does not allege settlement prior to said purchase.

In reply I would state, that under the law a party settling upon un

surveyed land, which upon survey is found to be in a school section, may perfect title thereto under either the homestead or pre-emption laws, and he is the *only* person who can defeat the reservation for school purposes, his right not being transferable. You will therefore advise Mr. Watson of the illegality of his entry, and that it is held for cancellation, subject to appeal.

NOTE.—The above decision was affirmed by Acting Secretary Muldrow October 5, 1885.

TIMBER CULTURE ENTRY—PRE-EMPTION SETTLEMENT.

CALLAHAN *v.* BURKE.

A timber culture entry having been prevented by a vacancy in the office of receiver, and a pre-emptor subsequently settling upon the land, while said office was closed, a hearing is ordered on the allegation of the timber culture applicant that he had occupied and cultivated the land prior to the said pre-emption settlement and given said pre-emptor due notice of his claim.

Acting Secretary Muldrow to Commissioner Sparks, October 5, 1885.

I have considered the appeal of Robert C. Callahan from your office decision of August 30, 1884, denying his application to have the record cleared of the pre-emption filing of John P. Burke, which covers the NE. ¼ of NW. ¼, the N. ½ of NE. ¼ and the SW. ¼ of NE. ¼, Sec. 12, T. 17, R. 26 W., North Platte, Nebraska, and conflicts with his timber culture entry, No. 4104, made July 1, 1884, for the SE. ¼ of NE. ¼, the W. ½ of NE. ¼ and the NE. ¼ of NW. ¼, same section.

It appears that said pre-emption filing was made July 1, 1884, (the same date as the timber culture entry,) with allegation of settlement May 17th, same year.

Appellant states, under oath, as a basis for his application, that on the 19th of March, 1884, he presented his timber culture application at the local office for the tract now covered by his subsequent entry; that said application was refused for the reason that, the receiver having died, a vacancy existed which prevented the transaction of public business in the local office; that said office remained closed until June 25, 1884, upon which day he again presented his timber culture application, which was then accepted and the entry was allowed July 1st following; that when Burke made settlement in May, 1884, appellant notified him of his selection under the timber culture law, and that he had already made application to enter, but had been refused for the reasons stated; that he had previously to Burke's settlement broken a portion of the land, which fact Burke well knew, and that the tract covered by his timber culture entry adjoins land upon which he has long resided, and its loss will be a great detriment to him. He therefore prays that Burke's pre-emption filing be canceled, and all conflict with his timber culture entry be thus removed.

The records show, as appears from your office decision, that John Taffe, receiver at North Platte, Nebraska, died March 14, 1884; that his successor was commissioned May 29th following, and that the local office was closed during the period of the vacancy in the office of receiver.

Appellant's claim is that, in view of the facts as set forth in his application, his right under his entry of July 1, 1884, should attach and take effect as of the date (March 19, 1884,) when he first applied to enter, which date was anterior to that of Burke's alleged settlement; that having been guilty of no laches, his application to enter having been refused solely on account of the vacancy caused by the death of the receiver and through no fault of his, he should not be made to suffer.

Upon the showing made by appellant, as above set forth, I think the case is one which would justify further inquiry as to the facts alleged, and their bearing upon the pre-emption applicant's rights. Though appellant had, at the alleged date of settlement by the pre-emptor, acquired no vested right to the land, yet in view of the allegations of the latter as to his occupancy and cultivation, and of his notice to the pre-emption settler that he (the appellant) laid claim to the tract in question, and that the improvements thereon were his, a hearing may very properly be ordered with a view to testing the accuracy of appellant's allegations, and whether, in the face of notice of occupancy, the acts of the pre-emptor evinced such good faith as to give him any valid rights as a pre-emption claimant.

You will order a hearing on the facts presented by the petition of Callahan, the timber-culture claimant, the register and receiver to render their decision pursuant to said hearing, on the questions of law and fact involved, subject to appeal as in other cases.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

ELIJAH WELCH ET AL.

Under the second section of said act only such lands may be purchased as were properly subject to homestead entry.

The acceptance of patent for a less quantity than entered is in effect an abandonment of the land eliminated from the entry.

Acting Secretary Muldrow to Commissioner Sparks, October 5, 1885.

I have considered the appeal of Elijah Welch and Stephen L. Morse from your office decision of May 28, 1884, rejecting their applications to purchase under the second section of the act of June 15, 1880, (21 Stat., 236,) certain tracts of land which were eliminated from their homestead entries. Said tracts had been eliminated because within the

limits of the Umatilla Indian reservation, the boundaries of which were defined by the treaty of June 9, 1855, (12 Stat., 945,) while the homestead entries were not made until 1868 and 1870 respectively. For the same reason your office refused the applications to purchase.

The facts appear as set out in your office decision.

It is only necessary to go to the law under which these applications are made for a reason which renders it necessary to reject said applications. Section 2 of the act of June 15, 1880, provides "That persons who have heretofore under any of the homestead laws entered lands *properly subject to such entry* . . . may entitle themselves to said lands by paying the government price therefor," etc. The tracts in question, being a part of an Indian reservation, were not at the dates of the homestead entries properly subject thereto, and therefore are not subject to purchase under these applications.

If further reason were necessary, it might be found in the facts that both the applicants proved up and took patents for the residue of their respective entries after the elimination of the tracts in question. It might very properly be held that by so doing they, in law, abandoned the tracts thus eliminated, and surrendered whatever of right they might otherwise have had in them. Nix *v.* Allen, (112 U. S., 129.)

Your office decision is affirmed.

MILITARY BOUNTY LAND WARRANT.

GEORGE W. HENDRY.

The assignment of a warrant in blank is not authorized under the law or regulations of the Department.

The location of a warrant and issuance of patent thereon operates as a cancellation thereof.

The Department cannot recognize a claim asserted under an unperfected warrant location, where the land claimed has either passed from the jurisdiction of the Department, or been appropriated under some law.

Acting Secretary Muldrow to Commissioner Sparks, October 5, 1885.

I have examined the correspondence relative to the alleged location of warrant No. 95,958, for 160 acres, under the act of Congress approved March 3, 1855, (10 Stat., 701,) by Geo. W. Hendry, at Tampa, Florida, on January 7, 1861.

It appears from the papers submitted that said warrant was issued in the name of Frederick Varn, a private in Captain Spark's Company of Florida militia, which served in the Seminole Indian disturbance; was assigned to one Max Gehr, on October 5, 1860, which assignment appears to have been duly acknowledged before a justice of the peace in and for the county of Manitee, in said State; and was located by said

Gehr, November 4, 1869, upon the SE. ¼ of Sec. 36, T. 30 N., R. 18 W., Ionia, Michigan, and patent issued thereon June 1, 1870.

In reply to a letter from F. A. Hendry, dated September 5, 1878, alleging that G. W. Hendry located said warrant at Tampa, Florida, on January 7, 1860, upon the E. ½ of the SE. ¼ and SW. ¼ of the SE. ¼ of Sec. 15, and the NE. ¼ of the NE. ¼ of Sec. 22, T. 31 S., R. 25, your office advised him, on October 17, 1881, that the records of your office "do not show any such entry. They do show that the tracts in Sec. 15 were approved to the State May 18, 1876, under act 4th September, 1841, and that the tract in Sec. 22 is vacant." The same statement relative to the status of said tract in Sec. 22 is made in your office letter of January 12, 1882. A careful inspection of the records of your office shows that said tracts in Sec. 15 were approved to the State of Florida on May 18, 1876, as stated, but that the tract in Sec. 22 is covered by homestead entry No. 8936, made June 27, 1881, by Arthur Keen. It appears from a copy of the certificate of location issued by the register on January 7, 1861, that there was an excess of 94-100 of an acre, and the number of the excess receipt is 225; while the records of your office show that the last number issued at Tampa, prior to January 1, 1861, was 214. An inspection of the warrant shows that the same was duly assigned to Max Gehr on the 5th of October, prior to the date of the alleged location. It may be that the warrant was assigned in blank, and afterward the name of Gehr inserted; but such an assignment was never contemplated by the law or the regulations of the Department. Rev. Stat., Sec. 2414; 3 Iowa (Clarke) 153.

It does not appear that the register ever entered said location upon the records of the district land office, and the location of said warrant upon the tracts in the Ionia land district, and the issuance of patent thereon, operated as a cancellation of said warrant. If it be true, as alleged by Hendry, that he attempted to locate said warrant upon said tracts, his failure to insert his name in the assignment as assignee enabled the party who subsequently used said warrant to become the beneficiary of a fraud upon Hendry's rights. It is clear that the jurisdiction of this Department can no longer attach to the tracts in said Sec. 15 which have been approved to the State of Florida. Moore *v.* Robbins, (96 U. S., 535); United States *v.* Schurz, (12 Otto, 378); Frasher *v.* O'Connor, (115 U. S., 102).

The tract in Sec. 22 having been entered as a homestead, I concur in the view expressed by your office that it can not afford the applicant any relief. Congress alone has the power to furnish the remedy applied for. Isaac Hicks, (7 C. L. O., 71); Talkington's Heirs *v.* Hempfling, (2 L. D., 46.)

TIMBER CULTURE—PLANTING.

CAVINESS *v.* HARRAH.

Both planting and re-planting should be done when the ground is in such condition as will, under ordinary circumstances, be favorable to the growth of trees.

Acting Secretary Muldrow to Commissioner Sparks, October 5, 1885.

I have considered the case of George C. Caviness *v.* George M. Harrah, involving the latter's timber-culture entry No. 257, made October 21, 1879, for the NE. ¼ of Sec. 26, T. 4 N., R. 31 E., La Grande, Oregon, on appeal by Harrah from your office decision of July 12, 1884.

Affidavit of contest was filed November 30, 1883, alleging failure to comply with the timber-culture law in that the entryman did not "cultivate by raising a crop or otherwise, five acres during the second year after making said entry, and did not cultivate, by raising a crop or otherwise, five acres, and plant in timber, seeds, or cuttings, five acres during the third year, and also failed to plant in timber, seeds, or cuttings, five acres during the fourth year after making entry."

A hearing was set for January 16, 1884, at which time contestant filed an amended affidavit of contest, in which, in addition to the allegations in his first affidavit, he alleged that "defendant failed to protect any trees, seeds or cuttings which he may have on the tract, by fence or otherwise." . . .

The local office decided in favor of the contestant. Upon appeal their decision was affirmed by your office.

It appears from a careful examination of the evidence that the entryman, within the first and second years after entry, plowed the required amount of land (ten acres), in an indifferent manner, and whatever cultivation was done was of the same character. A number of seeds were planted, but failed to grow. Weeds, bunch-grass and sage-brush were permitted to grow from year to year, and when any re-planting was done it could not have been done properly because of the foul condition of the tract. There was no fence of any kind around the timber tract until about February 16, 1884, when a few posts were set around it, at distances varying from one to several rods, and one barbed wire was fastened to them at the height of from two to four feet. Stock running at large had trampled over the entire tract, and several trails were visible through it. At the date of the hearing there were very few trees upon the tract, probably from twelve to fifteen. True, the entryman claims to have re-planted in September, 1883, and that the seeds had not had time to come up at the date of hearing.

While the fact that the entryman re-planted his tract, taken alone, may be evidence of good faith, it is surely the intent and spirit of the timber-culture law that the planting and re-planting should be done when the ground is in such condition as will, under ordinary circumstances, be conducive to the growth of plants. And the fact that in

this instance the planting and re-planting were done when the ground was in no condition suitable for such growth is a very strong circumstance against the good faith of this entryman.

In view of the facts as hereinbefore recited, it is considered that there is no error in the decision appealed from, and it is accordingly affirmed.

TIMBER CULTURE—PREVIOUS BREAKING.

CLARK *v.* TIMM.

An entryman may take advantage of breaking upon the land at date of his entry.

The law is satisfied if the breaking and planting are performed within, or in advance of the required time.

Acting Secretary Muldrow to Commissioner Sparks, October 6, 1885.

I have examined the case of George A. Clark *v.* Henry Timm, involving the latter's timber culture entry No. 8187, for the SE. ¼ of Sec. 29, T. 105 N., R. 60 W., Mitchell, Dakota Territory, on appeal by Clark from your office decision of July 5, 1884, dismissing his contest.

Timm made entry of above tract March 28, 1882. Some time within a year thereafter, one John W. Hays filed an affidavit of contest against this entry, which has not been transmitted from the local office. On March 29, 1883, Clark filed affidavit of contest against Timm's entry, and at the same time attacked Hays's contest on the ground of its being a "friendly contest." Clark alleges that the ground of contest set up by Hays was simply: "That said Henry Timm has to the best of his belief executed a relinquishment of said tract and sold the same." Clark further alleges that his own affidavit was filed March 29, 1883, and the circumstances of the case seem to confirm his allegations. The local office, however, neglected to note on the affidavit the day of its filing.

Hays's contest was set for April 27, 1883, but both parties failed to appear. Clark, however, did appear and the local office at that time recognized his contest and issued notice thereon.

It is shown by the testimony that at the time Timm made his entry there was about ten acres of breaking upon the tract in question; that he did nothing whatever upon the land within a year after entry. As soon as spring opened up however, in 1883, Timm re-plowed and planted to crop the said ten acres, finishing said planting about April 23, 1883.

It accordingly appears that there never was a time between the date of Timm's entry and April 27, 1883, that a contest would lie against him on the ground of abandonment. Under the timber culture law, an entryman may take advantage of breaking upon the land at the date of his entry, and this is what Timm did. Your office well says, "all that is required is that the breaking and planting is done within the required time. 'He may do it in advance of the required time and the law will be satisfied.'"

The decision appealed from is affirmed.

TIMBER LAND ENTRY—ADVERSE RIGHT.

CAPPRISE *v.* WHITE.

An application to purchase under the act of June 3, 1878, does not reserve the land applied for, but an entry or filing made pending such application is subject to the rights of the applicant.

A homestead settler's allegation of settlement and improvement made prior to the application, puts in issue a material fact sworn to by the applicant and under the law a hearing should be ordered thereupon.

Acting Secretary Muldrow to Commissioner Sparks, October 7, 1885.

I have considered the case of Joseph Capprise *v.* Leonard White on appeal by the former from the decision of your office dated October 11, 1884, rejecting his application to purchase under the act of June 3, 1878 (20 Stat., 89) the N. ½ of the NW. ¼ of Sec. 32, the NE. ¼ of the SE. ¼ and the SE. ¼ of the NE. ¼ of Sec. 31, T. 18 N., R. 1 E, Humboldt land district California, for the reason that a portion of said land was covered by homestead entry No. 2242.

It appears from the record in the case, that Capprise filed his sworn statement for said tracts, as required by said act, on April 14, 1884, alleging, among other things, that "the said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, except a small cabin owned by this applicant;" and after due notice by publication offered his final proof—taken July 5th before the county clerk—and payment for said land, which was rejected by the register on July 7, 1884, for the reason that the N. ½ of the NW. ¼ of said section 32 was covered by homestead entry No. 2242, made June 12, 1884, by said White. The affidavit of White, made before the superior court for Del Norte county, in said State, alleges that he has made a bona fide improvement and settlement on the land embraced in his homestead application; that said settlement was commenced on or about September 4, 1882, and that his improvements consist of two cabins, about one half acre cleared, and some fences erected. The final proof submitted by Capprise tends to show that said land is subject to purchase under said act. The witnesses swear that it is not occupied, nor are there any improvements on the land, except those of the applicant; that it is not fit for cultivation, and is chiefly valuable for its timber.

On July 31, 1884, Capprise filed in the district land office his own affidavit and the affidavits of five other parties, averring that said White never resided upon, cultivated, or made any improvement upon the tract covered by his homestead entry; that White's entry was made in bad faith and with no intention of complying with the requirements of the homestead laws, and was made only for the purpose of securing valuable timber land without paying the legal price for the same. For the foregoing reasons, Capprise asked that a hearing be ordered and that he be allowed to prove the bad faith of said entry-

men and that the tracts applied for are of the character described in said act. The register and receiver refused to order a hearing and your office on appeal affirmed their decision, but allowed the right of appeal

In the case at bar the timber applicant filed his sworn statement and gave the required notice prior to the date of the homestead application. The sworn statement did not reserve the land applied for from entry or filing under the homestead and pre-emption laws, but such entry or filing is subject to the rights of the timber applicant. It is provided in the first section of said act, among other things, "that nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler," and in section third of the same act it is provided "that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken and the merits of said objection shall be determined by the officers of the land office, subject to appeal as in other cases." The regulations prescribed by your office, pursuant to the provision in the third section of said act, require that "if at the expiration of sixty days' notice provided for, an adverse claim should be found to exist, calling for an investigation, the register and receiver will allow the parties a hearing according to the rules of practice." (See General Circular, March 1, 1884, p. 34.)

The filing of the homestead affidavit, alleging a prior settlement and improvement by the entryman, puts in issue a material fact, sworn to by the timber land applicant, and under the law and the regulations a hearing should be ordered to enable the timber land applicant to prove his allegations. You will therefore direct the register and receiver to order a hearing under the rules of practice to determine the rights of the respective parties.

Said decision is accordingly modified.

TIMBER ENTRY—ADVERSE RIGHT.

FITZGERALD *v.* REID.

No formal objection to the timber entry was made until after the submission of final proof, when a pre-emptor who had a filing of record prior to the timber application, came in and alleged want of notice as to the proceedings of the timber applicant, and set up his adverse settlement, filing and improvements: *Held*, that under section 3 of the timber act a hearing should be ordered.

Acting Secretary Muldrow to Commissioner Sparks, October 7, 1885.

I have considered the case of Hortense E. Fitzgerald *v.* Thomas Reid, involving the SE. ¼ of Sec. 35, T. 1 N., R. 2 E., Humboldt, California, on appeal by the first named from your office decision of September 18,

1884, holding for cancellation her timber entry No. 6207, made May 27, 1884, under the act of June 3, 1878, (20 Stat., 39,) because in conflict with pre-emption filing No. 4730 of Reid, made June 2, 1882, with allegation of settlement May 31, 1882. Said decision was made pursuant to an affidavit filed by Reid June 28, 1884, and forwarded by the local office to your office July 1, 1884.

Said affidavit reiterated the allegation of settlement upon the tract May 31, 1882, and further set out that he (the pre-emption claimant) "immediately thereafter proceeded to complete his settlement upon and improve the same, and constructed thereon a substantial residence and fencing, and broke and planted ground thereon; that he has continued to reside upon said land, when not necessarily absent at labor, to the present time, and has continued to occupy and improve the same." He further alleges that Fitzgerald's published notice of intention to purchase never in any manner came to his knowledge or attention.

Fitzgerald's appeal from your office decision is accompanied by the affidavits of two persons, who swear that at the date of appellant's application to purchase the tract as timber land, Reid, the pre-emption claimant, had never resided on said land, or even seen it, and had no improvements thereon. One of these affiants states that in April, 1884, he "went with said Thomas Reid to said land and assisted him in laying the foundation for a house; that at that time deponent showed the way to the land to said Thomas Reid, and pointed it out to him."

The first section of the act of June 3, 1878, (the timber law,) provides "That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States."

The affidavits above referred to, however, attack the bona fides of the pre-emption claimant, but they are ex parte and should not determine his rights. On the other hand, he has a claim of record, and his affidavit, herein referred to, and made the occasion of the decision from which this appeal is brought, may be regarded as an objection to the issuance of patent to Fitzgerald, and therefore as bringing him within the scope of the proviso of Section three of the Act of June 3, 1878. This being the status, the residue of said proviso should be complied with, which directs that "evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases."

You will direct the register and receiver to order a hearing, with proper notice to the parties in interest, for the purpose of testing the merits of Reid's objection to the timber entry, and the rights of the respective parties, the decision of the register and receiver on the evidence so taken, to be subject to appeal as in other cases.

Your office decision is modified accordingly.

ATTORNEYS BEFORE THE DEPARTMENT.

LUTHER HARRISON.

Section 190 of the Revised Statutes comprehends in its terms all the Departments, and the prohibition therein extends to the prosecution of pending claims of every class, whether as counsel, clerk, or agent, during the two years designated.

Secretary Lamar to Commissioner Sparks, October 6, 1885.

I have received a letter from Luther Harrison, Esq., late Acting Commissioner of the General Land Office, purporting to be an appeal from your action as Commissioner of the General Land Office, in refusing to recognize him as an attorney in certain matters pending before that office. The facts in this case are shown in the following correspondence:

"WASHINGTON, D. C., *Sept.* 22, 1885.

HON. WM. A. J. SPARKS,
Comm'r. General Land Office:

SIR: I was informed yesterday that you had instructed your chiefs of divisions that I was not permitted to appear in any case pending while I was in the employ of the General Land Office, and that in such cases I should be denied access to the papers and not advised of the action of the office respecting them.

This action, I presume, was had under some supposed authority contained in the letter of the Hon. Secretary of the Interior to you, of 17th instant, directing, in response to your inquiry, an enforcement by you of section 190 of the Revised Statutes, prescribing the terms and conditions upon which certain persons, previously employed by the Government, may prosecute claims against it.

This action on your part is not justified either by the law or the Secretary's letter referred to, and I respectfully request that you reconsider it.

The rights, privileges and liberties of an American citizen, as guaranteed by the Constitution of our common country, are a priceless heritage left him by his forefathers, and should not be trampled upon to satisfy the whim and selfish greed of persons who have been agitating this matter, and who, but for the limitation of two years, during which time they enjoyed a lucrative practice, would now come within the provisions of the law. It is a serious thing to deprive a man of his only means of earning a livelihood for himself and family, and should not be done except for some crime committed, or unprofessional conduct, and this branch of the case appeals to you upon other grounds which I need only mention to be understood.

I claim also that section 190 of the Revised Statutes has no application to my case, because it provides that "It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the

Departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments, while he was such officer, clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of such claims, within two years next after he shall have ceased to be such officer, clerk or employé."

This law clearly contemplates that any person who was not in the employ of the Government on the first day of June, 1872, but was thereafter appointed to office, should not be permitted to prosecute any claim against the Government which was pending while he was in office, within two years next after he shall have severed his official relations with the Government.

This is apparent for the reason, that the Constitution, under the head of "Limitations of the power of Congress," in express terms provides: "No bill of attainder, or *ex post facto* law shall be passed." Art. 1, section ix, paragraph 3.

At the date fixed by the law, June 1, 1872, I was a third class clerk in the General Land Office, and from that time and before, to the 31st of August, 1885, I was continuously employed in that office. It is true, however, that I did not continue in that grade. The record shows, that January 31, 1880, I was commissioned by the President to be principal clerk on private land claims; September, 20, 1882, was appointed by Secretary to be chief clerk, and July 9, 1884, was commissioned by the President to be Assistant Commissioner. My employment, however, has been continuous from the date of my original appointment, December 9, 1865, to the 31st of August 1885, when my resignation of the office of Assistant Commissioner took effect, and the record will also show that I have been paid for every day during that period. The various positions which I have filled since the 9th day of December, 1865, were a continuation of the original appointment which was then made, and which was the foundation of, and key to my entrance into the public service as a first class clerk, and they have always been considered promotions from that grade.

I hope you will give this subject that serious consideration which it merits at your hands, and advise me promptly of your decision.

Respectfully,

L. HARRISON.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Sept. 23, 1885.

Hon. L. HARRISON:

DEAR SIR: Yours of the 22d instant before me. In reply I beg to say, that I transmitted to the chiefs of the various divisions of the General Land Office a copy of the "Secretary's Instructions" in relation to persons who had been officials of the office practicing as attorneys

therein, with directions that they should cause the same to be strictly complied with.

In this I certainly have neither deprived, nor attempted to deprive you of any of your constitutional and legal rights, nor have I thereby indicated any unkindly treatment toward you personally, but simply, as I conceive it, have discharged my official duty under the law, to the head of the Department under which I serve.

It is not unknown to you that it has been, and is, my earnest desire and determination, so far as in me lies, to do away with the loose practices that have heretofore existed in the General Land Office.

In this I shall continue, prompted by the sole desire to discharge a duty, and certainly regretting if in doing this, any body shall feel that they have cause of grievance, or that it is aimed at them in any spirit of unkindness or malevolence.

Very truly,

WM. A. J. SPARKS,
Commissioner.

In a communication addressed to me, as Secretary of the Interior, dated September 30th, and entitled as stated at the beginning of this paper, Mr. Harrison says:

"It will be observed that the Commissioner does not directly decide whether my case as presented to him, falls within the provisions of the law, yet in view of what I had stated as his action in the matter, he, by inference, decides that it does, and there can be no doubt about this, for in his letter he says, without qualification, that the directions given were with reference to persons practicing who had been previously officials of the office and that he had simply as he conceived it, discharged his official duty under the law, to the head of the Department, thus denying a reconsideration of his action. . . . .

I now respectfully appeal to you, and as grounds therefor state:

(1) That Section 190 R. S. should be held to apply only to the prosecution of claims for money.

(2) That it has no application in the practice before the General Land Office except in cases involving the payment of money.

(3) That in my case the law has no application whatever."

In the course of his argument Mr. Harrison contends that he should be excepted from the operations of the statute for the following reasons:

"I was then, and for some years previous, employed in the General Land Office. From date of my original appointment to the 1st instant, I was not for a day, an hour, or an instant, out of such employment. It is true that my salary was increased by promotion to higher grades, and that I performed different duties at different times. It is also true that these promotions were made by new appointments. I contend, however, that it was the clear intent of the statute to except from its operations any person who on June 1st, 1872, was an officer, clerk or employe in any department, and who continuously thereafter remained

in such Department up to his severance of official relations, following which, he might seek to practice as an attorney."

OPINION.

The question presented is, whether a person who holds his appointment as an officer, clerk, or employe in the Department of the Interior may act as counsel, attorney, or agent for prosecuting any claim against the United States in that Department while he was such officer, clerk, or employe, or can in any manner, or by any means, aid in the prosecution there of such claim, until two years have expired since the dissolution of his official connection with that Department.

The act of Congress of 1872, section 190 of the U. S. Revised Statutes, reads as follows:

"It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employe in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employe, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employe."

The prohibition of this statute is unconditional, and comprehends in its terms all of the Departments of the Government, every case of the prosecution of a claim pending against the United States in any one of them, and debars every officer, clerk, or employé from participating in any manner, with any means, whether as counsel, clerk, or agent, in the prosecution of that claim within the time designated.

I shall consider this case as an appeal from the decision of the Commissioner of the General Land Office in cases of contests relative to titles to the public lands between claimants, and which were pending while the appellant was a clerk in that office, and within two years since his resignation.

The objection is that this statute has no reference to contests of title to lands, but only to claims for money upon the United States, and that the language of the statute and the policy of the act are each satisfied by this interpretation.

I do not concur in this conclusion. The statute applies to all of the Departments; to all of the offices of the designated classes in each one; and to all prosecutions of claims of every class in the Departments pending there while the officers, clerks, or employés appointed since June, 1872, belonged to them. The act is not penal in its nature. It authorizes no criminal prosecution, nor does it impute discredit or dishonor, nor affix stigma on any. It creates a civil disability for the public utility. Its design is to elevate the public service, so that it may inspire public confidence. The act plainly implies that it is not suitable or seemly for an officer, clerk, or employé, shortly after his departure from service in a Department, to appear before that Department as a

prosecutor of the claims pending therein against the United States while he was a member of it.

The principle of the act is, that all the public servants in the Department, whether officers, clerks, or employés, shall observe a condition which at least tends to hinder them from appearance of being placed under a suspicion of having had a conflict between their duties as officers or public agents and as men, and as giving preference to the last. For two years after their resignation or dismission they are disabled for the prosecution of claims in the Department against the United States. The terms of the act are unqualified, and are very expressive by their universality and absoluteness. My opinion is, they embrace all persons commissioned or appointed in the Department since the first day of June, 1872, as officer, clerk, or employé, and who have not been out of service for two years. Neither do I concur in the argument that cases prosecuted in the Land Office relative to claims for title to the public lands are not included within the terms of the act.

The power to dispose of the public domain, and to make rules respecting it under the acts of Congress, is confided to this Department. The *claims* upon the United States respecting the disposition of their public lands arise out of treaties with foreign nations and Indian tribes; compacts between the United States and States of the Union; and laws of the United States for disposition by sale, donation, or as bounties, under laws for settlement, and grants of pre-emption and other forms of contract. It would be difficult to state the value of the rights and interests involved and the variety of questions and controversies that arise. An officer, clerk, or employé of the Department may abuse his opportunities in the Department for the acquirement of information, or the making of connections to assist him to appear favorably and profitably thereafter, as counsel, attorney, or agent in the litigous discord which may exist, or as preparing in the Department in cases of claims. Such officer, clerk, or employé during his term may apply himself for practice after his resignation. He may be tempted to foment controversies in respect to titles which have come before the Department in his presence, and perhaps in cases within his cognizance, and within his care as an officer, clerk, or employé.

The titles issued by the Government may be discredited, and the purchasers of the public domain embarrassed, because of such infidelity. The irregularities, defects, or omissions he may have noted he may conceal and withhold for further speculation or merchandize.

It is easy to conceive of cases of claims and counter-claims pending between the government and its citizens, where the loss, destruction or mutilation of a single book or paper, or the alteration of a single word therein, might result in a heavy loss to the government and a great injustice to a large number of citizens. In view of the fact that certain government employés are the trusted custodians of its books and papers, while others have free and unrestricted access to the same,

it might be an easy thing for a faithless employé to use his time—not in the speedy and *just* settlement of claims against the government during the term of his office—but, in *preventing* such settlement, and putting them in such a shape as to enable him to reap handsome profits by their *unjust* settlement, after the term of his service shall have expired.

The statute is so comprehensive and absolute in imposing disqualification, that we may fairly conclude the decision was, that the axe was to be placed at the root of the tree bearing the fruit. The statute imports that no citizen should be put to loss or suffering because of the infidelity of any of the officers of the Department appearing as counsel, attorney, or agent, adversely to the United States, by any manner or means in their possession.

The statute includes all persons "appointed after the first day of June, 1872, as an officer, clerk, or employé," etc. That was the date of the passage of the act; and the Congress in directing that the statute should apply alone to appointments made after its enactment, evidently intended, in a spirit of fairness to impose the disability, which sound public policy required, only with the assent of the appointee—to be implied from acceptance of the office. It gave notice that all persons thereafter appointed as officer, clerk, or employé in any of the Departments must accept their appointments and commissions subject to the conditions prescribed. This purpose is just as applicable to one who has accepted a distinct appointment to a new and better position since the date fixed, as to one newly introduced to the service. Those officers of the Department who have been appointed to another grade and commissioned are included in the prohibitions of the act. They clearly apply to one who, like Mr. Harrison, has accepted and held an office by appointment of the President, by and with the advice and consent of the Senate, when at the time specified by the statute he was employed merely in a clerical capacity.

Your action is approved.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

PRACTICE—REHEARING.

MEHLER *v.* MCBRIDE.

A rehearing cannot be secured on the ground that the evidence of the applicant's witnesses was not properly transcribed, it being apparent that the applicant and his attorney had full opportunity to learn such alleged fact, and act thereon, while the case was in the local office.

Secretary Lamar to Commissioner Sparks, July 22, 1885.

Inclosed herewith you will find the application of counsel for J. C. McBride, for a rehearing of the case of J. C. Mehler *v.* J. C. McBride, involving the latter's homestead entry No. 20781, Mitchell, Dakota Ter-

ritory, covering the SE. ¼ of Sec. 11, T. 104, R. 64, decided by this Department on November 4, 1884.

The application is duly verified and accompanied by several affidavits of witnesses, some of whom were examined at the hearing in the original contest between said parties.

The grounds upon which said application is based are:

* * * * * * *

2. Because he has evidence that testimony in his behalf was not correctly reduced to writing, and that his own testimony was not read to him, nor did he examine the same after it was taken.

* * * * * * *

The decision of this Department in said case was rendered on November 4, 1884, affirming the decision of your office of March 26, 1884, holding said entry for cancellation upon the charge of abandonment and failure to comply with the requirements of the homestead laws as to residence and good faith.

The claimant was represented at the hearing by counsel, and it is nowhere stated in what respect the written testimony of claimant or his witnesses differs from that actually given. An examination of the affidavits presented in support of the application shows that the allegations therein contained bear upon the precise points at issue in the original contest and upon which judgment has already been rendered.

If the testimony taken at the hearing was not properly reduced to writing, or if after it had been so reduced it was not read over to and examined by the respective witnesses, such neglect was as much the fault of the claimant and his counsel as of the officer who transcribed the testimony. Besides, the testimony remained a sufficient time in the local land office for claimant and his counsel to examine the same and see that it was correct, and their failure to do so can constitute no ground for a rehearing. Hilliard on New Trials, p. 495.

The allegations in the affidavits filed in support of the application relative to the business of the contestant and what has transpired since the rendition of said departmental decision can have no effect upon the case at bar. If the contestant fails to comply with the law, and it is shown in a legal manner, he will be unable to acquire title to said tracts under the homestead laws.

The application is accordingly denied.

HOMESTEAD ENTRY—RIGHT OF CONTEST.

GEISENDORFER *v.* JONES.

The right to contest an abandoned homestead entry does not rest upon the contestant's qualification to enter the land, but may be exercised by any one.

Poverty will not excuse total failure to comply with the requirements of the law.

Acting Secretary Jenks to Commissioner Sparks, September 4, 1885.

I have considered the case of George Geisendorfer *v.* Austin L. Jones, on appeal by Jones from your office decision of August 13, 1884, holding

for cancellation his homestead entry No. 3796, for the E. ½ of the SE. ¼ of Sec. 28, T. 14 N., R. 9 E., Sacramento land district, California.

The contest was initiated January 14, 1884, on the affidavit of contestant, alleging that "the said Austin L. Jones never has resided on said land at any time since he filed his homestead application, and has wholly abandoned said tract."

* * * * * * *

Upon the testimony as adduced at the hearing the local office decided in favor of contestant and held for cancellation the homestead entry of Jones. Your office affirmed said decision; whereupon Jones appealed to this Department, alleging two grounds of error:

1st. The evidence does not show that the contestant is qualified to enter the land.

2d. The evidence shows that the contestee has exercised good faith, and has attempted to comply fully with the requirements of the homestead laws.

As to the first ground of error, it is immaterial in the determination of this case whether the contestant be competent to enter the land or not. The right to contest abandoned homestead entries does not rest upon the contestant's qualifications to enter the land, but may be exercised by any one.

A careful examination of the evidence herein shows that the contestee never resided upon the land at all. His improvements consisted of a shanty eleven by eight, with shed roof made of shakes, weatherboarded partly with sawed inch boards and partly with poles; no window or floor, and no furniture of any kind. His residence was in Penryn, twenty miles from the land in controversy, where he was at work, and where his wife resided since some time in October, 1883. At various intervals of a month or so he visited the land, and at one time staid all night there. Upon none of these visits was anything done by him towards cultivating or improving the tract. He alleges poverty as the cause of his not being able to reside upon the land, and states that he intended to move upon the land as soon as he got able, and plant and cultivate a vineyard thereon. There is no doubt as to his poverty, and his intentions may have been good; but it cannot be contended with any show of success that in the matter of residence, cultivation, and improvement he has complied with the requirements of the homestead laws.

No residence being shown, it is clear Jones cannot be regarded as a *bona fide* homestead claimant. The law on this point is too well settled to need comment.

The decision of your office is affirmed.

PRE-EMPTION ENTRY—REPAYMENT.

HEIRS OF G. AND D. DUPREY.

Repayment will not be allowed except where title cannot be given to the purchaser.

Acting Secretary Muldrow to Commissioner Sparks, September 24, 1885.

I return without approval the claim of the heirs of G. Duprey and D. Duprey, for repayment of purchase money upon New Orleans pre-emption cash entry No. 1254, dated June 18, 1835, for lot 3 of Sec. 12, T. 9 S., R. 1 E., canceled September 18, 1844, for supposed conflict with the Houmas grant.

By decisions of the courts it has been decreed that the Houmas title did not extend to this land, and it is not shown by the papers before me that the entry may not be reinstated and duly patented. As the law only allows repayment where the title cannot be given to the purchaser, you will please re-examine the matter with a view to such reinstatement if it can be made without prejudice to existing rights or claims, and the submission of the entry to the Board of Equitable Adjudication, if necessary to its confirmation, in case it be found of the class entitled to such disposition.

PRACTICE—APPEAL.

WESLEY A. COOK.

Failure to appeal from an erroneous decision of the local office will defeat the right to set up such error in the presence of an adverse claim.

Acting Secretary Muldrow to Commissioner Sparks, October 8, 1885.

On January 19, 1883, one Michael Fitzgerald made timber culture entry No. 7945 for the SW.$\frac{1}{4}$ of Sec. 24, T. 134 N., R. 63 W., Fargo, Dakota Territory. On October 16, 1883, Wesley A. Cook filed in the local office at Fargo Fitzgerald's formal relinquishment of said timber culture entry, executed October 15, 1883, and at the same time attempted to file his own application, accompanied with proper affidavit, to enter said tract under the timber culture law, tendering fee and commissions. The local office, acting under circular instructions from your office, dated January 12, 1883 (9 C. L. O., 194), transmitted said relinquishment to your office, and returned Cook's application papers and money to him.

By letter "P," April 3, 1884, your office canceled the said entry of Fitzgerald and directed the local office to "hold the land subject to entry by the first legal applicant."

April 21, 1884, Juan M. Soules filed regular application to enter said tract under the timber culture law. April 22, 1884, Cook again at-

tempted to file timber culture application for same tract, which was "rejected because of the prior filing made April 21, 1884, by Juan M. Soules."

On appeal to your office this decision of the local office was affirmed September 20, 1884.

From your said office decision Cook regularly appealed to this Department. It is clear that under the law said decision should be affirmed. Under the first section of the act of May 14, 1880 (21 Stat., 140), Cook's said application of October 16, 1883, should have been received at that time, and the local office did wrong to reject it. But Cook by failure to appeal from their action at that time, and by quietly waiting for the action of your office, has lost all rights that he might have perfected by diligence. The fact that now adverse rights have intervened will operate completely to bar his right to the land.

The decision appealed from is affirmed.

HOMESTEAD—SECOND ENTRY.

LEWIS M. HUNTLEY.

A second entry will not be allowed, although the first was relinquished on the erroneous information of the local officers that by such act he would not exhaust his rights under the homestead law.

Acting Secretary Muldrow to Commissioner Sparks, October 10, 1885.

I have examined the appeal of Lewis M. Huntley from your predecessor's decision of August 7, 1884, refusing to grant his application for restoration of his homestead rights.

It appears that on October 16, 1865, Mr. Huntley made homestead entry No. 801 for the W. ½ of NE. ¼ of Sec. 33 and S. ½ of SE. ¼ of Sec. 28, T. 4 N., R. 11 E., Brownsville, Nebraska, which entry was canceled October 22, 1866, for relinquishment.

Mr. Huntley alleges in an affidavit, corroborated by that of two other persons, that when he made said homestead entry it was his *bona fide* intention to make said tract his home; that in pursuance of such intention he improved the tract as much as he was able to do, he being a very poor man; that he was obliged to leave his land for the purpose of earning an honest livelihood (designing to be absent only such length of time as was made absolutely necessary by his circumstances), and accordingly applied to the local officers of the district in which the land was situated for instructions as to how he should proceed in order to retain his homestead rights; that the local officers informed him that if he would relinquish his said entry he might at any time thereafter make a second homestead entry; and that, acting under such instructions, he made said relinquishment in good faith, fully believing that he in no wise impaired his homestead rights. He now asks that his homestead rights

be restored to him, and that he be allowed to enter the SE. ¼ of Sec. 3, T. 7 S., R. 16 W., Kirwin, Kansas.

Taking Mr. Huntley's corroborated statements as true, there is no way of granting his request. While his case is one which appeals strongly for sympathy, it nevertheless falls clearly within the rule of law that "*Ignorantia legis neminem excusat*," or, as it has been liberally expounded, "Every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law."

Neither can his case be considered as coming within the rule laid down in Lytle *et al.* *v.* The State of Arkansas *et al.* (9 How., 314):

"Where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

For the reasons herein set forth the decision appealed from is affirmed.

PRE-EMPTION—SECOND FILING.

JONATHAN HOUSE.

The fact that the first filing was made prior to the adoption of the Revised Statutes will not avoid the inhibition of section 2261.

Secretary Lamar to Commissioner Sparks, October 10, 1885.

I have considered the appeal of Jonathan House from your office decision of October 1, 1884, rejecting his application to make pre-emption filing for the NW. ¼ of Sec. 13, T. 7 S., R. 68 W., Denver, Colorado, on the ground that he had exhausted his pre-emption right by a prior filing on another tract. On appeal he admits a previous filing, but claims that the same having been made prior to the approval and adoption of the Revised Statutes (June 22, 1874), he is not precluded by section 2261, Revised Statutes, from now making a new filing, and thus securing the benefits of section 2259.

I do not think this contention can be sustained.

The pre-emption laws have always prohibited what appellant seeks to do. Section 2261 announces no new doctrine on the subject.

Section ten of the act of September 4, 1841, (5 Stat., 543,) contained the following language: "No person shall be entitled to more than one pre-emptive right by virtue of this act;" and section four of the act of March 3, 1843, (5 Stat., 619,) provided—"That where an individual has filed, under the late pre-emption law, his declaration of intention to claim the benefits of said law for one tract of land, it shall not be lawful for the same individual, at any future time, to file a second declaration for another tract."

These two provisions of law are consolidated in section 2261 of the Revised Statutes, and in substance constitute what is now that section,

which reads as follows: "No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract."

The section quoted, it will be observed, creates no new provision of law; it simply continues in force as a part of the revised statutes certain provisions which had long previously been in force as a part of the pre-emption law.

The fact that appellant's first filing was made prior to the adoption of the Revised Statutes can therefore make no difference. The inhibition has been continuous and is equally mandatory and effective, whether applied to filings made before or after the date of said adoption.

The Supreme Court in the case of Baldwin *v.* Stark (107 U. S., 403,) recognize and interpret the law forbidding second filings to be the same under section 2261 of the Revised Statutes as under the acts of 1841 and 1843. Referring to those acts the court uses the following language:

"It is sufficient to say that both these acts, with all others on that subject, were consolidated in the Revised Statutes, and Section 2261, which is a reproduction of the law in force when the rights of the parties here accrued, is positive that, when a party has filed his declaration of intention to claim the benefits of such provision (the right of pre-emption) for one tract of land, he shall not at any future time file a second declaration for another tract."

I concur in the conclusion reached by your office, and the decision appealed from is affirmed.

TIMBER CULTURE ENTRY—SIMULTANEOUS APPLICATIONS.

DOYLE *v.* KELLEY.

Bona fide improvement, however slight, should be recognized in determining priorities in case of simultaneous applications.

Secretary Lamar to Commissioner Sparks, October 15, 1885.

I have considered the appeal of John Doyle from your predecessor's decision of June 21, 1884, in the matter of awarding a preference right of entry to Edward Kelley upon simultaneous application at Devil's Lake, Dakota, February 9, 1884, to make timber culture entry for the SW. ¼ of Sec. 47 T. 157 R. 65.

On the day of the filing of the township plat, both parties applied at the same time. Doyle offered an affidavit setting up claim to a partially constructed sod shanty and nearly one half acre of breaking, valuing his whole improvement at "about five dollars." Kelley offered the usual application. The register and receiver held the alleged im-

provements of Doyle to be insufficient to sustain a preference right in equity, and accepted Kelley's bid of ten dollars, Doyle refusing to bid for such preference, and objecting to the reception of Kelley's application as a simultaneous one, on the alleged ground of insufficiency of the affidavit with respect to citizenship, and also objecting that his papers failed to show his post office address.

Kelley's application having been allowed, and he having filed affidavits of himself and others on the 11th of February setting forth that the shanty of Doyle consisted of a few sods thrown together as if intended for a foundation about eight by ten feet square, and one and one half foot high, while the breaking only consisted of the ground stripped in procuring such sod, and that he (Kelley) was the owner of a house valued at twenty dollars, which was on the land at date of application, his receiver's receipt appears to have been issued on the 12th of February, although his entry is reported as of the 9th, the date of his application.

On the 5th of March, Doyle appealed, setting up the objections to Kelley's application heretofore stated, and, further, that the latter did not swear to ownership of the house on the land at date of application, but only claimed such ownership on the 11th of February. He insists upon the equitable preference on account of his alleged improvement, under the second head of the ruling in Helfrich *v.* King (3 C. L. O. 19), as applied to timber culture applications in Melville & Kelly, Comfort and others, (9 C. L. O. 199,) that "where one has actual settlement and improvements, and the other none, it should be awarded to the actual settler," although also insisting "that there is no law which authorizes the local officers to dispose of the right of entry to the highest bidder."

Your office approved the action of the register and receiver, on the ground that they had exercised a discretion in determining the alleged equities of the claimants, which exercise ought not to be overruled except for good reasons.

I find from inspection that the affidavit of Kelley is in the words of the statute (20 Stat., 113), and consequently no exception can be taken to its sufficiency. Upon the question of superior right by virtue of first occupation and commencement of improvements upon the land, I think such improvement, however slight if it be bona fide is entitled to recognition. Doyle made instant claim on the day of application. Kelley did not allege any improvement on that day. Two days after he and three others swore that there were none on the land except Doyle's, which they attempted to show were of no account or value. On the same day, February 11, he and one other by a separate affidavit swore that "he now owns improvements on said tract of land consisting of one house, valued at twenty dollars; that said improvements were put on said tract prior to the offering of any timber culture application for said tract, and that said house was on said tract at the time he applied to enter it." On the 12th of February, as before stated, his fees appear to have been paid and receipt given therefor.

This seems to have been a case of afterthought on the part of Kelley. If he relies on his own improvement, there is no virtue in his bid, and as the bid was first resorted to and accepted in the face of Doyle's claim, it would appear to have been on the day of entry the sole basis of his claim for preference. Being so preferred, it must be so adjudged, and it was error to deny Doyle's right, unless then and there his good faith was brought in question. I accordingly reverse the decision, and direct that Doyle be allowed thirty days from notice to enter the land, in default of which Kelley's entry will stand, but on compliance with which the same will be canceled.

MILITARY BOUNTY LAND WARRANT.

REVERT AND REVERT.

No attempt having been made during a period of twenty years to procure a duplicate of a lost warrant, parties holding under deeds of conveyance from the locator are allowed to make homestead entry of the land located.

Secretary Lamar to Commissioner Sparks, October 15, 1885.

I have considered the papers transmitted with your office letter of July 7, 1885.

The facts presented are as follows:

On September 20, 1855, the register of the Dubuque district land office, Iowa, issued to Samuel H. Stevens a duplicate certificate of location of military bounty land warrant No. 10,965, in the name of Sarah Mason, widow of Benjamin Mason, deceased, upon the SW. ¼ of Sec. 4, T. 88 N., R. 16 W. On April 7, 1865, Stevens filed in your office said duplicate certificate and asked to be advised relative to securing patent thereon. On April 29, in reply to your office letter of April 12, 1865, the register of the Des Moines office reported "that the books of the late Dubuque land office do not show the SW. ¼ of Sec. 4, T. 88, R. 16 W., to have been located by Samuel H. Stevens. The plat is marked, L. W. No. 10,965," and that he was unable to find said warrant. On May 13, 1865, your office instructed the district land officers — the Dubuque office having been consolidated with the Des Moines office—to make such entries upon their records as will prevent the sale or location of the tract until otherwise directed, and on same day your office advised said Stevens that from the report of the register, the abstract of location and tract book show no such location, and that if Stevens left the warrant in the Dubuque land office, it may possibly have been consumed by fire at the burning of that office. Your office further advised Stevens that the duplicate certificate and entry upon the plat were evidence of his attempt to locate said tract, and that he would be entitled to a preference right to the same, by forwarding to your office within a reasonable time a land warrant for one hun-

dred and sixty acres, duly assigned to him, or that he could make private cash entry of the tract. A circular of the Pension Office was also forwarded to Stevens, giving him all necessary information relative to an application for the re-issue of land warrants where the originals have been lost, or destroyed.

On May 17, 1869, your office again advised the district land officers, in response to their request, that said warrant had never been received at your office as located, and that Mr. Stevens could still exercise the privilege extended by your office letter of May 13, 1865. On August 20, 1860, Stevens transmitted his affidavit alleging the loss of said warrant and his belief that the same was burned, when the Dubuque office was destroyed by fire. On March 26, 1870, your office advised Stevens that said affidavit had been received and filed, and was sufficient to arrest the issue of a patent for any location that may be made with said warrant.

On October 27, 1884, H. L. P. Hillyer transmitted to your office an abstract of title showing that said tract was sold for taxes by the treasurer of Grundy County, Iowa, on July 23, 1866, and subsequently conveyed to Dick Revert and Frederick Revert. The abstract also shows that on November 1, 1875, Samuel H. Stevens and wife conveyed said tract by quit claim deed to one Jacob De Haan, who, with his wife, on May 3, 1877, conveyed by warranty deed the east half of said quarter to Dick Revert and the west half of the quarter to Frederick Revert. On November 28, 1884, your office, in response to a suggestion from the register, transmitted said certificates of location and directed him to compare it with writing of its date on the records of the Dubuque office, and return the certificate with his opinion as to its genuineness.

On January 21, 1885, your office, in reply to a letter from S. R. Raymond, advised him of the proceedings relative to said certificate, as shown by the files and records of your office, and also that when report is received from the register, the issuing of a patent on the duplicate certificate of location to Mr. Stevens will be considered.

On February 27, 1885, the register returned said certificate of location, but expressed no opinion as to its genuineness.

On April 21, 1885, Dick Revert applied to make homestead entry of the E. ½ of said SW. ¼, and on same day Frederick Revert applied to make homestead entry of the W. ½ of said SW. ¼, each alleging settlement and improvements of the value of $500. Both applications were rejected by the receiver on April 25, 1885, on account of the alleged location by said Stevens.

On June 2, 1885, your office again advised the district land officers that no patent would issue based upon said alleged location, until the warrant shall be returned, with evidence of its legal location, and if the warrant can not be produced, another may be surrendered, or the entryman may pay cash for the land.

In reply to a letter from Raymond, dated June 19, 1885, asking that said applicants be allowed to enter said tracts, or that a patent be issued to Stevens upon the evidence already submitted, your office, on June 26th, sent him a copy of your office letter of June 2, 1885, to the district land officers.

It does not appear from the record that any formal decision was rendered by your office upon the appeal of said applicants from the decision of the local land officers, other than said decision of June 2d last. It appears that the homestead applicants have purchased all of the interest that Stevens has in said lands. They have been in possession of said tracts, one since 1877, the other since 1878, and made valuable improvements thereon. More than thirty years have passed since the duplicate certificate of location was issued to Mr. Stevens, and for the past twenty years, though often advised by your office as to the proper procedure, Stevens has failed to take the necessary steps to duplicate the warrant which he swears he believes was burned when the Dubuque office was destroyed by fire.

Every consideration of justice and equity would seem to urge this Department to render all possible aid to the homestead applicants to enable them to secure the lands they have already purchased from those claiming title thereto, and which they now seek to enter under the homestead laws. In view of the probable destruction of said warrant by fire, the action of Stevens in selling to the applicants his interest in said tracts and his failure to procure a duplicate warrant, I think that the Department may treat his claim as waived or relinquished. You will therefore direct the register and receiver to cancel said notation on said plat and allow said homestead applications.

PRACTICE—NOTICE—ATTORNEY.

NICOLAS FELLER.

Though formal notice of an adverse ruling was not served upon the appellant, his relation, by attorney, to the other parties in the proceedings was such that presumption of knowledge sufficient to put him upon notice is established, and his right to a further hearing thereby cut off, in the presence of an intervening claim.

Secretary Lamar to Commissioner Sparks, October 20, 1885.

I have considered the appeal of Nicolas Feller from your predecessor's decision of June 19, 1883, refusing his application, made May 11, 1883, to enter the NW. $\frac{1}{4}$ of Sec. 17, T. 106, R. 55 W., Mitchell district, Dakota, under the timber culture law. A relinquishment of a previous entry, Sioux Falls No. 4236, made May 10, 1880, by John Harrison, which relinquishment appears to have been executed under seal July 21, 1881, was filed on said 11th of May with the application of Feller, and was transmitted therewith to your office under authority of official

circular of January 12, 1880. With the papers was also transmitted a withdrawal by one Frank J. Fox of his contest against Harrison's entry, which had already been heard and passed to decision declaring the entry forfeited on the 28th of April preceding. One John S. Ahern had also previously contested the same entry and obtained a decision in his favor, rendered August 17, 1882.

Nothing appears of record before me as to whether or not Harrison appealed from either of these decisions. The contest of Ahern appears, however, to have been among the files of your office, and that of Fox to have been transmitted by the register and receiver June 23, 1883, after the withdrawal of his contest, and after the date of your predecessor's letter of 19th June canceling the entry as fraudulent. Ahern's contest had already been dismissed on the 14th of May, 1883, for failure on his part to file an application for the land.

All these proceedings appear to have been somewhat connected. One A. E. Hitchcock appears to have been attorney for Ahern; also for Fox. He also appears and files the present appeal of Feller, who does not appear in person since the filing of his application, the affidavit having then been made before William C. Pidge, a notary public of Miner County, who was at the first attorney for Ahern in initiating his contest.

It further appears that on the 27th of June, 1883, after the land had been declared open to the first legal applicant by your predecessor's letter of 19th June, one John T. Summers made timber culture entry No. 11,202 for the tract. Afterward, on the 30th of June, the register requested the return of Feller's application of 11th May, "for the purpose of examination of supposed endorsement on the margin, relating to the payment of fees and commissions." This supposed endorsement shows in pencil on the corner of the application, "14.00 Paid." On the 6th of September it was returned to the register and receiver, and on the 11th it was again forwarded to your office by the register without further comment or explanation.

It also further appears that on the 12th of October, 1883, your predecessor, *sponte sua*, took up the case of Fox *v.* Harrison, examined the same and failing to notice the withdrawal of contest made May 10, 1883, although especially noticed in the decision of 19th June, found as follows: "As the contest appears to have been initiated and the hearing had prior to such cancellation and the testimony clearly showing that Harrison had wholly failed to comply with the timber culture laws, you will advise Mr. Fox that he will be allowed the usual time to perfect his right to said tract." Whereupon, Fox promptly appeared on the 3d of November and made entry No. 11,487, which was admitted and forwarded, apparently without any annotation or mention of the prior entry of Summers. The latter on the 16th of February, 1884, having learned of the entry of Fox made affidavit, duly corroborated, asserting his own compliance with law and the breaking of twelve acres of

the land, and his intention to plant trees thereon and largely improve the same, and to build a house and barn thereon.

Upon receipt of these papers your office again acted upon the matter, under date of March 15, 1884, rescinded the action of October 12, 1883, held the entry of Fox for cancellation, and taking up Feller's application made May 11, 1883, made further adjudication thereon as follows:

"As Feller's application to enter was never acted upon by you as it should have been and was refused by my letter 'P' of June 19, 1883, above mentioned, you will report the time and manner of service of notice of said decision upon said Feller, and whether or not he has taken any appeal therefrom."

The receiver replied, April 1, 1884, "that no notice was given Feller of the action communicated in your letter 'P' June 19, 1883, for the reason that the entry was canceled for fraud and no instructions given to notify either of the parties in interest." Whereupon, by letter of April 14, 1884, your office instructed the register and receiver to notify Feller and allow him the usual time for appeal. Notice was given April 22, and appeal filed by Hitchcock, attorney, June 10, 1884.

It is clear from this recital that the case presented is anomalous. Ordinarily there would be no difficulty in deciding that the relinquishment of Harrison having opened the land to entry on the date of filing, May 11, 1883, an application on that day duly appropriated it. But no entry was admitted on that day, and Feller apparently accepted the authoritative ruling of the Department that a relinquishment presented under such circumstances affected the transaction with fraud and the application must abide the judgment of your office. That judgment found the fraud, canceled the entry and rejected the application. Afterward a stranger enters the land and proceeds to improve it. The application of Feller is recalled by the district office apparently for adjustment of the matter of fees and commissions, and is again returned to your office without any remark. Again, after an erroneous allowance of the right of entry by Fox, who had withdrawn his contest in favor of Feller, the former steps in and makes such entry. All this time Feller is not heard from, so far as the record shows, nor until after another judgment of your office that he is entitled to notice and appeal does he come forward. He then appears by attorney only—the same who was Ahern's attorney, and attorney for Fox and who must have had all along notice of these proceedings, and who appears to have brought forward first one client and again another, with conflicting claims for the same land, Ahern, the first contestant, being a witness for Fox, the second contestant, and Fox, who had withdrawn in favor of Feller, again being presented, without scruple, as a preferred contestant, and again submitting to cancellation, as the shifting course of decision may suggest.

All this time Summer has apparently been allowed to go on with occupation and improvement under color of an entry regularly made, and without protest by Feller so far as alleged.

The presumption of knowledge sufficient to put him upon notice is, I think, established, as well as the showing of a collusive attempt by the parties concerned with him, by means of fictitious contests, a relinquishment made many months previously being in their hands, to control for purely speculative ends the disposal of this tract and shut it out from *bona fide* appropriation, except at profit to themselves. If Feller has suffered from this combination without participation in the scheme his choice of attorney has led to his loss. Another has in good faith apparently acquired a superior right, with added equities, which I cannot under these circumstances disturb upon the mere plea of want of formal notice, where such notice is not specifically required by the regulations governing the procedure.

For these reasons, I dismiss the appeal, and thus affirm the decision.

FINAL PROOF—DISCRETION OF LOCAL OFFICERS.

PHILIPP MANNHEIM.

On the submission of final proof it lies within the discretion of the local officers to require additional or explanatory evidence, subject to review for manifest error.

Secretary Lamar to Commissioner Sparks, October 20, 1885.

I affirm the decision, and dismiss the appeal of Philipp Mannheim from your predecessor's action of October 27, 1884, declining to direct the register and receiver at Fargo, Dakota, to accept the final proof of appellant for the SE. $\frac{1}{4}$ of Sec. 11, T. 130 R. 56, made before the county judge July 26, 1884, and refused by them September 8, 1884, because of his refusal upon proper request to explain an absence of upwards of three months from the land, to wit, from December 1, 1883, to March, 1884, during the period of his residence, claimed from August 28, 1883, to date of such proof.

The ground of appeal is the claim that the proof was fair upon its face, stated the period of absence, and was sufficient in showing residence before and after such absence to establish the good faith of the settler.

This is matter for the register and receiver, subject to review for manifest error, and their requirement in such case is but the exercise of commendable caution in guarding the public interests against weak and speculative pretensions on the part of those seeking to acquire title to the public lands. The utterly frivolous nature of the appeal is shown in this instance by a voluntary affidavit, filed before me, in the identical matter required by the register, and which if deemed important to disabuse my mind of any suspicion of intent to evade the law, was equally important when such suspicion on the part of the district officers impelled them to require the explanation.

PRE-EMPTION—RESIDENCE—ABANDONMENT.

JAMES WOODLEY.

Before a person can quit or abandon a residence on his own land, to reside on the public land, he must have a residence to abandon of the same character that the pre-emption law requires to be established.

Where residence has once been abandoned it can not be again acquired by a temporary abode at a place without the intention of remaining, or of making the same a home.

Secretary Lamar to Commissioner Sparks, October 20, 1885.

I have considered the appeal of James Woodley from the decision of your office dated September 17, 1884, holding for cancellation his pre-emption cash entry No. 1252, made September 11, 1883, covering the NE. ¼ of Sec. 24, T. 16 N., R. 41 E., W. M., Colfax, Washington Territory, for the reason "that the claimant comes within the statutory inhibition" of section 2260 of the Revised Statutes of the United States.

It appears from the record that the claimant filed his declaratory statement No. 2902 for said tract on March 3, alleging settlement thereon February 25, 1883, and that he made his final pre-emption proof on September 11, 1883, before the clerk of the district court in said Territory.

One of the witnesses in the pre-emption proof, in response to the question, "Did he leave or abandon a residence on his own land in this Territory," swears that Woodley "was boarding with a party to whom he had rented his place at the time when he went to reside on his pre-emption claim." The other witness, in response to the same question, swears that Woodley "was boarding on his own place with a tenant, when he went to reside on his pre-emption claim." The claimant, in response to question No. 4, paragraph 2, "Did you leave other land of your own to settle on your present claim," swears, "I did not."

The proof shows that the claimant entered said tract under the timber culture act, which he relinquished when he filed his pre-emption declaratory statement; that his improvements consist of a box house, twelve by eighteen feet; a barn, thirty-two by thirty-two feet; four corrals; fifteen or twenty acres of breaking; fencing around five acres, which the claimant has cultivated to rye; and that the improvements are valued by the witnesses at $500, and by the claimant at $1000.

The register and receiver accepted the proof offered, and allowed the claimant to make payment for said tract in the sum of $400, and thereupon certificate No. 1252 issued, dated September 11, 1883.

On July 17, 1884, your office required the claimant to furnish his sworn statement, corroborated by two disinterested witnesses, to the effect that "he did not abandon a residence, or other land of his own in the Territory to reside on the land embraced in his entry." In re-

sponse to said requirement, the district land officers, on August 25, 1885, transmitted to your office the sworn statement of the claimant and the affidavits of the two witnesses, who had testified in his pre-emption proof. The claimant avers "that long prior to filing his declaratory statement for said tract, he had leased for a term of years a certain tract of land then owned by him. That he afterwards went to New York State and remained away several months. That, on his return from the east, he went upon the above mentioned tract and boarded with the party then occupying the tract until he had completed his dwelling on the said NE. ¼ of Sec. 34, T. 16 N., R. 41 E., W. M., and that he did not leave or abandon land of his own to make such residence, and that at the time of filing said declaratory statement he had no established residence in this Territory." The witnesses swear that when they testified in the pre-emption proof, "they did not understand the meaning of the term residence as regarded Mr. Woodley's case; that he, Mr. Woodley, moved from his land in June, 1882, and rented the same to Robert Whitehead for a period of two years, and that he, Woodley, went to New York and was gone several months. That on his return to Whitman county, he did not establish a residence anywhere until he made his declaratory statement filing, but boarded with a family up to that time."

Upon consideration of said statement and affidavits, your office held that the statement as to residence "is only the expression of an opinion and does not affect the fact that while boarding with his tenant on land owned by him, he was residing on land of his own at the date of said filing."

Two classes are prohibited by said section 2260 from acquiring any right of pre-emption under section 2259 of the Revised Statutes, unless otherwise specially provided for by law.

First: "No person who is the proprietor of three hundred and twenty acres of land in any State or Territory."

Second: "No person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory."

The sole question presented in the case at bar is: Did the entryman "quit or abandon his residence on his own land" within the meaning of the statute?

It is not always easy to determine what constitutes residence. The Supreme Court of Massachusetts (1st Metcalf, 245), speaking through Chief Justice Shaw, say:

"The questions of residence, inhabitancy, or domicil—for although not in all respects precisely the same, they are nearly so, and depend much upon the same evidence—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case."

Mr. Justice Story, in his Commentaries on the Conflict of Laws (7th Ed., p. 38), says:

"It is sometimes a matter of no small difficulty to decide in what place a person has his true or proper domicil. His residence is often of a very equivocal nature; and his intention as to that residence is often still more obscure."

Residence is defined by Bouvier to be "the place of one's domicil," and domicil to be "the place where a person has fixed his ordinary dwelling without a present intention of removal," citing 10 Mass., 488; 8 Cranch, 278.

It is evident that, before a person can quit or abandon a residence on his own land to reside on the public land, he must have a residence to abandon of the same character that the pre-emption law requires to be established, before the pre-emptor can make entry of a particular tract.

If it be true that Woodley rented his own land for two years and abandoned his residence thereon for several months, without any intention of returning to the same, the mere fact that he returned and boarded with his lessee while he was building his house would not of itself establish his residence on land of his own within the contemplation of the statute.

It has been repeatedly held by this Department and the Supreme Court of the United States that the pre-emption laws require a residence both continuous and personal upon the tract, of the person who seeks to take advantage of them. (Bohall *v.* Dilla, (114 U. S., 47,).

When a legal residence has once been established, it is not lost by a temporary absence for which a sufficient legal excuse is shown. So where the residence has once been abandoned, it can not be again acquired by a mere temporary abode at a place, without the intention of remaining for any length of time, or of making the same a home.

It does not appear that there was any concealment of the facts by the witnesses in the pre-emption proof. It is shown that Mr. Woodley is a married man; that he returned from New York and boarded with the man to whom he had rented his place for two years prior to his departure. If his absence was only temporary, if he quit or abandoned his land for the purpose of residing on his pre-emption claim, the fact that he rented his place for a term of years would not remove his disqualification under the statute. It appears that the claimant was a married man, but it is not shown whether his wife accompanied him to New York, nor whether the object of the trip was temporary in character. There is no evidence showing what disposition Mr. Woodley made of his household effects prior to his departure for New York, or whether the lease of his land was in writing and the terms of the same. While the explanation of Mr. Woodley is not full enough to warrant passing his entry to patent, yet the testimony is not sufficient to justify a forfeiture without giving him a further opportunity to furnish additional evidence, showing that he does not come within the inhibition of said section.

You will therefore direct the register and receiver to order an investigation relative to said entry. Their inquiry should be directed with a view of ascertaining all of the facts and circumstances relative to Mr. Woodley's lease—the original of which, if in writing, or secondary evidence of the same, if the original is lost, should be forwarded—the date of his removal from his own land; the length of time absent in New York; the object of his trip; the residence of his wife during his absence; and the date of his return, and the length of time that he boarded with his tenant. As the proof on its face shows that the certificate of entry was improperly issued, Mr. Woodley will be required to furnish the additional evidence in answer to the inquiries as above indicated. Upon receipt from the district land officers of their report, your office will again consider the whole proof submitted.

Said decision is accordingly modified.

SPECIAL AGENT'S REPORT—HEARING.

FREDERICK FREED.

The entry was canceled on a special agent's report and a hearing subsequently had, but the witnesses then testifying were not subjected to cross-examination: *Held*, that further evidence is required and that a rehearing should be accordingly ordered.

Secretary Lamar to Commissioner Sparks, October 20, 1885.

I have considered the appeal of Frederick Freed from your office decision of August 1, 1884, declining to re-instate his Osage cash entry, No. 8873, made February 20, 1883, under the act of May 28, 1880, (21 Stat., 143,) on the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 33, T. 30 S., R. 15 E., Independence, Kansas.

Said entry was canceled by your office letter "P" of June 27, 1883, upon facts presented by Special Agent Drew's report of June 13, 1883, to the effect that Freed had not resided upon the land for six months prior to his entry, and was not an actual settler within the meaning of the law; that his alleged residence was a mere pretense, consisting of his occasionally sleeping on the premises in an uninhabitable house.

Upon his application, a hearing was ordered for October 16, 1883, and Special Agent Drew was directed to appear for the government.

October 12, 1883, said Drew notified the local office that he could not be present on the day set for hearing, being at that date under subpœna as a witness before the U. S. District Court at Leavenworth, Kansas, and asked for a continuance of the case, with due notice to all parties. The local office, however, allowed the hearing to proceed on the date named, to the extent of hearing Freed's witnesses and taking their testimony, notwithstanding the absence of the special agent.

An adjournment was then had to January 22, 1884 when appellant

again appeared. Drew, the special agent, was unable to appear at that date also, and on the 17th of January, 1884, so notified the local office, and asked that Freed be notified so as to save him the expense of appearing with his witnesses on the day named. To this notification and request it does not appear that any attention was paid. The case was closed, and on the 29th of February, 1884, the testimony, all of which had been submitted by Freed, was transmitted to your office, which, as before stated, upon consideration of the same in conjunction with the special agent's report, refused to re-instate the entry.

In view of the foregoing, and upon the record as before me, I do not feel justified in deciding the case on its merits.

The affidavits furnished by Special Agent Drew, and the testimony submitted by appellant at the hearing are directly in conflict. The first is ex parte, and the latter was taken without cross-examination, though at the time and place fixed for hearing. I therefore deem further evidence necessary.

You will direct that a hearing be ordered with a view to determining conclusively the questions involved, due notice to be given Freed and also the special agent for the land district in which the tract is situated, the latter to be furnished with the names of affiants in the former investigation and the substance of their statements.

Your office decision is vacated.

TOWNSHIP SURVEY—PLAT OFFICIALLY FILED.

INSTRUCTIONS.

Commissioner Sparks to registers and receivers, October 21, 1885.

Hereafter when an 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:

1. You will forthwith post a notice in a conspicuous place in your office, specifying the township that has 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.

2. You will also send a copy of such notice to the postmasters of the post offices nearest the land, and a copy to each clerk of a court of record in your district, with request that the same be conspicuously posted in their respective offices.

3. You will furnish the public press in your district with copies of such notice as a matter of news.

4. You will give such further publicity of the matter in answer to inquiries (for which you will charge no fee) and otherwise as you may be able to do without incurring advertising expenses.

Approved:

L. Q. C. LAMAR,

Secretary.

PRACTICE—APPEAL—CONTESTANT.

LYMAN *v.* FAYANT ET AL.

The decision and papers in a case should be retained in the local office for a period of thirty days following notice of such decision.

The preference right of entry accorded the successful contestant under the act of May 14, 1880, is not affected by the want of the contestant's qualification to make such entry at the initiation of the contest.

Acting Commissioner Harrison to register and receiver, Huron, Dakota, August 30, 1884.

I have examined the contested case of Earnest C. Lyman *v.* Wm. N. Fayant and Walter Watson, involving the NW. ¼ Sec. 33, T. 111, R. 61, on appeal by Lyman from your adverse decision.

The record shows that on the 24th of June, 1880, Watson made pre-emption cash entry No. 3183 for the above described tract; that on December 24, 1881, Lyman filed affidavit of contest against the aforesaid cash entry of said Watson, and on the 27th of same month Fayant filed affidavit of contest against said entry. These affidavits, which are supported by corroborating testimony, were transmitted to this office from the Mitchell office for my consideration, and on the 27th of January, 1882, I returned them with direction to order a hearing. After due notice a hearing was ordered and had in both cases on the 29th of September, 1882, at the Mitchell office. The local officers did not, however, decide the cases.

The land having passed within the jurisdiction of the Huron office the cases were transmitted to the latter office, and on the 27th of November, 1883, you rendered a decision holding that Watson has failed to comply with the law, and recommending that his entry be canceled, and the tract awarded to the party whom the testimony will show to have the preference right of entry. You gave notice of this decision on the same day you forwarded it with the papers to this office, whereas, under Rule 51 of Practice, you should have retained the decision and papers in your office for thirty days after notice, and then reported whether or not an appeal had been filed. It was also your duty to have decided which of the contestants had the better right to the tract as shown by the papers. I therefore returned you the papers in the case for your decision as between the contestants by my letter "G" of the 23d of February, 1884.

On the 4th of August, 1884, you rendered a decision holding that the cash entry of Watson was fraudulent from its inception, and recom-

mended that it be canceled. You also decided that Fayant had the preference right of entry.

From this decision, within the time prescribed by the Rules of Practice, Lyman filed an appeal.

I have considered the appeal, the arguments of counsel, and examined the testimony in the case. But two questions are presented in this case for my consideration.

1st, As to the bona fides and validity of Watson's cash entry.

2d, In case of the cancellation of said cash entry, who shall have preferred right conferred by act of May 14, 1880, Fayant or Lyman.

As to the first question, the testimony is conclusive, and shows that the cash entry was fraudulent from its very inception; that Watson neither settled upon, cultivated nor improved the tract, and in fact never resided near the same.

As to the second question, viz: who is entitled to the preference right of entry, the local officers decided in favor of Fayant upon the theory that Lyman had exhausted his rights by filing upon the SE. ¼ Sec. 1, T. 111, R. 61, on the 26th day of April, 1882.

The record shows that he did file for the tract last described, at the time specified, and offered to prove up, March 9, 1883, but his application was denied upon the ground that he was still the proprietor of his homestead claim, and had moved from that to the pre-emption claim; thereupon, he applied to this office for the restoration of his pre-emption right. By my letter of the 11th of July, 1883, I advised the local officers, in substance, that if it be found that Lyman removed from land of his own in the same State or Territory, to make settlement upon the tract, his filing should be set aside without prejudice to his pre-emption rights. Lyman thereupon admitted that he had removed from his homestead, and the local officers canceled his filing and restored his pre-emption right, so that at the present time his rights have not been exhausted.

In the opinion of this office, it is a matter of indifference what his status was at the time of his filing the affidavits initiating the contest against the cash entry aforesaid. The sole question upon which this case hinges, is, did he become and was he qualified at the date of the cancellation of the cash entry; if so, then he is entitled to the preference right of entry for the tract in controversy. This question has already been settled by this decision in favor of Lyman.

Your decision so far as it holds the cash entry No. 3183 for cancellation is affirmed, and said entry has this day been canceled upon the records of this office. You will make the necessary memorandum on your records. Your award of the preference right of entry to Fayant is reversed, and the same is hereby awarded to Lyman subject to appeal. Your decision is modified accordingly.

NOTE.—The above decision was affirmed by Secretary Lamar, October 24, 1885.

TIMBER-CULTURE ENTRY—FORFEITURE.

LUCAS *v.* ELLSWORTH.

The contestant is estopped from charging insufficient cultivation where he had control of the land for that purpose.

An entry will not be canceled when substantial compliance with the law is shown.

Acting Secretary Muldrow to Commissioner Sparks, September 30, 1885.

I have considered the case of Joseph Lucas *v.* Albert S. Ellsworth, on appeal of Lucas from the decision of your office of 2d August, 1884, dismissing his contest against timber-culture entry No. 3261, Wa-Keeney, Kansas, made November 11, 1879, for the SE. ¼ of Sec. 8, T. 12 S., R. 23 W.

Contest was initiated February 24, 1883, alleging failure to plant five acres during the third year, and to plow or cultivate during the same year five acres broken during the second year after entry.

Testimony shows that Ellsworth paid $1,000 for the possessory right to said land, broke and put in cultivation nearly one hundred acres during the first and second years, 1880 and 1881, procured the cultivation and planting in crop of some fifteen or twenty acres in 1882, and engaged and paid for the plowing and planting in tree seeds, five acres. The cultivation of the crop in 1882 is alleged to have been insufficient to answer the requirements of the law, in that it was done by harrowing instead of plowing, and the crops raised were very inferior and unproductive in consequence.

A portion of this cropping, embracing three acres, was done by the contestant under permission of Ellsworth's agent, and if he failed to prepare the ground for and cultivate his own crop, after obtaining control of the land for that purpose, he is estopped from charging the failure upon his lessor for the purpose of depriving him of his entry and taking the land for himself. Other twelve acres were planted in corn by one Marks, who furrowed the ground with the shovel plow, and harrowed the crop after planting, and it is in evidence that the land was free from weeds, and reasonably mellow, and in fair condition for the future planting of trees. On this point there appears to be a failure to sustain the allegations of the contestant.

A more difficult question relates to the amount planted in tree seeds. By the testimony for the contestant, who procured a measurement of the land on the 23d of February, 1883, the day before the filing of his own application to enter, there are but four acres and sixty-seven rods of ground so planted. This is the testimony of the county surveyor and two others who made the measurement. On the contrary, the witness for Ellsworth, who plowed and planted the same, swears to the measurement by himself, with a tape-line, of over five acres of ground, prior to the planting, and that he planted that amount, as he believed then and still believes, under agreement with Ellsworth's brother, who

acted as agent, and charged and received pay for the same as five acres. The merchant who sold him the tape-line, also seeds for the planting, and who paid the bill for Mr. Ellsworth, swears that the same was a regular tape-line of four rods in length, and he believed Mr. Summerville, who did the planting, acted in entire good faith in doing the work. No attempt is made to discredit the transaction either on the part of Mr. Ellsworth or Mr. Summerville, the only claim being to the effect that the subsequent measurement, at the instance of the contestant, showed a deficiency of a large portion of an acre.

The register and receiver, while giving their opinion that the entryman fully believed that the amount broken was five acres, decided that the measurement by the county surveyor, a professional expert, is better proof of the quantity than that of the farmer who put in the seeds, and consequently adjudged the entry forfeited for failure to plant the full five acres.

Your office held that the evidence failed to justify a declaration of forfeiture, and dismissed the contest. I affirm the decision.

RAILROAD GRANT—CERTIFICATION.

ST. PAUL M. & M. RY. CO. *v.* BOLLMAN.

As title to the land has passed to the company through certification to the State, entries and filings subsequently made therefor must be canceled.

Secretary Lamar to Commissioner Sparks, October 24, 1885.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Carl Bollman, involving the homestead entry No. 11,454, made May 19, 1879, for the NE. ¼ of Sec. 19, T. 38 N., R. 28 W., 4th P. M., St. Cloud, Minnesota, on appeal by the company from your office decision of December 20, 1883, rejecting its claim to said tract.

The land involved is within the indemnity limits of the St. Paul and Pacific Railroad Company, branch line, (now St. Paul, Minneapolis and Manitoba Railway Company,) Act of March 3, 1865, (13 Stat., 526,) the withdrawal for the benefit of which became effective July 19, 1865.

The record shows that the E. ½ of said quarter was embraced in the homestead entry No. 994 in the name of J. W. Hunt, of date April 12, 1865, and the W. ½ of the quarter was embraced in homestead entry No. 995 in the name of John Glue of same date, both of which were subsisting at date of withdrawal and were canceled for abandonment July 10, 1868. It further appears that on December 22, 1869, this tract in question was selected by the First Division, St. Paul & Pacific Railroad Company (now St. P., M. & M. Ry. Co.,) and was certified to the State of Minnesota for the benefit of said company on June 5, 1871. Further, one John Patka filed pre-emption declaratory statement No. 4591 for said quarter October 24th, alleging settlement thereon October 23, 1878.

Under the law the said homestead entries of Hunt and Glue operated to except the land covered thereby from the withdrawal, and upon their cancellation in 1868, said land became subject to entry or selection by the first legally qualified applicant.

The company made its selection of the tract, the certification of the same was made to the State for the benefit of the company, and by such proceedings the United States had parted with all right and title to said land long prior to the time when the pre-emption claim of Patka, or the homestead entry of Bollman were in existence. The company's right to the land is paramount, and will not be questioned. Accordingly, the said premption filing of Patka and the homestead entry of Bollman will be canceled.

The decision appealed from is reversed.

PRACTICE—ORAL MOTION—COSTS.

CRAM *v.* MCALLISTER.

The Rules of Practice do not require that a motion to dismiss a contest, pending before the local office, should be in writing.

An agreement that the contestee's evidence should be taken before a stenographer will not relieve the contestant from the payment of the costs of taking such testimony.

Acting Secretary Muldrow to Commissioner Sparks, October 30, 1885.

I have considered the case of Allen P. Cram *v.* Cora McAllister, on appeal from your office decision of July 30, 1884, affirming the action of the local officers in dismissing the contest of Cram on his refusal to pay the costs of reducing to writing the testimony of claimant. . . . .

The facts as set forth in the appeal of contestant are as follows: The contest came up for hearing before the local officers of the Huron Land Office May 16, 1884, and both parties appeared. Contestant asked for a continuance and filed his affidavit, as required by Rule 20. Claimant admitted the affidavit under Rule of Practice 22, and both parties were then ready for trial. The register and receiver could not hear the testimony in the case on that day, and thereupon both parties agreed to go before the stenographer and have the testimony of the witnesses reduced to writing, and to submit to the register and receiver written testimony instead of oral testimony. Contestant submitted the affidavit of continuance as his only evidence, and rested his case, having paid all costs and expenses of the contest up to this time. Claimant called upon contestant, under Rule 54, to deposit $45.00 to pay for reducing to writing the testimony of nine witnesses in claimant's behalf. Contestant, acting under Rule 56, refused to make a deposit for that purpose. Claimant went before the register and made an oral motion to dismiss the contest for the reason that contestant refused to make a deposit to pay for reducing the testimony of claimant's witnesses to

writing, and the register sustained the motion and dismissed the contest.

From this action contestant appeals as follows:

"1st. The motion for dismissing the contest should have been made and submitted in writing.

"2d. The register erred in entertaining the motion and dismissing the contest."

As to the first point, I know of no rule requiring the motion herein described to be in writing. Contestant does not allege want of notice thereof.

In support of his second allegation of error, appellant relies on Rule of Practice 56. That rule provides, "When testimony is taken by deposition, the party in whose behalf the same is taken must pay the costs thereof." I do not find it necessary to determine in whose behalf the testimony herein was taken. Testimony so taken as above described can not be considered a "deposition," in the sense contemplated by Rule 56. Rule 23 provides that depositions may be taken when a witness is unable to attend, resides out of the State, or more than fifty miles from the place of trial, or where it is apprehended that the witness will be unable or will refuse to attend. Rule 24 provides that the party desiring to take a deposition must make affidavit before the local officers, setting forth the causes for taking such deposition, and that he must file interrogatories, etc. None of these conditions appear in the present case. The parties agreed, because the register was unable to hear the case on the day appointed, to have the testimony taken before a stenographer, and when written out, submitted to the local officers. Rule 54 provides that, "applicants for contest must deposit with the register and receiver a sufficient sum of money to defray the cost of proceedings." After agreeing that the testimony should be taken before a stenographer, contestant can not be heard to say such taking of the testimony is not part of the "proceedings."

The question at issue is, therefore, governed by Rule 54, and not by Rule 56. Contestant does not claim that the amount demanded was unreasonable, and I do not pass on that question. The decision appealed from is affirmed.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

SOUTHERN MINN. R. R. CO. *v.* BOTTOMLY.

In 1874, on contest between these parties, the land was awarded to the company and the cancellation of the entry directed. This judgment was never carried into execution, and the entry in question falling within the terms of section 2 of the act of April 21, 1876, is held to be confirmed thereby.

Acting Secretary Muldrow to Commissioner Sparks, October 31, 1885.

I have examined the case of the Southern Minnesota Railroad Company *v.* Seth Bottomly, involving the E. ½ of NW. ¼ Sec. 23, T. 104 N.,

R. 29 W., Worthington, Minnesota, on appeal by the company from your office decision of November, 9, 1883, awarding the land to Bottomly under the provisions of section 2 of the act of April 21, 1876 (19 Stat., 35).

The recital in said decision developes the fact that your office, by its decision of March 14, 1874, in a contest between the same parties, held the entry now in question for cancellation, and awarded the land to the railroad company, which decision on appeal by Bottomly was affirmed by this Department October 23, 1874.

Execution of the judgment thus rendered was delayed by your office in order that it might by correspondence ascertain whether the company would relinquish the land under the act of June 22, 1874.

Such correspondence was had, and the company, by its attorney, on the 3d of November, 1874, refused to relinquish.

June 5, 1877, Mr. Bottomly addressed a letter to your office making certain inquiries relative to the tract, in reply to which he was informed, among other things, that his entry would be held in suspension for thirty days to give him an opportunity to obtain, if possible, a relinquishment from the company under the act of June 22, 1874. No relinquishment appears to have been made by the company. Notwithstanding this fact Bottomly's entry was not canceled; he was permitted by the local office to make final proof February 10, 1879, and final certificate, No. 5497, issued to him for the tract in dispute. By letter of June 12, 1883, he requested that patent issue to him for the land covered by his entry and final certificate. The next action of your office was the decision from which the appeal under consideration was taken. That decision, as already stated, awarded the land to appellee, and held his entry for approval for patent.

It is claimed by the company on appeal that even though under present rulings the entry would be considered legal, yet your office decision was error, for the reason that the Department had by its decision of 23d of October, 1874, declared that it was not a competent entry to defeat the grant. This is in effect a plea of *res judicata*, and it is true that the case presents nearly or quite all the characteristics which ordinarily make that rule applicable. There is identity of the thing sued for; identity of cause of action; identity of parties, and identity of quality in the parties. But for one thing, the rule invoked would be applicable and operative, and the judgment of 1874 would stand. That one thing was the passage of the remedial act of 1876 (cited *supra*), pending the execution of the judgment. That act took hold of and became operative upon all cases within its purview, which at the date of its passage had not been finally and fully disposed of. In this case although judgment had been rendered, it was and still is unexecuted. The entry is still of record. The act of 1876 is entitled, "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants, in cases where such entries have been made under the regulations of the Land Department."

Section 2 of the act provides, "That when at the time of such withdrawal as aforesaid (the withdrawal for the purposes of a land grant, as mentioned in sec. 1 of the act), valid pre-emption or homestead claims existed upon any lands within the limits of any such grants, which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants, who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto." This law calls for a certain condition of fact which if found in any case renders it operative in that case. In so doing it legalizes what might otherwise be without authority of law.

Does it meet the facts in this case? A map of general route having been filed, the lands were withdrawn by your office letter of August 23, 1866, which was received at the local office September 10, 1866. On the dates mentioned the tract in question was covered by homestead entry of one Henry Russell. Said entry was made July 1, 1863, and canceled January 16, 1867. It appears from your office decision that said cancellation was for abandonment, but as this was not declared until after the withdrawal as aforesaid, the tract clearly falls within the category of land upon which a valid homestead entry existed at date of withdrawal, for, while said entry existed of record, it was an appropriation of the land, and no other rights could attach. See case of Henry Cliff (3 L. D., 216), and cases cited therein.

I find nothing to indicate that the subsequent entry by the appellee was not made "under the decisions and rulings of the Land Department," and am satisfied that it was so made. It seems also clear that the entryman has complied with the laws governing homestead entries, for he has made the proper proofs required under such laws, and has procured final certificate showing such fact. The conditions of the act seem therefore to have been met, and section 2 thereof says "such entries shall be deemed valid, and patents shall issue therefor."

Your office decision awarding the tract to Bottomly is affirmed.

FINAL PROOF—NATURALIZATION PAPERS.

C. R. GLOVER.

In case of final proof, made before an officer of a court of record, the local office may receive copies of naturalization papers in place of the original, where said officer certifies to the correctness of such copies.

Secretary Lamar to Commissioner Sparks, October 31, 1885.

I have considered your report of the 15th instant upon the request of C. R. Glover, dated August 8th last, in which he asks if copies of naturalization papers made and certified as correct by a United States

Commissioner, or other officer than the register and receiver, will be accepted for purposes of making final proof.

You report, "that transcripts from the court records, duly certified by the proper officer, are accepted as evidence. Frequently mere copies of such transcripts are presented, which copies are not accepted unless certified by the register and receiver of a district land office. This exception is made because in such cases a trusted officer of the Department has an opportunity to examine the transcript and certify the copy."

It does not appear in the statement of Mr. Glover whether the proofs taken before him as United States Commissioner were in pre-emption or other cases under the land laws of the United States. Section 2259 of the Revised Statutes provides that certain persons having the qualifications therein set forth, shall have the right, upon the compliance with certain requirements, to make pre-emption entry of the public lands, not to exceed one hundred and sixty acres. Section 2262 (same volume) provides that before any person shall be allowed to make such entry, he "shall make oath before the receiver or register of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section 2259," etc.

By act of June 9, 1880, (21 Stat., 169,) it is provided that the affidavit required to be made by sections 2262 and 2301 of the Revised Statutes of the United States may be made before the clerk of the county court, or of any court of record of the county and state or district and territory in which the lands are situated, ... and the affidavit so made and duly subscribed shall have the same force and effect as if made before the register and receiver of the proper land district."

The act of March 3, 1877, (19 Stat., 403,) provides that the proof of residence, occupation, or cultivation, the affidavit of non-alienation and the oath of allegiance required to be made by section 2291 of the Revised Statutes of the United States may be made before the judge or in his absence before the clerk of any court of record of the county and state, or district and territory, in which the lands are situated; . . . . and the proof, affidavit and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land district."

Section 2 of said act provides the penalty for false swearing in the making of such proof. Prior to the enactment of said statutes entrymen were required to make their final affidavits before the register or receiver of the proper land district. In pre-emption cases the testimony of witnesses was allowed to be taken before any officer competent to administer oaths and affirmations. (See Crail Wiley 3 L. D., 430.)

For the convenience of entrymen and their witnesses, said acts were passed and the officers before whom final proof is duly made, if officers of courts of record, must duly authenticate the proceedings with the seal of the court. It is no more essential that the personal qualifications of the entryman shall be fully proven before a trusted officer of this

Department, than that the other proof required by the land laws shall be proven before the same officer. Since judges and clerks of courts of record have been specially designated by law and the regulations of this Department to take the final proof in certain cases, there appears to be no good reason why they should not examine the naturalization papers when offered, make accurate copies of the same, and incorporate them into the record under their official seal. You will therefore instruct the district land officers to receive copies of naturalization papers in place of the original where the final proof has been duly taken before an officer of a court of record and such officer certifies that he has carefully compared the copy transmitted with the original paper, presented by the entryman, and that the same corresponds in all respects. In all other cases, the copy should be certified by the register and receiver.

TOWNSITE—MINING CLAIM.

ESLER ET AL. *v.* TOWNSITE OF COOKE.

Townsites may be located on mineral land, and the townsite claimants will hold their claim subject to the right of the mineral claimants.

Questions involving priority of occupation, and the necessary use of the surface in conflict by the mineral claimants, will be left for determination to a jury of the neighborhood.

Pending appeal, no action in the case should be taken by the local office.

Assistant Secretary Muldrow to Commissioner Sparks, October 31, 1885.

I have considered the case of Frank Esler, John Keeney, N. J. Malin, George H. Smith, George Ash, G. A. Huston, and C. M. Stephens, with Fellows D. Plase and Pike Moore, protestants and mill-site claimants, *v.* Cooke Townsite, by Hon. J. P. Martin, probate judge for Gallatin county, Bozeman land district, Montana Territory, as presented by the appeal of the protestants from the decision of your office, dated August 14, 1884, dismissing their several protests, filed in the case.

The record shows the following facts.

On October 8, 1883, the occupants of the town of Cooke City—which was unincorporated—filed a petition in the office of said probate judge "to have entered, surveyed and platted at this place so much of the public land as may be sufficient for a townsite, to be called Cooke City, in accordance with section 2382 of the Revised Statutes of the United States and section 1205 of the Revised Statutes of the Territory of Montana of 1879."

In November, 1883, the townsite was surveyed and the plat of its exterior boundaries, as certified by the United States surveyor-general for said Territory on January 12, 1884, shows that the same conflicts with mill site surveys "B," "C," "E," "F," "J," "L," "45 B," "3," "4,"

and "G." to the extent of 27.11 acres, and the area not in conflict to be 21.05 acres.

On February 8, 1884, the mill-site claimants, by their attorney, filed with the district land officers notice of their several mill-site claims, and asked to be notified of any attempt to make proof and entry of the land claimed for a townsite, as shown by said plat of survey.

On February 9, 1884, townsite proof was made before the register, which tended to show, among other things, that the land was selected and occupied as a townsite in May, 1883, that the land is non-mineral; that there are three stores of general merchandise; one livery stable; six saloons; one drug store; one hotel and two or three boarding houses; that the town is unincorporated, with about two hundred inhabitants, and that the improvements thereon cost seven thousand dollars.

On March 7, 1884, the attorney for Esler filed in the district land office his protest against allowing entry of said townsite, so far as the same embraces mill-site "B," as shown by said plat of survey. Protests were filed by the other mill-site claimants, the particular date not appearing, against allowing entry for the lands covered by the mill-site surveys, except those designated as "C," "3" and "4." The protestants aver that each mill-site was located in connection with a distinct lode claim; that such location was made prior to the date of the petition of the townsite occupants; that a survey of each location was made prior to the survey of the townsite, and that said mill-sites were located in good faith, and are in use and occupation by the claimants, upon which they have expended large sums of money.

On March 12, 1884, the townsite proof was "suspended and referred" to your office, together with the protests of the several mill-site claimants. The protests were dismissed by your office as stated (*supra*), for the reason that there was no evidence that the lode claims were taken in accordance with law, or that the locators complied with the local or United States laws; that the protestants did not allege that the townsite claimants have failed to comply with the law in any particular, and that if the mill-site claimants have any valid possessions held under existing lows, which appear to be in conflict with said townsite claim, they will be fully protected by the reservation clause, which will be inserted in the patent for said townsite, should one be issued. No mention of any right of appeal was made in said decision, and on August 23, 1884, said probate judge made cash entry No. 227 in trust for the townsite of Cooke, under the act of March 2, 1867, and the act of June 8, 1868, now incorporated into the Revised Statutes, section 2387 and section 2392. Appeals were duly taken from said decision, and several grounds of error are assigned.

It is insisted by the appellants, that when said protests were filed and notice given of the several mill-site claims, which were shown to conflict with the townsite application, a hearing should have been ordered to determine the rights of the respective claimants, and also that the

Rico case, cited as an authority in said decision, is not applicable, for the reason that in that case a hearing was held and the case was decided upon the whole testimony.

It will be proper to inquire what is the character of the claims of the protestants. They claim under the first paragraph of section 2337 of the Revised Statutes, which provides that, "Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes." It is conceded by all parties that the land embraced in said mill-site claims is non-mineral and non-contiguous to the lodes with which they are said to be connected.

Section 2386 of the Revised Statutes provides that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof," and it is provided in section 2392 of the Revised Statutes that, "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or *possession* held under existing laws."

It has been repeatedly held by this Department and the courts of the country that townsites may be located on mineral land, and the townsite claimants will hold their claims subject to the rights of the mineral claimants. Townsite of Butte (3 C. L. O., 131); Rico case (1 L. D., 567); Vizina Consolidated Mining Co. (9 C. L. O., 92); Papina *v.* Anderson (10 *id.* 52); Mining Co. *v.* Consolidated Mining Co. (102 U. S., 168); Steel *v.* St. Louis Smelting Co. (106 *id.* 447).

In the Rico case (*supra*) this Department expressly ruled that under section 2386, "the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof," that if necessary the mineral claimant may take the ground for the purpose of sinking a shaft to his lode for the erection of the buildings required to carry on his mining enterprise for reduction works, or for a millsite, and in such a case, the claim under the townsite must be subject to the claim under the mineral law. It was further decided in said case that all "questions of priority of occupation, as well as the question, what is the necessary use of such surface by the mineral claimants, ought to be submitted to a jury of the neighborhood where such controversies arise."

The ruling as above stated was re-affirmed in the Vizina Consolidated Mining Company (*supra*), and may be considered now as well settled by this Department.

A careful consideration of the whole record fails to disclose any error in the decision of your office dismissing said protests, and it is accordingly affirmed. It appears, however, that subsequently, without wait-

ing for the time to pass within which an appeal may be filed, the register and receiver allowed the townsite entry. This was error. The appeal of the mill-site claimants ought to have suspended all action relative to the tracts involved, until the questions raised by said appeal are finally determined. It also appears that since the decision of your office dismissing the protests of the mill-site claimants, application for patent has been made upon the mill-site in connection with the "Bull of the Woods" claim, publication had and adverse claims filed by those claiming under the townsite entry, and appeal has been filed by the mineral claimants from the refusal of the district land officers to allow entry pending the decision in the courts of said adverse claims. As there has been no decision by your office upon said appeal, it is not deemed advisable for this Department to express any opinion in advance of your decision upon the same.

RESTORATION OF FORFEITED RAILROAD LANDS.

TEXAS PACIFIC R. R. CO. AND SOUTHERN PAC. (BRANCH LINE) R. R. CO.

The act of Congress declaring forfeited, and restoring to entry, lands granted to the Texas Pacific Railroad Company, is held to apply to lands along the branch line of the Southern Pacific Railroad Company, where the same passes through lands withdrawn for the former company, as by the terms of the grant to said Southern Pacific, such lands were excepted therefrom in favor of the Texas Pacific Company.

OPINION.

Assistant Attorney-General Montgomery to Secretary Lamar.

Agreeably to request for an opinion touching the matter of the restoration to market of certain lands in California within what are claimed as the joint limits of the Texas Pacific and Southern Pacific Railroad Companies, I beg leave to submit the following:

On March 3, 1871, Congress passed an act incorporating the Texas Pacific Railroad Company, and authorizing said company to construct a railroad and telegraph line,

"From a point at or near the town of Marshall, county of Harrison, Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to Ships Channel, in the Bay of San Diego, in the State of California."

It was also thereby enacted—

"That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to said

Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

It is further provided—

"That the said Texas Pacific Railroad Company shall commence the construction of its road simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, . . . and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete and in running order within two years after the passage of this act, and to continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the Bay of San Diego in California within ten years after the passage of this act," etc.

Section 23 of the same act provides as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866. *Provided, however*, That this section shall in no way affect or impair the rights present or prospective of the Atlantic and Pacific Railroad Company or any other railroad company."

(See 16 Stat., 573.)

It is under the last named section that the Southern Pacific Railroad Company, appellant, claims the lands now in controversy, to wit, lands alleged to be within what are claimed as the common grant limits of the Texas Pacific and Southern Pacific roads.

In order to determine what construction it is proper to give to the granting clause of section 23 of the above act of March 3, 1871, let us consider the legal rules laid down by the Supreme Court of the United States for the interpretation of granting acts of this character.

In the case of the "Dubuque and Pacific Railroad Company *v.* Litchfield" (23 Howard, 88), the Supreme Court says:

"All grants of this description are strictly construed *against the grantees;* nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed they can not be implied."

Further on, quoting the language of Lord Ellenborough, the court says:

"If the words would admit of different meanings, it would be right to adopt that which is more favorable to the interests of the public, and against that of the company. . . . . The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed it is their own fault. On the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretations that which cannot be obtained by plain and express terms."

It can scarcely be claimed that the reason of this rule is the less applicable to the present case because of the fact that more than one grant is provided for in the same act. At the time the Southern Pacific Company was seeking to procure the grant provided for in section 23 of said act, the possibility of a forfeiture of its grant by the Texas Pacific was well known to said Southern Pacific company. Hence, according to the above rule of construction, if said section 23 of said act is so worded as to leave it uncertain whether the lands now in question passed to the Southern Pacific, or whether in the event of a forfeiture by the Texas Pacific—just such as has taken place—it was intended that said lands should revert to the government, all such uncertainty must be resolved in favor of the government.

The same rule of construction as that above laid down in 23d Howard has been again and again reiterated by the Supreme Court of the United States—notably in the case of the Leavenworth, Lawrence & Galveston R. R. Co. *v.* The United States (92 U. S., 740).

It will be observed that the first and chief object of the above named act was to secure the building of a railroad from Marshall, Texas, to the Bay of San Diego, California; and secondly, to connect said railroad, when built, with the city of San Francisco. And it appears, from appellant's own showing, that although a map of general route of said Texas Pacific Railroad was filed in the General Land Office, yet not a mile of said road was ever built, nor was its line of definite location ever established. So that not only was it impossible for the Southern Pacific road to establish a connection between said road and the city of San Francisco (the very thing which the Southern Pacific Company was required to do as the condition and in consideration of its grant), but it was impossible for the said last named company, in the absence of a definite location of the line of said Texas Pacific road, either to connect therewith or to know at what point such connection could even prospectively be made. Thus matters stood up to February 28, 1885, when Congress declared a forfeiture of the lands granted to said Texas Pacific Railroad Company. In pursuance of said act, and under instructions from the Honorable Secretary of the Interior, the Honorable Commissioner of the General Land Office, on March 17, 1885, directed

the register and receiver of the land office at Los Angeles, California, to cause notice to be published,

"That the odd numbered sections of land heretofore withdrawn for said grant (to the Texas Pacific Railroad Company) have been restored, and that the books of your office are now open for the entry of said lands under the pre-emption, homestead and other laws relating to unoffered lands."

On the following day, to wit, March 18, 1885, the above order was modified by a letter addressed to the said register and receiver at Los Angeles, signed by the then *Acting* Commissioner of the Land Office, advising them that—

"The lands in the limits of the withdrawal for said (Texas Pacific) grant, which are also within the limits of the grant to aid in the construction of the branch line of the Southern Pacific Railroad will not be affected by this restoration."

On April 4, 1885, the Hon. Wm. A. J. Sparks, Commissioner of the General Land Office, by letter to the said register and receiver at Los Angeles, revoked the said modified order of March 18, 1885, leaving in force the aforesaid order of March 17, 1885. From this last named order of April 4th, the Southern Pacific Railroad Company has appealed.

Long prior to the passage of said act of Congress, declaring a forfeiture of said grant to the Texas and Pacific Company, the Southern Pacific Company had extended its road from Tehachapa southward, through the lands embraced within the map of general route of the Texas Pacific, to and across the Colorado River, by way of El Paso, into Texas; and the question now presented is, can said Southern Pacific Company, by virtue of said 23d section of said act of March 3, 1871, rightfully claim the alternate odd sections of land lying along the line of its said road, and within the grant limits of the Texas Pacific Road.

In view of the fact that, without any fault of the government, it became impossible for the Southern Pacific to establish a railroad connection between the city of San Francisco and said Texas Pacific Road "at or near the Colorado River" the accomplishment of which work, as suggested above, constituted the very condition upon which its right to a grant was seemingly made to depend—it might be a serious question whether or not, in the absence of Congressional relief, said Southern Pacific Company is in a position to demand an acre of the land originally intended to be granted. According to the general doctrine pervading the law of dependent contracts, an impossibility to perform the conditions of such a contract will not excuse non-performance when such impossibility is occasioned either by the act of God or a stranger. (See 2 Chitty on Contracts, 9th English edition, p. 1086.)

But without discussing the question of the applicability of this doctrine to the case under consideration, let us inquire whether it clearly

appears that Congress ever intended to grant to the Southern Pacific Company any land within the grant limits of the Texas Pacific.

As we have seen, the closing words of said section 23 of the act above quoted—the section under which the Southern Pacific Company claims the lands in question, are as follows:

"*Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Company, or any other railroad company.*"

Now in view of the fact that this same act, in its preceding sections, had already declared that the "Texas Pacific" was thereby constituted an incorporated railroad company, and was granted certain lands, including *all* the odd-numbered sections now in dispute, it is difficult to see how it would have been possible more clearly to except said lands from the operation of said grant to the Southern Pacific, than by providing that the latter grant should not "affect or impair the rights, present or prospective, of any other railroad company."

Appellant's counsel contend that the "Texas Pacific Railroad Company" is *not* embraced in the term "*any other railroad company,*" and in support of this contention one of said counsel in his brief cites the following authority:

In Sandiman *v.* Breach (7 Barn. & Cress., 96,) it was held by Lord Tenterden, delivering the unanimous opinion of the Queen's Bench, that the Stat. 29 Car., 2, c. 7, that "No tradesman, laborer, or other person or persons, shall do or exercise any worldly labor, business or work of ordinary calling upon the Lord's day," did not include the drivers of stage coaches, because, where general words follow particular ones the rule is to construe them as applicable to persons *ejusdem generis.*

If the act of Congress under which the Southern Pacific Railroad Company claims its grant had been a penal statute, where every intendment must be taken most strongly against the government, instead of a statute granting lands, where every intendment must be taken *most strongly against the grantee* and *in favor* of the government; and if "The Texas Pacific Railroad Company" (when so incorporated and so christened by act of Congress) lacked as much of being a railroad company as does the driver of a stage-coach lack of being either a "tradesman" or an "artificer," it might in that event be logically contended that the above quoted decision of the Court of Queen's Bench was an authority in point in this case. But it can scarcely be presumed that Congress, while in the very act of incorporating the Texas Pacific Railroad Company, and granting to it certain lands in order to enable it to work out the objects of its creation, could have intended to exclude it from the beneficial effects of a clause specifically declared to be for the protection of the rights of the Atlantic and Pacific Railroad Company "*and all other railroad companies,*" against all claims of the Southern Pacific based upon section 23 of the aforesaid act.

Again: It is a recognized rule of construction, alike applicable both

to statutes and to contracts, that where one construction will give force and effect to every part of a statute—or of a contract—while a different construction would produce a conflict between different parts thereof, the former construction must be adopted. And in this case it is clear that if we so construe said section 23 as to make it pass to the Southern Pacific Railroad Company *any* of the odd-numbered sections of land within the grant limits of the Texas Pacific, such a construction would bring said section into palpable conflict with section 9 of the same act, whereby *all* the odd-numbered sections within said limits were granted to the Texas Pacific. If, however, we give to said *proviso* embodied in section 23 its literal meaning as above suggested, no such conflict will be found; and all the parts of said act will stand in perfect harmony with each other.

After a careful consideration of the whole case, I am therefore of opinion that the action of the Commissioner appealed from ought to be sustained.

DECISION.

Secretary Lamar to Commissioner Sparks, November 2, 1885.

In the matter of the appeal of the Southern Pacific Railroad Company from your office decision of April 4, 1885, directing the local officers at Los Angeles, California, to be governed by instructions of March 17, 1885, directing them to give notice of the restoration of all lands theretofore withdrawn for the Texas and Pacific Railway; and revoking your office letter of March 18, 1885, excluding from such restoration lands along the Branch Line of the Southern Pacific Railroad, where the same passes through lands withdrawn from said Texas and Pacific Railway; I have carefully considered the points presented by said appeal, and, for the reasons set forth in the foregoing opinion, the said decision appealed from is hereby affirmed.

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*ATTORNEYS—OFFICIAL ORDER.**

DEPARTMENT OF THE INTERIOR,
ORDER.] *Washington, D. C., October* 21, 1885.

By virtue of the authority conferred upon the Secretary of the Interior by the act of the 4th of July, 1884, it is hereby prescribed:

That no person who has been an officer, clerk or employé of this Department within two years prior to his application to appear, in any case pending therein, shall be recognized or permitted to appear as an attorney or agent in any such case as shall have been pending in the Department at or before the date he left the service.

Provided, this rule shall not apply to officers, clerks, or employés of the Patent Office, nor to cases therein.

L. Q. C. LAMAR,
Secretary.

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*For the act referred to, and Departmental order, see 3 L. D. 113.

PLACER MINING CLAIM—EXPENDITURE.

GOOD RETURN MINING CO.

As a condition for application for patent under section 2325 R. S., a preliminary showing is required of work or expenditure upon each location sufficient to maintain possession under section 2324 R. S.

On application for patent to a mining claim embracing several locations, an adverse claimant may prove abandonment of any one of such locations by failure to make annual expenditure thereupon, or upon a common claim for its benefit.

In case of such an application for a placer claim, the requisite proof relative to expenditure is furnished by the surveyor-general's certificate showing that $500 has been expended upon the claim, the law not requiring such proof to show that amount to have been expended upon each original location, in lieu of the amount provided for by section 2324 R. S.

Secretary Lamar to Commissioner Sparks, October 31, 1885.

I have considered the appeal of the Good Return Mining Company from your predecessor's decision of September 19, 1884, declining to recognize its application for patent, for the reason that it was not shown nor alleged that five hundred dollars had been expended for the development of each separate original location embraced in said application.

This is a placer, designated as the Good Return Placer Mining claim, covering one hundred and forty acres of section 34, 6 N., 14 E., M. D. M., Stockton district, California, viz: the W. ½ of NW. ¼ of SW. ¼; the W. ½ of SW. ¼ of NW. ¼; the NE. ¼ of SW. ¼ of NW. ¼; the N. ½ of SE. ¼ of NW. ¼; the E. ½ of NE. ¼ of NW. ¼; the NW. ¼ of NW. ¼ of NE. ¼; the N. ½ of SW. ¼ of NE. ¼; the NW. ¼ of SE. ¼ of NE. ¼, and the SW. ¼ of NE. ¼ of NE. ¼, described in the location notice made on the ground February 27, 1884, as "being a relocation of the Good Return Placer Mine, so as to specify the land as per the Government survey, and for the purpose of placing the same of record in the records of the county." The location was made by the Good Return Mining Company and six individuals, and was duly recorded February 29, 1884. March 1, 1884, the six individuals conveyed to said company by deed their undivided interest, which deed was duly recorded March 4, 1884.

March 11, 1884, notice of intention to apply for patent was posted on the claim, and on the 14th such application was made at the Stockton office, with an affidavit that applicant and its grantors had expended five hundred dollars or more on said claim. The application was rejected, as reported by the register and receiver April 14, 1884, "under that clause of the circular of the Department dated December 9, 1882, which reads: 'If an individual become the purchaser and possessor of several separate claims of twenty acres each or less, he may be permitted to include in his application for patent any number of such claims contiguous to each other, not exceeding in the aggregate one hundred and sixty acres; but upon or for the benefit of each original claim, or location so embraced, he or his grantors must have expended the sum

of five hundred dollars in improvements.'" The report adds, that they "refused to file the claim, because $500 in labor or improvements is not shown to have been expended upon or for the benefit of each claim or location embraced by the Good Return application for patent."

The original locations referred to are not disclosed. They only appear from a statement or recital in the application that "said mining claim was located years ago in accord with the customs of placer miners, which did not require such locations to be placed of record; that the Good Return Mining Company, for the purpose of applying for a patent for their said mining property, on 27th day of February, 1884, relocated their said mining claim with their own name and the names of S. S. Bradford," etc., and recorded the same, as before recited.

Your office treats this recital as "evidence," from which "it appears . . . . that the claim for which said application was presented comprises several original claims." And this inference seems also to have been so treated by the register and receiver, although not stated.

Upon this showing your predecessor held, (1), that the law as declared by the circular instructions requires the amount of expenditure "to be determined in a case like the present by the number of *original claims* or *locations*, upon which the application rests;" and (2), that "a party who becomes the purchaser of several original placer claims or locations cannot, by a relocation embodying these several original claims or locations, avoid the statutory expenditure of $500 for each original claim or location so embodied upon which application for patent is based."

The appellant denies the authority of the circular, and insists, as matter of law, that the amount of $500 is only required to be shown to have been expended upon the entire claim embraced in the application for patent.

The provisions of law for expenditure upon mining claims are found in sections 2324 and 2325 of the Revised Statutes.

The first is that "on each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." A provision follows, touching delinquency of

co-owners. By act of January 22, 1880, (21 Stat., 61,) the period for the commencement of each year is fixed as the first day of January succeeding the date of location.

The other provision touching amount of expenditure is that made by section 2325 as a requirement of proof, pending the proceedings upon application for patent, to the effect that "The claimant at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors."

The broad question presented by the appeal is, whether or not the expenditure required to be shown by section 2325 must, like that required by section 2324, be so great as to amount to the whole specified sum for each original location or discovery claim embraced in the application.

The circular instructions assume that such is the law. To properly decide the point requires close analysis of the statute as construed by the highest judicial tribunals. As to section 2324 the case of Jackson *v.* Roby (109 U. S., 440,) establishes the doctrine that the annual expenditure to the amount of $100 to be done on each located claim or for its benefit, must be made upon placer as well as lode claims, a requirement that does not appear to have been heretofore insisted upon by the regulations of the Department. This case, together with that of Chambers *v.* Harrington, (111 U. S., 350) also holds that the showing must be made to the jury that such work, or at least some work, must have been done on or for the benefit of each discovery claim, in order to hold and protect the same from re-location, and sustain the right of possession in an applicant for patent. In the first case the court say: "There having been no work done by either claimant, plaintiff, or defendant, on the premises in controversy, the court properly instructed the jury to find against both." In the latter case, after referring to the complete security of possessory rights under mining regulations, where no patent is sought, this language is used:

"These mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves; and it was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil, a mining regulation was adopted that some work should be done on each claim in every year, or it would be treated as abandoned.

"In the statute we are considering, Congress, when it came to regulate these matters and provide for granting a title to claimants, adopted the prevalent rules as to claims asserted prior to the statute, and as to those made afterwards, it required one hundred dollars' worth of labor

or improvement to be made in each year on every claim. Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger."

"When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent."

In this case there were three successively acquired claims, supposed to be located on the same lode. The amount of $300 was found by the court to have been expended by locating the main shaft on one during the year in which the abandonment of another of said claims was alleged, which work was also found by the court to have been done for the benefit of the three, and the title was sustained against an attempted re-location of part of the ground.

I draw from these cases the conclusions:

(1). That when application is made for patent upon a mining claim embracing several locations an adverse claimant may prove abandonment of any one of such locations by failure to make annual expenditure upon it, or upon a common claim for its benefit, and the possessory right will fail even though the adverse claimant may not show in himself a good adverse claim by reason of a like failure. And this accords with the act of March 3, 1881 (21 Stat., 505).

(2). That compliance "with the terms of this chapter," as a condition for the making of application for patent according to section 2325, requires the preliminary showing of work or expenditure upon each location, sufficient to the maintenance of possession under section 2324, either by showing the full amount for the pending year, or if there has been failure it should be shown that work has been resumed so as to prevent re-location by adverse parties after abandonment.

This renders unnecessary any extended review of the provision of section 2325, requiring the further showing "that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or his grantors." This is but saying that in any case at least that amount shall have been expended to entitle him to patent, though for a single location one hundred dollars per year would protect the possessory right. That more than one such location may be embraced in an application for patent is clear from the cases *supra*, and also from Smelting Company *v.* Kemp (104 U. S., 636,) where the question was directly brought in issue, and wherein all these terms, "location," "claim," "mining claim," etc., are elaborately discussed and specifically defined, and wherein the distinction is very clearly drawn between the limitations upon the quantity that may be embraced in one location and that which may be included in a single patent, and the often variant and different meanings of the words "claim" and "mining

claim" are cited and distinguished. The construction of sections 2324 and 2325 on this point must be considered by these decisions as settled; wherefrom it follows that as section 2325 only directs proof of expenditure to the amount of five hundred dollars by certificate of the surveyor-general on the claim embraced in the application for patent, it must be error to hold that it further requires that amount on each individual original location in lieu of the amount already provided for by section 2324.

I think the circular instructions of 9th December, 1882, and the first requirement of the circular of 8th June, 1883, are erroneous, and the same are accordingly overruled.

With respect to the ruling in the present case that it was not competent for the Good Return Mining Company to re-locate the claim purchased from parties who many years ago made locations which were never recorded and never adjusted to the public surveys, such re-location having been made so far as shown by the allegations, not for the purpose of evading annual expenditure, but for better and legal description, and in order to enable the owner to proceed and obtain patent, I am of the opinion that said ruling is not well grounded in law, and works essential hardship. There is nothing to indicate whether the original discovery was before or after 1872. Nor is there any showing as to the number of original discovery claims, and annual expenditure upon each so as to prevent its re-location by anybody "in the same manner as if no location of the same had ever been made." If no location had ever been made, the manner of this location and recording was precisely in accordance with law. It conforms to the requirements of sections 2329, 2330 and 2331, respecting placers upon surveyed lands. I see no objection to the receipt and publication of the application as a basis for entry, subject to the filing of adverse claims and the usual proceedings, as in other cases.

The decision is therefore reversed, and the company will be permitted to proceed with its application, upon showing compliance with law to date of renewal of such proceedings, in accordance with the foregoing views.

ADJUSTMENT OF SWAMP GRANT.

STATE OF OREGON.

When by the decision of the General Land Office the claim of the State to any tract is rejected, and a review of such action is sought either through appeal, or by certiorari, the State should bring itself within the rules of practice governing such proceedings.

Secretary Lamar to Commissioner Sparks, October 31, 1885.

I am in receipt of a communication from your office, dated the 27th instant, inclosing copy of your office letter, dated September 2d last, to Captain John Mullan, agent for the State of Oregon, and his letter

dated September 12, 1885, relative to certain cases involving the right of said State to certain lands under the grant by act of Congress approved March 12, 1860, (12 Stat., 3,) extending the provisions of the swamp grant to the State of Oregon.

It appears from your said office letter of September 2d, that in reply to a letter from said State agent, asking that he be allowed until November 20th next to examine the papers and records in certain cases decided by your office adversely to said State, because of his inability to attend to the matters involved prior to that time, he was advised that "the rules of practice having been approved by the Secretary of the Interior, I do not feel authorized to grant the extension of time asked for in the cases where the claim of the State has been held for rejection, except with the consent of the other parties to the contests." On September 21, 1885, said counsel for the State filed in your office a paper, dated September 12th, same year, signed by him as attorney for said State, which he asks to have considered as an appeal in each and every case referred to therein by number, and also as a motion to certify to this Department all of said cases for final action.

The grounds of the motion are, that the decisions in the cases referred to are not in accordance with the facts adduced at the hearing before the district land officers, and that, as the law makes the action of this Department final, the State is not finally concluded until this Department has finally adjudicated each case.

The paper is unverified, and can not be entertained as a motion for a certiorari under the rules of practice. Rule 83 (September 1, 1885,) provides that when the Commissioner shall formally decide that a party has no right of appeal to this Department, such party may apply for an order directing that the proceedings be certified to the Secretary, and further action shall be suspended until advised by this Department.

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

Rule 86 provides that notice of an appeal from a decision of your office must be filed within sixty days from the date of notice of the decision appealed from.

There may be instances where this Department would feel called upon to exercise its supervisory power to prevent a great wrong, and would direct that an appeal be allowed, or the record certified where the offer to file the appeal was not made in time. But no such case is presented by the counsel for the State.

In your communication of October 27, 1885, you ask to be instructed relative to certification of those cases wherein the decisions of your office or of the local officers have become final by failure to appeal, and the claims of the State have been rejected.

It is not deemed advisable to establish any general rule different from those now in force. It was held by this Department, *in re* State of

Oregon (3 L. D., 474,) that although no appeal was taken from the finding of the district officers as to the character of the lands, it was the duty of your office to review the testimony taken at the hearing and to render a decision upon the whole evidence. When, therefore, the decision of your office rejects the claim of the State to any tract under said grant, and an appeal is filed within the time prescribed by the rules of practice, the case should be duly transmitted to this Department for final adjudication. In no case will you certify proceedings under Rules 83 and 84 unless specially directed by this Department.

Your attention is also called to the repeated departmental decisions to the effect that separate appeals must be filed in each case, and the same transmitted to this Department separately. Griffin *v.* Marsh, and Doyle *v.* Wilson (2 L. D., 28); So. Minn. Ry. Ex. Co. *v.* Gallipean (3 L. D., 166).

PRACTICE—REVIEW—APPEAL.

POSTLE *v.* STRICKLER ET AL.

The rights of the party having been duly considered by the Department on motion for review, and the decision thereon, denying the same, having been received at the General Land Office, prior to action on the appeal of the same party to the Department, raising the same question, the Commissioner properly declined to transmit the papers on appeal.

Secretary Lamar to Commissioner Sparks, October 31, 1885.

In 1882 Martin Postle began a contest against the timber culture entry of Jacob Strickler for the NW. ¼ of Sec. 24, T. 20, R. 1 W., Grand Island, Nebraska, alleging non-compliance with the law. The local office decided in favor of the contestant and such decision was affirmed by your office, but on appeal my predecessor on June 25, 1883, dismissed the contest, because the contestant did not appear to have made application to enter at the time of beginning the contest.

Due notice of this decision was given Postle on July 17, 1883. On the 13th day of February, 1884, Postle filed affidavits to the effect that he did in fact apply to enter at the time of initiating contest, and asking that an investigation be made with respect to such alleged application. February 19, 1884, a report was called for from the local office and on March 3, the said application was forwarded to your office, with the statement that it appeared to have been mislaid in the local office. Whereupon, my predecessor, on April 29, 1884, (2 L. D., 246,) reconsidered the decision of June 25, 1883, and vacating the same, affirmed the decision of your office. This conclusion rested upon the ground that Postle's contest was in all respects regular; that the application having been lost through no fault of his, and his search for the same having been diligently followed up to success, he should not be deprived of his right simply because he had not filed his motion for review within the time prescribed by the rules of practice.

A petition is now filed, bearing date October 14, 1885, on behalf of Henry Rogers, alleging that when the period of thirty days had elapsed after Postle had been notified of the adverse decision of June 25, 1883, Strickler, the original entryman, relinquished his entry, and he (Rogers) then made timber culture entry for the land. That your predecessor, on receipt of the decision of April 29, 1884, directed the cancellation of petitioner's entry and permitted Postle to enter the land. That from this action of your office Rogers appealed, but that said appeal was never transmitted to this Department and therefore application is now made to the end that such appeal may be allowed, and the whole case again sent up for examination here.

While it is true that Rogers' case has not been considered by the Department on *appeal*, it is also true that he has had his day in court through a different proceeding. The record shows that after the decision of April 29, 1884, a motion was filed in this Department on behalf of Rogers, asking a reconsideration of said decision and setting up the rights acquired by said Rogers through his entry made as alleged by him after the right of review had been lost by Postle. This motion was denied by departmental decision of July 25, 1884 (3 L. D., 42,) which again declared that Postle should lose nothing through the negligence of the local office, and directed the cancellation of Rogers' entry.

As the appeal of Rogers was only filed on July 22, 1884, it followed that before any action thereon could be taken by your office the decision of July 25, 1884, was received, and your predecessor very properly held that the denial of Rogers' motion for reconsideration by the Department rendered unnecessary the transmission of his appeal.

The petition is therefore denied.

HEARING—EVIDENCE.

MARK L. CAMPBELL.

Statements of a special agent made privately to the local officers, and ex parte affidavits cannot be considered as legal evidence, upon which final action may be taken.

Secretary Lamar to Commissioner Sparks, October 31, 1885.

I have considered the case of Mark L. Campbell, on appeal from your office decision of October 11, 1884, holding for cancellation his declaratory statement for the E. ½ of the NW. ¼ and the SW. ¼ of the NW. ¼ of Sec. 24, T. 60 N., R. 16 W., 4th P. M., Duluth, Minnesota.

Campbell filed for said tract on October 30, alleging settlement June 12, 1883. On report of Special Agent Eaton, alleging fraud, he offered final proof and a hearing was had at the local office.

In the decision of the local officers thereafter rendered I find the following statement: "In arriving at our opinion in this case we are influ-

enced not only by the testimony submitted, but also by certain other evidence disclosed to us by the special agent, and which he did not then wish to submit in the case, as he wished to make use of it in criminal proceedings before the grand jury in U. S. district court." This is error. The local officers were authorized to consider only such evidence as was legally offered at the hearing. The statement of the Government agent, made privately to them, was not legal evidence.

I find in the record of the case an affidavit in writing of one George Cole introduced at the hearing. Cole was not present at the hearing; claimant was afforded no opportunity of cross-examining him, and the statements contained in his said affidavit cannot therefore be considered. After an examination of the testimony legally adduced in the case, I concur in the conclusion of your office and that of the local officers, that Campbell did not make his filing in good faith; but for the benefit of others. The decision appealed from is therefore affirmed.

PRACTICE—PUBLICATION OF NOTICE.

BRANNIN *v.* TOWNSEND.

Publication of notice is only allowed under strict compliance with the rules of practice, and one of the essential requirements of such rules is the contestant's affidavit showing that personal service cannot be made.

Secretary Lamar to Commissioner Sparks, November 5, 1885.

I have considered the case of Robert C. Brannin *v.* Fred. J. Townsend, involving timber-culture entry No. 190, made April 28, 1879, covering the SW. $\frac{1}{4}$ of Sec. 25, T. 5 N., R. 32 E., La Grande district, Oregon, on appeal from your office decision of July 16, 1884, holding said entry for cancellation.

Contest was initiated by Brannin against said entry June 26, 1883, alleging failure to cultivate properly. September 10, 1883, was set for the hearing; at which date contestant appeared, testimony was taken, and the hearing closed. Contestee failed to appear either in person or by attorney.

The register and receiver rendered joint opinion that the allegations of failure to comply with the law had been sustained, and decided that the entry should be canceled. This decision your office affirmed.

Defendant appeals from your decision, upon the following assignments of error:

"First for the reason that it was not shown by the affidavit of plaintiff that personal service of notice of contest could not be had at time of order of publication, as required by Rule 12 of Practice."

The published notice of intention to contest is dated July 30, 1883. The notice of contest, which was placed in the hands of the sheriff of

the county for personal service, bears the following endorsement, dated July 28, 1883:

State of Oregon, County of Umatilla, ss:

I, William Martin, being first duly sworn do depose and say that I have made due and diligent search for the within named Fred. J. Townsend, but am unable to find him in the county or State.

WM. MARTIN,
Sheriff.

While the affidavit of the sheriff to whom the notice of contest was given in order that he might make personal service thereof clearly comes under the head of "such other evidence as the register and receiver may require," it can not supply the place of the "affidavit of the *contestant*," which the rule explicitly states is indispensable before notice by publication will be recognized as valid.

* * * * * * *

In the case of Parker *v.* Castle (4 L. D., 84,) the Department decided that in case of notice by publication, in order to render such notice valid there must be full and strict compliance with the provisions of the statute and the rules of the Land Department. In this case such rules were not fully and strictly complied with; the defendant in fact received no notice of the pending contest; he presents affidavits to show that if opportunity were afforded him he could make a meritorious defense.

Said decision of your office, of July 16, 1884, is therefore reversed, and you are directed to order a rehearing, for the purpose of testing the question of the compliance of said Fred. J. Townsend with the provisions of the timber culture law.

PRE-EMPTION—JOINT ENTRY.

O'NEAL *v.* PAQUIN.

Joint entry allowed for the conflicting claims, it appearing that settlement was made prior to survey and that a common boundary line had been recognized by the settlers as designating their respective possessory rights.

Secretary Lamar to Commissioner Sparks, November 5, 1885.

I have considered the case of William O'Neal *v.* Moses Paquin, on appeal from your predecessor's decision of September 30, 1882, in favor of Paquin for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 2 T. 44 N., R. 8 W., Lake City District, Colorado.

This is purely a question of settlement right, certain preliminary matters relating to the status of the lands having been heretofore adjusted.

Survey in the field of this township was made in May, 1881, the plat approved by the surveyor general October 11, and filed in the local office November 27. 1881.

Both parties filed December 5, 1881, Paquin alleging settlement April 12, 1877, upon S. ½ of NW. ¼ and N. ½ of SW. ¼ and O'Neal alleging settlement March 10, 1881, upon SE. ¼ of NW. ¼, NE. ¼ of SW. ¼ and NW. ¼ of SE. ¼; thus conflicting with Paquin for two forty acre subdivisions, namely SE. ¼ of NW. ¼ and NE. ¼ of SW. ¼.

It is shown that both settled as alleged, on opposite sides of a road running diagonally across the eighty acres from southeast to northwest, and that said road was common boundary for their respective grantors of possessory right and occupation. The register and receiver awarded to each the portion of his claim not in conflict, and decided to allow joint entry of the tract in dispute, on account of their respective rights at date of survey.

Your office reversed this award, on the sole ground that up to June 6, 1881, O'Neal, while holding and residing on the tract in dispute east of the road, was upon the land as a renter or tenant under permission of a previous occupant, and only purchased the right of ownership on that date at a trustee's sale to secure a loan previously made by him and which was a mere lien on said land.

The facts appear to be that O'Neal had in 1880 advanced $1300 to enable one Truitt to purchase this farm with its improvements and took a trust deed as security; that Truitt did not take personal possession, but his agent did move into the house on the land; that on the 10th of March, 1881, this agent gave possession to O'Neal, upon conditions not set up; the answer of O'Neal to a question on that point being that he "went on at that time as a renter." The conditions of the trust deed were broken April 9th, and on the 11th of May, 1881, notice of default and advertisement of sale to take place on the 6th of June were published in accordance with law, and O'Neal bought in the property and has continued his residence thereon. The notice does not recite the date when request for sale was made to the trustee by O'Neal, but it must have been prior to May 11, the date of the first insertion of the notice in the newspaper.

Taking all these facts, namely, that O'Neal was on the land; that the township survey in the field was "in the month of May," as sworn by the surveyor, the official plat showing that it was made from May 4 to May 31; that the plat was not approved until October; that as early at least as May 11, any tenancy which might have existed under Truitt was ended by the notice of default and sale; that neither Paquin nor his grantors had ever reduced to possession or claimed east of the road; that he himself assisted and assented to a removal of the original boundary line and the establishment of the road on its present line as a boundary, I find no difficulty in dismissing the technical objection and directing joint entry as awarded by the register and receiver. If either party shall refuse to make such joint entry after reasonable notice, say ninety days, the other party may be allowed to enter the tract according to his filing.

The decision of your office is accordingly reversed.

RAILROAD GRANT—SELECTION.

ST. PAUL M. & M. RY. CO. ET AL. *v.* PAULSEN.

The grant of four additional sections per mile to the St Paul & Pacific R. R. Co. by act of March 3, 1865, was one of quantity, requiring selection on the part of the grantee.

The pending appeal of a pre-emptor from the rejection of his filing will operate to bar selection by the railroad company.

Secretary Lamar to Commissioner Sparks, November 5, 1885.

I have considered the case of the St. Paul, Minneapolis & Manitoba Railway Company and the Hastings & Dakota Railroad Company *v.* Peter O. Paulsen, involving his application to make homestead entry for the S. ½ of NW. ¼, Sec. 1, T. 117, R. 29, Benson, Minnesota, on appeal by both companies from your predecessor's decision of January 12, 1884, allowing said application.

The tract in question is within the fifteen mile or indemnity limits of the grant for the St. Paul and Pacific Railroad—main line—(now St. P., M. & M. Ry.), act of March 3, 1857, (11 Stat., 195,) and was withdrawn for the benefit of the company March 7, 1857.

The grant of the company along this line, as far west as R. 38, was adjusted in 1863, and the lands not necessary to satisfy the grant (among which was the tract in question) were restored to market by offering at public sale September 5, 1864, under Executive Proclamation No. 700 (G. L. O. series), dated April 18, 1864.

By the subsequent act of March 3, 1865, (13 Stat., 526,) which was amendatory of the said act of March 3, 1857, this tract came within the ten mile or granted limits of the grant for the St. Paul and Pacific R. R. Co.

The tract is also within the twenty mile or indemnity limits of the grant for the Hastings and Dakota Railroad, act of July 4, 1866, (14 Stat., 87,) the withdrawal for the benefit of which became effective in that district August 8, 1886.

The records show that at the date of the second grant in favor of the St. Paul and Pacific R. R. Co., and also at the date of the grant in favor of the Hastings and Dakota R. R. Co., the whole of the NW. ¼, Sec. 1 T. 117 R. 29, was covered by homestead entry No. 1109 in the name of Edward G. Ashley, of date November 18, 1864, which was canceled September 30, 1872, for failure to make final proof within the statutory period.

On the 5th of June, 1878, Peter O. Paulsen applied to file pre-emption declaratory statement for the tract in question, which was "rejected for the reason that the tract described is within the ten mile limits of the St. Paul and Pacific R. R., and the twenty mile limits of the Hast-

ings and Dakota R. R. The land is not subject to pre-emption settlement and entry."

An appeal was duly taken by Mr. Paulsen to your office, which appeal was still pending on the 13th day of September, 1880, when the whole of the NW. ¼ Sec. 1, T. 117 R. 29, was selected by the St. Paul, Minneapolis and Manitoba Railway Company, and was dismissed January 24, 1884.

On the 5th of April, 1883, Paulsen executed a homestead affidavit before the clerk of the court of McLeod County, and transmitted it, together with an application to enter the tract in question, to the local office at Benson. This application was rejected May 31, 1883, and Paulsen appealed to your office on June 2d following.

Your office allowed the homestead application of Paulsen, and rejected the selection of the land by the company, on the ground that the land being within the granted limits of the grant by act of March 3, 1865 (*supra*), was not subject to selection by the company at any time or under any circumstances. Such construction was error. The grant to the St. Paul and Pacific Railroad Company in 1865 of the four additional sections, being one of quantity, and to be selected by the company along and opposite the completed road, such company could acquire no right to this land except by selection. See Winona and St. Peter R. R. Co. *v.* Barney *et al.* (113 U. S., 618)

Ashley's entry, subsisting at the date of the withdrawal for the benefit of the Hastings and Dakota Railroad Company in 1866, excepted the land from such withdrawal, and upon its cancellation in 1872, the land became subject to entry or selection by the first legally qualified applicant. It does not appear that the Hastings and Dakota Company ever exercised its right of selection, consequently it has no rights to this tract.

The appeal of Paulsen from the register and receiver's decision in 1878 rejecting his application to make pre-emption filing, while still pending, operated to bar the selection of the land by the company; and for this reason the selection herein referred to will be canceled.

Inasmuch as Paulsen attempted to make homestead entry of this tract in 1883, he thereby waived his appeal before mentioned, and there then being no other legal claim to the land, his homestead application will be received.

The decision appealed from is modified accordingly.

*RULE OF PRACTICE AMENDED.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 26, 1885.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Rule 70 of Rules of Practice, approved August 13, 1885 is hereby amended to read as follows:

"RULE 70. Rules 43 and 48, inclusive, and Rule 93, are *not* applicable to appeals from decisions rejecting applications to enter public lands."

WM. A. J. SPARKS,
Commissioner.

Approved Oct. 29, 1885:
H. L. MULDROW,
Acting Secretary.

PRACTICE—CONTINUANCE—SECOND CONTEST.

WOODWARD *v.* PERCIVAL ET AL.

A continuance cannot be effected except upon the action of the local officers.

No proceedings should be allowed under a second contest until the final determination of the first.

Secretary Lamar to Commissioner Sparks, November 9, 1885.

I have considered the case of Ozro M. Woodward *v.* Washington D. Percival and Albert W. Waggoner, on appeal by Woodward from your office decision of August 26, 1884, dismissing his contest against Percival's timber-culture entry, made March 9, 1882, for the SW. ¼, Sec. 25, T. 112 N., R. 67 W., 5th P. M., Mitchell (now Huron), Dakota Territory.

Contest was initiated by Woodward on November 2, 1883, and a hearing ordered for March 13, 1884, at which date the case was continued until May 13, 1884. On this last date, neither party appeared, and the contest was dismissed. May 14, 1884, at 9 a. m., Albert W. Waggoner was allowed to initiate contest against the said entry of Percival. Five minutes later Woodward's attorneys attempted to file an agreement for a further continuance of sixty days. The local office refused to recognize this agreement as the case had been dismissed. From such refusal an appeal was taken by Woodward, and on the 26th of August, 1884, your office rendered a decision sustaining the action of the local office, as before mentioned.

Your office well says: "A case cannot be continued by agreement of parties, but a continuance must be allowed by the register and receiver."

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* For Rule 70, see page 45 of this volume.

In this case no continuance was asked for on the day of hearing, no testimony was offered, and the local office was properly justified in dismissing the contest of Woodward and entertaining the second contest.

So far there was no error. It appears, however, that the local office allowed the second contest to proceed pending the final determination of the first. This was error. The second contest should have been received, but not acted upon until the final determination of the first. By your letter "C" of date March 30, 1885, you transmit the papers in the second contest, showing that the local office on the 17th of March, 1885, adjudged the entry of Percival forfeited as the result of Waggoner's contest, before mentioned. You took no action on the last at all, except to send it to this Department.

I now return all the papers accompanying your office letter of January 14, 1885, and your said letter of March 30, 1885, with directions that Mr. Waggoner be allowed to proceed anew with his contest, dating his right to do so from May 14, 1884. Woodward is no longer in the case.

The decision appealed from is affirmed.

PRE-EMPTION—CONTEST—RESIDENCE.

STRAWN *v.* MAHER.

While it is the better practice to not allow proceedings against a pre-emption claim, prior to offer to make final proof, yet the government may at any time exercise the right of instituting inquiry as to whether the claimant is complying with the law.

In such cases objection to the jurisdiction of the local office should be made prior to a trial on the merits.

Mere visits to the land to keep alive the fiction of residence do not constitute compliance with the law.

Secretary Lamar to Commissioner Sparks, November 11, 1885.

I have considered the case of Joseph T. Strawn *v.* Jane Maher, involving the SE. ¼ of Sec. 7, Tp. 110 N., R. 59 W., Huron, Dakota, on appeal by Maher from your office decision of October 2, 1884, holding her pre-emption filing for cancellation, on the ground that she has failed to comply with the requirements of the pre-emption law, and is seeking in bad faith to acquire title to the public domain without complying with the law regulating the disposal of the same. * * *

A hearing was ordered and had, which resulted in a finding by the register and receiver favorable to contestee, their conclusion being, not that she had complied with the law, but that her "intention is honest and she has done the best she could." The appeal from your office decision reversing that of the local office objects to said decision, assigning several grounds of error, which, in substance, amount to the following: First, that the local officers were without jurisdiction to order a hearing and determine the rights of either party until one or the other

should first offer to make final proof; second, that on the merits of the case, as presented by the evidence, the judgment holding contestee's filing for cancellation was error.

As to the first ground of objection, while it is true in such cases that it is better practice as a general rule to wait until one of the parties to the record offers final proof before authorizing proceedings, rather than multiply suits on applications to clear the record, yet the Government is not bound by such rule, regardless of what the prima facie showing may be, but may at any time institute proceedings necessary to determine whether or not the laws are being complied with. Further than this—in the case under consideration, appellant did not, prior to nor at the hearing, nor at any time, so far as the record shows, until after judgment had been rendered by the local office, and again by your office on appeal, object to the jurisdiction taken in the case. She cannot now be heard to raise such objection. The case has been heard on its merits, and on the testimony adduced your office has found that appellant has lost her pre-emption right by reason of her failure to comply with the law. If that finding is correct, I am unable to see on what principle of law or good practice the proceedings should be set aside and contestant be forced to again go over the same ground at some future time in order to protect his rights.

After a careful examination of the testimony, I concur in the conclusion reached by your office. I find that there has not been such inhabitancy of the land as the pre-emption law requires. In fact I am unable to find that there has been any inhabitancy. Notwithstanding appellant's statement on the hearing that she had no other place that she called her home, her acts, as admitted by herself, and shown by other witnesses, I think clearly demonstrate that under the most liberal construction of the law the tract could not be regarded as her home or place of residence. Her residence seems quite clearly to have been with her son John, whose place was a mile or so distant from the tract in question. He testified under cross-examination that she stayed at his house, and that "her bed was there." Her claimed residence upon the land covered by her filing consisted of mere visits in company with her son. They would drive over occasionally, remain on the tract three or four hours, then return together to his house. It is not claimed that she slept there until the spring of 1883, about six months after her alleged settlement and commencement of residence, and then only a few nights, a night now and then apparently for the purpose of keeping her claim alive. These acts are not such as to evidence good faith, or to show compliance with the pre-emption law. On the contrary, they tend to impeach the good faith of claimant, since, in connection with all the circumstances, they indicate a purpose to acquire title to the land without actual residence or inhabitancy. In view of all the facts, I do not think the pre-emption claim is such an one as could ever properly pass to entry, especially in the face of a valid adverse claim.

Your office decision is affirmed.

HOMESTEAD ENTRY—COMMUTATION.

GREENWOOD *v.* PETERS.

The right of commutation depends upon a prior compliance with the homestead law. If the cash entry fail the homestead entry falls therewith.

Secretary Lamar to Commissioner Sparks, November 14, 1885.

I have considered the case of James B. Greenwood *v.* Fred. D. Peters, involving the SW. ¼ of Sec. 32, T. 164 N., R. 56 W., Grand Forks, Dakota, on appeal by Peters from your office decision of July 14, 1884, holding for cancellation his cash entry covering said land.

Appellant made homestead entry on the tract March 21, 1882, and on the 5th of January, 1883, made final proof and commuted to cash entry as above. Pursuant to an investigation and report, made by special agent under orders from your office, on charges by contestant that said entry was upon false and fraudulent testimony, and that the law had not been complied with in the matter of residence, improvement and cultivation, a hearing was ordered and had, resulting in a decision by the register and receiver adverse to the entryman, which decision was sustained by your office.

Upon a careful examination of the evidence adduced at the hearing, I find the facts to be as stated in the decision appealed from, and concur in the conclusion therein reached. The evidence at said hearing entirely nullifies the proofs upon which the cash entry was allowed, and said entry is therefore clearly illegal. The entryman's own testimony is sufficient to show his utter lack of good faith. It is manifest that neither at the date when he made his final proof, nor at that when this contest was initiated, had he established a residence upon the land.

Your office decision holding his cash entry for cancellation is affirmed.

Though not made an assignment of error in the appeal, objection is made in argument by counsel for appellant to your office ruling in letter of August 6, 1884, (having reference to the decision appealed from,) that "by commutation claimant merged his homestead entry in the cash entry involved, and the cancellation of the cash entry necessarily involved cancellation of the homestead entry." It is urged in behalf of appellant that even if his cash entry should fail, he could proceed under his homestead entry. The question thus raised is so plain a one as not to call for argument. There can be but one answer. Any person desiring to commute a homestead to a cash entry must show compliance with the homestead law up to date of such commutation. If the cash entry fail, it must be because of defect or illegality in the homestead entry upon which it rests. The homestead entry is the basis of the cash entry, and as such must stand or fall with it. It was necessary from the very nature of things to consider and determine the character and standing of the homestead claim in order to properly determine the standing of the cash entry. The conclusion that the latter was

illegal necessarily involved the conclusion that the law had not been complied with under the former. The contest which procured the cancellation of the cash entry for illegality, therefore, at the same time in effect resulted in a judgment adverse to the homestead claim, which had been merged into and made the basis of the cash entry.

TIMBER LAND—CONTEST.

HOUGHTON *v.* JUNETT.

The burden of proof is with the applicant to show not only that the land has its principal value in the timber thereon, but also that such land is unfit for cultivation.

The right of protest against a timber purchase is not confined to an adverse claimant.

Secretary Lamar to Commissioner Sparks, November 14, 1885.

In the case of Joseph H. Houghton *v.* James M. Junett, decided by the Department January 26, 1885, wherein the application of Houghton to purchase the E. ½ of the SW. ¼ and the W. ½ of the SE. ¼ of Sec. 7, T. 20 N., R. 3 E., W. M., Olympia, Washington Territory, under the act of June 3, 1878, was rejected, a motion for review has been filed on behalf of said Houghton.

January 28, 1882, Houghton filed his application under which notice issued July 29, 1882, and proof was made in due form October 30, 1882, accompanied with the requisite deposit to pay for said land. September 25, 1882, Junett made homestead entry of the tract in question, and a hearing was directed to determine whether said land was of the character described in the said act of 1878.

In the decision now under consideration, it was held that "the evidence failed to show the land to be chiefly valuable for the timber thereon and unfit for cultivation." The motion for review rests mainly upon the allegations that the evidence does not warrant the conclusion drawn therefrom and that the decision is in conflict with that rendered in the case of Tipton *v.* Hughes (2 L. D., 334).

A most careful re-examination of the testimony has been made, from which no material reason has been discovered for adopting a view differing from that expressed by my predecessor. 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. The evidence in this case is peculiarly marked for its widely variant and conflicting character, with no such preponderance in favor of the applicant as the statute in question plainly requires, hence, under said act, his application must be denied, and that irrespective of any claim put forward by the homesteader.

This brings us to a consideration of the case of Tipton *v.* Hughes which it is alleged lays down a rule, that followed herein, would lead to a conclusion favorable to the applicant. Said case held in substance among other things, that the "adverse claim," which would defeat an application to purchase under said act, must exist prior to the filing of said application; and that the land described in said act as "unfit for cultivation" was land "unfit for *ordinary* agricultural purposes."

The standing of Junett herein is of no material importance. He did not make his entry until after the application of Houghton was of record, hence said entry was made subject to any right that Houghton had under the statute. Smith *v.* Martin (2 L. D., 333). It can make no difference whether Junett appears as an adverse claimant or a protestant, if as the result of such appearance it transpires that Houghton's application covers land not subject to purchase under the act; and the case of Tipton *v.* Hughes recognizes the right of protest, while defining an "adverse claim" and a "valid claim." In other words, Houghton's right to the land is not impaired, under the law, by the presence of Junett's entry. The application, if rejected, does not fail because of an adverse claim, but because the land is not properly subject to disposal under the timber act, and the right to show such fact might have been properly accorded to Junett even though he had no entry of record, or claim to the land.

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. In the case at bar, the evidence adduced against the application was for the greater part from farmers, who testified from experience with land of a similar character in that vicinity, while the evidence in support of the application was lacking in that element of competency.

The motion for review is denied.

TIMBER CULTURE ENTRY—CONTEST.

MURPHY *v.* LONGLEY ET AL.

If the affidavit required in section 2 of the act of June 14, 1878, is wilfully false in any material respect, the entry made thereupon is illegal from inception and subject to cancellation upon the institution of proper proceedings.

A contest raising such issue may be allowed without instructions from the General Land Office.

In all contest proceedings the government is a party in interest, and whenever it is shown that an entry was fraudulently made, such entry will be canceled.

Secretary Lamar to Commissioner Sparks, November 14, 1885.

I have considered the case of Henry Murphy *v.* George Longley and Ira A. Heath, as presented by the appeal of Murphy from the decision of your office, dated June 9, 1884, adverse to him.

It appears from the record that on May 16, 1882, Longley made timber culture entry No. 9020 of the SE. ¼ of Sec. 7, T. 110 N., R. 64 W., 5th P. M., (Mitchell series,) Dakota Territory.

On May 11, 1883, Murphy filed in the district land office his affidavit of contest, alleging that Longley "made said entry for speculation, and not for his individual use and benefit; that said Longley has offered his said entry and claim for sale, and holds the same for the purposes of sale only, and that said tract is not plowed, nor any improvements thereon as required by law." At the same time Murphy filed another affidavit, alleging that he was duly qualified to make timber culture entry; that he had not paid or promised to pay any consideration to Longley for any interest in said land, and "that said contest if perfected will be followed by my application to enter said claim under the timber culture laws of the United States, for my sole use and benefit, and not for the use of any other person whomsoever." Both of said affidavits were sworn to before Charles H. Huntington, who afterwards appeared as attorney for contestant. On December 13, 1883, Murphy filed a third affidavit for the purpose, as appears from the heading, of curing "the irregularity of contest affidavit, to which this is attached, wherein one Charles H. Huntington swears contestant Henry Murphy and then appears as his attorney." The amendatory affidavit makes the same charges as the first affidavit, but differs as to the allegation of service of notice, the latter averring that personal service can be made upon Longley, although he is a non-resident, and asking "that service in this case may be so made."

It appears from the report of the register and receiver, that a hearing was ordered and January 29, 1884, was set for trial, and the case continued to March 5th, same year, in order to enable contestant to perfect service on Longley.

On January 29, 1884, the day fixed for the hearing, Longley, by his attorneys, entered a special appearance and moved to dismiss the contest, on the ground that the district land officers had no jurisdiction to order hearings upon the allegations set forth in the affidavits made by contestant, and that the claimant had not been properly served with notice. This motion was overruled.

On January 21, 1884, one Ira A. Heath presented his contest affidavit against the same tract, alleging abandonment and at the same time moved to dismiss Murphy's contest, as appears from the report of the register and receiver, the original motion not appearing in the record, on the ground that the allegations contained in his affidavits were not sufficient to justify a hearing by the local office. Heath's application was rejected, because of Murphy's prior pending application to contest the same tract. From this ruling Heath appealed, upon the ground that Murphy filed his contest affidavit before the expiration of one year from the date of entry.

On February 20, 1884 the register and receiver transmitted to your

office the petition of Murphy, asking that the district land officers be directed to order a hearing upon the basis of the affidavit heretofore filed by him and attached to said petition.

On March 8, 1884, the appeals of Longley and Heath were forwarded to your office.

Your predecessor, on June 9, 1884, reversed the decision of the register and receiver, on the ground that Murphy's first affidavit was a nullity, because it contained no sufficient allegation of contest, and his second affidavit was a nullity, for the reason that no application to enter the land was made at the time of its filing. Murphy's contest was dismissed, and Heath's affidavit of contest, timber culture affidavit, and application were returned to the district land officers as a basis for a hearing.

It appears from the report of the register and receiver, dated March 8, 1884, that at the time that Murphy filed his affidavit of contest it was the custom of the office to accept a contest wherein the allegations were speculation and fraud.

The second section of the act of June 14, 1878, (12 Stat., 113,) provides, among other things, that the timber culture applicant shall make oath that "this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly, or indirectly, for the use or benefit of any other person or persons whomsoever." If the affidavit required to be made by the applicant is wilfully false in any material respect, then the entry made upon the basis of such affidavit is illegal in its inception and subject to cancellation upon the institution of proper proceedings.

It was held by this Department, in the case of Caroline Halvorson (2 L. D., 302), and cited with approval in the case of Graves *v.* Keith (3 L. D., 309), that a contest before the local office may be instituted against a timber culture entry for illegality in its inception, without waiting for instructions from your office. The first affidavit was filed four days prior to the expiration of one year from date of entry, and although, in addition to the charge of speculation, it charged failure to comply with the requirements of the timber culture act, it was prematurely filed and could not be the basis of a hearing to prove that charge. But the amended affidavit was filed after the expiration of the year and contained a sufficient charge of failure to comply with the requirements of the law. The affidavit was still on file giving the qualifications of the contestant and notice of the intention of the applicant to take said tract under the timber culture laws, and since no objection was raised by the counsel for the entryman that no formal application to enter the tract was filed with the amended affidavit, so far as the claimant is concerned, it must be considered as waived. Butler *v.* Mohan (3 L. D., 513). In the case at bar, aside from any consideration of the question whether it is necessary in a contest under the 3d

section of said act that a formal application for the land shall be filed by the contestant, taking the three affidavits together, it would seem to be clear that the proceedings are not void, but that the contestant should have been allowed an opportunity to prove his allegations. It must not be forgotten that in all contest proceedings the government is a party in interest, and whenever it is made to appear that an entry of the public land was fraudulently made, such entry should be canceled. Smith *v.* Brandes (2 L. D., 95); Condon *v.* Arnold (1 Ibid., 96).

It is shown that on August 20, 1884, the register transmitted the appeal of Murphy from said decision of June 9, 1884, which was returned by your office letter of October 7, 1884, for correction under Rule 82, and Murphy was directed "to furnish satisfactory evidence that he has served notice of his appeal on Longley and Heath."

In reply to your office letter, dated November 22, 1884, directing the register and receiver to forward the record in the case of Heath *v.* Longley, the district land officers reported on December 5, 1884, that the hearing in said case had been continued indefinitely, awaiting the result of Murphy's appeal. Upon receipt of said report, your office advised the register and receiver "that after a hearing has been ordered, either by this office, or by you, it is improper practice to 'continue such hearing indefinitely' because a third party takes an appeal upon a question involving the same land, and you will discontinue such practice and proceed with all such cases now on your docket."

This order, so far as it relates to the case at bar, was erroneous. Murphy had been directed, by said decision of your office, to perfect his appeal by giving notice to both Longley and Heath, which was accordingly done. The appeal then operated, under the rules of practice, to suspend all further proceedings in the case until the final adjudication by this Department of the questions presented in said appeal.

The decision of your office dismissing Murphy's contest is therefore reversed, and he will be allowed to proceed with his contest under the rules of practice. Heath's contest will be suspended until the final determination of the contest by Murphy.

PRACTICE—RECONSIDERATION.

SOUTHERN PAC. R. R. CO. *v.* ROBERTSON.

On application for a reconsideration of his predecessor's decision, the Commissioner, finding that no notice of such decision had been served upon the applicant, granted the petition: *Held*, that further evidence as to want of notice shall be required prior to final disposition of the case.

Secretary Lamar to Commissioner Sparks, November 14, 1885.

I have considered the case of the Southern Pacific Railroad Company *v.* Mrs. Eliza E. Robertson, as presented by the appeal of said company from the decisions of your office, dated December 12, 1883, and of Jan-

uary 23, 1884, refusing to reconsider the prior decision adverse to said company.

It appears from the record that on January 15, 1881, your office examined the pre-emption declaratory statement No. 1771, made October 6, 1879, by Eliza E. Robertson, for Lots 2, 3, and 4 of Sec. 1, and Lot 4 Sec. 2, T. 3 N., R. 20 W., S. B. M., Los Angeles land district, California, in which settlement is alleged May 20, 1879, and held the same for cancellation, as to the tracts in odd numbered section, because of conflict with the withdrawal of May 10, 1871, for indemnity purposes, for the benefit of the branch line of the Southern Pacific Railroad Company, under its grant by act of Congress approved March 3, 1871 (16 Stat., 579).

It appears that said tracts were within the exterior limits of the Sespe Rancho at the date of said withdrawal and were not excluded therefrom until March 14, 1872, and your office held in accordance with the departmental ruling then in force, that as soon as the claim of the rancho was removed the withdrawal of May 10, 1871, became effective and served to reserve the tracts in the odd numbered sections within its limits from settlement and entry.

On April 5th the register and receiver reported that Mrs. Robertson had been duly notified of said decision, and filed no appeal therefrom, and, thereupon, your office on June 14, 1881, declared said decision final and canceled her pre-emption declaratory statement as to the lots in the odd numbered section.

On May 3, 1883, Mrs. Robertson, through her attorney, filed an application for a reconsideration of your predecessor's (Commissioner Williamson) decision of January 15, 1881, upon the ground that she never received any notice of the same; that the land was excepted from the grant and from the withdrawal for the benefit of said company, and that she has continuously occupied and resided upon said tracts since 1872.

In support of her allegation of want of notice Mrs. Robertson filed her own *ex parte* affidavit. On August 25, 1885, your predecessor (Commissioner McFarland) rejected the application for reconsideration, upon the ground that the *ex parte* affidavit of Mrs. Robertson was not sufficient to contradict the return of the register, who is a sworn officer, and that since said decision had become final, no authority existed for its reconsideration.

On October 1, as shown by the stamp of your office, and not September 29, 1883, as stated in the decision of your predecessor, Mrs. Robertson, through her attorney, renewed her application for a reconsideration of your predecessor's (Williamson) decision of January 15, 1881, canceling her filing as to the tracts in the odd numbered section, and submitted the *ex parte* affidavits of William Horton and Charles H. Willard, tending to show that said tracts were occupied and improved by the husband of Mrs. Robertson up to the time of his death, and that

the improvements were worth one thousand dollars; also the affidavit of one S. A. Guiberson, tending to show that he was requested by the register to give notice of said adverse decision to Mrs. Robertson; that he could not find her, but thinks that he requested her son to give her the information. On December 12, 1883, your predecessor revoked the decision of January 15, 1881, and allowed Mrs. Robertson to perfect her pre-emption claim, for the reason that she had settled upon and filed her declaratory statement for said land long prior to the selection by said company of the tracts in the odd numbered section, which selection was made on May 25, 1883, per list No. 5.

On January 10, 1884, the attorney for the company filed a motion for reconsideration of said decision, dated December 12, 1883, which was denied by your office on January 23, 1884, on the ground that Mrs. Robertson had not been notified of the decision of your predecessor dated January 15, 1881. The grounds of error assigned are as follows:

1st, That since said decision of January 15, 1881, had become final from failure to appeal, the succeeding commissioner had no jurisdiction to revoke the same.

2d, That the application of September 29, 1883, was not filed within the thirty days required by the rules of practice, and was only for a hearing, and your predecessor had no authority to grant other or different relief from that prayed for.

3rd, That the original decision of January 15, 1881, should have been sustained.

The main question to be determined is, whether Mrs. Robertson had notice of the decision adverse to her as required by the rules of practice.

It is clear that Rule of Practice No. 86 contemplates that the party against whom the decision of the Commissioner is rendered shall be served with notice of such decision, and shall be allowed sixty days from the date of the service of such notice within which to file an appeal in the General Land Office.

Mrs. Robertson offered in support of her first application for a reconsideration only her own *ex parte* affidavit to contradict the return of the sworn officer, and when the decision of your office was adverse, offered other affidavits and what purports to be a letter from the register, requesting one Guiberson to notify Mrs. Robertson of the decision against her, and also to notify other parties of similar decisions against them and requesting Guiberson to advise the register if there were any whom he could not notify. It does not appear that Guiberson ever advised the register that he had not notified Mrs. Robertson, nor is it shown that the register was called upon for a report other than the one already rendered. When Mrs. Robertson alleged under oath that she had received no notice, the register and receiver should have been required to report all of the facts relative to the service of notice of said decision upon Mrs. Robertson. If the allegations in the affi-

davits filed by her be true, it is evident that she has had no notice of said decision, as required by the Rules of Practice.

Mrs. Robertson will be allowed to offer proof and payment for said tract within ninety days from the receipt of notice hereof, and will be required to prove to the satisfaction of the register and receiver that she had no legal notice of the decision canceling her said filing. The company should be specially notified of the time and place of offering such proof. Said decision of your office is modified accordingly.

TIMBER CULTURE ENTRY—CONTEST.

LILLY *v.* THOM ET AL.

Sale of relinquishment is sufficient charge to authorize a contest.

Commissioner McFarland to register and receiver, Huron Dakota, June 21, 1884.

I am in receipt of your letter of April 18, 1884, transmitting the appeal of James E. Lilly from the register's action of February 26, 1884, dismissing his contest against timber culture entry No. 6690, Mitchell series, SE.¼ of Sec. 5, T. 111, R. 63, made by George M. Thom, September 14, 1881.

It appears from your report that Lilly initiated his contest July 18, 1883, and a hearing was ordered for February 7, 1884, and the case continued to April 7, 1884.

You state that you inadvertently allowed George T. Lancaster to initiate a contest against this entry September 15, 1883, and ordered a hearing thereon for February 25, 1884, which was continued to April 17, 1884, at which time Lancaster submitted ex-parte testimony, you having previously, as soon as you discovered that you had allowed two contests against the same entry, "critically inspected both contest papers," and dismissed Lilly's contest, "for the reason that the contest affidavit did not allege sufficient grounds for the action." The charge in Lilly's affidavit of contest is "that said George M. Thom has sold his relinquishment to said tract."

The Hon. Secretary of the Interior decided in the case of Green *v.* Graham, (7 C. L. O. 105,) that the allegation of relinquishment was a good ground of contest against a timber culture entry, even before the expiration of one year from date of entry. Lilly's appeal is therefore sustained, and you are directed to dismiss Lancaster's contest. Lilly's affidavit of contest, with the accompanying timber culture affidavit and application to enter, is herewith returned as the basis of the hearing to be had after due notice. The allegation, however, that the residence of the entryman is unknown, is insufficient to warrant the service of notice of the trial by publication.

NOTE.—This decision was affirmed by Secretary Lamar, November 9, 1885.

TIMBER-CULTURE CONTEST—BUNDY CASE.

RYAN *v.* CONLEY JR. ET AL.

A contest, regular in all respects, save that no application to enter was filed, having been instituted, and the award thereunder become final, prior to the decision in the Bundy case, the rights of the parties are not affected by such decision.

Secretary Lamar to Commissioner Sparks, November 19, 1885.

I have considered the case of Joseph C. Ryan *v.* Michael Conley, jr., and Henry S. Daius, on appeal by Conley from your predecessor's decision of January 29, 1884, rejecting his homestead claim to the N. E. ¼, Sec. 6, T. 103 N., R. 68 W., 5th P. M., Mitchell, Dakota Territory, and awarding to Ryan the preference right to enter same tract.

Owing to the carelessness, or ignorance, or something worse, on the part of the then register at Mitchell, it is somewhat difficult to ascertain the true status of the case at bar; but as near as may be determined from the mass of unwarranted and anomalous proceedings, the facts are as follows:

On July 23, 1880, Michael Conley, jr., made timber culture entry 5017 for the above tract. January 27, 1882, Joseph C. Ryan initiated contest against said entry, alleging abandonment and failure to comply with the law in that no breaking or cultivating of said tract had been done by Conley since his entry. Notice was issued and a hearing had on March 23, 1882, at which time Conley failed to appear, but Ryan did appear, submitted his evidence, proved his allegations, and upon such evidence and proof the local office adjudged Conley's entry forfeited. This judgment was never appealed from, and further, appears never to have been carried into execution. No report of this proceeding was made and submitted to your office in accordance with Rules of Practice 50 and 52, and matters remained thus until December 19, 1882, when Ryan, who, in the meantime, had learned of the Departmental decision of November 14, 1882, in the case of Bundy *v.* Livingston, (1 L. D., 179,) and who knew that his contest had not conformed to the law as therein interpreted, in that no application to enter the tract accompanied the contest papers, appeared at the local office, and, it seems acting upon its advice, filed his application to enter the land, accompanied by an affidavit showing the necessary qualifications to do so. On the 27th day of December, 1882, Henry S. Daius applied to contest the said entry of Conley, accompanying his affidavit of contest with an application to enter the tract under the homestead law. This application was "rejected because of prior contest by Joseph C. Ryan, January 27, 1882, Testimony in U. S. L. O. Mitchell—12, 27, '82." On the 8th of January, 1883, however, the local office did entertain Daius's contest and *dismissed* Ryan's contest, not thinking it worth their while to notify Ryan of their proceedings, although having once decided his

contest in his favor, and all costs and expenses having been paid by him up to date.

Notices were issued on Daius's contest and a hearing set for March 12, 1883, at which date Daius appeared at the local office, withdrew his contest because notice thereof had not been served, and initiated a new contest in exactly the same form. Ryan also appeared, made his motion in writing to dismiss Daius's contest, and have his own prior contest re-instated. The local office allowed his motion, and Ryan filed new affidavit of contest, accompanied by application to enter under the timber culture law. Again, no notice of contest was issued to Ryan, and on May 1, 1883, this status continuing, Conley appeared at the local office, filed a relinquishment of his timber culture entry No. 5017, and immediately made homestead entry No. 25,131 of the same tract. Notice of this proceeding was not given until June 23, 1883. Thereupon, on July 2, 1883, Ryan tendered application and affidavit to enter said tract and the same was taken under advisement. At the same time Daius appeared, and demanded that his affidavit and application, submitted March 12, 1883, (*ante*) be re-instated and made a matter of record.

On the 11th of August, 1883, a new register having been appointed at that office, the register and receiver considered the case as it then stood on the records and as they understood it. They wrote and filed separate opinions, each holding that Ryan, upon the filing of Conley's relinquishment, should have the preference right of entry under the act of May 14, 1880; but neither said anything directly in reference to Conley's homestead entry then on record. In pursuance of said decision, Ryan, on September 10, 1883, consummated his application tendered on July 2d (*ante*), and made timber culture entry No. 11,352 for the tract in question.

Upon the back of the register's opinion is the following indorsement: "Notice issued to parties in interest August 29, 1883. G. B. Everett, Reg." Daius appears to have received his notice on the same day it was issued. It does not appear when Conley received his notice, or whether he received any at all.

On the 9th of October following, (forty-one days after receipt of notice,) Diaus appealed to your office. Conley took no appeal. On November 1, 1883, the register transmitted testimony and other papers in the case to your office. December 10, 1883, your office suspended the said timber culture entry of Ryan for conflict with the said homestead entry of Conley, and gave Ryan sixty days to show cause why such action was not proper.

January 29, 1884, your office decided the case as then presented, holding:

First, That Daius's appeal was not filed in time and dismissed the same.

Second, That Ryan gained nothing by his first contest, the same being a nullity under the doctrine of Bundy *v.* Livingston and other later cases.

Third, That as his second contest (that of March 12, 1883,) was pending at the date of Conley's relinquishment, he was entitled to a preference right of entry under the doctrine of Johnson *v.* Halvorson (8 C. L. O., 56.)

Fourth, that as Ryan applied within thirty days after notice of cancellation, his timber culture entry No. 11,352 should be sustained, and Conley's homestead entry No. 25,131 should be canceled.

On the 14th of April, Conley appealed to this Department. Daius took no appeal.

Viewing the case as thus presented, and sifting it of all loose and irrelevant details, it assumes this status:

Ryan's first contest being according to the Rules of Practice then in force, and the law as then understood and interpreted, was legal, and the proceedings thereunder were regular and proper. His proof was properly submitted at a hearing regular in all respects under the then existing rules and regulations. The entry thus contested was adjudged forfeited, appeal notices were issued, the costs of all proceedings were paid by Ryan as they were made, no appeal was taken, and the decision of March 23, 1882, had become final long prior to the date when the practice was changed by the Bundy-Livingston doctrine. Consequently, none of the proceedings under such contest can in any wise be prejudiced by any construction of law and change of practice subsequently adopted. The fact that the judgment of March 23, 1882, was never carried into execution by a formal cancellation of the entry contested, and was afterwards treated by the local office and by Ryan himself as never having existed, makes no difference in the view that is taken of this case. Pomeroy *v.* Wright (2 L. D., 164). The judgment was obtained in a proper tribunal, before the proper officers, and in a proper proceeding under the then existing practice; and the mere fact that the cancellation of the entry (which should have followed in the ordinary course of legal proceedings) did *not* follow can not operate to defeat the rights of an individual who did all that was required of him. Lytle *v.* Arkansas (9 How., 314).

Neither can such judgment be treated as a nullity by simply ignoring its existence. For, "on general principles, a judgment is binding and conclusive until reversed or set aside by a legal proceeding."

It follows from what has been said that the timber culture entry made by Ryan December 19, 1882, before any adverse claim had attached to the land was *prima facie* valid and should have been so considered. The subsequent proceedings were mere nullities, for there was nothing in existence upon which they could be predicated.

Consequently, were there no questions now raised impeaching Ryan's good faith in the premises, the case might be readily disposed of. Since your said office decision, however, there have been filed with the papers in the case the affidavits of one Thomas H. Purcell and said Michael Conley, together with certain letters and receipts for money paid,

which if true show that when Ryan initiated his contest it was under and in pursuance of a contract between him and Purcell, by which Purcell was to have the preference right of entry upon the successful termination of said contest; but that Ryan after receiving about $29.00 from Purcell, to be applied in the prosecution of said contest, made entry in his own name and for his own benefit. Conley's affidavit corroborates Purcell's, thus showing that if any contract was made as alleged, he (Conley) knew all about it, and was as much a participant in whatever fraud was committed as Ryan.

Inasmuch as fraud, speculation and all proceedings of a kindred nature are prohibited in land practice, it is deemed advisable that the full particulars in reference to fraud in this case be inquired into.

Accordingly you will direct the local officers to order a hearing to determine the good faith of the parties to this contest, citing thereto the parties in interest. Upon the evidence thus adduced they will render a decision as in other cases of like kind. All other proceedings in the case will be suspended pending the final adjudication of the questions raised by the hearing now ordered.

RAILROAD GRANT—HOMESTEAD ENTRY.

HASTINGS & DAKOTA RY. CO. *v.* WHITNALL.

Although under a decision that became final, the claim of the entry-man was rejected and the land awarded to the railroad company, it now appearing that the company has no valid claim to the land, thus leaving the question between the government and entry-man, he is allowed to make new entry for the land.

Secretary Lamar to Commissioner Sparks, November 19, 1885.

I have examined the case of the Hastings and Dakota Railroad Company *v.* Robert T. Whitnall, involving the N. ½ of SW. ¼, Sec. 35, T. 116 N., R. 32 W., Benson, Minnesota, on appeal by the company from your office decision of February 18, 1884.

The tract in question is within the ten mile (granted) limits of the grant in aid of the Hastings and Dakota Railroad Company, act of July 4, 1866, (14 Stat., 87,) the map of the definite location of which was accepted by the Secretary of the Interior June 26, 1867.

The record shows that at the date of the grant and also at the date of filing map of definite location, the entire SW. ¼ of said section was covered by homestead entry No. 1342, in the name of Bentley S. Turner, made May 3, 1865, under act of March 21, 1864, (13 Stat., 35—now Sec. 2293 U. S. Revised Statutes), and canceled September 30, 1872. On the 30th of August, 1877, Robert T. Whitnall made homestead entry No. 7831 for the tract in controversy. September 30, 1880, your office following the ruling in the case of Kniskern *v.* Hastings and Dakota Ry. Co., (6 C. L. O., 50,) which held that an entry made under section 2293 U.

S. Revised Statutes, by a single man in the military service of the United States, who had not made a *bona fide* settlement and improvement thereon, was illegal, and would not defeat the right of a railroad company attaching during the existence of such entry, directed the local office to order a hearing to ascertain whether any of Turner's family was residing on the land embraced in his said entry, at the date of such entry, or at any time subsequent thereto. A hearing was ordered for March 25, 1881, at which neither party appeared. April 23d following the said entry of Whitnall was held for cancellation for failure to show that Turner's entry was a valid one, so as to except the tract from the grant to the railroad company. Notice of said decision was given to Whitnall, but he took no appeal therefrom. Accordingly, on the 5th of October, 1881, this decision was declared final, Whitnall's entry above mentioned was canceled, and the land was awarded to the railroad company.

By and by the case of Graham *v.* Hastings and Dakota Railway Company, involving the S. ½ of the SW. ¼ of the aforesaid section, in the regular course of proceedings, came up to this Department on appeal, and on February 12, 1883, my predecessor, Secretary Teller, decided that the aforesaid homestead entry of Turner served to except the tract covered thereby from the operation of the grant to this railroad company. See 1 L. D., 380.

Five days thereafter, to wit, February 17, 1883, Whitnall made application to have his said homestead entry No. 7831 re-instated and made a matter of record. March 3d following, your office, in a letter to the local office, held that it had no authority to review a decision of a former commissioner and to re-instate the entry which had been canceled, under the rulings and practice existing at the date of such cancellation; but held that under the Graham case (*supra*) Whitnall might make new entry and final proof.

Thereupon, on March 30, 1883, Whitnall made homestead entry No. 11,399, for said N. ½ of SW. ¼ of Sec. 35 T. 116 R. 32, the tract in controversy; and on May 19, 1883, he made final proof to the satisfaction of the local office and your office. Final certificate No. 6710 was issued to him May 29, 1883.

By your said office decision of February 18, 1884, it was decided that the railroad company had no claim to this tract of land, and Whitnall's entry No. 11,399 was held for patent. The railroad company duly appealed from such action, alleging three grounds of error, to wit:

"1. In holding said tract excepted from the railroad grant.

"2. In setting aside the former decision adverse to Whitnall, same having become final.

"3. In affirming validity of his second entry thereon."

Without discussing each separate alleged error in detail, it is sufficient herein to say that none of the alleged grounds of error are available. The land was excepted from the grant to the railroad company, and nothing has been done to defeat such exception. True, the afore-

said action of October 5, 1881, may be considered *res judicata*, so far as Whitnall's rights existing at that time are concerned. But the award of the land to the company at said last date was clearly erroneous, and it has no claim thereto of any value. The land has never been certified over to the company, no patent has ever been issued to it for the same, and the question now is one solely between Whitnall and the government. At the date of his second entry the tract was public land and there is no reason why such entry should not be allowed. His final proof is sufficient, and patent will be issued to him for the tract covered by his entry.

The decision appealed from is affirmed.

RES JUDICATA.

PAULSON *v.* ST. P. M. & M. RY. CO.

As the settlement alleged was upon land withdrawn by departmental order, the filing therefor canceled without appeal, and the land subsequently patented to the railroad company the Department can afford no relief.

Secretary Lamar to Commissioner Sparks, November 20, 1885.

I have considered the case of Andrew O. Paulson *v.* The Saint Paul, Minneapolis and Manitoba Railway Company (formerly the St. Paul and Pacific, St. Vincent Extension, Railroad Company), as presented by the application of said Paulson for a review and revocation of departmental decision, dated May 29, 1878, in the case of said company *v.* Engel Severtson, so far as the same shall affect his right to the E. ½ of the SE. ¼ of Sec. 3, T. 145 N., R. 48 W., Crookston, land district, Minnesota.

The record shows that said tract is within the limits of the withdrawal of November 7, 1870, based upon the filing of the map of general route of the Northern Pacific Railroad, under its grant by act of Congress approved July 2, 1864 (13 Stat., 365). It is also within the six miles, or primary, limits of the grant for the benefit of the St. Paul and Pacific, St. Vincent Extension, Railroad Company, by act of Congress approved March 3, 1857 (11 Stat., 195).

On August 2, 1872, Paulson filed his pre-emption declaratory statement No. 526, for the SW. ¼ of the SW. ¼ of Sec. 2, the E. ½ of the SE. ¼ of Sec. 3, and the NE. ¼ of the NE. ¼ of Sec. 10, in said township and range, alleging settlement thereon July 3, 1871, which was canceled by your office on April 7, 1873, and no appeal taken therefrom by Paulson.

On November 3, 1873, said tract in section 3 was selected by the St. Paul and Pacific Railroad Company, which selection was approved on April 30, 1874, and patent issued thereon on January 14, 1875.

On April 12, 1877, more than four years subsequently to said cancellation, Paulson filed an application for a re-instatement of his filing for

said tract in Section 3, upon the ground that his settlement antedated the time when the right of the company attached, and was therefore confirmed by the act of Congress approved April 21, 1876 (19 Stat., 35).

Said application was rejected by your office, on the ground that the tract was withdrawn for the benefit of the Northern Pacific Railroad Company, and, although by a subsequent decision of this Department the land in controversy was adjudged to belong to the St. Paul and Pacific Railroad Company, Paulson's filing could not be confirmed by said act, because his settlement as alleged was made without authority of law.

It appears by your office letter of July 16, 1883, that said decision was appealed to this Department and affirmed "in the 'test case' (involving same points) of Engel Severtson *v.* St. Paul and Pacific and Northern Pacific Railroad companies."

In your office letter of transmittal, dated January 26, 1885, it is stated that Paulson appealed from said decision rejecting his application for re-instatement, and filed argument in support of his appeal, and that "Paulson's appeal, it appears, was never transmitted to the Department, for the reason that his case was in all respects similar to that of Severtson." An examination, however, of the records of your office discloses the fact that Paulson's application, with others, appeal, and argument were transmitted to this Department in the case of Severtson (*supra*) and the appeal of Paulson, no service of which is shown, alleges that said tract in section 3 was within an Indian reservation at the date of the grant for the benefit of the St. Paul and Pacific Railroad, and therefore excepted therefrom. It is further shown that Mr. Paulson was advised by your said office letter of July 16, 1883, that, although the decision of this Department in the Severtson case was not in accordance with the present practice of your office, it could only be reversed by the then Secretary of the Interior, and it was suggested that it would be well for him to make an early application to the Secretary of the Interior for a review of the decision of May 29, 1878.

In compliance with said suggestion, the application for review of said decision was filed by Paulson. The application is not verified, nor was it filed within the time required by Rule of Practice No. 77. No affidavit accompanies the motion, as required by Rule 78.

If Mr. Paulson be considered as a party to the record in the Severtson case, (*supra*,) then his rights have been finally adjudicated by this Department, and no good reason is shown why that decision, rendered by a former Secretary, should now be disturbed. Robert Carrick (3 L. D., 558); State of Oregon, and cases therein cited, (Ibid., 595).

Even if the tract had not been patented to said company long prior to Paulson's application for re-instatement, and if the application had been properly verified and filed within the proper time, it would be a very serious question whether Paulson has shown sufficient grounds for

relief. His alleged settlement having been made upon lands withdrawn by order of this Department, and his filing having been canceled by your office, from which cancellation no appeal was taken, and the tract having been patented to said company, this Department has now no power to grant the relief prayed for. The application must be denied. Whatever rights Mr. Paulson may have the courts must maintain when his possession is attacked.

FINAL PROOF—SATISFACTORY EVIDENCE.

FRED. KING.

The district officers should thoroughly scrutinize and test the accuracy and reliability of all proofs presented for their action. Formal answers to the questions contained in the printed forms should not be held satisfactory without cross-examination.

Secretary Lamar to Commissioner Sparks, November 20, 1885.

I have examined the case of Fred. King on appeal from your office decision of August 7, 1884, rejecting his commutation proof for the NE. ¼ Sec. 29, T. 118, R. 57, Watertown, Dakota.

King made homestead entry No. 10,434 for said tract on March 24, settlement on May 15, and on November 27, 1883, made commutation proof before the clerk of the district court of Clark County, Dakota. Said proof was approved by the local officers, and on November 30, final certificate issued. The proof shows that King is qualified to make entry under the homestead laws, is unmarried, and twenty-six years of age. He says he built his house and established residence on the land on May 15, 1883. To the question: "Have you resided continuously on the land since first establishing residence thereon?"—he answers, "Yes." To the question—"For what period or periods have you been absent from the homestead since making settlement, and for what purpose?"—he says, "Have been absent five and six days at a time at work to earn a living." These answers, corroborated in the same words by two witnesses, comprise all the proof submitted on the question of residence. With reference to cultivation, claimant answers, "Broke eight and one-half acres. No crops." His improvements are described as—"House ten by twelve feet, shingle roof, good well, eight and one-half acres broke, total value $125.00." The proof of residence is altogether insufficient. It does not show how frequently the periods of absence occurred, when they commenced, or when they ended. In fact, the allegations as made would not warrant the finding that King ever remained on the land for a single day, or that he ever slept upon the premises. The proof of cultivation is unsatisfactory. In reference thereto, claimant simply says he, "broke eight and one-half acres. No crops." From such a statement it is impossible to ascertain the amount of work actually done, or whether the law has

been complied with in reference to cultivation. The proof of cultivation should set out facts sufficient to convey an intelligent idea of the amount and character of work actually done. As bearing on the question of good faith, the evidence should also describe the house with reasonable particularity, and show what, if anything, has been done toward making it inhabitable.

I call attention to the instructions issued April 3, 1884, (3 L. D., 211,) as follows—" It is the duty of officers taking proofs to test by oral examination the correctness of statements made in *ex parte* cases; to ascertain by close inquiry the exact facts from which proper conclusions may be drawn, and when witnesses are testifying to examine them as to their means of information and the nature and extent of their knowledge of the facts. . . . This office . . . enjoins as an imperative duty of registers and receivers the exercise of their authority to thoroughly scrutinize and test the accuracy and reliability of all proofs presented for their acceptance. Merely formal answers to the interrogatories contained in the printed forms should not be deemed satisfactory without cross-examination. The printed forms were designed for the purpose of facilitating business, but were never intended to preclude further inquiry, nor to interdict a verification of the answer made."

In the case under consideration, you will cause appellant to be notified that he must furnish supplemental proof in accordance with the requirements above indicated, within ninety days from receipt of notice hereof, and in case of his failure so to do his entry will be canceled.

The decision appealed from is accordingly modified.

HOMESTEAD ENTRY—CONTEST.

WINANS *v.* MILLS ET AL.

An affidavit of contest setting forth a statutory ground for cancellation having been filed and notice issued thereon, the contest is regularly initiated so far as any stranger to the record is concerned, and may not be dismissed prior to the day fixed for hearing and without notice to the contestant.

Secretary Lamar to Commissioner Sparks, November 20, 1885.

I have considered the case of Henderson Winans *v.* John R. Mills and Frederick Leigh, as presented by the appeal of Winans from the decision of your office dated August 29, 1884, dismissing his appeal from the action of the local land officers in dismissing his contest against homestead entry No. 2,259, of the NW. $\frac{1}{4}$ of Sec. 6, T. 112 N., R. 59 W., Huron land district, Dakota Territory, made by said Mills on March 15, 1883.

The record shows that the contest affidavit of Winans against said entry, charging abandonment and change of residence for more than six months since making said entry and next prior to the date of said contest affidavit, April 2, 1884, was filed in the local land office, the particular date of filing not appearing.

On April 9th the register issued notice for a hearing, and June 26. 1884, was set for the trial of the case. On May 26, 1884, Frederick Leigh filed in the district land office a motion to dismiss said contest, because the affidavit was not corroborated as required by Rule 4 of the Rules of Practice, and was sworn to before a notary public, who appears as attorney for contestant. Thereupon, the register dismissed said contest, for the reasons above stated.

The decision of your office states that "although a stranger to the record ought not ordinarily to be heard in a case prior to the day of trial, (see Hanson *v.* Howe, 2 L. D., 220) still, in this case, Winans' affidavit was fatally defective and his contest should not in the first place have been allowed. Undoubtedly, therefore, it was proper for you, at any time, to dismiss such a contest, either of your own motion, or at the instance of any one calling attention to the irregularity.

This ruling is not in harmony with the decisions of this Department, or the former rulings of your office, and is also inconsistent. If the omission to file the corroborative affidavit was was a mere "irregularity," then, the affidavit filed was not "fatally defective," as held in said decision.

In Houston *v.* Coyle (2 L. D., 58) the law and practice governing homestead contests was elaborately discussed, and it was held that, under Section 2297 of the Revised Statutes, jurisdiction vests in the local office by the issue of "due notice to the settler," and not by virtue of the affidavit of contest. This case has not been overruled or materially modified by any subsequent decision of this Department.

In Graves *v.* Keith (3 L. D., 309,) this Department, citing Houston *v.* Coyle (*supra*), decided that where the local officers issued a notice of hearing for invalidity of entry, on verbal allegations of the informant without the affidavit of contest required by the rules of practice, and both parties appeared and the trial proceeded without objection by the contestee, objection because of irregularity of the proceedings may not afterwards be made.

The case cited in the decision of your office is not an authority in support, but rather in opposition to it. In Hanson *v.* Howe, this Department held that it was contrary to law and practice to permit the dismissal of a contest regularly initiated merely on the motion of a stranger to the record without notice to the contestant, and prior to the hearing.

In the case at bar the affidavit of Winans had been received and notice issued thereon. It contained the specific charge of abandonment and change of residence, required to be proven by the statute. If it was defective in not having the required corroborative affidavit, as it undoubtedly was, it was the duty of the register to have rejected the affidavit and pointed out to the contestant the defect that he might have an opportunity to supply the deficiency under the rules of practice. But the notice having issued, the contest was regularly initiated, so far

at least as any stranger to the record was concerned, and could not be dismissed prior to the day set for the trial without notice to the contestant. Hopkins *v.* Daniels *et al.* (4 L. D., 126).

The decision of your office must be reversed. Winans' contest will be reinstated and Leigh's contest will be suspended to await the final determination of the contest initiated by Winans.

RAILROAD GRANT—HOMESTEAD ENTRY.

SOUTHERN PAC. R. R. CO. *v.* REED.

On the allegation of settlement, preceding indemnity withdrawal, the homestead entry is received, the company to be specially cited on offer to make final proof.

Acting Secretary Muldrow to Commissioner Sparks, November 23, 1885.

I have considered the case of the Southern Pacific Railroad Company *v.* Quitman Reed, on appeal by the company from your office decision of March 1, 1884, allowing said Reed to make homestead entry of the SW. ¼ of the SE. ¼ of Sec. 12, the W. ½ of the NE. ¼ and the NW. ¼ of the SE. ¼ of Sec. 13, T. 7 S., R. 1 E., S. B. M., Los Angeles district, California.

The land in question is within the thirty-miles or indemnity limit of the grant to said company, the odd-numbered sections along the line of its route having been withdrawn for its benefit May 10, 1871.

Township plat of survey was filed in the local office February 12, 1877.

September 6, 1883, Reed applied to make homestead entry for said land, alleging settlement in 1863. The application was rejected by the local officers on the ground that the land in the odd-numbered sections had been withdrawn for the benefit of said railroad company. Reed appealed to your office, which decided that as "he appealed on the ground that he was a settler on the land long prior to the grant to the railroad company, he will accordingly be permitted to make homestead entry for said land."

From said decision the company appeals to the Department, claiming, in substance:

1. Even if it were true that Reed settled upon said tract at the date claimed by him, yet in the absence of any pre-emption filing homestead entry, or other recognized claim, at the date of withdrawal for the benefit of the railroad, such settlement did not except the tract from the operation of the withdrawal.

2. Whatever inchoate right Reed may have had in the premises has lapsed (under the act of May 14, 1880), by his failure to make homestead application within three months after the filing of the township plat.

3. In any case, though it might have been competent for your office to order a hearing to determine the fact of Reed's actual settlement at

the date alleged by him, yet your office cannot properly order his homestead application to be received upon his mere allegation of such settlement, without hearing or investigation.

These points may be disposed of, seriatim, very briefly:

First: The tract being within the indemnity limits, the only right of the company relating thereto was that of selecting the same for the purpose of making good any deficiency within the granted limits; and according to the rulings at present in force in this Department, if Reed was found in occupation of the tract as a *bona fide* settler at the date when the company's right attached, his right antedated and was paramount to that of the company.

Second: Any laches on the part of the settler as to the time of making homestead entry is a matter solely between himself and the government, of which it is not competent for the company to take advantage.

Third: It appears from the records that it has been customary with your office, in cases of allegation by a claimant of settlement prior to the date when the right of the railroad attached, to order a hearing to determine the question of priority. But in this case the claimant purposes to make homestead entry and final proof at the same date, or with only the interval between the two necessary in order to make publication of intention to make such final proof. So if a hearing were to be ordered to determine the date of Reed's settlement, and if it should appear that he did make settlement as he alleges, upon his tendering final proof, the company would undoubtedly again contest his right, which would subject him and the company to the expense of two hearings. I therefore affirm your office decision.

Since the company, however, has appeared in the case as a contestant, I have to direct that when notice of intention to make final proof is published, the company shall be specially notified.

HOMESTEAD ENTRY—SETTLEMENT RIGHTS.

CONK *v.* RECHENBACH.

One holding as the tenant of another acquires no settlement rights under the homestead law.

The ownership of the improvements being in the pre-emptor at the date of his settlement such improvements inure to his benefit as fully as though made in person by him.

Acting Secretary Muldrow to Commissioner Sparks, November 23, 1885.

In the case of Rebecca Conk *v.* Ferdinand Rechenbach, involving the W. ½ of the SW. ¼ of Sec. 25, and the E. ½ of the SE. ¼ of Sec. 26, T. 6 N., R. 12 E., M. D. M., Sacramento, California, the Department November 17, 1884, refused to re-instate the pre-emption entry of Rechenbach for said tract. A motion to dismiss the application of Rechenbach for

review was overruled in the departmental decision of August 24, 1885, (4 L. D., 106), and the arguments of counsel having been filed in accordance with said decision, the case comes up now for disposition on the said application for review.

A recitation of the record appears necessary to the proper discussion of the case.

The township plat was filed June 20, 1870. September 9, 1871, Mary Hoerchner (widow of Dr. Hoerchner) filed her declaratory statemen for the tract, alleging settlement November 1, 1849. January 16, 1878, John L. Hoy made homestead entry therefor.

January 25, 1878, William Conk made pre-emption filing for the land, alleging settlement December 21, 1877. May 4, 1880, Rechenbach filed his declaratory statement, alleging settlement March 13, 1880. May 24, 1880, Rebecca Conk filed homestead application for the tract.

No rights are now asserted under any of the filings or entries, save those of Rechenbach and Rebecca Conk, the others being either abandoned or canceled.

From the evidence it appears that in 1849 Dr. Hoerchner settled upon this land with his family, and improved and cultivated the place. While thus in possession Dr. Hoerchner brought from the east Mr. and Mrs. Conk (his wife's parents) and placed them upon the land in a house built for the purpose. In 1861 Dr. Hoerchner removed from the land, leaving Mr. and Mrs. Conk there. September 24, 1870, Dr. Hoerchner died. It is claimed by Mrs. Conk that Dr. Hoerchner in 1858 gave her the place by verbal declaration. Up to the time of Dr. Hoerchner's death, he exercised ownership and control over the land, having placed all the improvements thereon. After his death Mrs. Conk appears to have been allowed to remain on the land with her son William, as a tenant at will, or by sufferance, though the property was under the control of the heirs of Dr. Hoerchner. During this time, the Conks, mother and son, were in the occupancy of a garden spot, comprising a few acres of land, but the remainder of the farm was rented by the heirs to other persons. The widow of Dr. Hoerchner testifies that Mrs. Conk was permitted by the heirs "to remain on the land to keep it in order."

John L. Hoy having purchased the possessory right from the heirs of Dr. Hoerchner for the sum of $400 in 1878, made his homestead entry and began suit in ejectment against William Conk, who was then claiming as a pre-emptor. In this suit judgment was rendered in favor of Hoy, who was placed in possession by the sheriff in January, 1880, on the eviction of William Conk and his mother. Hoy then sold his possessory right to Rechenbach, who filed for the land, and upon his application to make final proof a hearing was had October 13, 1880, as between the parties hereto, the local office awarding, upon said hearing, the land to Rechenbach and recommending the cancellation of Mrs. Conk's entry. February 9, 1882, your office approved such conclusion of the local office, with the modification that Rechenbach should show

full compliance with the law to the time when he applied to make entry. Rechenbach thereupon, without publication of notice, submitted on August 7, 1882, additional proof, which acting upon, August 10, the local office accepted and admitted his entry. Mrs. Conk then filed an application for rehearing, and your office held, March 19, 1883, that Rechenbach's additional proof was improperly submitted, no notice having been given, canceled his entry without prejudice, re-instated the entry of Mrs. Conk, and directed Rechenbach to submit his proof after due notice.

In accordance with this decision, a hearing was had June 19, 1883, and further testimony submitted by the parties hereto, the local office again awarding the land to Rechenbach. April 16, 1884, the case came before your office on the appeal of Mrs. Conk, and the decision of the district officers was affirmed. Mrs. Conk again appealed and on November 17, 1884, the Department rendered a decision in her favor. This decision went mainly upon the ground that Rechenbach had failed in the matter of residence and improvement, and the motion for review is based in effect upon the allegation that the decision is not in keeping with the evidence submitted.

The claim of Mrs. Conk that the possessory right to the premises was given to her by Dr. Hoerchner is not established. Her holding was that of a tenant and therefore conferred upon her no right as a settler. Call *v.* Swaim (3 L. D., 46); Callahan *v.* McLaughlin (10 C. L. O., 256). Again, if Mrs. Conk was a settler in her own right, she did not assert the same within the statutory period, but waived said right in favor of her son, who was dispossessed on the suit of Hoy, and by such action she is now precluded from setting up any claim, prior to her entry, as against the intervening adverse right of Rechenbach.

The ownership of the improvements on this land was in Rechenbach at the time of his settlement and said improvements therefore inured to his benefit as fully as though made in person by him. Pruitt *v.* Chadbourne (3 L. D., 100); Kurtz *v.* Holt (4 Id., 56). Both your office and the local office were satisfied with the proof submitted as to the residence of Rechenbach, and upon a careful review of the same I am fully convinced that such conclusion was properly reached. The evidence on this point shows in substance that Rechenbach settled March 13, 1880, and from that time until his first offer of final proof resided on the land with but few absences and those of but slight duration.

From the foregoing it will be apparent that the decision of November 17, 1884, was inadvertently rendered and should therefore be vacated. The said decision is accordingly set aside. The decision of your office is affirmed and the entry of Rechenbach re-instated and approved for patent. The homestead entry of Mrs. Conk will be canceled.

FINAL PROOF—CROSS-EXAMINATION.

HALVOR HANSEN.

If the local officers are in possession of information, tending to impeach the good faith of the claimant, such information should be made the basis for due cross-examination upon the offer of final proof.

Secretary Lamar to Commissioner Sparks, November 25, 1885.

I am in receipt of your office letter of January 29, 1885, transmitting the appeal of Halvor Hansen from your office decision of December 17, 1884, rejecting his commutation homestead proof, for N. ½ of NW. ¼ of Sec. 6, T. 94 N., R. 55 W., Yankton, Dakota Territory.

Hansen made homestead entry No. 5978 for the above tract on the 26th of July, 1882, and on the 21st of July, 1884, he attempted to commute his entry. The local office rejected his proof "for the reason that the evidence in regard to residence was insufficient and unsatisfactory, being so vague that no conclusion could be drawn from it as to the length of time the claimant was upon, or absent from the land, and merely stating that he had not been absent more than a few weeks at a time, without specifying the number of these absences." This action was affirmed by your office as before stated.

A careful examination of the proof submitted does not lead to this conclusion. True, the entryman has not actually been upon the land all the time, and his absences are frequent and of considerable duration. But he swears that it is his residence; that he is a poor man and obliged to be away a great deal of the time in order to earn money to support his family and improve the land; that some of his family have remained upon the land all the time, and that it is their and his home. His statements are corroborated by two other witnesses. Here is a *prima facie* case of continuous residence and good faith. See Andrew J. Healy (4 L. D., 80), and cases therein cited. Were it not for the statement of the local officers that "the claimant Hansen is known by the register and receiver to be a resident of the city of Yankton, where he is engaged in business," this Department would have no hesitancy in reversing the action of your office. As it is, however, such statements, although injected in the proceedings irregularly, are sufficient to put the government upon inquiry. The proper thing for the local office to have done, knowing that the claimant resided elsewhere than the tract in controversy, would have been to cross-examine the claimant and his witnesses fully upon such residence, and thereby arrive at the truth.

It is not expected that the stereotyped form of commutation proof will be sufficient in all cases. It is simply a general formula for ordinary occasions, and should in all cases when necessary be supplemented by such other evidence as may be at hand, and the local officers are required in all cases when necessary to "personally direct the examination of witnesses, in order to draw from them all the facts within their

knowledge requisite to a correct conclusion upon any point connected with the case." See instructions of April 3, 1884 (3 L. D., 211).

Accordingly, owing to the unsatisfactory and contradictory showing now made, it is determined to not pass upon the merits of the case at this stage.

The papers accompanying your office letter of transmittal dated January 29, 1885, are herewith returned, with directions that you direct the local office to require Hansen to make his commutation proof *de novo*. Such proof being presented, the case will proceed in regular order.

DESERT LAND ENTRY—FINAL PROOF.

ALEXANDER TOPONCE.

In view of the unusual obstacles encountered, and expense incurred, in procuring water for the reclamation of the land, final proof may be made, in the absence of an adverse claim, though the statutory period, within which such proof should have been made, has expired.

Secretary Lamar to Commissioner Sparks, November 25, 1885.

I have considered the case of Alexander Toponce, on appeal from your office decision of August 21, 1884, holding for cancellation his desert land entry for Sec. 26, T. 13 N., R. 3 W., Salt Lake City, Utah.

Toponce made said entry on May 14, 1877. On October 18, 1880, in pursuance of instructions from your office, he was notified to show cause, within ninety days, why his entry should not be canceled. On January 8, 1881, he forwarded a statement to the effect that he, with a neighboring entryman, made several surveys for canals from Bear River and Malade River for the purpose of conducting water therefrom to the land in question; that he had enclosed said section with barbed wire fence, and that if necessary he would obtain water by boring artesian wells.

It does not appear that any further action was taken by your office on this statement.

On February 1, 1884, Toponce was again notified from your office to show cause, within ninety days, why his said entry should not be canceled, and in reply on April 29, 1884, he forwarded his affidavit, setting forth that he "has in every way attempted to get water upon said land for the purpose of reclaiming the same, as required by law, and has expended over five hundred dollars in making surveys for ditches from the Malade River," and found it impossible to obtain water therefrom; that he and others have organized a company under the laws of the Territory, called the "Bear River Canal Company," for the purpose of constructing a canal from the Bear River to the vicinity of said land, by means of which water sufficient to irrigate the surrounding country will be obtained; that said canal "is now under construction"; that it will be from thirty-five to forty miles long; will cost $150,000, and that he will procure sufficient water therefrom to irrigate said land.

On this statement, your office held for cancellation the entry of claimant.

In a corroborated affidavit filed on appeal to this Department, Toponce alleges that he is now prepared to make final proof and payment, and that there is no adverse claimant for the tract. In view of these statements and of the nature of the alleged improvements, and the difficulties attendant thereon, the final proof of Toponce, showing full compliance with the law, if submitted within sixty days from notice hereof, in the absence of adverse claim, will be accepted.

The local officers are notified that the field notes on file in your office describe the land as "first rate," and the plat shows that the Malade River runs through said section 26. They will therefore require the clearest proof of the desert character of the land, and of the allegations made in the affidavits above referred to.

Said decision is accordingly modified.

REPAYMENT—RELINQUISHMENT.

GIDEON L. BEARDSLEY.

The entry having been made with full notice of the rights of a prior settler, and voluntarily relinquished, the claim for repayment is denied.

Secretary Lamar to Commissioner Sparks, November 25, 1885.

I have examined the case of Gideon L. Beardsley, on appeal from your office decision of December 16, 1884, refusing repayment of the fees and commissions on his homestead entry No. 2986 for N. ½ of NE. ¼ Sec. 24, T. 2 N., R. 69 W., Denver, Colorado, and rejecting his application to make a new homestead entry.

On June 20, 1874, Beardsley went to the local office and made homestead entry for the above described tract. At that date there stood of record in said office the pre-emption filing of one Groesbeck for the same land, made April 13, prior thereto. Beardsley does not plead ignorance of this fact. He says that when he went to the local office there was a foundation for a house on said land, that on his return the house was in process of construction, and that when completed it was occupied by said Groesbeck for some time. Appellant says further that he became satisfied that Groesbeck had a prior right to said land, and "therefore never made any improvements, of any value, thereon." On February 15, 1875, he voluntarily relinquished his entry, and in November, 1884, made the application herein.

Beardsley was charged with knowledge of said pre-emption filing, and made his entry subject to the rights of said pre-emptor under said filing. After eight months, being convinced that the pre-emptor's rights in the premises were superior to his own, he voluntarily relinquished.

It is perfectly clear that whatever loss Beardsley may have sustained in this matter, is chargeable to his own negligence or folly, and under such circumstances this Department will not grant the relief prayed for.

Said decision is affirmed for the reasons herein stated.

REVIEW DENIED.

GEORGE W. HENDRY.

Motion for review of departmental decision of October 15, 1885, (4 L. D. 172), denied by Secretary Lamar November 27, 1885.

CONTEST—INTEREST OF THE GOVERNMENT.

DAYTON *v.* HAUSE ET AL.

In every contest the government is a party in interest and will take care, so far as possible, that every applicant for public land shall show good faith in every act.

In view of the charge and counter-charge of fraud, the doubt as to the correctness of the record, and the conflicting allegations as to improvements, a further hearing is ordered.

Secretary Lamar to Commissioner Sparks, November 28, 1885.

I have considered the appeal of Lyman C. Dayton from the decision of your office, dated October 10, 1883, and October 15, 1884, adverse to him.

It is shown by the record that on June 4, 1880, Joseph F. Hause made timber culture entry No. 2,972 of the NE. $\frac{1}{4}$ of Sec. 23, T. 123 N., R. 64 W., in the Watertown land district, Dakota Territory.

On June 21, 1881, Lyman C. Dayton filed in the district land office his affidavit of contest against said entry, averring that Hause had relinquished the same to the United States. Thereupon notice was issued and the hearing was set for August 25, and continued until November 1, 1881, to enable Dayton to perfect service upon Hause, which was done September 26, 1881.

Upon the day set for the trial, Dayton appeared and filed a paper purporting to be a relinquishment of Hause, and stating that about the 25th day of March, 1881, he relinquished to the United States all of his right, title and interest to said tract for which he held receipt No. 2,972; that he executed said relinquishment upon the back of said duplicate receipt, and duly acknowledged the same before a notary public; that he has not seen said receipt since the execution of said relinquishment, and does not know where it is, and the paper concludes with a formal relinquishment of said entry.

The paper appears to have been duly acknowledged before a notary public. The indorsement upon said paper is as follows: "Filed November 1, 1882, held insufficient on which to base cancellation. Statement as to absence of receipt not being sworn to. A. C. Millette, Reg'r."

On November 1, 1881, James R. Dayton filed an affidavit, alleging that the contest initiated by Lyman C. Dayton was speculative and fraudulent, and was instituted for the express purpose of preventing him from entering said land under the homestead laws, and he therefore

moved that the contest of Lyman C. Dayton be dismissed; that the entry of Hause be canceled; and that he, James R. Dayton, be allowed to make homestead entry of said tract. On January 21, 1882, James R. Dayton filed another relinquishment of Hause in the local office, whereupon said entry was canceled and said Dayton permitted to make timber culture entry No. 5,070 of said tract.

On March 24, 1882, Lyman C. Dayton filed in the district land office, at Watertown, in said Territory, a motion for a rehearing and review of the decision of said office, made, or claimed to have been rendered, on November 1, 1881, holding his proof of relinquishment by Hause insufficient, and also of their decision of January 21, 1882, canceling said entry of Hause and allowing James R. Dayton to make timber culture entry of said tract.

The grounds of said motion are, (1) error in the rulings of the register, and (2) that no notices of said decisions were given to said Lyman C. Dayton, or his attorneys of record, as required by the rules of practice of this Department.

With said motion for review were filed affidavits of Lyman C. Dayton and his said attorneys, in support of the allegations therein contained. Under date of September 29, 1882, the register and receiver transmitted said motion, with a record of the proceedings, in which the allegations of said Lyman C. Dayton were contradicted by the register.

In said transcript it appears that the following entry was made upon the contest docket in the district land office, "November 1, 1881. Present, W. S. Glass, Att'y and contestant, and D. A. Thomas, Att'y for J. R. Dayton. Contestant files relinquishment and asks for cancellation November 1, 1881, the contestant having failed to produce any testimony in proof of the relinquishment set up in his complaint, case is therefore dismissed."

On October 10, 1883, your office considered the motion for rehearing, and refused the same, on the ground that Dayton's affidavit of contest was not accompanied by an application to enter the land. Subsequently, Lyman C. Dayton applied for a reconsideration of your said office decision of October 10, 1883, and also filed an appeal from the decision of the register of the Watertown land office, dismissing his contest, which was transmitted by the district land officers, at Aberdeen, on March 4, 1884. By your office decision of October 15, 1884, the action of the Watertown land office in dismissing said contest was approved and the appeal of said Dayton dismissed, for the reason, among others, that said Lyman C. Dayton made timber culture entry No. 5,259 of SE. ¼ of Sec. 2, T. 122 N., R. 64 W., on March 10, 1882, which entry is still intact.

It will be observed that no witnesses have testified in this case before the register and receiver. Ex-parte affidavits have been filed by both Lyman C. Dayton and James R. Dayton directly in conflict, and they cannot be accounted for, except upon the hypothesis that one or the other has sworn falsely. It is alleged by Lyman C. Dayton that the

entire tract in controversy has been platted as an addition to the city of Aberdeen in said Territory by James R. Dayton, and that he has sold portions of the same. This allegation is denied by the ex-parte affidavit of James R. Dayton.

In view of the charges of fraud preferred by both Lyman C. Dayton and James R. Dayton against each other, and the conflict with regard to the correctness of the record made by the register of the Watertown office, as well as the allegations relative to improvements made by the respective parties, it is considered advisable, before any final adjudication is made, that a hearing be had to ascertain, if possible, the truth in the premises. You are therefore directed to instruct the register and receiver at the Aberdeen office to order a hearing, giving due notice to all parties in interest of the time and place for holding the same. The inquiries of the register and receiver should be directed with a view of ascertaining whether Lyman C. Dayton filed any application to enter said tract, and, if so, when; at what time the register and receiver dismissed his contest against said entry, and whether due notice of said dismissal was given to Lyman C. Dayton, or his attorneys of record; what improvements Lyman C. Dayton has made upon said tract; when said improvements were made, and their value. Inquiry should also be made with a view of ascertaining whether either or both of said parties have acted in good faith; whether they are qualified to enter said tract under the homestead or timber culture laws; and whether said tract has been platted and sold as alleged.

It should be kept in mind always that in every contest the United States is a party in interest, and will take care, so far as possible, that every applicant for public land shall show good faith in his every act.

Upon the receipt of the record and the testimony taken at the hearing, with the report of the register and receiver, you will proceed to re-examine the case. James R. Dayton's timber culture entry will be suspended to await the final determination of the case.

RAILROAD GRANT—HOMESTEAD ENTRY.

CHICAGO, ROCK ISLAND & PAC. R. R. CO. *v.* EASTON.

While the entry of Easton served to except the land from the operation of the railroad grant, his right under such entry was forfeited by his failure to comply with the homestead law.

Final proof should not be submitted while the right to make the same is pending on appeal.

Secretary Lamar to Commissioner Sparks, November 28, 1885.

I have examined the case of the Chicago, Rock Island and Pacific Railroad Company *v.* Levi W. Easton, involving the S. ½ of SW. ¼, Sec. 20, T. 79 N., R. 34 W., Des Moines, Iowa, on appeal by the com-

pany from your office decision of March 29, 1884, allowing Easton to make final homestead proof.

The tract in question is within the twenty mile or indemnity limits of the amended line of the Mississippi and Missouri (Chicago, Rock Island and Pacific) Railroad, as established under the act of June 2, 1864, (13 Stat., 95,) the withdrawal for the benefit of which was made June 16, 1864. The lands were subsequently restored to homestead and pre-emption entry, August 25, 1864, and again withdrawn June 7, 1865.

The record shows that at the date of the second withdrawal aforesaid, the tract was covered by homestead entry No. 297, of date June 5, 1865, in the name of Levi W. Easton, which was canceled July 20, 1872, for failure to make proof within seven years from date of entry.

Upon receipt of a letter from Mr. Easton, stating that he had resided on the tract about two years and six months, that his absence from the land was caused by sickness, and asking that his said homestead entry be re-instated, your office,—having before it evidence that Easton was entitled under the act of June 8, 1872 (17 Stat., 333), to credit for three years' residence upon his homestead, on account of services in the United States Army,—on the 29th of of March, 1884, re-instated his said homestead entry, and gave him an opportunity to make final proof according to law. From this action the railroad company appealed to this Department.

Pursuant to said decision, Easton gave the usual notice, and proceeded to make final homestead proof before the clerk of the court of Audubon county, Iowa, notwithstanding the fact that his right to do so had not been finally determined.

At the time Easton made his proof, his right to the land was contested by one Hannah Bush, who claimed to have settled on the tract in 1871 and resided there continuously up to date. A great amount of testimony was taken and forwarded to the local office, which, on the 4th of August, 1884, transmitted the same to your office for instructions. The said decision of March 29, 1884, having been appealed from, your office, by letter "F" of date January 30, 1885, transmitted the testimony so taken as aforesaid, together with the other papers in the case, to this Department for final consideration.

While the final proof of Easton should not have been made pending the appeal from the action of your office, allowing him such right, yet inasmuch as it has been made, and the proceedings of the same are before me, I shall consider the whole case on its merits.

It appears that Easton made homestead entry, as aforesaid, on the 5th of June, 1865. This entry being intact upon the record at the date of the withdrawal for railroad purposes, operated to except the same from the withdrawal, and upon its cancellation in 1872 the tract became subject to entry, or selection, by the first legally qualified applicant. No such entry, or selection, appears of record. It further appears from the testimony, that Easton made settlement on this tract some time in

the fall of 1865, and resided there until about the 15th of September, 1867, when he abandoned the same, moved into another State, then back again to the county in which the tract is situated, but never set up any subsequent claim whatever to the tract until that in his said letter to your office. His allegations of sickness are not substantiated by proof; it is very doubtful from the evidence whether he is the identical Levi W. Easton, who served in the U. S. army, as aforesaid; he actually abandoned said tract for at least sixteen years, without ever attempting to make final proof; and upon his own showing, were there no other claims to this tract, his final proof ought to be rejected.

Again, this identical tract is now claimed by Hannah S. Bush, who made settlement in 1871, and, as before stated, claims continuous residence thereon up to date. It appears that she never made any entry or filing for this land, however, but on June 27, 1884, she executed a final homestead affidavit before the clerk of the district court of Audubon County, Iowa, and filed it along with the testimony taken at the hearing aforesaid.

There is not sufficient evidence before this Department to arrive at any conclusion in reference to Mrs. Bush's rights to the land in controversy, and those rights will not be adjudicated herein. If her claim to this tract is as alleged by her, there is no reason why upon proceeding in the proper manner, she may not perfect such claim.

The decision appealed from is modified in accordance with the views herein expressed. The claim of the railroad company is rejected, Easton's final proof is rejected and his said entry will be again canceled.

PRACTICE—ATTORNEY.

SMITH *v.* LOVELL ET AL.

The formal withdrawal of an appeal or contest by the proper attorney of record is conclusive, and rights lost thereby cannot be restored by an attempted revocation of such withdrawal, after the intervention of an adverse claim.

Secretary Lamar to Commissioner Sparks, November 30, 1885.

I have considered the case of Ira W. Smith *v.* Edgar A. Lovell and Andrew J. Webster, involving the NE. ¼, Sec. 32, T. 112 N., R. 74 W., Huron, Dakota Territory, on appeal by Webster from your predecessor's decision . . . . dismissing his contest and allowing Smith the right to contest Lovell's timber culture entry of the tract in question.

* * * * * * *

On the 16th of September, 1884, your office . . . rendered a decision in the case, dismissing Webster's contest and allowing Smith the right to contest Lovell's entry. From this decision, Webster duly appealed to this Department. Pending the appeal here, on the 28th of

April, 1885, Lovell executed and filed his relinquishment for the above tract, and his timber culture entry was canceled. At the same time, one Neil O'Donnell presented timber culture application for same tract. His application was "rejected, for the reason that an appeal by one Andrew J. Webster . . . is still pending." From this rejection, O'Donnell appealed and the case came up to your office. It appears, however, that on the 27th of April, (the day before O'Donnell's application,) Webster's attorney came to the local office and withdrew his (Webster's) appeal, and asked that the same be dismissed. On the 29th of April, Webster came to the local office and stated that his attorney had acted in this matter without his knowledge or authority. The register states that it transpired that the non-payment of alleged attorney's fees was the motive which prompted the aforesaid withdrawal; and that subsequently on the same day Webster and his attorney came to some agreement, when the attorney formally withdrew the withdrawal. At the same time Webster filed application to enter the tract under the timber culture law. On the 25th of April, 1885, (three days prior to the filing of Lovell's relinquishment,) there was filed in the local office a withdrawal of Smith's contest, signed by his attorneys. On the 1st of June, 1885, one of Smith's attorneys filed an affidavit in the local office, alleging that when he executed the withdrawal of Smith's contest, it was delivered to Webster's attorney, with the understanding that both were to withdraw, and that both withdrawals were filed by Webster's attorney. In the same affidavit, he accordingly withdrew the withdrawal of Smith, and said it was never to be filed, unless Webster also withdrew. It may be remarked in passing that the attorneys for Smith are the same attorneys who are prosecuting the said appeal of O'Donnell.

Your office took no action in reference to these later proceedings at the local office subsequent to Webster's said appeal, except to transmit all the papers pertaining thereto to this Department, by letters of May 27th and June 19, 1885.

Without passing upon any of the questions raised by Webster's said appeal, it is sufficient herein to say, that the withdrawal of said appeal by his attorney, acting within the scope of his ordinary authority, is a determination of his rights as they then existed. It may be true that the attorney acted unwarrantedly to the detriment of his client; but that is a matter wholly between himself and his client. It is not the business of the Land Department to adjust matters growing out of the relation between attorney and client when the government will not be injured by any of such matters. Neither can it be said that the withdrawal of a withdrawal of an appeal *ipso facto* revives the appeal. Again, the withdrawal of Smith's contest by his attorney is a determina tion of whatever rights he (Smith) had in the premises; and a withdrawal of such withdrawal will not *ipso facto* re-instate his contest. It matters not what agreement he may have had with Webster's attorney in ref-

erence to the matter. Such agreements tend to indicate bad faith and are always to be discouraged. The withdrawal of Smith's contest, the withdrawal of Webster's appeal, and the relinquishment of Lovell's timber culture entry, operated to divest all rights which any and all of the three parties had to the tract in controversy, and the land thus became open to settlement and entry by the first legally qualified applicant. This appears to have been O'Donnell; and there being no other claim to this tract existing at the date of his said timber culture application, he will be allowed to make timber culture entry of the tract in controversy, dating his right to do so from the 28th day of April, 1885, when he filed said application. The claims of Webster and Smith are hereby rejected.

ACCOUNTS—APPEAL—CERTIORARI.

GEORGE K. BRADFORD.

It lies within the discretion of the Commissioner of the General Land Office, to adopt such methods in the examination of accounts, as may seem to him best calculated to ascertain the justness and accuracy of the same, and his action in such matter is not subject to appeal, though it will be reviewed on certiorari for due cause shown.

The writ was denied, where it appeared that the adjustment of an account for services as deputy surveyor, had been suspended, pending an examination of the work in the field.

Secretary Lamar to Commissioner Sparks, November 30, 1885.

A petition has been filed on behalf of Deputy U. S. Surveyor George K. Bradford, asking the issuance of a writ of certiorari with respect to the proceedings of your office in the matter of adjusting said Bradford's claim, aggregating $4,930.74, for services performed in Louisiana under survey contract No. 22, dated August 8, 1884.

It is set forth in said petition that the field work under said contract was executed in due accordance therewith, and pursuant to the law and regulations governing surveys; that the field notes and maps of such work, together with the statement of account therefor, were returned in form with the approval of the U. S. Surveyor General for the State of Louisiana, and, that so far as the knowledge of the petitioner extends, no charges have been preferred against the field work under said contract. That under a general order of your office of June 20, 1885, the petitioner's account was suspended.

It is further alleged that on September 14, 1885, said Bradford, through his attorneys, addressed your office requesting adjustment of said account, or, if it should be deemed advisable to examine the petitioner's work in the field prior to the allowance of the account, that such examination be at once ordered under section 2223 of the Revised Statutes. To this request, it is alleged, your office responded Septem-

ber 25, 1885, declining to order the examination in the manner suggested, but adding that as soon as a sufficient number of examiners of surveys were appointed, commensurate with the work involved, the surveys in Louisiana would receive prompt attention; and that, replying further, your office informed petitioner, on September 30, 1885, that said account would remain suspended until a field examination of the work was made in accordance with the method indicated in the letter of September 25th.

Thereafter it appears that said Bradford in due form appealed from the action of your office, but the appeal was not allowed, for the reason, as stated in this petition, and shown by copy of your office decision of October 19, 1885, that the order of June 20, 1885, suspending action on all surveying accounts pending examination of the work in the field, was a matter resting solely within your discretion as Commissioner, and hence not subject to appeal under the Rules of Practice. Thereupon this application was made.

It is urged by the petitioner that he was entitled to an appeal, but that if it should not be so found, then your action should be reviewed on certiorari.

Section 456 of the Revised Statutes provides that, "All returns relative to the public lands shall be made to the Commissioner of the General Land Office; and he shall have power to audit and settle all public accounts relative to the public lands, and upon the settlement of any such account, he shall certify the balance, and transmit the account, with the vouchers and certificate, to the First Comptroller of the Treasury, for his examination and decision thereon."

The general authority so conferred carries with it, of necessity, in the absence of express statutory direction, the right and duty to pursue such course as may appear to you best calculated to ascertain the justness and accuracy of the accounts thus specially confided to your supervision. Hence as the selection of a method to be pursued in the adjustment of an account, or class of accounts, is left within your discretion, it follows that you properly held that the applicant herein was not entitled to an appeal. Rule of Practice 81.

The discretionary authority recognized in the foregoing is, however, subject to review on certiorari by the Department in the exercise of its supervisory powers if it shall be made to appear that your action was irregular or without due warrant of law. Florida Railway and Navigation Company *v.* Miller. (3 L. D., 324.)

Section 2223 of the Revised Statutes, under which the petitioner requested an examination of the field work to be made, provides, with respect to the duties of surveyors-general, among other things, that "He shall, so far as compatible with the desk duties of his office, occasionally inspect the surveying operations while in progress in the field sufficient to satisfy himself of the fidelity of the execution of the work according to contract . . . ; and when it is incompatible with his other duties

for the surveyor-general to devote the time necessary to make a personal inspection of the work in progress, then he is authorized to depute a confidential agent to make such examination" . . .

It is alleged that the act of March 3, 1885, (23 Stat., 499,) making an appropriation for "surveying the Public Lands," amplifies the provisions of the foregoing section, and authorizes the examination asked, it being provided in said act as follows: "And of the sum appropriated not exceeding fifty thousand dollars thereof may be expended for occasional examinations 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 . . . *Provided* that all appropriations herein under public lands shall be expended under the direction of the Secretary of the Interior."

As the act quoted does not provide for the manner in which such occasional examinations shall be made, and declares such appropriation is for the purpose of preventing payment for fraudulent and imperfect surveys *returned* by deputy surveyors, leaving the expenditure therefor under the direction of the Department, it is apparent that the inspection thus authorized is not confined to that specified in Section 2223, where the examination was to be made while the work was in course of execution.

It appearing then that you are charged with the duty of carefully scrutinizing accounts rendered for surveys, and that a special appropriation has been provided for such purpose, without limitation as to the method to be pursued in examining into the basis of such accounts, the conclusion is obvious that your action herein raises no such question of irregularity or illegality as would justify the issuance of the writ prayed for, and the petition is accordingly dismissed.

MINING CLAIM—PROTEST.

SOUTHWESTERN MG. CO. *v.* GETTYSBURG LODE CLAIM.

Adverse claim having been filed, and full opportunity accorded for the settlement in court of the questions now urged by protestant, who claims as the assignee of the adverse claimant, but disclaims for itself the position of adverse claimant, further objection resting on alleged prior and legal possession will not be entertained.

Secretary Lamar to Commissioner Sparks, November 30, 1885.

On the 27th of August last I re-opened, for purposes of argument and further consideration, the matter of the protest of the Southwestern Mining Company, assignee of the Techatticup Mining Company, against the issue of patent to George Burnham, George H. Vickroy and others, for the Gettysburg Lode so called, Mineral Entry No. 173, made March 31, 1877, Carson City District, Nevada.

By decision of your predecessor, dated July 23, 1883, it was held that the proof in support of the application showed a substantial compliance with the requirements of the act of July 26, 1866; and in view of the lapse of time since the filing of the same in October, 1867, and the

evident default of protestant in responding to an order for hearing, made at request of said Techatticup Company, the late Commissioner further signified his intention, upon the filing by the manager of the Southwestern Company of copies of certain alleged conveyances, "to waive whatever informalities may appear in the record and approve the case for patent."

The protestant did file an abstract of title relating to said conveyances, but protested against the issue of the patent, and brought the matter by petition before my predecessor, who, on the 18th of December, 1883, affirmed the action of your office and returned the papers.

Application for suspension of this proceeding was filed, and the papers were again before my predecessor, who on the 3d of March last removed further suspension, and directed the decision to be carried into effect.

By departmental indorsement of 13th March, upon a renewed application for reconsideration, the matter was again presented for official report, which was rendered on the 14th of that month, and after due consideration and oral argument, it was determined that the technical bar of *res judicata* did not apply so as to prevent further examination with a view to such disposal as might be demanded under all the circumstances. (4 L. D. 120).

Argument both oral and by brief has accordingly been had upon the matter as formulated, viz:

"(1) Whether or not such validity attaches to the initiatory proceeding, in view of the apparently conflicting interests, as to allow patent to issue thereon; and

"(2) Whether or not such substantial compliance with law is shown as would authorize a waiver of informalties in case it be found that the adverse proceedings constitute in themselves no bar to the claim of the applicants."

This formulation of the issue was made in view of the fact set up in the recital that, although appearing as a protestant, the interest of the Southwestern Company had already been "in terms recognized by your office and the Department." It consequently became in my judgment important, before concluding, against its protest, a matter which had at the first been proposed on account of an assumed consent of the company, that opportunity to be heard and fully state its position should be given to said company.

By the showing made upon the argument two things are completely established, namely: (1) that the Southwestern Company expressly disclaims the position of adverse claimants as that term is known to the mining law, and (2) that after having had the proceedings stayed by formal notification of the register and receiver on the 11th of February, 1868, upon a full and formal notice of an adverse claim filed by the Techatticup Mining Company on the first of February, 1868, in which protest and claim was couched a specific prayer for the granting of such stay "until a final settlement and adjudication in some court of compe

tent jurisdiction," no resort was had to such court, and nothing appears respecting the claim until revived in 1876 and 1877, and carried forward to entry in October of the latter year. A third fact was already prominent, to wit, that the Southwestern Company claimed its interest by virtue of alleged purchase of the interest of the Gettysburg Mining Company (limited), grantee of twelve of the fourteen claimants parties to the entry, and also by purchase and control of the entire interest of the original protesting Techatticup Mining Company.

I think from these established premises the following conclusions result.

1. Had no adverse claim been filed the *prima facie* case made by the applicants would have supported the entry, as the law was then construed and administered, so far as relates to to the possession of the mine.

2. Adverse claim having been filed, without objection as to time of filing, so far as shown, and the "stay" having been declared by the proper officers, full opportunity to take the case into court for the determination of the question of the right of possession was afforded; and, as necessary to that determination, all incidental questions were involved. The whole controversy was for the court; and having failed to assert it there, no objections based merely upon allegation of prior and legal possession can now be heard in this Department on behalf of the parties disclaiming as aforesaid.

3. The sufficiency of proof upon questions of fact to support the *prima facie* right having already been favorably adjudged by the register and receiver, by your office, and by this Department, the money having been paid, and the entry permitted to stand for eight years past, such finding should not be disturbed, except for controlling reasons.

Upon the whole I therefore decide that substantial justice will be best subserved by a removal of the suspension from the issue of patent, thus leaving all parties to assert title thereunder according to their respective interests through the judicial tribunals.

MINING CLAIM—DISMISSAL OF SUIT.

MONROE LODE.

A voluntary dismissal of the suit instituted in the court by the adverse placer claimant, is held an abandonment of the ground in conflict, and a sufficient waiver of claim to the entire width applied for by the lode claimant, to authorize the issue of patent accordingly.

Aside from any question as to the competency of the evidence, the clause reserving the rights of a townsite, will not be inserted in the patent, as all the claims of discovery and location antedate the town settlement.

Acting Secretary Muldrow to Commissioner Sparks, November 30, 1885.

I have considered the appeal of the Caledonia Gold Mining Company from your predecessor's decision of February 26, 1884, in the matter of

the Monroe Lode claim, mineral entry No. 101, Deadwood, Dak., allowed by the district office December 17, 1881, after the application, publication, and the dismissal in court of all adverse claims.

But two questions appear to be important in disposing of this case.

1st. It appears that before application was made for this claim an application was made by Matthew H. Johnson for patent on a claim designated as Placer No. 10, Bobtail Gulch, with which a part of the surface ground of Monroe Lode claim conflicts. The owners of the lode did not adverse the placer claim. On publication of the lode application, however, the owners of the placer did adverse the same and went into court to determine the right of possession, and afterward voluntarily dismissed their own suit.

Your office held, notwithstanding this proceeding, that, as the placer claim was first applied for without adverse by the lode claimants, the surface ground of the latter claim must be limited to twenty-five feet on each side of the lode where it passes through the placer claim as surveyed and applied for.

I think the withdrawal of a suit regularly and subsequently brought is a sufficient waiver of claim to the entire width applied for to authorize the issue of patent to the lode applicant, and is an abandonment of the small portion of alleged placer ground included in the No. 10 application, which conflicts with this lode claim.

2d. It is found by your office that an examination of "the testimony in the matter of the protest of John Plunkett *et al. v.* Matthew H. Johnson discloses that a portion of Lot 202 is within the town of Terraville, therefore should a patent issue for the Monroe Lode claim Lot 202, mineral entry No. 101, it will contain the usual townsite reservation."

Without reference to the question of admissibility of testimony taken in another case, in which the decision makes no mention of any notice to or opportunity to be heard on the part of these claimants, I am of the opinion that no case is made out in the proceedings referred to which requires the insertion of such clause in this patent, under the rules which have been established for the regulation of these matters. All the claims of discovery and location antedate what may be in any sense regarded as a town settlement right entitled to consideration.

The proof to sustain the entry seems sufficient, and I am of the opinion that patent should issue as prayed by appellant. The appeal is accordingly sustained and your predecessor's decision reversed.

PRACTICE—RULE 114.

COLLAR *v.* COLLAR.

This rule requires the transmission only of the papers filed in support of the motion or application.

Acting Secretary Muldrow to Commisssioner Sparks, December 5, 1885.

I have considered the motion for review of departmental decision, rendered July 15th last (4 L. D., 26), in the case of Squire T. Collar *v.* Layton Collar, involving the SW. $\frac{1}{4}$ of Sec. 10, T. 113 N., R. 63 W., Huron land district, Dakota Territory.

Said motion was filed by the attorney of Layton Collar in your office on August 27, and transmitted with the record in the case by letter dated September 1, 1885. The motion does not present a *prima facie* showing why said departmental decision should be revoked. No new evidence is offered, no authorities cited, and the grounds of error in sisted upon were duly considered in the decision sought to be reviewed.

Your attention is called to the fact that the record in the case was transmitted by your office letter of September 8th last, with said motion for review. Rule 114 of Rules of Practice reads—"Motions for review before the Secretary of the Interior, and applications under Rules 83 and 84, shall be filed with the Commissioner of the Land Office, who will thereupon suspend action under the decision sought to be reviewed, and forward to the Secretary such motion or application." Said rule does not require the transmission of any papers in the case, except the motion or application and the papers filed in support thereof. If upon examination it shall be considered advisable to have the record of the case sought to be reviewed transmitted to this Department, your office will be notified accordingly.

The application for review is denied.

HEARING ON SPECIAL AGENTS' REPORT.

JAMES COPELAND.

When a hearing is ordered on the report of a special agent, the local office should not consider the *ex parte* testimony submitted by the claimant in making his final proof.

A motion by the entryman to dismiss the prosecution, on the ground of the insufficiency of the evidence, having been sustained, obviated the submission of testimony on his part, and it was error to thereafter cancel his entry without allowing him opportunity to rebut the proof offered against him.

Acting Secretary Muldrow to Commissioner Sparks, December 5, 1885.

I have considered the appeal of James Copeland from the decision of your predecessor on December 5, 1884, holding for cancellation his cash entry No. 1891, commuted from homestead entry No. 4514, Watertown series, for the SW. $\frac{1}{4}$ of Sec. 29, T. 123 N., of R. 63 W., Dakota Territory.

It appears from the record that Copeland made homestead entry May 10, 1881, and commuted the same to cash entry January 4, 1882, having filed his affidavit and submitted proof thereon in full compliance with the law. Upon a report subsequently made by Special Agent Jaycox you suspended action on said entry, and directed a hearing thereon. At this hearing Special Agent Jaycox, representing the Government, testified that he "found a house twelve by fourteen on the land and about ten acres broken. Total value of improvements about $75.00. The house had not been completed. The roof was not finished. There was no stove pipe hole, or chimney through the roof, and all the indications about the house showed that the house had never been lived in. The nearest settler never saw any smoke come from the house. The claimant visited his claim but seldom. He boarded in Aberdeen and loafed about town," etc. The case on the part of the United States closed with the testimony of said witness: whereupon, counsel for Copeland moved to dismiss said proceeding upon the insufficiency of the evidence. The register and receiver sustained said motion, upon the ground that "the United States failed to make out a prima facie case in not showing that the statements in the final proof were untrue, or that the claimant had not had his residence on the land at and prior to the time of making his final proof."

Upon an appeal filed by the United States, your predecessor refused to concur in the opinion of the register and receiver, and held that "said entry appearing from the evidence to have been invalid from want of compliance with the law, and no testimony having been offered at the hearing in defence of the claim, the same is held for cancellation." From which decision Copeland appealed.

When a hearing has been ordered by the Commissioner of the General Land Office upon the report of a special agent, such hearing is a proceeding *de novo*, and the register and receiver on such hearing should not consider the *ex parte* testimony submitted by claimant in making his final proof. The testimony submitted by the government in this case showed at least *prima facie* that the law had not been complied with by claimant, and not being rebutted by any evidence proper on that hearing to be considered, it was error to dismiss the case against the government.

But the motion of Copeland was in the nature of a non-suit, which being sustained obviated the necessity for him to submit proof. Had the motion been overruled, he would still have had the right to offer evidence to rebut the proof offered against him. The decision holding his entry for cancellation denied him this right.

Upon this ground said decision is reversed, and you will direct the register and receiver to continue the hearing of said case at as early a day as practicable, giving all parties due notice of the time set for such hearing. If at the time set for said hearing the claimant offers no evidence, said decision will stand affirmed.

PRACTICE—APPEAL—CERTIORARI.

BLAKE *v.* RASP.

From the adverse decision of the local office the pre-emptor took no appeal, relying on his alleged right, under rule 81 of Practice, to appeal from the Commissioner's decision if that should also prove unfavorable. The Commissioner held however that the right to appeal from his decision was lost through failure to appeal below. On application for certiorari the Department denied the writ, as from the record presented, the case appeared to have been properly disposed of under rule 47.

Acting Secretary Muldrow to Commissioner Sparks, December 8, 1885.

I am in receipt of your office letter of September 29th last, enclosing application of Ernest Rasp, dated August 26th last, to have the papers in the contest case of Moses W. Blake *v.* said Rasp certified to this Department under Rules, 81 to 85, of Practice, inclusive.

Rasp made timber culture entry November 16, 1883, for the NE. ¼ of Sec. 18, T. 157 N., R. 43 W., Crookston district, Minnesota. On June 28, 1883, he relinquished said entry, and on the same day filed pre-emption declaratory statement for the same tract, alleging settlement June 23, 1883.

February 24, 1884, Moses Blake made timber culture entry of same tract. Rasp, after duly publishing notice, appeared at the local office April 15, 1884, to make final proof and payment, when contestant Blake appeared and filed written protest, and was allowed to cross-examine Rasp and the witnesses introduced by him. Blake then offered to introduce witnesses to testify in his own behalf, which was refused, upon the ground that no hearing had been ordered for that purpose.

There is nothing in the petition showing that Rasp did not have full opportunity to offer any testimony in his behalf nor that any proof was allowed to be offered against him except from the testimony of witnesses introduced by him.

From the evidence submitted, the local officers decided as follows:

"From the records in the case, and the testimony adduced on cross-examination, we find that claimant purchased from one Pyle the NW. ¼ of Sec. 22, T. 157, R. 48, and established his residence thereon about May 13, 1883; that about June 15, 1883, he moved his family to the house of James Longmeier, on section 18, adjoining his timber-culture entry, where he temporarily remained eight or nine days, and from there removed to his timber-culture claim on section 18, which he relinquished, and upon which he filed a pre-emption declaratory statement on June 28, 1883, and again moved back to where he started, on section 22. It was an attempt on his part to evade the restriction of Section 2260 R. S.; and if his actual residence has ever been changed from the NW. ¼ of section 22, he removed from his own land to make settlement upon the land under contest, and is therefore not a qualified pre-emptor. Wherefore his tender of proof and payment should be rejected and declaratory statement No. 7905 declared canceled and forfeited to the United States."

From this decision no appeal was filed.

On December 9, 1884, your office approved this decision, holding as follows:

"Hearing was had, and from the testimony adduced you held that Rasp moved from land of his own in the same State to reside on the public lands, and that his proof should be rejected, and his entry canceled. From this action, after due notice, no appeal has been filed, and the same is final and the case is closed. The declaratory statement of Rasp is this day canceled."

February 25, 1885, Rasp filed an appeal to the Department; but it was held by your office letter of April 1, 1885:

"An appeal does not lie from the decision of this office, inasmuch as the failure to appeal from your decision rendered the same final. Rasp has therefore no standing before this office as an appellant."

Whereupon, Rasp filed his petition to the Department, reciting said facts, and further alleging in substance that he failed to file an appeal from the decision of the local officers, because he was advised by his counsel that when the case was reported to the Commissioner of the General Land Office a hearing would be ordered, in which he would have opportunity to make full, clear and satisfactory proof; that it was impossible to do so at the time of the hearing because he did not then expect a contest and was taken by surprise; that he did not appeal because he was advised by his counsel that if the Commissioner affirmed the decision of the local officers an appeal to the Department would be allowed under Rule 81 of Practice.

Waiving the question whether Rasp would be entitled to appeal under this rule in a proper case made, which is not necessary to consider in determining this case, does his application present such a case as would entitle him to the right of appeal under the rule?

Rule 81 must be considered in connection with Rule 47 of the Rules of Practice in operation prior to September 1, 1885, (now Rule 48,) which says:

"In case of a failure to appeal from the decision of the local officers, *their decision will be considered final* as to facts in the case, and will be disturbed by the Commissioner only as follows: (1), where fraud or gross irregularity is suggested on the face of the papers; (2), where the decision is contrary to existing laws or regulations; (3), in event of disagreeing decisions by the local officers; (4), where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal."

Considering the record as made by the application of Rasp to have this case certified to the Department, there was no error in the decision of the Commissioner in approving the action of the register and receiver holding Rasp's entry for cancellation, because—(1) There was no fraud or irregularity suggested on the face of the papers; (2) The decision was not contrary to existing laws and regulations; (3) There was no disagreeing decision by the local officers; (4) Rasp was duly notified of the decision and of his right of appeal.

After all, the gravamen of the case is that Rasp supposed his evidence sufficient to warrant a decision in his favor, and now seeks to have the case re-opened to enable him to submit further proof. Neither Rule 47 (now 48), nor Rule 81 allows a finding of the local officers, unappealed from, to be disturbed by the Commissioner for any such purpose. Blake had a right to appear and require Rasp to make out his case, and there is no reason shown why the matter of surprise was not at the time brought to the notice of the local officers.

When the record of the case as made by the petition for certification shows no ground or reason why the decision of the Commissioner should be disturbed, the petition will be refused by the Department. Considering the Rules of Practice applicable to appeals in the most favorable light claimed by Rasp, I see no reason why his petition should be granted. His application is therefore refused, and transmitted herewith.

PRACTICE—NOTICE OF DECISION.

ST. PAUL M. & M. RY. CO. *v.* BAKKE.

As the notice from the General Land Office informing the entryman of the adverse decision erroneously allowed but sixty days from the *date* thereof for appeal, and such notice was not received until after said sixty days had expired, said decision never became final and the case was therefore properly re-instated.

Secretary Lamar to Commissioner Sparks, December 9, 1885.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* John Bakke, on appeal by the company from your office decision of February 12, 1884, rejecting its claim to the N. $\frac{1}{2}$, NW. $\frac{1}{4}$ Sec. 31, T. 128, R. 34, St. Cloud, Minnesota, and re-instating the homestead entry of Bakke thereon.

The tract is within the grant to said company, formerly the St. Vincent extension, St. Paul and Pacific Railroad Company, the right of which attached December 19, 1871. At that date said land was covered by the homestead entry of one Jerry Smith, made November 1, 1865, and canceled March 24, 1874.

On February 21, 1878, Bakke filed declaratory statement for said tract, and on July 8th following changed said filing to homestead entry. On April 5, 1881, the then acting Commissioner examined said homestead entry, held the same for cancellation, and awarded the tract to appellant, basing his decision on the case of Kniskern *v.* Hastings and Dakota Railway Company (6 C. L. O., 50). The local officers were directed to notify Bakke of said decision.

Accordingly, the register, under date of April 11, 1881, mailed a notice directed to said Bakke, concluding as follows: "Appeal if taken must be filed in this office within sixty days *from the date of this notice.*" An appeal from said decision was duly filed by one J. V. Brower, as

attorney for said Bakke, but being found defective, was returned by the Commissioner, and fifteen days allowed for amendment thereof. Said Brower was duly notified of this action, but neglected to take any further steps in the premises. After the expiration of said fifteen days the Commissioner was notified of the default of said Brower, and accordingly on October 10, 1881, said entry was canceled.

On October 22, 1883, Bakke filed an affidavit setting forth that he settled on said tract in February, 1878, erected a comfortable dwelling house, and had continuously resided therein, with his family, ever since; that he made other valuable improvements, and cultivated a large portion of said tract during each year, from the date of his said settlement; that the said notice of April 11, 1881, was sent to the wrong post office, and did not reach him for six months after its issuance; and asked that he be allowed to make final proof. Upon this showing your office, by letter of November 5, 1883, ordered a hearing for the purpose of "determining the facts as to Bakke's receipt of notice of the decision, and his right of appeal." On January 16, 1884, said hearing was had at the land office, both parties being represented by counsel. The testimony there taken corroborates the statements made by Bakke in said affidavit, and shows that he never employed said Brower as his attorney in this matter, or any other; that he was never informed, by said Brower, of his rights in the premises, or of the action taken by said Brower; that he first learned of the cancellation of his entry on receipt of said notice of April 11, 1881, requiring him to file his appeal within sixty days from the date thereof; that the sixty days therein allowed for appeal had long since passed, and that he concluded it was then too late to appeal. These facts are corroborated still farther by the notice itself, and the registry return receipt.

The company offered no testimony.

Upon examination of the evidence, your office, on February 12, 1884, rendered the decision indicated above. From that decision, the company appeals alleging error:—

"In not holding that the question determined by the cancellation of the entry of Bakke in 1881 was *res judicata*."

I can not find that this point is well taken. Bakke was entitled to notice of the decision holding his entry for cancellation, and also to sixty days from the *receipt* of such notice within which to file his appeal. The notice actually sent him by the officers of the government required him to file his appeal within sixty days from the *date* thereof, and did not reach him until said sixty days had long since expired. He was justified in relying upon the express words of said notice, and in failing to prosecute his appeal. It can not be said, therefore, that your office decision holding said entry for cancellation ever became final, or that the question therein passed upon has become *res judicata*. Claimant is in condition to ask that his case be re-instated as it stood at the date of said last named decision.

Under the circumstances the government will not impute *laches* to him, the appellant company is not in position to do so, and there is no other adverse claimant. Since the company has filed an exhaustive brief upon all the points involved, I will pass upon the merits of the case in the present application. I find that the aforesaid entry of Smith, existing at the date when the grant to appellant took effect, excepted the tract therefrom, and after the cancellation of said entry Bakke was the first legal applicant for the land; that he has complied with the requirements of the law, and shown good faith throughout. The claim of appellant is therefore rejected, and the entry of Bakke will be re-instated. Said decision is affirmed for the reasons herein stated.

VOID RELINQUISHMENT.

ST. PAUL M. & M. RY. CO. *v.* CARLSON.

The relinquishment, on which the filing was canceled, having been procured through duress, was void, and the filing is therefore re-instated.

Secretary Lamar to Commissioner Sparks, December 9, 1885.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* John Carlson, on appeal by the company from your office decision of January 22, 1884, holding the canceled pre-emption filing of Carlson for re-instatement on the SW. ¼ NE. ¼, SE. ¼ NW. ¼, NE. ¼ SW. ¼, and Lot 3, Sec. 29, T. 131, R. 38, Fergus Falls, Minnesota. . . . . Carlson filed declaratory statement, No. 1177, for the tract on May 13, 1872, alleging settlement July 5, 1871, and lived upon the land until 1876, when upon his relinquishment said filing was canceled on September 23d. On September 15, 1876, one Christine Carlson, mother-in-law of said claimant, made homestead entry, which was canceled for abandonment January 25, 1881. On March 17, 1881, said John Carlson filed a corroborated affidavit, setting forth that he . . . . . did not relinquish his claim of his free will, but from compulsion. The corroborating witnesses swear that during said year, Carlson was very weak and sickly and that his mental condition was such that he was not accountable for his own acts, and that there was strong talk in the neighborhood at that time of having him sent to the insane asylum at St. Peter, Minnesota, and in fact he was for a time mentally deranged, and had to be taken care of. On examination of said affidavits, your office on October 27, 1881, ordered a hearing to determine the truth of said allegations. On February 16, 1882, said hearing was duly had, the company being represented by counsel.

I am satisfied from the testimony taken at said hearing that the statements made in Carlson's said affidavit are substantially true, and

that the relinquishment of his said filing was not his voluntary act, and he will be allowed to have his declaratory statement No. 1177 reinstated.

Said decision is accordingly affirmed.

ACT OF JUNE 3, 1878.—*ADVERSE CLAIM.*

F. E. HABERSHAM.

The applicant should not submit his proof until after the expiration of the sixty days of publication.

The "adverse" or "valid" claim specified in the act refers to a claim initiated prior to the date of the application.

The issue raised by an adverse claim is as to the validity of such claim, while a protest calls in question the character of the land or the good faith of the applicant.

Secretary Lamar to Commissioner Sparks, December 16, 1885.

I have considered the appeal of F. E. Habersham from the decision of your office of October 8, 1884, holding for cancellation his cash entry No. 5588 for the W. ½ of SW. ¼ of Section 8, Township 35 south of Range 6 W., Roseburg, Oregon.

It appears from the record that Habersham filed in the local office, September 6, 1883, his sworn statement to enter said tract as timber land, under the act of June 3, 1878, and on that day posted and published notice as required by law, of which proof was made. The testimony of witnesses as to the character of the land and improvements was taken before a notary public, October 9, 1883, but the record does not show when this testimony was submitted to the local officers.

On December 11, 1883, Charles Ladd filed declaratory statement on the same tract of land, alleging settlement December 5, 1883. The receipt and certificate of payment issued to Habersham purport to have been issued January 2, 1884, but the register, by letter of December 30, 1884, to your office, says: "Proof of Habersham was received in due time after publication, and was suspended to give ample time for Ladd's protest, if he should make one, and in that way entry was omitted till January 2, 1884, by neglect on account of other business demanding attention at the time."

No protest was filed to Harbersham's application, nor was any contest ordered, or initiated, when Ladd filed his declaratory statement. On June 3, 1884, Ladd transmuted his pre-emption entry to homestead entry. Your predecessor held that the application of Habersham should be held for cancellation, it being in conflict with the homestead entry of Ladd, from which decision Habersham appealed.

The third section of the act of June 3, 1878, provides: that after the expiration of the sixty days of publication, the applicant shall furnish to the register satisfactory proof of the character of the land contem-

plated by the act, and that it was unoccupied and without improvement. The testimony was taken in this case October 9, 1883, thirty-three days after the filing of the application. From this evidence it would be impossible to determine what was the character of the land at the expiration of the sixty days, nor can it be inferred what these witnesses would have testified to at that time. Therefore the local officers should not have received the money, nor issued the cash certificate, until proof had been made after the expiration of the time required by the act, and in the absence of protest from any one.

The irregularity of the proceedings and neglect of duty on the part of the local officers, however, should not affect the preference right of the applicant, who it is presumed was governed by the practice of the local officers at that date in respect to such proof. (See letter of Acting Commissioner Harrison, August 19, 1884; 3 L. D., 34.) The filing of the preliminary affidavit by Habersham gave him a preference right against every person, except a prior claimant and the United States, and no adverse claim can be initiated after his filing to defeat his preference right. An "adverse" or "valid claim," referred to in Section 3, refers to a claim initiated prior to the date of the application. Hughes *v.* Tipton, (2 L. D., 334). This however does not prevent any one, whether a party in interest, or not, from appearing at any time before proof is offered to contest the bona fides of the application and the character of the land. (Id., 336.)

When there is an adverse claim of file at the date of the application, a contest should be ordered, and the sole question then involved is the validity of such adverse claim. When there is no adverse claim of file at the date of the application, a simple protest will make an issue, and the sole question then involved is the bona fides of the application and the character of the land, and this issue must be made by protest filed for that purpose. Martin *v.* Henderson, (2 L. D., 172); Rowland *v.* Clemens (Id., 633); Showers *v.* Friend (3 L. D., 210); Crooks *v.* Hadsell (Id., 258); Merritt *v.* Short *et al.*, (Id., 435); Jones *v.* Finley (10 C. L. O., 365).

Ladd has no right of protest by virtue of his subsequent pre-emption filing, but by the provisions of the act, which permits any one to appear after the expiration of the sixty days of publication and to file protest.

The provision embraced in the third section of the Act of June 3, 1878, that after the expiration of sixty days, if no adverse claim shall have been filed, the applicant may, upon submission of proof be entitled to enter the land and receive patent therefor, is not a limitation of the right of any one to enter protest as to the bona fides of the application and the character of the land, but refers solely to the period of time that shall elapse after the filing of the application, and before the applicant may submit his proof.

In accordance with this ruling, you are directed to remand the case to the local office, with instructions to require Habersham to submit the proof *de novo*. Notice shall be given to Ladd of the time and place of

receiving such proof and he should be allowed the opportunity of filing protest, but the testimony received shall be confined to the bona fides of Habersham's application and the character of the land, and shall not involve the merit of Ladd's entry. Whatever rights he may have as a pre-emptor are not involved in this controversy, and they can be determined hereafter, if it should appear that the land is not of the character contemplated by the timber act, or that the application of Habersham was from any other cause illegal.

REVIEW DENIED.

LITTLE PET LODE.

Motion for review of departmental decision of July 9, 1885, (4 L. D., 17) denied by Secretary Lamar December 16, 1885.

PLACER MINING CLAIM—APPLICATION.

SAMUEL E. ROGERS.

An application for placer patent may embrace more than one location of one hundred and sixty acres.

Secretary Lamar to Commissioner Sparks, December 16, 1885.

I have before me the request of counsel for Samuel E. Rogers, applicant for patent for the Washington, Adams, Jefferson and Madison locations of oil placer claims in the Cheyenne, Wyoming, Land District, for the allowance of the entry as applied for. Said request is based on the finding that the land is only fit for extracting petroleum, in the report of a special agent of your office, who was directed to investigate the tracts in question in pursuance of Departmental decision in the case of Downey *v.* Rogers (2 L. D., 707).

The decision in said case appears to have disposed of all the questions raised, except one, namely, the rejection by your office of Rogers' application "because it embraces four separate locations of one hundred and sixty acres each." The above-mentioned investigation into the character of and improvements upon the claim was ordered in view of Department ruling of January 30, 1883 (9 C. L. O., 210), and for the purpose of determining "whether or not the same ruling should apply to oil lands." The necessity for such determination is, however, obviated by the recent ruling of the Department in the case of The Good Return Placer Mine (4 L. D., 221), to the effect that an application for patent may embrace more than one placer location. In this case four placer locations by associations of persons have centered in the hands of Mr. Rogers, and his application for patent embracing them is sanctioned by the ruling afore-

said. For these reasons, your office decision rejecting said application must be overruled.

But I cannot undertake to direct an allowance of the entry, as requested by applicant's attorney, nor to pass upon the questions of good faith and of the value of improvements raised by the report of your special agent. Your attention is directed to these points in said report, which are properly subject to the action of your office in the first instance.

RULE OF PRACTICE AMENDED.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 8, 1885.

Rule 81 of Rules of Practice, approved August 13, 1885, is hereby amended so as to read as follows:

No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers.

Subject to this provision, an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims except in case of interlocutory orders and decisions, and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

WM. A. J. SPARKS.
Commissioner.

Approved Dec. 8, 1885.
H. L. MULDROW,
Acting Secretary.

PRIVATE ENTRY—LAND REDUCED IN PRICE.

WEIMAR ET AL. *v.* ROSS.

Following the departmental ruling in the case of Pecard *v.* Camens, the private entries herein are held not void, but voidable, and subject to confirmation by the Board of Equitable Adjudication.

Secretary Lamar to Commissioner Sparks, December 14, 1885.

In the matter of the controversy initiated by J. B. Weimar, Patrick D. Murphy, and Nicholas Kirst against John D. Ross, relative to cer-

*For Rule 81 see page 46 of this volume.

tain tracts of land upon even sections within the common limits of the grants made by act of June 3, 1856, (11 Stat., 21) for the Marquette and State Line and the Ontonagon and State Line Railroads, the pertinent facts, as set forth in departmental decisions of October 2, 1884 (3 L. D., 129) and March 3, 1885 (Id , 441) are briefly as follows:

The tracts claimed in 1882 as pre-emptions by the contestants, respectively, were the SW. ¼ of SE. ¼ and SE. ¼ of SW. ¼ of Sec. 26, the NE. ¼ of Sec. 36, and the N. ½ of NE. ¼ of Sec. 26, all in T. 43, R. 35, but said tracts had been covered in 1879 by Supreme Court scrip and warrant locations in favor of John D. Ross. In the decision of October 2, 1884, the Department expressed the opinion that said locations were void, and directed your office to permit the pre-emption applications of said contestants "to be filed, as of the date thereof." Motion for a review of said decision was duly filed, and on November 23, 1884, the Department instructed your office to permit final proof to be made by the pre-emptors, without prejudice to said motion, and to "suspend all further action therein until otherwise ordered." Notwithstanding and in contravention of this suspension of all further action, by direction of your office the said locations were canceled, and the pre-emptors were allowed to make cash entries, said entries being afterwards approved for patent. Wherefore departmental decision of March 3, 1885, on the motion for review aforesaid, overruled the said approval for patent, reversed the said decision of October 2, 1884, directed re-instatement of the said locations, and reserved the questions involved in the controversy for further consideration and decision. Ross's locations have been re-instated, it appears, and the controversy is now before me for final decision.

The point that the three cases herein involved are *res judicata* in favor of the pre-emptors, by virtue of the approval of their entries for patent by the verbal advice or consent of my predecessor, as alleged, is not well taken. It must be presumed that this subsequent decision of March 3, 1885, was made in view of and upon consideration of the facts, whatever they may have been, and said decision has effectually and finally disposed of the question by finding that the action of your office in approving said entries for patent was mistakenly taken, and by formally overruling it.

The facts in these cases being substantially the same as those existing in the case of Pecard *v.* Camens, and other cases, decided by the Department September 17, 1885 (4 L. D., 158), it is only necessary to say that the principle therein settled is fully applicable to them. In pursuance of said decision it is held that Ross's location entries, herein involved, are not void, but voidable; and it is hereby directed, in case Ross by his counsel files within sixty days written application for submission of said entries to the Board of Equitable Adjudication, that the same be duly certified for the action of that tribunal.

COMMUTATION OF HOMESTEAD ENTRY.

JOSEPH HOSKYN.

The rule requiring evidence of six months residence, prior to the allowance of commutation, is founded upon the regulations under the pre-emption law, and is followed to secure an assurance of good faith on the part of the entryman.

Good faith being manifest from improvements and cultivation, a successful contestant, who had made entry and shown six months residence, was allowed to commute, though said period of residence began over a month prior to the cancellation of the contested entry.

Secretary Lamar to Commissioner Sparks, December 19, 1885.

I have considered the appeal of Joseph Hoskyn from your decision of June 19, 1885, rejecting his final proof and canceling his cash entry, No. 11,343, which covered the SW. ¼ of Sec. 11, T. 110 N., R. 61 W., 5th P. M., Huron, Dakota.

Briefly the facts appear as follows:

One John A. Spink made homestead entry October 18, 1882, upon the tract described, and on the 19th of April, 1883, Hoskyn, the appellant, initiated contest charging abandonment by Spink. Hearing was ordered for December 7, 1883, at which Spink, the defendant, failed to appear. Being in default, judgment was rendered against him and the register and receiver recommended that his entry be canceled, which was done on the records of your office June 21, 1884, no appeal having been taken from the action of the local office. Hoskyn by virtue of his contest had a preference right of entry. His application to enter the land under the homestead law was allowed, and his entry was made of record July 5, 1884.

On September 5, 1884, he began publication of notice of his intention to make final proof in support of his claim and secure final entry thereof. Said publication, which named November 15, 1884, as the day when he would offer final proof was duly made, and on the day specified he appeared at the local office with his witnesses, made his proof to the satisfaction of the register and receiver, commuted his homestead to cash entry, paid his money and received final certificate. Your office canceled said cash entry on the ground that it had been prematurely made in that six months had not elapsed between the date of the cancellation of Spink's homestead entry and that of final proof and cash entry by Hoskyn. The proofs upon which the entry was allowed by the local office show that appellant made settlement upon the tract May 5, 1884, and commenced his residence thereon the 15th of the same month; that his improvements consisted of a frame dwelling house, twelve by sixteen feet, habitable and well built, a barn twelve by twelve, poultry house, corn crib, good well of water, and eighty-five acres of breaking, thirty-five of which had been cropped one season;—all valued at $600 It further appears from said proof that his residence and occupancy had

been continuous, and that his family was with him on the land. On the facts he claims that he is entitled to patent under the law, and that your decision to the contrary is error,—

First, in stating the office rule, which requires six months residence before a homestead entry can be commuted;

Second, in applying this rule to the case in hand;

Third, in not holding that the proof would justify making this case an exception to the rule, providing said rule is applicable.

The rule referred to has been of long standing and was made, as I understand, with special reference to pre-emption cases.

It is consequently applicable to those cases which in their characteristics bear an analogy to and partake of the nature of pre-emption claims. Accepting this rule as within the law and applying it as above indicated we find that the case under consideration comes within its purview.

Two questions, therefore, present themselves for consideration and answer: First, did the local officers in allowing appellant's entry by commutation of homestead violate or exceed the rule?

Second, if they did, is the case one which, in view of all the facts and circumstances, would warrant its being excepted out of the rule?

In answering these questions, it is necessary to recur to two facts, brought out by the evidence. One is, that appellant did as a matter of fact reside upon the tract for a period of six months prior to his cash entry. The other is, that there was less than six months' residence between the date of the actual cancellation of Spink's entry on the records of your office and the date of appellant's cash entry, the first date being June 21, 1884, and the latter November 5, 1884. The actual time between these two dates is a little short of five months.

Your decision holds that appellant could gain nothing by his residence prior to the actual cancellation as above, and that, as six months thereafter had not elapsed at the date of his cash entry, said entry was premature and was wrongly allowed. Your conclusion that he, though a successful contestant, gained no legal right by virtue of his residence upon the tract prior to the actual cancellation of Spink's entry on the records of your office, to my mind raises a question of grave doubt. But waiving this question and for the present accepting the construction placed upon the rule by your decision, I pass to a consideration of the second question propounded herein, to wit, is the case one which in view of all the facts and circumstances would warrant its being excepted out of the rule? We have already seen that when appellant applied to commute his homestead to cash entry he proved an actual residence of six months, evidently under the impression that by so doing he was fully complying with the law and regulations as to residence.

His belief that he was so doing was confirmed by the action of the register and receiver allowing his entry. No bad faith can, therefore, be imputed. On the other hand, every act of his, from the date of the

initiation of his contest to that of his entry, appears to have been in demonstration of his good faith. His improvements and cultivation are in value and extent very far beyond the average usually made and had in six months. The reason and purpose of the rule under consideration is, as I understand it, to furnish evidence of good faith under the settlement laws. That evidence seems to be abundant and conclusive in this case, and therefore the purpose of the rule is subserved though its letter may not have been strictly complied with.

While the cases are rare which would justify an exception to a well established rule of the Department, this, in my judgment, is such a case as would, for the reasons herein given, and in view of all the facts and circumstances, warrant its being excepted out of the rule in question.

Your decision is therefore reversed. You will re-instate the cash entry of Hoskyn and issue patent on the same.

PROTECTION OF TIMBER UPON PUBLIC LANDS.

CIRCULAR.

Commissioner Sparks to registers and receivers, and special agents, December 15, 1885.

The following rules and regulations are hereby prescribed by the Secretary of the Interior for the protection of the timber growing or being upon public lands covered by homestead or preëmption entries; and paragraphs 8 to 10, circular of June 1, 1883, and circular of December 15, 1883, are hereby revoked.

1. Homestead or preëmption claimants who have made *bona fide* settlements upon public land, and who are living upon, cultivating, and improving the same in accordance with law and the rules and regulations of this Department, with the intention of acquiring title thereto, are permitted to cut and remove, or cause to be cut and removed, from the portion thereof to be cleared for cultivation, so much timber as is actually necessary for that purpose or for buildings, fences, and other improvements on the land entered.

2. In clearing for cultivation, should there be a surplus of timber over what is needed for the purposes above specified, the entryman may sell or dispose of such surplus; but it is not allowable to denude the land of its timber for the purpose of sale or speculation before the title has been conveyed to him by patent.

3. Where it is ascertained that timber is being cut upon a homestead or preëmption claim for the purpose of sale or disposal, the special agent must promptly and personally investigate the same, and report in full the facts in connection therewith to this office on the form provided for that purpose: (4—478.) He must also make a separate report on the entry involved, (Form 4—480), in accordance with the general instruc-

tions to special agents appointed to investigate fraudulent land entries, (circular of June 23, 1885), being careful to note on the briefing fold of each report a reference to the relative report.

4. A sworn statement from the entryman should be taken in every case where practicable, and if it is alleged in any case that the timber was cut to clear the land preparatory to cultivation, the agent should particulary examine the report whether the clearing was done in the manner usual in such cases, or, as is customary, where timber is cut for removal without expectation of cultivating the land; whether valuable timber was culled out, leaving the inferior trees and the undergrowth and stumps undisturbed except as incidental to the removal of the cut timber; whether the land is really fit for agricultural purposes; and, if so, whether it has been cultivated or prepared for cultivation after the removal of the timber, ascertaining and reporting the nature and extent of any such cultivation, the kind of crops raised, and their amount and value.

5. In every case where an entry involving timber trespass is under investigation by a special agent he must promptly notify the register and receiver of the proper land office of that fact, and upon receiving such notification the register and receiver will at once make a proper notation upon their tract books, and will thereafter forward all papers which may be submitted relative to said entry to this office, (referring to the special agent's notification), and will take no action whatever thereon which will change the character or status of said entry until the special agent has concluded his investigation and his report has been acted upon by this office.

6. The abandonment of a settlement claim after the timber has been removed is presumptive evidence that the claim was made for the primary purpose of obtaining the timber, and all facts relative to abandonment should be carefully ascertained.

7. Squatters upon public lands have no right to cut timber therefrom for any purpose.

8. Where timber is obtained by mill owners, lumbermen, or others, from a number of individual homestead or preëmption claims, a report should be made combining the several trespasses, so far as practicable, into one case against the instigators or beneficiaries of the whole trespass, using the claimants to the land and the cutters and employés as witnesses.

9. The judgment of this office upon the merits of a case must be based upon the report of a special agent; and it is of paramount importance that such report sets forth fully, concisely, and intelligently all the facts in the case. Conclusions of the special agent, whether in favor of or against the party must be supported by a sufficient recital of facts and evidence.

Approved.

L. Q. C. LAMAR,
Secretary.

DESERT LAND ENTRY—COMPACTNESS.

KENNETH McK. HAM.

An entry covering the technical three quarters of one section is within the requirements of the law as to compactness.

Secretary Lamar to Commissioner Sparks, December 19, 1885.

On the 3rd instant you submitted for decision and action the application of Kenneth McK. Ham, for the repayment of $40—being the first payment on the SE. ¼ of Sec. 24, T. 9 N., R. 14 W., S. B. M., Cal., which tract with the N. ½ of the same section comprised his Los Angeles, California, desert land entry No. 201.

Your letter of October 15th, last, states as the reason for the cancellation of the entry in part, that the land embraced therein did not form a compact body as required by the desert land act.

I do not deem such action to have been properly taken and am of opinion that the tracts covered by the entry come clearly within the law as regards compactness.

The entry should, therefore, stand intact; and I herewith return the application without approval, that the canceled tract may be re-instated and the entryman apprised thereof.

TIMBER CULTURE ENTRY—PREVIOUS PLANTING.

MURPHY *v.* OLSEN.

The claimant having purchased the right of a former entryman may avail himself of the planting already done.

Secretary Lamar to Commissioner Sparks, December 22, 1885.

I have considered the appeal of James Murphy from your office decision of November 1, 1884, dismissing his contest against Thomas Olsen's timber-culture entry on the NE. ¼ of Sec. 12, T. 118, R. 40, Benson, Minn., for failure to sustain the contest allegations.

Said allegations were failure to break the first year, and failure to cultivate and to plant the third year. The entry was made June 21, 1880, and the contest initiated December 3, 1883, or after the expiration of the third year. Without entering into a discussion of the evidence, I may say that I concur in the conclusions regarding the first two allegations, namely, that they are not sustained by the testimony. The testimony, I think, is clear on this point, as is substantially conceded by the contestant. As to the third charge, failure to plant five acres during the third year, the testimony shows that there was on the land at date of Olsen's entry an area, variously estimated as embracing from three-quarters of an acre to two acres, planted with trees (one thousand

originally), five acres planted with seeds and cuttings in the spring of 1880, and a row of trees planted around said five acres, estimated as occupying nearly an acre. That is to say, there were from seven to eight acres of land already planted to trees and cuttings, which Olsen had purchased from one Anderson, a prior timber-culture entryman on the same tract. The testimony shows that the cuttings on about half of the five-acre piece failed to grow, and that that piece was therefore plowed up and cropped. This would leave an area of from five to five and a half acres of planted ground remaining, and would of course satisfy the law as to the quantity of planting required in the third year. It was incumbent on the contestant to prove with reasonable certainty that there were not five acres then growing, but he has signally failed to do so. His witnesses might have taken the pains to inform themselves of the exact facts; but they did not, as was abundantly shown on cross-examination, and their testimony to this effect has no better basis than mere opinion. Hence, I agree with the view of your office that the third allegation of the contest affidavit is unsustained.

Said decision is affirmed.

PRE-EMPTION ENTRY—FORFEITURE.

LEWIS F. SPINK.

Final proof and payment having been made to the satisfaction of the local officers, and the entry admitted, a forfeiture thereof will not be declared except upon conclusive evidence of bad faith on the part of the entryman.

Secretary Lamar to Commissioner Sparks, December 22, 1885.

On the 19th of May last this Department rendered a decision affirming that of your predecessor rendered December 9, 1884, which held for cancellation pre-emption cash entry, No. 1912, (Watertown series,) made January 10, 1882, by Lewis F. Spink, for the SW. ¼ of Sec. 34, T. 123, R. 63, Aberdeen, Dakota, upon the ground, in effect, that said entry was in fraud of the law. (3 L. D., 543).

* * * * * * *

On the part of the government appeared four witnesses, including Special Agent Jaycox; and in behalf of Spink, five witnesses, including himself, were examined. These witnesses were examined at considerable length, the testimony covering upwards of one hundred pages, and after a careful re-examination of the same, I am now convinced that the evidence is not such as to justify a declaration of forfeiture.

* * * * * * *

The witnesses against him admit his improvements, and that his shanty was better than the average. Their testimony as to residence is negative—they did not see him at or about his shanty; did not see smoke coming therefrom, etc. Others, however, equally well situated to know the facts, did see him there and know that he resided there. Not only was his final proof accepted as satisfactory by the register

and receiver at Watertown, but on the evidence taken at the hearing, the register and receiver at Aberdeen, in which district the land now is, found in his favor.

In view of these findings and of the fact that Spink's money, $200, has been received by the government in payment for the land, a forfeiture should be declared only upon most positive proof of bad faith on the part of the entryman. Such proof I do not find in the case. Much of Special Agent Jaycox's testimony is hearsay, and while the information furnished him may have been sufficient upon which to institute inquiry as to the facts, it cannot be treated as evidence at a hearing had for the purpose of ascertaining facts. Not finding in the case such evidence as would, in view of all the circumstances, warrant a declaration of forfeiture, I hereby revoke the departmental decision of May 19th last, and direct that Spink's entry be re-instated, and that patent in due course issue thereon.

REPAYMENT AFTER PATENT—PRIVATE CLAIM.

HEIRS OF PIERRE A. SYLVE ET AL.

Repayment may not be made where the entry is valid, or can be confirmed.

A cash entry allowed in conflict with a private claim, confirmed before such entry but not surveyed until subsequently, could not properly go to patent, if such survey was not indispensable to the location of the private claim.

Patent having issued, the regulations require, before repayment, a duly executed deed of relinquishment recorded in the proper office of registration where the land is situated.

Secretary Lamar to Commissioner Sparks, December 22, 1885.

This is an application by the heirs and legal representatives of Pierre A. Sylve and Mary C. Lafrance for repayment on cash entry No. 1101 (originally made June 15, 1836, and re-issued in two certificates March 25, 1839) for Sec. 7, T. 19 S., R. 17 E., New Orleans, La., containing one hundred and forty-seven and seventy-seven one-hundredths acres.

It appears by the record that said entry was patented to the entryman May 1, 1839, that the patent has been lost or destroyed, that applicants have filed a relinquishment of all their right, title and claim in and to said land, and that said entry and patent have been canceled on the records of your office. The relinquishment or application for repayment were made because the entry conflicted with the private claim of Peter Philibert, O. B. 244, which was duly confirmed. It was not however surveyed, so far as appears by the records of your office, until 1841. Since under the statutes (Sec. 2362 and 2363, R. S., and Act of June 16, 1880) repayment may not be made where the entry is valid, or can be confirmed, it is desirable to determine the legal status of said entry.

As above noted, though confirmed before, the Philibert claim was

not surveyed until after date of the cash entry in question. In Ledoux *v.* Black (18 How., 473) it was held that an entry and patent, conflicting with a subsequent survey of a confirmed concession, gave a better title where the court was unable to ascertain the specific boundaries of the concession without resort to said survey. Said case followed that of Menard's Heirs *v.* Massey (8 How., 301), and in both cases the right of the United States to sell land within the limits of a confirmed claim prior to its survey, was put upon the ground that the private claim could not be located on the face of the earth until such survey. As remarked by the court in the earlier case:—"An actual survey is not indispensable; but boundaries must appear in some form, from the notices of claim and the accompanying evidences filed with the recorder. If from these the tract could not be laid down on the township surveys, then the land could not be reserved from sale."

Turning now to the Philibert claim (Duff Green, Vol. 2, p. 273), its description, as it was confirmed, is "a tract of land in the county of Orleans, below the city of New Orleans, about two and a half miles above Fort Placquemines, on the left bank of the Mississippi, containing twenty arpents in front, by the common depth of forty, bounded on the lower side by the lands of Pedro Roigas, and on the upper by vacant lands." Here we have two sides of the claim distinctly specified, namely the lands of Pedro Roigas and the left bank of the Mississippi River; and, the courses and distances being given, there would be no difficulty in laying down the tract on the township surveys, if the north boundary of the Roigas land were known. Upon examination, nothing concerning said land can be found in the records of your office; but I do not think further data are necessary for the purposes of this case. I think it reasonable to assume that the evidences furnished to the board of confirmation definitely exhibited the north boundary of said land, and that therefore it was made the southern limit of the Philibert claim. In this view of the case, the United States were not warranted in allowing the Lafrance entry, and it was properly canceled by reason of conflict with Philibert's private claim.

Upon the question of repayment, the papers accompanying the application seem to be in proper form with one exception, to wit, a deed to the United States. General Circular of March 1, 1884, p. 38, requires a duly executed deed of relinquishment, recorded before the proper recording officer where the land is situated, "in all cases where patent has issued." I know of no rescission of this rule, and I think that compliance with it is particularly desirable where the patent cannot be surrendered; in such case it would seem that the government should see that the public are protected, in the event of the patent's being hereafter found, by the proper record of the relinquishment in the office of the local recorder.

You are therefore instructed that repayment in this case may be made when the deed of the applicants and the recorder's certificate have been filed, as required by the regulations aforesaid.

ADJUSTMENT OF SWAMP GRANT.

STATE OF ARKANSAS

The field notes of survey, as found in the General Land Office, constitute the proper basis for determining the character of the land claimed by the State.

Secretary Lamar to the Governor of the State of Arkansas, August 15, 1885.

In reply to your communication of the 31st of March, 1885, inclosing a copy of the act of the Arkansas legislature with reference to the adjustment of swamp lands in the borders of the State of Arkansas, approved March 17, 1885, I have the honor to reply that I cannot accept the mode of adjustment provided for in the bill.

I submitted yours to the Commissioner of the Land Office for report thereon, and herewith inclose a copy of his report.

From the provisions of the bill and the facts, as shown by the records of the Land Office, it would seem that the mode of adjustment suggested would leave the subject involved in substantially the same difficulties that now exist. I would call your attention to the mode of adjustment adopted with reference to the States of Ohio, Michigan, Minnesota, Mississippi, Alabama, and Wisconsin, as shown by the report of the Commissioner of the Land Office, and respectfully suggest for your consideration, whether that basis would be acceptable to the State of Arkansas.

REPORT.

Commissioner Sparks to the Secretary of the Interior, May 21, 1885.

I am in receipt by reference from you of a letter from the Governor of Arkansas, dated at Little Rock, March 31, 1885, enclosing an act of the Assembly of that State, approved March 17, 1885, proposing a change in the method of adjusting the claim of the State under the swamp land acts of September 28, 1850, March 2, 1855, and March 3, 1857. Also one from Paul M. Cobbs, commissioner of State lands for Arkansas, dated March 31, 1885, and one from the Hon. C. R. Breckinridge, dated May 15, 1885, urging that the change asked for be made.

You ask for an expression of my views relative to the proposed change.

Up to this time the action taken by this office in the matter of adjusting the swamp claim of said State, has been on the basis of an examination of the land in the field by agents, together with proof as to the character of the land, and under this method which is now in force, the State has received patents for over seven million acres.

Your attention is respectfully called to the last lines of the first section of said bill, and also to the first and second provisos, from which it will be observed that the State proposes to change the manner of proving the swampy character of the land by accepting as final the field notes of survey, on file in this office, when such field notes show conclusively the character of the land, and when they are not clear the State reserves the right to present other evidence, and in no case will

the State be bound by the field notes where the survey was made subsequent to the year 1856.

The States of Michigan, Minnesota, Wisconsin, Mississippi, Ohio and Alabama, which have agreed to make the field notes the basis of adjustment, have done so without making any such reservations. One of the reasons urged in the preamble to the act of the Assembly for the change, is, as the preamble assumes, that it is required by the Secretary of the Interior that the proof of the swampy character of the land, must be in the form of sworn testimony of persons who knew the land at the date of the grant, September 28, 1850, and that as more than thirty-four years have elapsed it is impossible for the State to furnish the proof required.

The following are the requirements of the rules relative to indemnity proof, which were approved by the Secretary, August 12, 1878, which rules have not been changed, and it will be observed that no such impossibility is required, viz:

"Where the testimony of witnesses having a knowledge of the condition of the land at the date of the grant cannot be obtained the evidence of at least two respectable and disinterested persons who have a knowledge of the land during a series of years extending as near to the date of the grant as *possible, may be presented* . . . ."

More than two hundred thousand acres of the selections made prior to March 3, 1857, were reported by the surveyor general as land not shown to be swamp by the field notes, but having been selected and reported to this office they were held by the Department to be proper selections, and were consequently confirmed to the State by said act. 1 Lester, 570; 2 C. L. L., 1066.

Notwithstanding the fact that the State has had over seven million acres of land patented to her under the swamp grant, two hundred thousand acres of which were reported as not swamp, it is set forth in the preamble to said bill that there is due the State, "many thousand acres of land and large sums of money," and that it is impossible to adjust the claim under the present method.

It would not appear from the above statement that the interests of the State of Arkansas under the swamp grant had been wholly neglected. Should the method proposed by said bill, be adopted, it would be necessary to look at the date of each plat, and if surveyed after 1856, the work by field notes must stop, and an agent must be designated to examine the land. See Secretary's letter of December 9, 1878, (2 C. L. L., 1060,) as to adopting field notes, where indemnity is claimed under the acts of 1855 and 1857.

Shortly after the passage of the act of September 28, 1850, it was estimated that it would take about five million acres, to satisfy all claims thereunder. The State of Arkansas alone has had over seven million acres patented to her, and up to June 30, 1884, there has been patented to the several States over *fifty-five* million acres under this grant.

The field notes prior to 1856, are not in all cases clear and it is difficult to determine the true character of the land by them. The surveys and field notes made since 1856, are supposed to show more clearly the swamp land, but for some reason which does not appear, the State refuses to be governed by them. See the 2d proviso of the bill. The field notes should be conclusive in all cases, whether made before or after 1856, or the method should not be changed.

In view of the facts herein recited, it does not appear to me that it would be practicable to adopt the methods proposed by said bill.

Secretary Lamar to State Agent, R. V. Yeakle, August 28, 1885.

In reply to your communication of the 21st instant, to this Department, relative to the claim of the State of Arkansas against the United States for certain swamp lands located within said State, while it may be possible that the facts set forth in your letter render the objectionable provisions of the act passed by the legislature of Arkansas immaterial and unimportant, yet, as they seem to be conditions or qualifications of the Governor's power to act in the case, they could not be waived.

Such being the case, and believing that the field notes of survey as found in the General Land Office constitute the just basis for determining the character of the land claimed by the State, I must adhere to the mode of adjustment laid down in my letter to His Excellency, Simon P. Hughes, Governor, dated the 15th instant.

This Department will afford the agent of the State of Arkansas full facilities for examining the field notes of survey relating to these lands, so that on amendment of the act passed by the legislature of Arkansas, the adjustment can be speedily and satisfactorily made.

FINAL PROOF PROCEEDINGS—ATTORNEYS.

CIRCULAR.

Commissioner Sparks to registers and receivers, and officers authorized to take affidavits and proofs in public land cases, December 15, 1885.

The large number of defective, irregular, and insufficient proofs presented in public land cases, and the looseness with which attesting officers, particularly others than registers and receivers, have exercised their functions, make it necessary that the following directions be carefully complied with:

1. In cases of final proofs and of entry applications the parties, whether applicants, claimants, or witnesses, must be properly identified before you. Attesting officers (including registers and receivers) must certify that the parties appearing are personally known to them or that their identity is satisfactorily established. The names of persons vouching to identity must be stated. Identifying affidavits should be required in all cases where necessary.

2. Each question in final proofs must be orally asked and answered in the presence of the attesting officer. Applications, affidavits, and final proof questions must be thoroughly explained, so that there can be no possibility that the parties will misunderstand the purport of their affidavits or the full meaning of the questions asked or the effect of their answers. Ready-made proofs presented merely for *pro forma* ac-

knowledgment without verification, cross-examination, or evidence of identity will not be considered such proofs as are required by law.

3. Officers taking affidavits and proofs must test the accuracy and reliability of the statements of applicants and claimants and the credibility and means of information of witnesses by a thorough cross-examination. Questions and answers in such cross-examinations will be reduced to writing and the costs thereof included in the costs of writing out the proofs.

4. Cross-examinations should be directed to a verification of the material facts alleged in the case, and especially to the actual facts of residence and other requirements, the use of the land and purpose of the entry, and whether the entry is made or sought to be perfected for claimant's own use and occupation or for the use and benefit of others.

5. Registers and receivers, and other officers must carefully see that parties and witnesses are swearing to actual facts and not to constructions of law as to what constitutes facts. This requirement will be particularly observed in respect to facts of alleged residence.

6. Proofs must be taken on the day and before the officer named in the advertisement, and at his office, and between the hours of eight A. M. and six P. M. Proofs taken privately or in secret, or otherwise in substance irregularly, will not be accepted.

7. Proofs must in all cases be made to the *satisfaction* of registers and receivers. Proofs that are not satisfactory must be rejected. Registers and receivers are authorized to avail themselves of all means of information in respect to the validity of entries and the interests in which they are made, and will not allow entries which they have good reason to believe collusive, speculative, or otherwise fraudulent.

8. Registers and receivers must thoroughly scrutinize all proofs taken before officers other than themselves. They will not accept proofs so taken that are defective or insufficient, and they must see that all papers are complete and perfect before an entry is allowed or the papers transmitted to this office. This rule will be imperatively insisted upon.

9. Registers and receivers will promptly call to the attention of special agents, and report to this office, all cases which in their opinion need investigation.

10. Should officers (other than registers and receivers) taking affidavits or proofs know or have occasion to suspect the existence of fraud in connection with any case, they should at once report all the facts to the register and receiver.

11. Officers taking affidavits and testimony should call the attention of parties and witnesses to the laws respecting false swearing and the penalties therefor, and inform them of the purpose of the government to hold all persons to a strict accountability for any statements made by them.

12. In no case are papers authorized to be executed in blank. Papers so signed or falsely authenticated will be treated as fraudulent, and the

acts of an officer misusing his official signature and seal will not be respected by this office, but the attention of the proper authorities will be called to his misconduct.

13. Officers taking applications, affidavits or final proofs, will not be permitted to act as attorneys in the case.

14. Attorneys *at Law* appearing in land office proceedings at local offices must file an appearance stating specifically whom they represent. Attorneys *in fact* must file the written authority of their principals.

Approved:

L. Q. C. LAMAR,

Secretary.

TIMBER CULTURE CONTEST—AMENDMENT.

LEAVENWORTH *v.* BIBBEY.

Evidence showing want of cultivation is not admissible under a charge of "failure to plant."

Though an amendment of complaint, after judgment, to correspond with the proof, is denied, a new contest is allowed on the basis of the desired amendment.

Acting Secretary Muldrow to Commissioner Sparks, December 23, 1885.

I have considered the case of Edwin A. Leavenworth *v.* John Bibbey, involving timber culture entry made by the latter November 15, 1878, for the NW. ¼ of Sec. 2, T. 2 N., R. 12 W., Bloomington district, Nebraska, on appeal by Leavenworth from your office decision of November 28, 1884, in favor of defendant.

The testimony in the case was taken before the clerk of the court of Webster county, Nebraska, and was received and filed in the local office November 1, 1883. The complaint alleges that defendant "has never planted on said land any trees, tree-seeds or cuttings, as affiant is reliably informed and believes, and that there is now no timber or trees growing on said land."

The decision of the local officers, dated November 12, 1883, finds as follows:

> That the defendant has from year to year planted trees, seeds, and cuttings, in amount more than required by law, and that there is at the present time fifteen acres and more planted to trees, which facts fully controvert the allegations in the complaint. We further find that the trees planted have had but little cultivation and care, and that under the same treatment the requirements of the law, as to the number and quality of trees to make final proof, can not be complied with. But in view of the fact that the allegations of the complaint do not find fault with the cultivation and character of the trees, we hold that the case must be dismissed.

December 5, 1883, contestant filed in the local office an amended complaint alleging that the land and trees had not been *cultivated*

according to law, and asking that said amended complaint be considered "the basis of said contest," in order that the "proof may conform to the allegations of the complaint." This application was denied by the local officers; and by your said office decision of November 28, 1884, their action in so doing was declared to be proper and was approved, and the contest dismissed. From said decision contestant appeals to the Department.

After an examination of the record, in my opinion the evidence shows a full compliance with the law as to the number of tree-seeds and cuttings planted, and the quantity of ground covered thereby.

The only remaining question is that of cultivation. The introduction of testimony bearing upon this point was objected to by defendant as irrelevant and immaterial, hence it is not proper that it should be allowed weight as evidence to the prejudice of defendant. While under the circumstances an amendment of complaint after the rendition of judgment could not be allowed, yet since the testimony tends to show complete failure on the part of the defendant to comply with the demands of the law in respect to cultivation, you will direct the local officers to notify contestant in the present case that he will be permitted to enter a new complaint, incorporating therein said amendment, upon which a new hearing will be ordered. Your office decision of November 28, 1884, is modified accordingly.

RAILROAD GRANT—RELINQUISHMENT BY STATE.

ST. PAUL M. & M. RY. CO. *v.* MORRISON.

The land was selected by the company and such selection approved. The State, through which the grant to the company was made, subsequently relinquished to the United States all claim to the land, in accordance with an act of its legislature. As the company accepted the terms of said act, its right under said selection terminated with the relinquishment of the State.

Acting Secretary Muldrow to Commissioner Sparks, December 26, 1885.

I have considered the case of the St. Paul Minneapolis and Manitoba Railway Company *v.* James A. Morrison, involving the NE. ¼ of NW. ¼, Sec. 7, T. 128 N., R. 34 W., St. Cloud, Minnesota, on appeal by Morrison from the decision of your office, dated March 3, 1884, holding for cancellation his cash entry No. 8046, covering the tract in question.

Morrison filed declaratory statement No. 4631 for the tract in question December 10, alleging settlement November 10, 1878. In his final proof he alleges (and is corroborated by his two witnesses) that he settled upon the above tract September 20, 1874, and has resided there continuously up to date.

The tract in question is within the twenty miles or indemnity limits of the grant for the St. Paul and Pacific (St. Vincent Extension), now St. Paul, Minneapolis and Manitoba Railway Company, the withdrawal

for which became effective in that district February 15, 1872. It is also within the forty miles or indemnity limits of the grant to the Northern Pacific Railroad Company, the withdrawal for which was received at the local office January 6, 1872.

November 17, 1865, Albert Love made homestead entry No. 2113 for this with other tracts, which entry subsisted until February 29, 1872, when it was canceled.

On the 17th of January, 1874, the tract in question was selected by the St. Paul and Pacific Company, and the selection thereof was approved April 30, 1874.

On the 23d of June, 1880, the Governor of the State of Minnesota, acting under the authority of an act of the State legislature, approved March 1, 1877, executed to the United States a relinquishment of this tract in favor of Mr. Morrison.

The decision of your office was based on the assumption that this Department has no authority over the land after certification of the same over to the State of Minnesota. In the abstract this principle is true. But in the present instance, the State has by its Governor, acting within the scope of his authority, relinquished all claim to this tract, and the railroad company, which claims through the State by virtue of the grant, cannot be heard to object. The said act of the State legislature provides that "upon the acceptance of the provisions of this act by said company, it shall be deemed by the Governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers," referring to lands settled upon prior to the passage of said act.

It is to be presumed that the Governor of the State of Minnesota acted according to law; and it cannot be denied that the company accepted the provisions of said act of March 1, 1877. This being true, it follows that the claim of the St. Paul, Minneapolis and Manitoba Company must be rejected and their selection of this tract canceled. Mr. Morrison will be awarded patent for the tract in question.

The Northern Pacific Railroad Company does not appear in this case.

The decision appealed from is reversed.

HOMESTEAD—RESIDENCE.

ELLIOTT *v.* LEE.

To constitute residence there must be inhabitancy, either actual or constructive; and such inhabitancy must exist in good faith and be exercised to the exclusion of a home elsewhere.

Residence is not established or maintained by occasional visits to the land.

Acting Secretary Muldrow to Commissioner Sparks, January 5, 1886.

On the 18th of October, 1881, Knudt A. Lee made homestead entry No. 9197 for the NE. $\frac{1}{4}$ of Sec. 9, T. 134 N., R. 57 W., Fargo, Dakota Territory. On the 18th of April, 1882, exactly six months from date of

entry, he was, for the first time, on the land, and stayed all night there in a shanty, which had been erected by some one prior to the entry aforesaid. This shanty was in size about twelve by fourteen feet, with one door and one window, no floor excepting a few loose boards, and was very roughly weatherboarded. At this last date, his furniture consisted of a sheet-iron stove and a bed of some sort. This stove was of little value—some of the witnesses say without any bottom—while he, himself, says it was badly cracked. He never had any other furniture there at all. He was again on the land April 20, 1882, but appears not to have stayed all night there at that time. He then removed his bed from the cabin and went to Minnesota. In June, 1882, he had about ten acres of breaking done, which has since been backset.

On the 14th of August, 1882, Robert Elliott initiated contest against the above entry, alleging abandonment. Hearing was had, and on December 28, 1883, the local office rendered a decision sustaining the contest and recommending the cancellation of Lee's entry. Upon appeal, your office on the 16th of August, 1884, reversed said decision and dismissed Elliott's contest. The case is now before me on appeal by Elliott from said decision of your office.

The decision appealed from went upon the theory that the entryman established his residence on the land April 18, 1882, when he stayed all night there; and that from that date to August 14, 1882, when the contest was initiated, the period of six months had not elapsed. Upon these points the decision states: "The testimony shows that claimant established his residence on the land April 18, 1882." And again: "Said contest was also prematurely brought as six months had not expired from the time claimant left the land to the date it was commenced," citing Sec. 2297, U. S. Revised Statutes.

The material fact in this case, then, is: Did the entryman, on the 18th of April, 1882, by merely sleeping in the shanty on his claim, establish his residence there? In view of all the circumstances of this case, I think not.

It has been repeatedly held that no established rule can be laid down to determine what constitutes residence under the homestead law, but that the material facts which go to make up residence must be gathered from the circumstances surrounding each particular case. There are, however, certain elementary principles which always enter into consideration of this question: *First*—There must be inhabitancy, either actual or constructive; *Second*—Such inhabitancy must exist in good faith, and be exercised on the part of the inhabitant with the understanding that the place so inhabited by him is his home, to the exclusion of a home elsewhere. In other words, in order to establish residence on a tract of public land, the individual when he settles thereon must do so with the *bona fide* intention of making that tract his home.

This is more than can be claimed for Lee, if his intentions are to

be gathered from his acts; and his acts are such as preclude the idea of good faith and honest intentions relative to the tract in question.

The case of Amley *v.* Sando (2 L. D., 142,) was one very similar to the one now under consideration. There the entry was made in June, 1882, and contest instituted in April following—about ten months after entry. The entryman had had some breaking done, and had stayed over night once on the claim. It was held in that case that:

"There is not an element of good faith apparent in the proceedings but the breaking; and that not followed by residence, cultivation, or any other improvement, wears the look of a mere pretense."

In the case under consideration, nearly ten months had elapsed after entry before contest was initiated, and the entryman in all that time had been on the land but twice, had slept there but once, and had no furniture there of any consequence. His excuse is that he was a poor man, and that he was compelled to be absent from the land in order to procure the means of subsistence. His poverty is not questioned; but it has been often held that poverty will not excuse a total non-compliance with law.

If the theory upon which your office based its decision be the correct one, then an individual by staying over night on his claim occasionally and never being absent therefrom six months at any one time, may establish and maintain his residence thereon contrary to the universal rule of law that, a homestead claimant can neither acquire nor maintain a residence on public land by making occasional visits thereto.

The law requires a homestead claimant to establish his residence upon the tract entered by him within six months from date of entry, except in cases where climatic reasons interfere, when in the discretion of the Commissioner of the General Land Office the time may be extended to twelve months. Sec. 2297 of the U. S. Revised Statutes, as amended March 3, 1881 (21 Stat., 511). That residence must be such as contemplated by law. The entryman herein never established a residence as required, and his entry ought to be, and will be canceled.

The decision appealed from is reversed.

TIMBER CULTURE—FIRST AND SECOND YEAR.

NELSON *v.* KING.

Eight acres being broken the first year, the law did not require five acres additional to be broken the second year, but did require that the breaking done should aggregate ten acres at the end of the second year after entry.

Acting Secretary Muldrow to Commissioner Sparks, January 5, 1886.

On the 11th of June, 1881, Eliza Ann King made timber culture entry No. 5765 for the NE. ¼ of Sec. 14, T. 144 N., R. 53 W., Fargo, Dakota Territory.

On the 19th of June, 1883, Henry Nelson executed affidavit of contest against said entry, alleging:

"That the said Eliza Ann King having broken five acres of said tract during the first year of the existence of her said entry failed to break or cause to be broken five acres thereon during the second year of the existence of her said entry, as required by the timber culture act, approved June 14, 1878."

* * * * * * *

Upon the evidence submitted at the hearing, the local office decided that the contestant had made out his case, and accordingly recommended the cancellation of said timber culture entry.

* * * * * * *

On July 3, 1884, your office rendered a decision reversing that of the local office, and dismissed Nelson's contest. The case is now before me on appeal by Nelson from the said decision of your office.

The evidence adduced at the hearing showed that there were eight acres broken the first year after entry; and that nothing more was done on the tract up to the date of hearing, to wit, August 3, 1883. Here is a clear case of abandonment and failure to comply with the requirements of the timber culture law. While it is true, as your office found, that there being *eight acres* broken the first year of the entry, the law did not require five acres additional to be broken the second year of the entry, it nevertheless did require that there should be at least ten acres broken at the end of the second year. The condition of the land at the date of contest (more than two years after entry) was not such as is required by the timber culture law, and the contest ought to be, and is hereby, sustained.

The decision appealed from is reversed.

PREFERRED RIGHT OF CONTEST.

SMITH *v.* DONOGH ET AL.

The right to contest an entry is held to lie with one who has been allowed, through inadvertency of the Government officers, to make and hold for five years, a homestead entry in conflict therewith.

Acting Commissioner Harrison to register and receiver, North Platte, Nebraska, October 16, 1884.

I have considered the appeal (transmitted in your letter of August 12, 1884,) of Dudley W. Smith, from your decision rejecting his application to contest the timber culture entry No. 56, of John Ormsby Donogh, made February 9, 1874, upon the SW. ¼, Sec. 34, T. 11 N., R. 23 W., but afterwards (viz:—on July 25, 1876,) and by authority of my predecessor's decision of July 10, 1876, amended to the SE. ¼ of said section, which Donogh claimed to be the tract he originally selected and intended to enter.

Smith's application to contest was rejected by you because, when presented, August 8, 1884, there was then pending before this office the petition of Wm. H. Blackmer (submitted by you July 23, 1884), for the cancellation of said timber culture entry No. 56 of Donogh, and the confirmation of his timber culture entry No. 3307, made February 18, 1884, for the NW. $\frac{1}{4}$, 34, 11, 23 W., which was held for cancellation by my letter of May 31, 1884, for conflict with said prior timber culture entry of Donogh. On the same day (May 31, 1884), I also held for cancellation for conflict with said entry (No. 56) of Donogh the homestead entry No. 1456 of Rosetta C. G. Kanatsher, (now Rosetta C. G. Moore) guardian of minor heirs of Dan'l Graves, deceased, on said SE. $\frac{1}{4}$ of Sec. 34.

September 9, 1884, you reported no appeal by said guardian from my said decision of May 31, 1884, but on September 16, 1884, transmitted her application also to contest the entry (No. 56) of Donogh. In support of her application, she sets forth, under oath, that on the 10th day of September, 1884, she, for the first time, learned that the homestead final proof made by her on said entry No. 1456 some time since had been rejected and her said entry held for cancellation for conflict with said prior timber culture entry No. 56 of Donogh; but she had no knowledge of such claim of Donogh being in existence else she would have contested the same, that she took possession of the land (SE. $\frac{1}{4}$) under her entry and cultivated the same as required by law; that Donogh has never claimed said SE. $\frac{1}{4}$, nor done anything under the timber culture law with regard to it since she made her said entry; wherefore she asks that she may be permitted the right to contest Donogh's entry, so as to clear the records thereof and leave intact her own entry, especially as the error in making her entry of record while the said SE. $\frac{1}{4}$ was covered by that of Donogh was occasioned by no fault of her's but arose, as it appears, from your report of February 20, 1884, from the fact that the notation on the tract and plat books of your office of the amendment of Donogh's entry is very indistinct, owing to the dimness of the ink.

As the further error in allowing Mrs. Moore's entry to remain upon the records for over five years past was the fault of this office in overlooking the conflict between it and Donogh's entry until May 31, 1884, and in view of Mrs. Moore's good faith and compliance with the law with regard to her own entry, I think her application to contest Donogh's entry should have precedence over that of Smith, so that in case she procures its cancellation, she may save her own entry and improvements placed on the land embraced therein.

Accordingly her application to contest Donogh's entry No. 56 is hereby granted, and her entry No. 1456 will be suspended awaiting the result of the contest.

As the cancellation of Donogh's entry would relieve from suspension the timber culture entry No. 3807 of Blackmer, also erroneously allowed

by you for the same reason as Mrs. Moore's was permitted, Blackmer's appeal from my decision of May 31, 1884, and entry will also be suspended awaiting the result of the above mentioned contest.

Under the circumstances, your action in rejecting Smith's application to contest Donogh's entry (No. 56) is affirmed, and you will so advise the respective parties in interest, allowing the usual privilege of appeal.

The application to contest of Mrs. Moore is herewith returned as the basis for the hearing herein allowed; but such hearing should only be held in case this decision becomes final.

NOTE.—The foregoing decision was affirmed by Acting Secretary Muldrow, January 7, 1886.

SETTLEMENT AND RESIDENCE—ADVERSE POSSESSION.

CALDWELL *v.* CARDEN.

As the settlement, residence, and cultivation of the homesteader were made with due notice of the *bona fide* claim and occupation of another no rights were acquired thereby.

Acting Secretary Muldrow to Commissioner Sparks, January 8, 1886.

I have considered the case of David Caldwell *v.* J. E. Carden, involving the SW. ¼ of SW. ¼ of Sec. 3, T. 2 N., R. 32 E., La Grande district, Oregon, on appeal by Carden from your office decision of March 6, 1884, permitting Caldwell to make pre-emption declaratory filling for the same, and holding Carden's homestead entry subject thereto.

The records of your office show that on June 10, 1869, one S. E. Phillips filed pre-emption declaratory statement, alleging settlement May 15, 1869.

February 1, 1876, John H. Wilson filed pre-emption declaratory statement embracing same tract, alleging settlement December 5, 1869.

October 11, 1871, John W. Bryant filed pre-emption declaratory statement embracing same tract, alleging settlement October 9, 1871.

August 24, 1882, James E. Carden made homestead entry for same tract, alleging settlement August 2, 1882.

August 26, 1882, David Caldwell offered to file pre-emption declaratory statement for same tract, alleging settlement April 1, 1880; but the same was rejected for conflict with the above mentioned homestead entry by Carden, and furthermore because not offered within the statutory period after settlement.

The tract is within the forty-miles limit of the grant for the benefit of the Northern Pacific Railroad Company, the withdrawal for which is held by your office and the Department to have become effective August 13, 1870—the date of filing map of general route. September 3, 1883, your office ordered a hearing to determine the facts relative to the settlement and improvements of Phillips, Wilson, Bryant, Carden and

Caldwell, and the rights of the Northern Pacific Railroad Company. Said hearing was held commencing November 17, 1883. As the result, your office decided that the settlement by Wilson, above mentioned, exempted the tract from the operation of the withdrawal for the benefit of the railroad company.

The company, though duly notified, failed to appear at the hearing, and also failed to appeal from the decision; hence said decision became final as against it.

From the portion of the testimony bearing upon the respective rights of Caldwell and Carden, it appears that Caldwell settled upon the tract in controversy April 1, 1880. Subsequent events can be most briefly told in the language of the finding of facts by the register and receiver:

Caldwell, thinking the land was owned by the Northern Pacific Railroad, filed his claim with that company to purchase the tract, and received therefrom some paper acknowledging in some way the receipt of said application. Acting upon this paper he went into possession of said tract, and occupied and enclosed the same. * * * For three years prior to the date of Caldwell's application to file, he and his family had resided upon said tract, and cultivated about thirty-five acres thereof, raising grain and garden vegetables, and still so occupies the tract. * * * The facts show but a shallow compliance with law on the part of Carden. * * * Carden has erected a small house on the southwest quarter of the tract, and has occupied the same to some extent as a residence. * * * . He keeps or did keep a shop in Pendleton, and occasionally went of nights and slept in the house. * * * He caused some one, without authority from Caldwell, to enter his (Caldwell's) enclosure, and plow for him (Carden) a small strip of land on the tract involved. * * * This constitutes all the improvement and cultivation Carden has done on the tract.

From the preceding facts the local officers concluded that Caldwell had no rights in the premises, because, looking to the railroad company for title, he failed to file his pre-emption declaratory statement within three months after settlement; and before he did so file, an intervening homestead claim was placed of record.

Your office decision, without discussion of the case, reversed that of the local officers, and directed that Caldwell's pre-emption filing be allowed—Carden's homestead entry to stand subject to that of Caldwell.

It is plain that if Carden's homestead entry had any right upon the record at all, it is a right superior to that of Caldwell, by reason of priority; and Caldwell's filing must stand subject to his entry. Let us, then, examine the character of Carden's claim to the tract in question.

The evidence shows that there was a general understanding throughout the neighborhood that when the region thereabout should become more thickly settled, a road would be laid out along the line of the tract in controversy. In anticipation of such road, Caldwell constructed the ditch and fence enclosing his claim thirty feet inside of the surveyed boundary line—considering the strip outside of said ditch and fence as his contribution toward the contemplated road. It was upon the strip

which had thus been left for road purposes—outside of Caldwell's ditch and fence—that Carden erected the shanty which constituted his alleged settlement. At one time during the summer Caldwell was absent on business for a few days. During his absence Carden employed a man to enter Caldwell's enclosure and break about two acres of his land. It is not shown by whom the fence was broken or taken down; it was up and in good condition when Caldwell went away—it was down when he returned, and he repaired it. Carden alleges the plowing to have been done by his procurement—and this constitutes all the cultivation done by him upon the tract. The question of Carden's residence was entered into exhaustively upon the hearing. Carden frequently referred to the tract in controversy as his "home;" but when questioned as to how frequently he was there, and how long he remained there, the nearest to a definite answer that could be obtained from him was this:

"I was running a cigar store and tobacco house in Pendleton. I ran the house till about ten o'clock at night, and then sometimes would stay in town, and sometimes would go home."

Carden's strongest witness, after testifying, "I have seen him there often and staid with him nights," on cross examination explains that he has seen him there "several times," and has staid with him "once." Another of Carden's witnesses testifies to knowing of his sleeping in the house "half a dozen times or more," during the interval between the date of his alleged settlement, August 21, 1882, and that of the hearing, November 17, 1883. Caldwell, upon whose claim Carden built his house, testifies that he has "never seen him there." Carden's nearest neighbor, living "not quite sixty rods" from his house, testifies that he has "never seen him there." It is clear that in Carden's case, absence from his claim has been the rule, and presence the exceedingly rare exception, and that he never has established a *bona fide* residence upon the tract in question. Carden on cross examination acknowledged that at the time he built his shanty on the corner of the tract in controversy, he knew that Caldwell claimed it, had enclosed it, and was occupying it (with the remainder of the tract enclosed by him) as his home, under color of what he supposed to be a valid right from the railroad company. Such residence and occupation Carden was bound to recognize; and his seeking title under such circumstances is simply an endeavor to make the United States Government an accessory in the perpetration of a bare-faced fraud. But "under no circumstances will" the Department "permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right." Johnson *v.* Johnson, (4 L. D., 158).

For the reasons herein stated I modify said office decision of March 6, 1884, and direct that Caldwell's pre-emption filing be allowed, and that Carden's homestead entry be canceled.

CONTEST—APPELLATE TRIBUNAL.

ODEGARD *v* STO-HE-GAH.

In a contested case, the Department will not indicate to the Commissioner of the General Land Office what his decision should be prior to his final action therein.

Acting Secretary Muldrow to Commissioner Sparks, January 8, 1886.

I am in receipt of your letter of May 11, 1885, transmitting for my "consideration and instructions," the papers in the case of David H. Odegard *v*. Sto-he-gah (a Winnebago Indian), involving the latter's homestead entry No. 2763, made June 5, 1878, upon the NW. ¼ of the NW. ¼ of Sec. 17, and the SW. ¼ of the SW. ¼ of Sec. 8, T. 27 N., R. 11 E., Wausau land district, Wisconsin.

The facts in the case are fully set out in said letter of transmittal, and it appears therefrom that said entry was canceled on July 6, 1882, for abandonment, and re-instated on December 12, 1882, because of failure to give the proper notice to the Indian agent, or the Commissioner of Indian Affairs.

It further appears that on October, 2, 1882, said Odegard made homestead entry No. 3938 of said land. On December 28, 1882, Odegard initiated a contest against Sto-he-gah's entry, charging abandonment, and on September 29, 1883, your office again canceled said entry and allowed Odegard's entry to remain intact. On January 18, 1884, the local land officers allowed Sto-he-gah to make final proof, final certificate No. 1751, upon his said entry, and thereupon Odegard filed his protest against the same and applied for a hearing to determine the rights of the respective parties. A hearing was ordered on June 12, 1884, and held on March 5, 1885, at which Sto-he-gah failed to appear, although duly notified.

On March 12, 1885, the then Commissioner of Indian Affairs submitted a report of a United States special agent, alleging that Sto-he-gah had been kept from the land by the threats of Odegard. You state that "while such threats may have been sufficient to cause Sto-he-gah's failure, if failure there was, to reside upon and improve the land as required by law, and warrant the re-instatement of his entry, I question whether such action would be proper in the absence of satisfactory proof to that effect, or in the face of the discrepancy between the testimony adduced by Odegard and the allegations in Sto-he-gah's proof as to the latter's residence and improvements on the land."

On June 8, 1885, the papers in the case were transmitted to the Commissioner of Indian Affairs, with directions to make "a thorough investigation on the spot" with a view of ascertaining all the facts in the case. Special Agent Bede was charged with the investigation. On August 4, 1885, the Commissioner of Indian Affairs reported that said special agent, on July 14, 1885, returned the papers in the case, and

transmitted the affidavits of Sto-he-gah and David Decorah, another Indian. The Commissioner states in his said report that said agent has been superseded, but "that the evidence taken will be sufficient for an intelligent disposition of the case."

On September 23d last, the Acting Commissioner of Indian Affairs, referring to the proceedings in the case of Odegard *v.* Sto-he-gah, directed J. L. Robinson, Esq., United States special Indian agent, at Tonah, Wisconsin, to "have Sto-he-gah select a tract or tracts of good vacant land, and make entry of the same at the proper local land office."

The papers in the case and the several reports made by the Commissioner of Indian Affairs, referred to herein, are returned to you herewith for your consideration and decision. It is not deemed advisable to indicate to you what your decision should be in the premises. The record shows that the case is contested, and if either party is dissatisfied with the decision of your office he has the right of appeal to this Department, when the whole case will be determined upon its merits. If this Department should attempt to control your action in the case, the parties affected thereby might have just reason to complain that their rights have been adjudicated by an appellate tribunal without affording them an opportunity of being heard. The papers are therefore returned to you and you will proceed to render such decision in the case as seems in your judgment to be in accordance with the law and the evidence.

SECOND FILINGS AND ENTRIES.

FREMONT S. GRAHAM.

The Department will not consider a petition for the restoration of the right to file for, or enter land, unless accompanied by application for some specific tract.

Acting Secretary Muldrow to Commissioner Sparks, January 8, 1886.

I am in receipt of your office letter of February 7, 1885, transmitting the application of Fremont S. Graham to be allowed to make timber-culture entry, in lieu of that made by him January 10, 1884, for the S. ½ of the NW. ¼ and N. ½ of the SW. ¼ of Sec. 4, T. 154 N., R. 64 W., Devil's Lake, Dakota, which he has relinquished under circumstances set forth in said application. As Graham does not apply to enter any specific tract in place of that relinquished, his application amounts simply to a request for a decision as to whether he would be allowed to make such entry if he should at any time hereafter desire to do so, and hence should be included among those hypothetical questions which the Department has as a rule refused to consider. Your office decision of January 9, 1885, denying Graham's application, is modified accordingly; and your office is directed to refuse hereafter to consider applications for a restoration of the right to make pre-emption filing, or homestead or timber-culture entry, except when accompanied by application to make filing or entry for some specific tract.

PRIVATE ENTRY—RESTORATION NOTICE REQUIRED.

HARLOW BAIRD.

The land applied for was marked on the plat in the local office with the number of a private entry, and though so marked probably through mistake, it was not thereafter subject to private entry until regularly restored by public notice.

Secretary Lamar to Commissioner Sparks, January 9, 1886.

I have considered the appeal of Harlow Baird from your office decision of December 11, 1884, rejecting his application to purchase at private entry the NW. ¼ of SW. ¼ of Sec. 35, Tp. 28 N., R. 8 E., Niobrara, Nebraska.

Said application was refused by the register and receiver for the reason that the land applied for was marked on the plat in the local office, as follows—"471."

The register, in his letter transmitting the papers, stated that it was probably so marked through a mistake.

Your office, in the decision appealed from, approved the action of the local office, and held that tracts erroneously marked on the books are thereafter not subject to private entry, until regularly restored by public notice, and that the notation on the plat in this case was sufficient to exclude the tract from private entry, citing in support of this view the case of S. A. Putnam, decided by this Department in November, 1877, (4 C. L. O., 146). That case followed an opinion rendered as long ago as 1837, by Attorney General Butler (3 Op., 274), which, so far as I know, has been recognized and followed by your office and the Department to the present time.

As stated in that opinion, "One of the most important points to be observed in the execution of the law is the securing to all persons a fair and equal opportunity to become purchasers of the public lands." The application of the fair and equitable rule thus stated, in my opinion, clearly justifies the decision made by your office in this case.

Said decision is affirmed.

PRIVATE CLAIM—LANDS OPENED TO ENTRY.

GERVACIO NOLAN.

Nolan was the owner of two grants: Congress confirmed one, with the condition that when the lands thus confirmed were patented, they should be taken in satisfaction of all "further claims or demands against the United States." The acceptance of such patent by Nolan's heirs was in full satisfaction of any claim under the remaining grant, and the lands held in reservation therefor are accordingly restored to the public domain.

Secretary Lamar to Commissioner Sparks, January 9, 1886.

On April 11, 1885, Mr. O. P. McMains, claiming to represent settlers upon land in New Mexico now in reservation because of what is known

as the Nolan grant No. 39, made application to have the plats of survey of the public lands, covering the territory embraced in said grant, restored to the local office, and said lands thereby thrown open to entry and settlement. On reference of said application to you, it was reported upon favorably.

It appears that at one time your office caused said land to be surveyed and the plats thereof filed in the land office at Santa Fé, and afterward reconsidering its action, about October 21, 1881, ordered said plats to be withdrawn and the land held in reservation, under section 8 of the act of July 22, 1854, (10 Stat., 308,) because of the claim arising under said grant.

From the facts disclosed it appears that on December 1, 1843, the Mexican authorities granted certain lands now lying in Colorado to Gervacio Nolan; that on November 18, 1845, the same authorities granted certain other lands, now lying in New Mexico, to the said Nolan and his two associates, Aragon and Lucero. Neither grant was limited as to quantity, and possession of the last tract was delivered by a justice of the peace going upon the land and pointing out to Nolan the boundaries named in the grant; the latter breaking sticks, pulling up grass, etc.: but there were no boundaries set up, no measurement or survey of the land—and consequently no segregation of the granted premises from the public domain, as is required in order to constitute juridical possession.

After the acquisition by the United States of the territory in which both grants are located, Nolan being dead, his heirs made application to the surveyor general of New Mexico for action looking to the confirmation of said grants, in pursuance of the provisions of said act of Congress of July 22, 1854. Accordingly, the surveyor general examined said claims, and reported on them favorably, recommending that Congress confirm both of them to the heirs of Nolan, it having been shown that prior to his death he had purchased the interests of his two associates, Aragon and Lucero, in the grant of November 18, 1845.

These claims and the report of the surveyor general were duly transmitted to Congress for action thereon—the last claim being numbered 39, and the first 48.

On July 1, 1868, the committee on private land claims of the House reported favorably on quite a number of claims, but the two of Nolan were "withheld for further investigation," because being subsequent to the Mexican colonization law of August 18, 1824, limiting grants to a single individual to eleven square leagues, they were understood to be largely in excess of that amount. After this I find no mention whatever of claim No. 39.

On April 23, 1870, the private land claims committee of the House made an elaborate report in favor of grant No. 48, for the confirmation of which to the extent of eleven square leagues a bill (H. B. 314) was introduced, discussed, passed, and ordered to be engrossed, but after

wards tabled. A bill (S. B. 843), to confirm the same grant to the same extent, was likewise introduced in the Senate May 25, 1870; called up, discussed and passed June 14, 1870: this bill was passed by the House June 29, 1870, and approved by the President July 1, 1870, and will be found in 16 Stat., p. 646.

In the fourth section of said act it is "Provided, however, that when said lands are so confirmed surveyed and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States."

The lands were "surveyed and patented" to the heirs of Nolan; and in view of the fact that at the time of his death he was the sole owner of both grants, I am compelled to hold that the acceptance of the patent by his heirs under said confirmatory act was "in full satisfaction of all further claims or demands against the United States" held by them, including claim No. 39; and further that by said act "final action of Congress" was had in relation to claim No. 39 and the lands heretofore held in reservation because of the same should be at once restored to the public domain, subject to settlement and entry. You will take action accordingly.

Since this matter has been pending here, two protests against the present action have been filed—one on June 6, 1885, by D. N. Baca, of Las Vegas, N. M., and the other on June 23, 1885, by William Pinkerton, of Wagon Mound, N. M., both claiming to be largely interested in this grant No. 39, and Pinkerton claiming under the title of Lucero, which has been shown was assigned to Nolan prior to his death. As neither of these parties have taken further action in following up said protests though six months have elapsed, I cannot delay action in the premises longer.

A similar application to the present was made by Mr. McMains in 1884, and on two unfavorable reports thereon, one by Commissioner McFarland on August 19, and another by Acting Commissioner Harrison on August 25, my predecessor on November 18, 1884, declined to order said plats of survey to be restored. As this is a matter touching the administration of this Department and a continuing subject for investigation, I do not under the circumstances consider the action of my predecessor necessarily binding upon me. Disagreeing with him in his conclusion, I now determine that the plats of public survey, so long withheld, shall be restored to the local office and that the land held in reservation for and under said pretended claim for nearly thirty years be now thrown open to entry and settlement.

I am also in receipt of your letter of December 18, 1885, transmitting a communication from N. W. Mills, District Attorney, Springer, New Mexico, in relation to said grant No. 39. Mr. Mills states that hundreds of suits have been instituted against the settlers within the boundaries of said grant, many of which are now pending, and one—the case of Pinkerton *v.* Ledoux—having been decided against the former in the territorial courts, has been appealed to the U. S. Supreme Court.

Mr. Mills urges that as the settlers are very poor the Attorney-General of the United States should take charge of the case. I have this day transmitted a copy of said letter to that officer, with a favorable recommendation.

MINING CLAIM—CERTIORARI—HEARING.

ALICE PLACER MINE.

The proceeding by certiorari is provided to cover cases where the Commissioner formally decides against the right of appeal, and, application therefor, having been duly filed, should be forwarded and all action in the case suspended under rule 114.

It is within the discretion of the Commissioner to order a hearing to ascertain the character of the land and whether the conditions of the law have been complied with, though the applicant for patent may have obtained a favorable judgment ir the courts as against an adverse claimant.

Secretary Lamar to Commissioner Sparks, January 9, 1886.

I am in receipt of your letter of the 16th ultimo, transmitting certair papers relative to the Alice placer mining application, No. 639, Leadville, Colorado, now pending in your office.

Among the papers is the application, filed in your office by Messrs. Britton & Gray, for certification, under rules 83 and 84 of practice, of the proceedings in said case for my consideration and action; also a copy of your letter dated November 19th ultimo to counsel above mentioned, holding in effect that the case does not fall under rules 83 and 84, and consequently not under rule 114, and declining to entertain the application for *certiorari*.

In your letter transmitting these papers you refer to the fact of your having held that the case in its present condition was not governed by the rules referred to, but fell within the exceptions of rule 81. You further say—"In view of the fact, however, that the question of practice involved is a new one, upon which differences of opinion may exist, and which is important should be well settled," you deem it proper to submit it for my consideration, and ask my advisory instructions upon the point presented.

On the 1st of September last, you ordered a hearing involving the merits of the Alice Placer mining claim.

From that action an appeal was filed. You refused to recognize said appeal, assigning as a reason for your action that "the matter of ordering hearings lies in the discretion of the Commissioner." The basis for said action must have been rule 81 of practice.

The next proceeding by counsel was to file their application for certification under rules 83 and 84. Rule 83 reads as follows: "In proceedings before the Commissioner, in which he shall formally decide that a party has no right of appeal to the Secretary, the party against

whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary, and to suspend further action until the Secretary shall pass upon the same."

By your letter refusing to recognize claimant's appeal you formally decided against the right of appeal. That action in my opinion clearly made rules 83 and 84 applicable. Indeed, they could apply only pursuant to action such as that had in this case. Being applicable and having been invoked, it follows that the petition filed thereunder should have been entertained and forwarded as required by rule 114, action in the meantime being suspended in accordance with said rule. Such proceeding in this and similar cases would be in strict accordance with the rules of practice, as I read them. It does not occur to me that the question of practice presented by this case is a new one. While an application for certiorari is not a writ of right, the rules of practice adopted by this Department, as well as those which prevail in the courts, contemplate, in every case where such application is made necessary, that it should reach the tribunal to which it is addressed, in order that that tribunal may take such action thereon as may be found proper.

The application in this case having been forwarded and being now before me, under the rules, is entitled to consideration.

The showing is that E. W. Sizer filed application for patent for the Alice Placer claim, containing 17.89 acres.

During the period of publication adverse claims were filed in behalf of the Addie Stevens and Lazy Bill Lode claimants, and suits thereunder were commenced.

While said suits were pending, your office pursuant to a report made by Special Agent Robert Berry, ordered a hearing before the local officers to determine the character of the land and the bona fides of the applicant. That hearing has not yet been held. The register on the 11th of October last forwarded to your office duly certified copies of the judgment rolls in said adverse suits, from which it appears that the suit brought in support of the Addie Stevens claim was dismissed for want of prosecution, while that brought in behalf of the Lazy Bill claim was fully tried and judgment awarded Sizer, the placer applicant, said judgment reciting that he "is the owner and is entitled to the possession of the premises in this action." Thereupon the placer applicant moved for allowance of entry and issue of patent. Instead of allowing this motion, you on September 1st last directed that the hearing which had previously been ordered on the report of Special Agent Berry proceed.

From that action appeal was filed. This you, acting under authority of rule 81 of practice, refused to recognize.

Then followed the application for certiorari, now before me. The question to be determined under said application is, whether or not you had the authority under the law to direct a hearing after judgment of the court favorable to applicant. I am asked to say that you have not such

authority—that at such a stage of proceedings the law is mandatory, and that your remaining duties under section 2326 of the Revised Statutes are merely the ministerial acts of preparing and issuing the patent. I am unable to assent to this proposition.

It is too well settled to need discussion that until the issue of patent, title to the public land is in the United States, and that while so and and subject to disposal, the Land Department must, under the law, be the judge as to when, under what circumstances and how the Government shall part with title, Moore *v.* Robbins, (96 U. S., 530). Not only must the character of the land be considered, but the law specifies that certain prerequisite qualifications must exist and be found in the applicant for title. Certain precedent acts are also necessary. The law imposes upon the Land Department the duty of passing upon these various prerequisites, and determining when they have been met.

This being true, can it be supposed that the intent of the law in such cases is to require the issue of patent by the officer specially charged with the duty of disposing of the public lands under the law, before that officer is satisfied that the requirements of law have in good faith been complied with by the applicant? Can the Commissioner of the General Land Office be compelled to act upon the judgment of another in opposition to his own judgment in a case for the proper disposal of which the law holds him responsible, subject to the direction of the appellate or supervisory authority placed over him by the law itself?

Does the judgment of a court as to which of two litigants has the better title to a piece of land bind the Commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law? The usual result following a favorable judgment in a court under section 2326 of the Revised Statutes is, I doubt not the issue of patent in due time, but in such case the final passing of title is not on the judgment of the court independent of that of the Commissioner, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.

The judgment of the court is, in the language of the law, "to determine the question of the right of possession." It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established.

The party thus placed in possession may "file a certified copy of the judgment roll with the register and receiver." But this is not all. He may file "the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon." Why file this, or anything further, if the judgment roll settles all questions as to title and right to patent? Clearly, because the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent.

His judgment should therefore be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. Branagan *et al. v.* Dulaney, (2 L. D., 744.) The sufficiency of that proof is a matter for the determination of the Land Department. It follows therefore that further hearing may, if deemed necessary, be ordered, for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith. To hold differently and to say that after the presentation of the judgment roll nothing remains for the Commissioner save the ministerial acts of preparing and issuing patent, would be to say that the Land Department loses all jurisdiction in a case after commencement of suit by an adverse claimant. I am well satisfied that the law contemplates no such condition of affairs.

You have ordered a hearing, deeming it necessary to satisfy your judgment, or more properly to aid you in making up a proper judgment in this case. That was an act of discretion with which no law, so far as as I am aware, affirmatively authorizes an interference, and I should be slow to exercise my supervisory authority in the direction of preventing you from getting all the information which in your judgment may seem necessary to the proper discharge of your official duty and to a correct adjudication of the case.

The application is denied.

DESERT LAND ENTRY—COMPACTNESS.

MAREN CHRISTENSEN.

The compactness of tracts entered is to be settled by their side lines, which should not exceed in length one and one-fourth miles for six hundred and forty acres, one mile for tracts down to and including three hundred and twenty acres, and three-fourths of a mile for tracts of less area.

Sub-divisions merely cornering one with another will not be regarded as compact.

Secretary Lamar to Commissioner Sparks, January 9, 1886.

I have before me for consideration the case of Cheyenne, Wyoming, desert land entry No. 2523, of the W½, N½NE¼, SW¼NE¼, NW¼SE¼, S½SE¼, Sec. 15, and N½NW¼, Sec. 22 Tp. 15 N., R. 78 W., 640 acres, by Maren Christensen.

On Sept. 3 last, you held that the tract embraced in this entry was not in compact form as required by the act, construed the term "in compact form" to mean "as nearly square in form as practicable with the number of acres taken," and directed that the claimant be called on to adjust the boundaries of her entry.

From this decision she has appealed.

The regulations under the law, embodied in the general circular of your office, sanctioned by departmental approval and promulgated for the information and guidance of the people acquiring title to public lands, require the tracts embraced in entries on surveyed lands to approach as near the form of technical sections as their situation and relation to other lands will admit, confine side lines to certain limits and do not allow the entry of narrow strips, which is regarded as a "gross departure from all reasonable requirements of compactness."

On examining the records of your office the fact is disclosed, that there are no vacant public lands contiguous to the tract embraced in this entry. Now, applying each of the requirements of the law and the regulations thereunder to the tract in question, it is found to conform therewith in every particular. Its area, six hundred and forty acres, is allowable, its sides do not exceed the limit, and in form it is as compact or near a technical section as its situation and relation to other lands will admit. These conditions being beyond doubt, I am at a loss to comprehend on what theory an adjustment could be made other than that which would involve an elimination of certain tracts from the entry, which seems to be the intendment of your decision. This is not a case in which such a requirement should be made, and the entry should not be disturbed.

The compactness of tracts in entries of this class, is to be determined by their side lines. Thus, they conform to this requirement, if, in tracts of six hundred and forty acres their side lines do not exceed one and one-fourth miles; in tracts of a less area down to and including three hundred and twenty acres, if they do not exceed one mile, and in tracts of a less area than three hundred and twenty acres if they do not exceed three-fourths of a mile. In no case, however, will tracts in which the subdivisions simply corner one with another be regarded as compact.

In view of the foregoing, your decision is reversed, the order for adjustment overruled and the claimant will be allowed to perfect her entry under the law.

APPLICATIONS TO CONTEST—WHEN SIMULTANEOUS.

JACOBS *v.* CHAMPLIN ET AL.

The right of precedence, in the case of two applications to contest, should be awarded to the one first actually received.

Rules adopted for the reception of applications on the filing of new plats are not to be followed except under similar circumstances.

Secretary Lamar to Commissioner Sparks, January 9, 1886.

I have considered the case of Joseph M. Jacobs *v.* Oliver Champlin and Ezra D. Parsholl, as presented by the appeal of Jacobs from the decision of your office, dated August 27, 1884, holding that his applica-

tion to contest timber culture entry No. 5,442, covering the SE. ¼ of Sec. 27, T. 126 N., R. 62, Watertown, now Aberdeen, land district Dakota Territory, made March 24, 1882, by said Parsholl, was presented simultaneously with the application of said Champlin to contest the same entry, and that said parties should be notified to appear and bid for the privilege of contesting said entry.

The report of the register and receiver shows that as soon as the local land office was opened on the morning of March 25, 1884, the attorney for Jacobs offered his contest affidavit against said entry, and said affidavit was received and the contest was duly entered of record. Immediately thereafter the attorney for Champlin offered his contest affidavit against the same entry, and it was rejected because of the prior entry of the contest by Jacobs.

The local land officers further report that, at the time they received the contest affidavit of Jacobs, they had no knowledge that the attorney for Champlin intended to file any affidavit of contest against said entry, and therefore they did not regard the affidavits as simultaneous.

Upon appeal, your office reversed their action, as above stated. Said decision is based upon the instructions given to the Huron office, in said Territory, on December 16, 1882, (1 L. D., 183,) wherein it is stated that "all persons in the office, immediately after opening of the same for business, who have written applications for entry of a tract on the same section under the timber culture law shall be considered simultaneous applicants." But those instructions were given with reference to the filing of new plats in the local land office and the usual rush of claimants for priority, and it is therein stated that on the morning of October 19th the crowd was so great that it was impossible for all claimants to pass their applications to the register and receiver at the same time, therefore, under the circumstances of that case, the applications should be regarded as simultaneous. In the present case no such state of facts exists. It does not appear that there was any crowd, nor is it shown that the attorney for Jacobs had any knowledge of the intention of Champlin to contest said entry. No settlement rights are involved, and no fraud or collusion is asserted or suggested. Simultaneous means existing or happening at the same time. In Benschoter *v.* Williams (3 L. D., 419) this Department decided that where a few seconds intervened between two applications to contest an entry, the right of precedence should be awarded to the one first actually received, and that "it matters not how short may have been the interval between the presentation of the two contests, the one actually received before the other is entitled to precedence." The affidavit of Jacobs was received first and he is entitled to the right of contest without being required to bid therefor. It is a maxim of law and equity that he who has the precedency in time has the advantage in right. (Fonb. Eq., 320.)

The decision of your office is therefore reversed.

RECOMMENDATION OF SUIT AGAINST PATENT—ORAL HEARING

HIBSHER *v.* STANBERY ET AL.

Proceedings in the name of the United States to set aside a patent will not be recommended, in the absence of fraud or irregularity, where it appears that the applicant for such relief failed to comply with the requirements of the law, and neglected to assert his rights at the proper time.

Oral hearings are not accorded without due notice to all parties.

Acting Secretary Muldrow to Commissioner Sparks, January 16, 1886.

I have considered the case of George Hibsher *v.* John Stanbery, Emily A. Glotfelter, John D. Forbes, S. N. A. Downing, as presented by the appeal of Hibsher from the decision of your office, dated June 2, 1884, refusing to recommend that proceedings be instituted looking to the vacation of patent issued on February 12, 1881, upon additional homestead entry No. 23, made February 9, 1880, by said Stanbery, covering the NE. ¼ of the SE. ¼ of Sec. 30, T. 35 N., R. 9 W., Durango land district, Colorado.

It appears from the record that the local land officers on June 18, 1883, transmitted the petition and corroborated affidavit of said Hibsher, claiming the N. ½ of SE. ¼, the SW. ¼ of NE. ¼, and SE. ¼ of NW. ¼ of said Sec. 30, and asking that proceedings be ordered to clear the record of any adverse claims for said tracts. It also appears that the NE. ¼ of said SE. ¼ of said Sec. 30 was entered on February 9, 1880, by John Stanbery, as an additional homestead entry No. 23; that Emily A. Glotfelter made additional homestead entry No. 117, final certificate No. 45, on September 22, 1881, covering the SW. ¼ of NE. ¼ of said section 30; that John D. Forbes, on September 26, 1881, made homestead entry No. 128 of the SE. ¼ of the NE. ¼ of said section 30, and that S. N. A. Downing, on October 5, 1880, filed his pre-emption declaratory statement upon the NW. ¼ of the SE. ¼ of said section 30.

Upon the showing made by Hibsher, your office on October 10, 1883, ordered a hearing to determine all the facts in the case. The hearing was duly had, at which Hibsher appeared in person and was represented by counsel, and the assignee of Stanbery also appeared by attorney. The register and receiver on February 1, 1884, transmitted the testimony taken at said hearing, but they made no recommendation, for the reason that they understood that the hearing was ordered for the purpose of determining whether the Department would recommend the institution of proceedings to vacate the patent issued on said additional homestead entry of Stanbery. On June 2, 1884, your office examined the testimony and exhibits, and found that Hibsher did not file his pre-emption declaratory statement within the legal period after his settlement, and that his filing did not reach the local land office until after said entry of Stanbery had been entered of record. The district land officers rejected Hibsher's filing and advised him that he could amend

his filing so as to take the remaining three forties embraced therein No appeal was taken from this action of the register and receiver, nor was any contest entered against Stanbery's entry, and the same was patented, as stated above, on February 12, 1881. Subsequently, Hibsher filed his pre-emption declaratory statement for other tracts, but as he alleges by mistake, as he intended to file for the same land as that included in his original declaratory statement.

The excuses offered by Hibsher for failure to file within the time required by law are not sustained by the testimony. When the entry of Stanbery was made, the records of the district land office failed to show any claim for said tract, and the evidence fails to show that any fraud was committed by the district land officers, or that they were imposed upon by false and fraudulent testimony. Nor is it shown that there is any irregularity or mistake in the issuance of said patent. That in a proper case it would be the duty of the United States to allow its name to be used, or even to be the moving party upon application to institute suit to cancel a patent, can not be denied.

It was held in the case of Hughes *v.* United States, (4 Wall., 232,) "that the equity of a pre-emption claimant of land under the laws of the United States, who has complied with the condition imposed by those laws, obtained his certificate by the payment of the purchase money, and retained uninterrupted possession of the property, can not be defeated by one whose entry was subsequent, although he has fortified his title with a patent, such person having notice sufficient to put him on inquiry as to the interests, legal or equitable, of the pre-emption claimant." And in United States *v.* Stone (2 Wall., 525), the Supreme Court re-affirm the doctrine that "the United States may properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued by itself ignorantly, or in mistake, for lands reserved from sale by law. See also United States *v.* Minor (114 U. S., 233).

The facts as disclosed in the testimony show that Hibsher is the author of his own misfortunes, by his neglect to comply with the requirements of the pre-emption laws, and his failure to contest said entry.

The decision of your office, dated June 2, 1884, is accordingly affirmed.

Counsel for Hibsher, on May 18th last, asked permission to make an oral statement in the case. Since then, however, to wit, on November 12, 1885, he has filed a supplemental brief, in the case. In *ex parte* George T. Burns (3 L. D., 561,) this Department laid down the rule that in *ex parte* cases oral arguments are not encouraged, except in special cases and good reasons shown therefor. It does not appear that counsel for the opposing parties has been advised of said application to make an oral statement in said case; and it would be manifestly improper for the attorney of one party to make an oral statement in the case in the absence of the attorney of the opposing party. For this reason the application to make an oral statement in the case is refused.

PRE-EMPTION—FINAL PROOF CONCLUSIVE.

CANN *v.* CANNON.

After the submission of final proof, and a hearing had thereon, additional time to show compliance with the law, though within the life of the filing, will not be granted in the presence of an adverse claim, and where bad faith is evident.

Acting Secretary Muldrow to Commissioner Sparks, January 16, 1886.

I have considered the case of Robert Cann *v.* James Cannon, on appeal from your office decision of November 12, 1884, dismissing the protest of Cann and allowing Cannon further time to show a full compliance with the pre-emption law.

The records show that on July 12, 1882, Cannon filed declaratory statement for the SW. ¼ of SE. ¼, Sec. 20, N.W. ¼ of NE. ¼, and N. ½ of N.W. ¼, Sec. 29, T. 7 S., R. 68 W., Denver, Colorado, alleging settlement May 15, 1882. On January 3, 1883, Cann made timber culture entry of said NW. ¼ of NE. ¼ and N. ½ of NW. ¼. On November 30, 1883, Cannon offered pre-emption proof, and Cann filed protest. Said proof and protest were duly forwarded, and your office, by letter of January 18, 1884, ordered a hearing, in order that testimony might be taken "relating to Cannon's residence and improvements on the land made since date of filing."

The hearing was had March 24, 1884. The testimony shows that Cannon is twenty-four years of age, single, and the manager of a coal mine or shaft in an adjoining quarter; that at the date of the final proof there were on the land two cabins, one built of fence poles, long prior to Cannon's settlement, by some person unknown, the other a frame shanty built by Cannon in July, 1882; that in January, 1883, the frame cabin was destroyed by the wind and lay in ruins until the following June, when it was rebuilt under claimant's directions; that before its destruction it had no door or window; that in the fall of 1882 a portion of an acre adjoining the frame cabin was plowed and sowed in rye, and again in 1883 that the plowed tract was enclosed by a single wire caught up on poles. This is the extent of the improvements. Cannon says he slept in the pole cabin in the fore part of July, and some time in September, 1882; that he occupied the frame cabin in the latter part of July, 1882, and in November, 1883; that he had no bedstead on the claim, but carried his bedding with him, and slept on a bench. He says he thinks he slept there more than ten times, but will not say he slept there twenty times. He says he had a stove in the frame shanty during a portion of the cold weather, but does not say he had any other household furniture there. He says that when away from the claim he slept with the miners or at a hotel in Sedalia, or with some of the neighboring ranchmen. Several witnesses testify that they have passed over the land many times and examined the

cabins thoroughly, and never found any signs of habitation. It is very evident that his absence from the land was the rule. There is some testimony that claimant had "rooms" in Denver, and was engaged in the coal business in that city. These allegations are not denied by him.

In April, 1884, one month after said hearing, Cannon filed in your office an application to withdraw his proof and to be allowed further time to show a full compliance with the law, setting forth that "he has commenced to reside permanently on his land." Your office held that, "as there is no evidence of abandonment on his part, and as his time for making proof and payment under the law does not expire until the middle of February, 1885, his application is hereby granted, and the case dismissed." This was error, in view of the facts elicited at said hearing. I am satisfied from the testimony therein taken that claimant never established a legal residence on said land, and that his alleged residence is a mere pretense, and discloses an effort on his part to acquire title to public land without compliance with law, and that his actions show a want of good faith throughout.

These facts were established at the hearing, and prior to that time a valid adverse right had attached to the land. Said declaratory statement of Cannon will be canceled. The decision appealed from is accordingly reversed.

SOLDIERS' ADDITIONAL HOMESTEAD.

LARS WINQVIST.

The right to make an additional entry is personal and non-assignable.

A certificate showing the right to make such entry may properly contain the expressed condition, "if shown to be still living at date of application to enter in his name."

This rule however does not apply to cases where the additional right had been certified prior to February 13, 1883, or to cases pending March 16, 1883.

Lars Winqvist made application for additional homestead entry, under section 2306 of the Revised Statutes, filing therewith the required affidavits, bearing date November 6, 1885, and statement from the Adjutant-General's office of date December 4, 1885.

Upon this application Winqvist, by his attorney, asked that certificate be issued in the usual form. By letter of December 3, 1885, you refused to issue the certificate, except with a condition attached in these words: "If shown to be still living at date of application for entry in his name." From this action Winqvist appealed.

On December 12, 1885, you issued certificate on the usual printed form, to which you added these words: "If shown to be still living at date of application for entry in his name."

This is the record of the case before me.

The gravamen of this appeal is that, under a circular issued by the Department, May 17, 1877, and by the rules and practice of certification

therein established, a form of certificate was then adopted, which has been in use from that day to the present time, and that while the circular of instructions of February 13, 1883, changed the rule and practice theretofore governing, it did not apply to cases that had previously been certified, or to cases pending, or which were filed in office prior to March 16, 1883. To bring this case within the exception provided for by the circular of February 13, 1883, it is contended by counsel that the application of Winqvist was a pending claim at the date of the circular, and was therefore controlled by the rules and practice of the Department of force prior thereto. Elaborate briefs have been filed by counsel, arguing mainly the doctrine of *res adjudicata* and *stare decisis*, as applicable to and controlling the case at bar.

The doctrine that where a case has been once adjudicated, rights acquired thereunder will not be disturbed, and that this rule applies to acts and adjudications of heads of Departments, is a rule too well recognized to require argument.

It is a doctrine equally well established that decisions of courts and heads of Departments, as a rule, are precedents which should govern the decision of similar cases. If the case presented is controlled by this doctrine, its solution is easy. Or, to state it more plainly: If this case has been once adjudicated, or if rights have vested which were valid under any rule or law of the Department as administered or expounded at the time such rights were acquired, they cannot be divested or impaired by the act of any succeeding Commissioner or Secretary.

From an inspection of this record I am unable to discover what right has vested in either the applicant or any one else that is in the least impaired by your action in this case. The record transmitted to the Department shows that Winqvist filed application for additional homestead entry, without date, but accompanied with the affidavits required by law, made before the deputy county clerk of Saginaw County, Michigan, November 6, 1885. On December 12, 1885, you issued certificate in the usual form, adding thereto the words, "If shown to be still living at date of application to enter in his name." There is nothing before me to indicate that this application and certificate is either amendatory of or supplementary to any other application or exercise of right by Winqvist, or any one in his behalf.

From the affidavits, bearing date November 6, 1885, it appears that Winqvist for the first time made application for additional homestead, and at that date made oath that he had not sold or agreed to sell, transfer, or pledge his right to make entry, and that he had not made any prior application for it. If the case is to be decided upon this record, the argument of counsel as to the vested rights of innocent purchasers have no application. Counsel for Winqvist have, however, filed a supplementary paper, alleging that Winqvist's application was a pending claim on March 16, 1883, referring to the records of the General Land Office, in support thereof

The records of the General Land Office show that on November 24, 1877, Winqvist made application to enter the NE. ¼ of the SE. ¼ of Sec 10, T. 16 N., R. 4 E., East Saginaw, Mich., under section 2306 Revised Statutes, but failed to file therewith the special affidavit as to military service—on which filing and entry certificate was issued by the register. On January 19, 1878, the Commissioner notified the local office that the Commissioner's certificate would be suspended awaiting such proof. Winqvist failed to furnish the proof, and as late as August 4, 1885, the Commissioner directed the local officers to notify Winqvist that unless the proof required by letter of January 19, 1878, was furnished within sixty days, the entry would be canceled. No response being made to this notice, on October 23, 1885, the Commissioner canceled the entry.

It nowhere appears from the record, or from any paper of file in the General Land Office, that Winqvist has executed to any one a power of attorney to locate or sell his right, nor that he has made any sale or transfer of it, although it is argued inferentially that his right to enter is now in the hands of an innocent purchaser.

Without entering into a discussion or review of the decisions and circulars of instructions issued at various times, and by different officials of the Department, relative to the execution of section 2306, it is sufficient to say that, notwithstanding the liberal interpretation given to the act by the report of Commissioner Williamson, of February 17, 1877, and the circular of instructions of May 17, 1877, issued thereon, it has at no time been declared that the soldier's right of additional homestead was a right that could be transferred, pledged, or sold. But if such a right had at any time been recognized by the Department, the party entitled to enter could not convey a right paramount to his own. Therefore if Winqvist had such an imperfect right that could not be exercised by himself, he could not convey a superior right to another.

The case of William French (2 L. D., 235,) is directly in point. In that case the final certificate from the General Land Office had issued, and the owner purchased it upon the faith of an apparently valid and established right, evidenced by the certificate of the highest authority, without notice of defect. The entry certificate and purchase were made while the instructions of May 17, 1877, were of force. The Department, after fairly discussing the right of the soldier under that section, held that, "Where a certificate issues improperly, inadvertently stating that a certain party is entitled to make additional homestead entry when he is not so entitled, the entry made thereunder should be canceled. As the right to make homestead entry is a personal right, the assignment of such certificate cannot be recognized. A purchaser takes it subject to any defects and cannot be treated as an innocent purchaser."

Without the proof required by the special affidavit as to military service, Winqvist had no right to enter, and therefore he could convey no such right to another. His entry remained suspended from November, 1877, to October, 1885, to allow him the opportunity of establish-

ing that right. Failing to do so, his entry was canceled, and every semblance of right that may have attached to it was completely annulled by the act of cancellation. The present application is therefore in no respect a claim pending prior to March 16, 1883.

Viewing the case as under the control of circular of instructions of February 13, 1883, I can see no objection to the additional words to the certificate, "if shown to be still living at date of application to enter in his name." They impose no restraint or condition that in the least impairs any right that he could acquire by the certificate without the additional words.

The circular of February 13, 1883, discontinued the practice of permitting entries to be made by agent or attorney, and the party entitled to the right of entry was required to make his entry in person at the local office, and to establish his identity. If Winqvist's entry is made in the manner required by that circular, his very compliance with it will establish the fact that he is "still living at the date of application to enter in his name." As this condition can work no harm, or even inconvenience, in supplying the proof, I can see no objection to the insertion of it in the certificate.

The condition attached to the certificate does not violate the presumption of law, "that a person once shown to be in life is presumed thus to continue until the contrary be shown." That presumption applies where the fact of death is an affirmative issue, requiring actual proof, or proof of circumstances from which the law will presume death.

The right of additional homestead given to the soldier can only be exercised by the soldier during his life, and after his death by his widow during her life or widowhood; and after her death or marriage, by his children during their minority. Hence, as this life and condition of life must exist to enable the party applying for the right to acquire it, I can see no violation of any rule of law requiring proof of it.

It will be observed that as the facts of the case bring it within the operation of the circular of instructions of February 13, 1883, the decision does not apply to cases where the additional right had been certified by the General Land Office prior to February 13, 1883, or to cases pending or which were filed in office prior to March 16, 1883.

Your judgment is affirmed.

CERTIFICATES OF DEPOSIT FOR SURVEY.

EDWARD POLLITZ.

Certificates issued for deposits made subsequent to the act of August 7, 1882, to cover excess in the cost of surveys executed under contracts entered into prior to the passage of said act, may be received in payment for any public lands entered under the pre-emption or homestead laws.

Acting Secretary Muldrow to Commissioner Sparks, January 16, 1886.

I have considered the appeal of Edward Pollitz, of San Francisco, California, from your decision of July 13, 1885, refusing to receive

triplicate certificates, issued for additional deposits, made subsequently to August 7, 1882, on account of surveys executed under contracts entered into prior to that date, in any district other than that in which the land surveyed is situated.

You held that, "Although certificates issued for deposits made subsequent to August 7, 1882, to cover excess of the cost of surveys executed under contracts entered into prior to the passage of the act referred to, have been allowed to be received in payment for any public lands entered under the pre-emption, or homestead laws, this practice has been discontinued, and no certificate issued since August 7, 1882, will be received, except in payment for public lands within the limits of the land district in which the surveyed township is situated."

Section 2403 of the Revised Statutes, as in force prior to March 3, 1879, provided that, "Where settlers make deposits in accordance with the provisions of section 2401, the amount so deposited shall go in part payment for their lands situated in the townships, the surveying of which is paid out of such deposits."

By act of March 3, 1879, (20 Stat., 352,) this section was amended by adding thereto the following provision: "Or the certificates issued for such deposits may be assigned by endorsement and be received in payment for any public land of the United States, entered by settlers under the pre-emption and homestead laws of the United States and not otherwise." This provision continued in force until the act of August 7, 1882, (22 Stat., 327,) making appropriation for the survey of the public lands, which provided "That no certificate, issued for a deposit of money for the survey of lands under section 2403 of the Revised Statutes, and the act approved March 3, 1879, amendatory thereof, shall be received in payment for lands, except at the land office in which the lands surveyed for which the deposit was made are subject to entry and not elsewhere; but this section shall not be held to impair, prejudice, or affect in any manner certificates issued, or deposits and contracts made, under the provisions of said act, prior to the passage of this act."

By section 25 of circular of instructions, relative to deposits by individuals for the survey of public lands, issued September 15, 1883, it is declared that, "Certificates issued for deposits made subsequently to and including August 7, 1882, to cover excesses of cost of surveys executed under contracts entered into prior to the passage of the act of August 7, 1882, are not affected by the clause in said act restricting the use of certificates of deposit on account of surveys to the land districts within which such surveys are located."

This instruction is omitted from the circular of instructions of June 24, 1885, and section 20 of that circular declares that, "Triplicate certificates, issued on or after August 7, 1882, can be received in payment for lands *only in the land district* in which the surveyed township is situated."

The question submitted is, whether section 20 of circular of instruc-

tions of June 24, 1885, is intended to restrict the use of certificates issued for deposits after August 7, 1882, in payment for lands entered under the pre-emption and homestead laws, to the land district in which the survey was made; although such deposit was made under contracts entered into prior to that date and subsequent to March 3, 1879. You decided that, although such certificates had formerly been allowed to be received in payment for any public lands entered under the pre-emption and homestead laws, that this practice has been discontinued, and no certificate issued since August 7, 1882, will be received, except in payment for lands within the limits of the land district in which the survey was made.

While this section may bear that construction, it would be in direct violation of the provisions of the act of August 7, 1882, which expressly declares that, it shall not impair, prejudice, or effect in any manner certificates issued or deposits and contracts made under the provisions of the act of March 3, 1879.

It is very clear that by the act of August 7, 1882, all certificates issued for deposits made under contracts entered into subsequent to the act of March 3, 1879, and prior to the act of August 7, 1882, should be received in payment for public lands entered under the pre-emption and homestead laws, irrespective of the date of the issuance of the certificate. Section 20, of circular of June 24, 1885, can therefore only apply to certificates issued since August 7, 1882, for deposit made under contracts entered into since August 7, 1882.

Under the practice of your office, governing the survey of public lands, the deposit is made to cover the minimum rate expressed in the contract of survey. The whole or any part of the maximum rate stipulated in the contract may be called for, if such excess is necessary to complete the survey. Therefore the additional deposits made under a contract entered into prior to August 7, 1882, although such deposit was made subsequent to August 7, 1882, is as much a part of that contract as the original deposit, and must be governed by the law of force at date of the contract.

Certificates issued before March 3, 1879, can be used only by the settlers in the purchase of lands in the township the survey of which was paid for out of such deposits.

While your letter of transmission seems to treat this matter as a refusal to accept such triplicate certificates, in payment of lands except within the district in which the survey is made, the correspondence between Mr. Pollitz and yourself discloses simply a construction asked for and given of section 20 of circular of June 24, 1885. As I do not understand that Mr. Pollitz has offered any such certificates in payment for lands which have been refused, I do not intend by this decision to pass upon the validity of any certificates that he may control, either for himself or as agent. If certificates for additional deposits, made upon contracts entered into after March 3, 1879, and prior to August 7, 1882,

which are in all other respects valid and are presented in the manner prescribed by the instructions and practice of the Department, they should be received in payment for any public lands entered under the pre-emption and homestead laws, without reference to the location of the lands surveyed.

Your decision is therefore reversed.

ACCOUNTS—DEPUTY SURVEYOR.

JOHN A. MCQUINN.

Duplicate oaths of the deputy surveyor's assistants, to replace originals, alleged to have been lost from the files, should not be accepted with the field notes, without a satisfactory showing that said originals were duly made and filed, and that due diligence has been used to procure new oaths from said assistants.

Secretary Lamar to Commissioner Sparks, January 20, 1886.

I have considered the appeal of John A. McQuinn, United States deputy surveyor, from your decision of June 11, 1885, refusing to accept his field notes "unless accompanied by the oaths of his assistants in due and legal form as required by the manual of surveying instructions."

It appears that said McQuinn entered into contract No. 103, dated May 8, 1884, for the survey of the first standard parallel north, through ranges 8 to 16 east, inclusive, and range 29 and 30 east, Boise meridian, Idaho Territory. He states that he executed said contract duly, and filed his field notes thereof, authenticated by the oaths of his assistants as required by the regulations, in the office of the United States surveyor general of Idaho; The surveyor general confirms this, and further states that said field notes, etc., were abstracted from his office a short time thereafter. McQuinn thereupon, on request, made duplicates of the field notes and the oaths of his assistants, and attached thereto his affidavit to the correctness of the latter; and he now offers them in lieu of the originals thus lost, at the same time making affidavit that he is unable to procure the oaths of his assistants for the reason that he is ignorant of their present whereabouts. Under the law and regulations a deputy surveyor may administer the oath to his assistants, and his certificate is accepted as satisfactory evidence thereof. McQuinn appears to have administered the oaths in this case, and he now asks that these duplicates, authenticated by his affidavit, be accepted, to the end that he may obtain payment for executing said surveys.

I am of the opinion that your office ought not to accept these duplicates until satisfied by the surveyor general that he had competent knowledge that the original oaths, properly made and certified, were attached to the original transcript of the field notes and duly filed in his office;

and until satisfied by the deputy surveyor that he has used due diligence in attempting to ascertain the present whereabouts of his assistants, and in procuring a second oath from them. When so satisfied, I think that the duplicates now offered by the deputy surveyor may be accepted and approved.

RESIDENCE—WHEN ESTABLISHED.

GRIMSHAW *v.* TAYLOR.

Residence is established from the time the settler goes upon the land with the *bona fide* intention of making his home there, to the exclusion of one elsewhere.

Secretary Lamar to Commissioner Sparks, January 20, 1886.

I have considered the case of William Grimshaw *v.* Lorison J. Taylor, involving the SW. ¼ of Sec. 20, T. 139 N., R. 73 W., Bismarck, Dakota Territory, on appeal by Grimshaw from the decision of your office, dated March 18, 1885, dismissing his contest against Taylor's homestead entry No. 930, made August 23, 1882, for said tract.

* * * * *

It cannot be doubted that when Taylor made his entry, he did so in good faith; and I think it abundantly clear from the testimony that this tract was his place of residence, and that he so considered it. The question of what constitutes residence under the homestead law has been so often before this Department, and is so well settled, that it is not necessary herein to discuss it generally. It was said in the case of Humble *v.* McMurtrie (2 L. D., 161): "A settler legally establishes a residence the instant he goes on the land for the purpose of establishing it." This is in harmony with the doctrine as enunciated by the courts and sanctioned by the ablest judicial writers. As long ago as the case of "The 'Venus,' Rae, Master," (8 Cranch, 253) the Supreme Court of the United States considered this question as well settled. Therein the Court say (and it is quite applicable to the case under consideration): "If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days." Justice Story in his "Conflict of Laws," page 35, in speaking of the term "domicile," says: "By the term 'domicile' in its ordinary acceptation is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, or inhabitancy, is sometimes called his domicile. In a strict and legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

Without further discussion, I think it clear that Taylor's residence on his claim was sufficient under the law. The facts and circumstances clearly indicate that this was his home to the exclusion of a home else-

where. The character of his improvements, and the extensive preparations made by him for the reception of his family (who, by the way, were residing upon the claim at the date of hearing) all indicate good faith and honest intentions.

For the reasons herein set forth, the conclusion reached in your said office decision is deemed correct, and is affirmed.

FINAL PROOF—GUARDIAN—MINOR.

DAVID THOMAS, GUARDIAN.

If the minor becomes of age prior to the time of making final proof, the final affidavit must be made by him.

Secretary Lamar to Commissioner Sparks, January 20, 1886.

David Thomas, guardian of James E. Jones, minor orphan child of John D. Jones, made final homestead proof, for the SE. ¼ of Sec. 7, T. 109 N., R. 60 W., Mitchell, now Huron, Dakota, land district, upon which final certificate issued.

Your office, by letter of April 17, 1885, rejected this proof, upon the ground that it appeared that James E. Jones was twenty-one years of age before final proof was made by his guardian. Notice of this decision was served on Thomas, guardian, by mail, but such notice was not received by him until July 17, 1885. Thomas, guardian, filed appeal in the local land office September 29, 1885. On October 10, 1885, your office canceled the final certificate, upon the ground that no appeal had been filed within the time required by the rule. By letter of November 9, 1885, you refused Thomas the right of appeal, who now applies to have the record in the case certified under Rule 83 of Rules of Practice.

As Thomas, guardian, did not file his appeal until after the expiration of sixty days from the date that he received notice of the decision, which is shown by his application and the exhibits submitted therewith, and no cause being shown for such failure, the decision rejecting his right of appeal was correct, and his application for certiorari will be denied.

From your office decision of April 17th rejecting the proof offered by Thomas, guardian, it appears that it was then held that "the beneficiary should be required to make final proof, and the certificate already issued will hold good, when such proof is found satisfactory."

"If the child becomes of age prior to time of making final proof, the final affidavit must be made by the beneficiary." See letter of Commissioner McFarland, 2 L. D., 101.

The cancellation of the certificate issued upon the proof submitted by the guardian can not, however, bar the right of the beneficiary to make the final affidavit and submit proof, as required by your office decision

of April 17, especially as it does not appear that he has had notice of these proceedings.

You will therefore direct the register and receiver at Huron to notify James E. Jones of his right to make final proof, with all the rights and privileges he may have had, if proof had been offered by him at the date it was offered for him by his guardian. If such proof should show that the law in regard to his entry has in every other respect been complied with, a certificate should issue in his name.

Your decision is therefore modified to this extent.

PRACTICE—APPEAL—WAIVER.

NICHOLSON *v.* DUFFY.

Where the contestant's attorney, in fraud of his client, waived the right of appeal and filed a new contest on behalf of another against the same entry, the right of appeal was not cut off by the said waiver or the new contest.

Secretary Lamar to Commissioner Sparks, January 20, 1886.

William E. Nicholson contested timber culture entry No. 5685 for the SW. ¼ of Sec. 19, T. 108 N., R. 60 W., Mitchell, Dakota, made by Martin Duffy.

On appeal, your office decided adversely to Nicholson's contest, by letter of June 2, 1885. On June 9, 1885, the local officers sent to Nicholson by mail notice of said decision. On July 26, 1885, Charles Winchester, who appears as attorney of record for Nicholson in said case, filed in your office a waiver of Nicholson's right of appeal, and on the same day offered a contest in favor of Homer Smythe against the same entry. On August 25, 1885, Nicholson, by his attorneys, Washburn & Curry, filed in the local office an appeal from your decision of June 2, which by letter of September 2, 1885, you refused to entertain, upon the ground that Winchester, who appeared as attorney of record for Nicholson, had prior thereto filed a waiver of the right of appeal in behalf of Nicholson; that a new contest by Homer Smythe was on that day allowed against said entry, and that Winchester's action waiving the right of appeal was binding on Nicholson.

A waiver of a legal right to be operative must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from taking advantage of his own act to the injury of another who has acted upon it. *A fortiori* an attorney has no such right, especially when fraud appears as the motive for such act.

Affidavits have been filed in this case to the effect that Winchester made this waiver as a punishment to Nicholson for refusing to pay his fee, and that he initiated the contest of Smythe in furtherance of it. Nicholson also files affidavit denying that he authorized Winchester to

withdraw or waive his right of appeal. Under this state of facts, Nicholson lost no rights by such improper conduct on the part of Winchester, and Smythe acquired none that would defeat Nicholson's right of appeal.

Allowing the time for transmission of notice by mail, as provided for by rule 87 of Rules of Practice, Nicholson's appeal was filed in time.

As the application and accompanying papers show sufficient grounds for granting the right of appeal without requiring the record to be certified, your decision is reversed. You will therefore transmit the record of the case to the Department, notifying the parties that it is pending here on appeal, and that under the rules they have thirty days from date of notice in which to file argument.

PRE-EMPTION—WITHDRAWAL OF PLAT.

HUDSON *v.* DOCKING.

Meagre observance of the requirements of the pre-emption law, pending a prolonged suspension of the township plat, held to be excused where good faith was shown in the maintenance of possession during such period, and compliance with the law after the plat was restored.

Secretary Lamar to Commissioner Sparks, January 20, 1886.

I have considered the case of Thornton Hudson *v.* Richard Docking, on appeal by Hudson from your predecessor's decision of August 25, 1884, holding his pre-emption filing for cancellation, and sustaining Docking's homestead entry, on the NW. ¼ of Sec. 34, T. 1 S., R. 2 W., M. D. M., San Francisco, California.

The land in controversy has for some years been involved in the settlement of the boundaries of the Rancho El Sobrante. Plat of the township embracing it was first filed July 30, 1878, and on August 5, 1878, Hudson filed his said declaratory statement, No. 14,442. In the following October, said plats were suspended, owing to the Sobrante question; and it is stated that your office afterwards held that this tract fell within the limits of the Mexican grant. Said decision was subsequently overruled, and the plats were restored in February 1882; but they were again withdrawn in March 1882, and were finally restored on April 16, 1883. Hudson gave notice August 7, 1883, of his intention to make final proof. In August 1883 Docking settled on the land, and on September 28, following, made homestead entry No. 5600; and on the day set for taking final proof, October 10 following, he appeared and contested Hudson's right to it, alleging and attempting to show non-compliance with the law in the matter of residence and cultivation.

I have carefully examined the mass of testimony taken in this case, and have fully arrived at the conclusion that Hudson settled on the land in June, 1878, in good faith, with a view to acquiring title to it

under the pre-emption laws. There is not only no evidence directly controverting his oath to this effect, but there is uncontradicted evidence sustaining it. Further, there is evidence showing that he at once built a cabin and began to reside in it; that, when the house burned down, he built a second cabin, and when its roof was demolished restored it; that he twice defended his possessory right to the tract in local tribunals, once having judgment against him and in favor of one Haynes, whose superior right he was therefore compelled to purchase; and that he was one of the settlers who engaged in the protracted contest with the Sobrante claimant concerning the limits of the rancho. In various ways, also, it is shown that he exercised the rights of ownership over the tract, in respect of party and other fences and the use of the cabin and land by others; and it is clearly shown that, until Docking "jumped" it, the claim was well-known by all settlers in the vicinity to be his and was respected accordingly. These facts prove beyond a doubt, and in fact it is admitted by counsel for contestant, that, having settled on the land as a pre-emptor, Hudson never abandoned it, but continued asserting his right to it until date of this contest.

The testimony shows that from 1878 until 1883 there was very little, if any, cultivation of the tract. A small part of it was broken in 1878, and, if sowed with grain, as some of the witnesses testify, it certainly never produced any crops. This Hudson admits, explaining the absence of further cultivation, however, by showing his own poverty, the expense of building fences to protect crops, the unrestricted ranging of cattle over the land, the uncertainty whether it was within the limits of the Sobrante rancho, and, finally, that the land as a whole is better adapted and was used for grazing purposes. All these facts I regard as well established, and I think that they furnish a satisfactory excuse for the absence of further cultivation of the soil.

In respect to residence on the land, the testimony for Hudson is weakest. His immediate family (father and brothers) swear that his claim was his only home, and that he resided there from settlement until date of contest. But there is much evidence tending strongly to the conclusion that this residence was not continuous, and was not what the law and the decisions of the Land Department require. Hudson was a single man, it is true, and, being poor, he worked around at various places for day wages; but his cabin was not fitted up for a comfortable home, and he probably lived most of the time with his father, who resided on an adjacent tract and who employed him much of the time. There is no doubt in my mind that, from time to time throughout the five years preceding Docking's settlement, Hudson worked and lived on the land; but I am of opinion that there was not that continuous residence which the law ordinarily requires of a pre-emptor.

The question is, however, whether, under the peculiar circumstances of the case, the Land Department should enforce the letter of the law

and regulations in respect of Hudson's residence and improvement. For the five years referred to, the legal status of this land was very uncertain; it was claimed as part of the Rancho El Sobrante, and was once held by your office to be within said rancho; and the plats were practically in a state of suspension during the entire period. It is manifest that this state of affairs would tend strongly to discourage settlers, and to deter them from making improvements; and it is in evidence that such was its general effect on the settlers in that vicinity. If Hudson had been ousted of his possession by force, the Department certainly would hold him excused from improvement and residence during such enforced absence; I find that such a rule has been recognized in the case of Williams *v.* Price (3 L. D., 486), where a timber-culture claimant failed to comply with the law during a protracted contest; and *a fortiori*, it seems to me, the Department should regard with lenity a partial non-compliance with regulations, when its own act had served notice on Hudson that his rights were extremely doubtful and that everything done on the land was at his peril, and when it had barred all possibility of his making entry during this long period. It is not to be forgotten that Hudson was invited to settle on and claim this tract, by the Land Department's action in 1878, which recognized it as part of the public domain; and therefore it cannot be said that he was chargeable with knowledge of the doubtfulness of his claim when he made his settlement. In view of all the facts in this case, I must hold that Hudson's residence and cultivation prior to the final restoration of the plats in 1883 were sufficient to satisfy the law.

The record shows that there are no equities with Docking. He was fully aware of Hudson's long possession of the land, and of his preemption filing; but he had been informed by some of the neighbors that in their opinion the claim could be "jumped," and he accordingly "jumped" it. He was formally ordered off the land by Hudson, but persisted in remaining and taking his chances; and he thereafter witnessed Hudson's building, fencing, planting, and residence, which are shown to have gone on steadily until date of final proof. At the hearing, his attack was directed at Hudson's failure to comply with the law prior to August 1883, principally, and he did not impeach his proofs of compliance with the law after the land was finally restored to the public domain.

It is shown that Hudson, who had been employed by his father in January 1883, returned to his own land in February, to make certain improvements there, namely, building and repairing fences, repairing his cabin, and plowing and sowing; that he allowed a hunter to stay in his cabin, with whom he frequently slept, and where he was seen by others, until the following June; that he was visited by John True and by his two brothers, who staid with him in June, July and August at various times; that he had in the cabin provisions, a stove, spring mattress, pillow, blanket, plates, etc., and was sometimes seen by the neigh-

bors taking his meals, washing, etc., at the cabin, while some of them at times observed smoke coming from the chimney; that the cabin was inhabited in August, and that he was there and about the land, plowing and fencing, and was met there by Docking within an hour after he "jumped" the claim; that during the same month he contracted for and began to build a small barn, and fenced in his garden, and subsequently made other improvements compatible with his means and the character of the land, upon which he had some eighteen head of his own cattle, besides stock of others; and, generally, that he had no other home than on his land during this period. This testimony shows a bona fide residence on and use of the land as a home from February to October 1883; and it is not overthrown by contestant's witnesses, while to an extent it was confirmed by several of them on cross-examination.

In my judgment, Hudson's proofs are sufficient to entitle him to entry. Wherefore your predecessor's decision is reversed, and you are directed to cancel Docking's entry, and to allow Hudson's pre-emption entry as of the date that he offered to make final proof.

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*RULE OF PRACTICE AMENDED.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 11, 1886.

Rule 108 of Rules of Practice, approved August 13, 1885, is hereby amended so as to read as follows:

"In the examination of any case, whether contested or *ex parte*, the attorneys employed in said case, when in good standing in the Department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field notes, and tract books, and the correspondence of the General Land Office or of the Department not deemed *privileged* and *confidential;* and whenever, in the judgment of the Commissioner, it would not jeopardize any public or official interest may make verbal inquiries of chiefs of divisions at their respective desks in respect to the papers or status of said case; but such inquiries will not be made to said chiefs or other clerks of division except upon consent of the Commissioner, Assistant Commissioner, or Chief Clerk, and will be restricted to hours between 11 a. m. and 2 p. m.

WM. A. J. SPARKS,
Commissioner.

Approved.
L. Q. C. LAMAR,
Secretary.

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* For Rule 108 see page 49 of this volume.

TOWNSITE—SETTLEMENT—RESIDENCE.

ELMER *v.* BOWEN.

A filing is not an essential to the right of purchase under section 2382 of the Revised Statutes.

Residence must be shown to establish the right of purchase accorded to the "actual settler."

After showing qualification to enter the first lot, an entry for an additional lot may be allowed, upon which substantial improvements have been made.

Acting Commissioner Harrison to register and receiver, La Grande, Oregon, October 15, 1884.

I have considered the case of Charles A. Elmer *v.* Winslow H. Bowen, involving Lots 2 and 3, Block 15, town of Baker City, received with your letter of May 17 last.

The records show, that Bowen made town lot cash entry No. 71½ for said lots July 15, 1875. That Elmer filed declaratory statement No. 156, for same lots, December 20, alleging settlement December 16, 1882. That Bowen filed declaratory statement No. 146 for said lots August 24, 1875, alleging settlement March 9, 1874.

Oct. 10, 1883, a hearing was ordered by this office, based upon the affidavits of Elmer and others, alleging that Bowen was not at date of his entry nor at any time prior thereto a resident of Baker City, or upon either of said lots, and that no substantial improvements have been made upon the lots by Bowen. Prior to ordering the hearing it was discovered that Bowen's entry through oversight had not been made a matter of record, the entry papers having lain in your office for years. The entry was originally numbered 71, but No. 71 by another party having passed to patent, No. 71½ was given to Bowen's entry. Hearing was set for December 21, last, and by stipulation the testimony was taken by a referee. You received the testimony March 11, and on April 11, decided: 1st. That Bowen was the owner of sustantial improvements on both lots. 2d. That he never resided thereon, as required by the pre-emption law, and 3d. That his final proof and entry having preceded his declaratory statement the former cannot be sustained. You recommend the cancellation of his declaratory statement and the entry. From said decision Bowen appeals, as to all conclusions except the first.

The issue in the case is, whether claimant had prior to entry, improved or resided upon the lots or either of them, therefore the conclusion as to the entry having preceded the filing is of no consequence in view of the fact that a filing is not necessary in order to make an entry under the act of July 1, 1864 (Sec. 2382, R. S.). Filings are only made for the purpose of operating as notice, that a lot is claimed by a party.

The testimony shows conclusively that Bowen purchased improvements of a former claimant, and has since, and prior to entry, repaired

the same, therefore the only question remaining is, whether Bowen was a settler upon either of the lots prior to entry as required by section 2382, R. S. under which, lots in said town are entered. Said section after providing for the preliminary steps to be taken in laying out a townsite etc. provides for entries as follows: " . . . But any actual settler upon any one lot, as above provided, and upon any additional lot on which he may have substantial improvements, shall be entitled to prove up, and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale." Counsel for Bowen insist that the word "settler" as used in said section cannot be held to mean the maintenance of an actual residence by a claimant to a lot, and cite opinions by Attorney-General Butler, and the case of Allman *v.* Thulon, (C. L. L., 690) in support of their position.

Before considering the testimony as to claimant's residence, the meaning of the term settler as found in said section will be considered. The opinions of Attorney-General Butler applied to the act of May 29, 1830, in which the words "every settler or occupant of the public land" occur. While his views may have governed in the disposition of the public lands under said act, and perhaps some subsequent acts, they have never been adopted or held to apply to the word "settler," and the accompanying language, as found in section 2382, and cannot now be held to govern in cases arising thereunder, because of the words there following the term "settler" which are held to extend its meaning to actual residence. All instructions relative to entries of lots under section 2382 have required actual residence upon one lot by an applicant, and I am unable to discover that in a single instance has the rule requiring such proof been deviated from. The meaning and construction of the term "settler" as found in said section was first considered in the case of Allman *v.* Thulon, on appeal to the Hon. Secretary from the decision of this office. In that case the Hon. Assistant Attorney General held that the term settler applied to a person who made a settlement upon the public land, which indicated a purpose to claim the land, and recommended that the decision of this office be reversed, his recommendation being in part based upon his construction of the word "settler."

In passing upon the case, the Hon. Secretary states that "while not entirely clear in my own mind as to the question of law involved, I cannot perceive sufficient grounds for reversing the decision of your office." The language is " . . . . any actual settler . . . . upon any additional lot in which he may have substantial improvements shall be entitled to prove up, and purchase the same as a pre-emptor etc." The words may fairly be interpreted to mean that a party seeking to enter one lot must possess a qualification to enable him to make such entry, superior to that required to make an entry of an additional lot, for the placing of substantial improvements upon the latter is sufficient, the word settler, whatever its meaning, having no reference thereto. That a special qualification is necessary as to the first lot is

clear and in my opinion, it is actual residence, though "settler" is used. Under the pre-emption law a mere act of settlement, unless actual residence follows does not entitle a party to make entry. The settlement must be followed by a residence. It cannot be doubted that the making of substantial improvements upon an additional lot as provided in section 2382, is as much a settlement, as any act of settlement that can be performed, and what more could an applicant do to entitle him to enter a single lot, unless it be to establish and maintain a residence thereon.

The law certainly requires more of an applicant in entering a single lot with respect thereto, than when entering an additional lot after showing qualification to enter the first lot. It has become a well settled rule, that where ever settlement is required of a claimant to the public land, under any law, relating to the disposal of the public domain, a residence must follow before entry, and though the requirement is provided in express terms in the pre-emption and homestead laws, and the words "residence" and "inhabits" do not occur in section 2382, I am of opinion that by analogy and on the ground of public policy, actual residence should be required of town lot claimants, and so hold.

This office so held in the case of Samuel M. Frank, (2 L. D. 628). The testimony in the case under consideration shows that Bowen for several years including 1874, and 1875, owned and cultivated an interest in a ranch or farm some 15 miles from Baker City. That when in town he kept his team and wagon, in a house or stable on the lots in controversy. That he had a small shed adjoining the stable, boarded up on three sides, where he sometimes kept hay for feeding purposes, and would occasionly sleep when in town. He also ate his lunch there sometimes, but usually took his meals with a neighbor. He never erected a house upon the lot of any character which could be considered a dwelling, and during the time he claims to have resided on the lot, he kept up his ranch, and spent most of his time there. He merely used the lots as a stopping place, and headquarters when in town. After carefully considering the testimony, I must conclude that his residence and interests on the ranch were such as to make that his home especially as it was not denied by him, and the mere sleeping occasionally upon the lots when in town, cannot be considered such a residence as is required in making a town lot entry. The allegation that Elmer has never resided on either lot, or improved them, and cannot therefore contest Bowen's entry, in no manner affects the case, as he is not contesting on the ground that he possesses a prior right, but that Bowen has not complied with law, and a contest in such case can be ordered upon the petition of a party properly corroborated, whether he asserts a prior claim or not. The entry of Bowen, has for the reason stated been held for cancellation subject to appeal.

NOTE,—The foregoing decision was affirmed by Acting Secretary Muldrow, January 23, 1886.

ENTRY—OSAGE TRUST LANDS.

ABRAHAM L. BURKE.

An entry should not be canceled upon the adverse report of a special agent.

To secure the right to purchase these lands, compliance with the requirements of the pre-emption laws with respect to settlement and residence must be shown.

Acting-Secretary Muldrow to Commissioner Sparks, January 23, 1886.

I have examined the appeal of Abraham L. Burke from the decision of your office, dated April 25, 1884, refusing to re-instate his cash entry, covering the NE. ¼ of Sec. 32, T. 30 S., R. 15 E., 6th principal meridian, Independence land district, Kansas, made April 25, 1883.

The record shows that upon the report of a special agent of your office said entry was canceled by your office letter, dated August 6, 1883, and the entryman notified that he would be allowed sixty days within which to show cause why the same should be re-instated.

A hearing was ordered upon the application of Burke, and after a continuance on account of the absence of said special agent, the hearing was held before the register and receiver of said office, the United States being represented by a special agent of your office. Upon the testimony taken, the district land officers rendered their joint opinion that Burke had not resided upon said tract for six months prior to making said entry, and that the house and other improvements were not as substantial as the law required. On April 25, 1884, your office considered the testimony taken at said hearing and found that at the date of filing his declaratory statement Burke had made no settlement on said tract; that his improvements were very meager; that his residence upon the land was not satisfactorily established; and that the final proof offered by the claimant in support of his said entry was untrue. The application for re-instatement was therefore refused.

While it appears that said entry was canceled by your office upon the report of a special agent, which was contrary to law and the established rules of evidence, yet, since a hearing was held upon the application of Burke, at which he appeared with his witnesses, the conclusion of your office not to re-instate said entry will not be disturbed for that reason.

It is urged that Burke is a poor man and that since said entry he has inclosed said tract with a fence, thereby showing his good faith.

The section (2283 Revised Statutes) under which said entry was made provides that "The Osage Indian trust and diminished reserve lands in the State of Kansas . . . . shall be subject to disposal for cash only, to actual settlers, in quantities not exceeding one hundred and sixty acres, or one quarter section to each, in compact form, in accordance with the general principles of the pre-emption laws."

The testimony shows that Burke did not intend to settle upon said tract and make it his home, and that instead of complying with the requirements of the pre-emption laws, he sought to acquire title to said tract by means of proof which he must have known to be untrue.

The decision of your office is accordingly affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM.

CENTRAL PAC. R. R. CO. *v.* WADMAN.

As the right of the company did not become effective until after the public land laws were extended over the Territory, the settlement claim then existing, excepted the land in controversy from the grant.

Acting Secretary Muldrow to Commissioner Sparks, January 23, 1886.

I have considered the case of the Central Pacific Railroad Company *v.* Henry H. Wadman, as presented by the appeal of the former from the decision of your office, dated March 14, 1884, rejecting its claim to Lot No. 2, the SW. ¼ of the NE. ¼, and S. ½ of the NW. ¼ of Sec. 5, T. 6 N., R. 2 W., Salt Lake City land district, Utah Territory.

The record shows that said tracts are in an odd numbered section within the limits of the grant to said company by the act of Congress approved July 1, 1862 (12 Stat., 480), and also the act of Congress approved July 2, 1864, amendatory of said act (13 Stat., 356). The right of the company is held to have attached to the lands granted for its benefit upon the receipt and approval of the map of the definite location of its road on October 20, 1868.

After due notice by publication, the agent of said company having been specially cited to appear, Wadman offered his final proof made before the register of said land office. The agent of said company appeared at the time and place of making said final proof and cross-examined the claimant. The cross-examination tended to show that the claimant had previously applied to enter said tracts and was refused by the register and receiver, for the reason that his naturalization papers were illegal, the same having been issued by the probate court of said Territory; that thereupon Wadman filed with the clerk of the district court of said Territory his declaration of intention to become a citizen of the United States, and was duly naturalized by said court on March 31, 1883; that he subsequently to filing his said declaration of intention applied to enter said tracts, and was refused by the district land officers, because said tracts had been withdrawn for the benefit of said company, and that he applied to said company in 1874 to purchase said land, and was assured that, as he "was a permanent settler," he should have the first chance to purchase the land in controversy.

The final proof submitted conclusively shows that Wadman has a family; that he established his residence on said tracts in April, 1861; that he has continuously resided upon and cultivated said land since said last named date, and that his improvements are worth two thousand dollars. The register and receiver accepted said proof and issued final certificate No. 2323, dated March 31, 1883. From their action no

appeal appears to have been filed. But your office, on March 14, 1884, considered said entry and held the same for approval, subject to the right of appeal by said company.

The ground of appeal insisted upon are—

1st, That said land was granted to said company;

2d, That the same was withdrawn for its benefit in the year 1865, upon the filing of its map of general route;

3d, That when the right of said company attached, as held by your office on July 18, 1868, Wadman had not made a legal declaration of intention to become a citizen, and

4th, That prior to the act of Congress approved July 16, 1868 (15 Stat., 91), there was no authority for pre-emption and homestead settlements in said Territory, and that if settlements were sanctioned prior to that date, they were without authority of law, and could not have the effect of depriving said company of the lands granted by said acts.

It is not denied, and the record shows, that Wadman made his first declaration of intention to become a citizen of the United States before the clerk of the probate court of Weber county, in said Territory, on March 4, 1860, and under the ruling of this Department, in the case of John Skelton (4 L. D., 107), said declaration of intention was legal, and qualified said Wadman so far as citizenship was required to make an application for land subject to entry under the homestead laws.

Again, by the 4th section of said amendatory act of 1864, it is provided, among other things, that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim." It is clear that under that provision it was not the intention of Congress to grant lands upon which there were improvements, and to which there was a claim such as is asserted by Wadman in the case at bar. See Kansas Pacific Railway Company *v.* Dunmeyer, (113 U. S., 629).

It will be quite unnecessary to consider the status of said land at the dates of said granting acts, or whether at the time Wadman settled he could acquire any legal claim to said land, for it is apparent that the date when the right of the company attached to its granted lands was subsequently to the time which, by the act of Congress approved July 16, 1868, (15 Stat., 91), the pre-emption, homestead, and other laws of the United States for the disposal of the public lands, were extended over said Territory.

The decision of your office is accordingly affirmed

PRACTICE—APPEAL—SPECIFICATION OF ERROR.

PEDERSON *v.* JOHANNESSEN.

Under the present practice it lies with the Department to determine whether a case shall be dismissed for defect in the appeal from the Commissioner's decision.

An allegation that a decision is "contrary to the evidence," is not such a specification of error as will entitle a party to be heard on appeal.

Secretary Lamar to Commissioner Sparks, January 25, 1886.

I am in receipt of your office letter of January 14, 1886, transmitting the papers in the case of August Pederson *v.* Jonas Johannessen, involving the NE. $\frac{1}{4}$ of Sec. 2, T. 129, R. 62, Aberdeen district, Dakota, on appeal by Johannessen from your office decision of March 3, 1885.

In said appeal Johannessen demands that the decision be reversed, "as the same is contrary to the evidence."

Your office, July 10, 1885, notified the local officers that the appeal was defective, in that the grounds of error were not stated in sufficiently explicit terms, and directed them to so inform appellant, in order that he might amend the same, in accordance with rule 82 of Practice.

August 13, 1885, the register of the Aberdeen office informed you that more than twenty-five days had elapsed since the notification by him of the attorney for Johannessen, and that no response thereto had been received. Thereupon your office transmits the papers in the case to me, for action under the first clause of said rule 82 of Practice. Said rule is as follows:

"When the Commissioner considers the appeal defective he will notify the party of the defect, and if not amended within fifteen days from the date of service of such notice, the appeal may be dismissed by the Secretary of the Interior, and the case closed."

Under the rule as it formerly read the appeal could be dismissed by the Commissioner; but the rule was changed in the interest of parties appealing, in order that the Department might have an opportunity of passing upon the question whether the Commissioner was correct in his decision as to what constituted a defect in the appeal.

In my opinion the appeal in the present case is clearly defective. Rule 88 of Practice says:

"Within the time allowed for giving notice to file, the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains."

The appeal in the case at bar entirely fails to designate clearly and concisely the errors complained of, but leaves the opposing party, your office, and the Department, wholly in the dark as to the particular respects in which appellant deems your office decision to be contrary to the evidence.

Said appeal is therefore dismissed under the rule.

EFFECT OF PATENT—ACT OF APRIL 21, 1876.

WISCONSIN CENTRAL R. R. CO. *v.* STINKA.

Application for the confirmation of an entry and the issuance of patent thereon under the first section of the act of April 21, 1876, must be denied where it appears that title has already passed from the government.

Secretary Lamar to Commissioner Sparks, January 25, 1886.

I have considered the case of the Wisconsin Central Railroad Company *v.* Michael Stinka, involving the N. ½ of NE. ¼ and NE. ¼ of NW. ¼, Sec. 33, T. 25 N., R. 9 E., Wausau, Wisconsin, on appeal by the company from the decision of your office dated April 22, 1884, adverse to it.

The tracts in question are within the ten mile (granted) limits of the grant in aid of the Portage, Winnebago and Superior—now Wisconsin Central R. R.—act of May 5, 1864, (13 Stat., 66), the withdrawal for which was received at Stevens' Point—now Wausau—land district, January 10, 1870. On the 12th of May, 1882, said tracts were selected by the railroad company, and the same were patented November 23, 1882.

It appears from the record that one C. Prondzinski made homestead entry No. 542 for the NE. ¼ of said section February 22, 1868, and the same was canceled July 27, 1869, as the result of a contest with said Michael Stinka. On the 24th of April, 1883, Stinka made homestead entry No. 4085, for the tracts in question, alleging settlement in June, 1869, continuous residence thereon, and improvement and cultivation of the tract to date. His improvements appear to be of considerable value. He further alleges that he is a Prussian by birth and is not acquainted with the land laws of the United States; that he supposed until recently that his title to said land was good; and that in 1869 and also in 1880 he applied at the local office to make homestead entry of said lands, but was refused by the local officers. Upon receipt of a letter from W. K. Mendenhall, attorney for said railroad company, dated April 14, 1884, and asking the cancellation of said homestead entry of Stinka, your office on April 22, 1884, rendered the decision from which the appeal herein was taken.

Said decision held that Stinka's entry "may be confirmed and patent issue thereon, under the first section of the act of April 21, 1876 (19 Stat., 35)," and accordingly denied the request of the railroad company.

Said section provides:

"That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the

General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

What effect this section of the statute would have in this case if the title to the land in controversy was still in the United States will not be discussed herein, as that question does not enter into a determination of the case as before me. In order that the United States may convey title by patent or otherwise, or confirm an entry, the title to the land involved must be in the government. Consequently, if it be ascertained that the United States have no title to the lands involved in this case, that said lands have ceased to be a part of the public domain, then, and in that event, this Department has no jurisdiction over such lands, and can determine no conflicting claims respecting them. It is conceded on all hands that patent for the lands in controversy was issued to this railroad company on the 23d of November, 1882. As to the validity of said patent it is not our province to determine herein. It is sufficient in the determination of this case that the patent was issued by the Land Department acting within the scope of its authority. In the case of the United States *v.* Stone (2 Wall., 525,) the court say: "A patent is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal." See also Hughes *v.* United States (4 Wall., 232). Again, in the leading case of Moore *v.* Robbins (96 U. S., 530), the court say: "The functions of the Executive Department necessarily cease when the title has passed from the government, and the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the Secretary nor any other executive officer can entertain an appeal. He is absolutely without authority." This doctrine was further confirmed and explained in the later case of United States *v.* Schurz (102 U. S., 378), wherein it was held that the delivery of the patent to the grantee is not essential to pass title, such title being title by record.

This ruling has been followed by this Department in numerous cases and is so well settled that it is unnecessary to discuss the question further. See Willis F. Street (2 L. D., 116). Heirs of John Lowe (ib., 386), Baker *v.* State of California (4 ib., 137), George W. Hendry (4 ib., 173), and numerous cases not reported. The title to the lands in question is not in the United States, and this Department has no jurisdiction over them. If the patent to the railroad company is for any reason invalid, and the settler herein has been injured in any way, the courts are the proper tribunals to adjudicate the matter.

For the reasons herein set forth, the decision appealed from is reversed; but Stinka's entry will be allowed to remain of record.

PRACTICE—LAWS OF THE STATE.

DEWEY *v.* CHRISTIE.

Proceedings before the district offices are controlled by the rules of practice adopted by the Department, and not by the laws regulating civil procedure in the States and Territories.

Secretary Lamar to Commissioner Sparks, January 25, 1886.

I have considered the case of Artemas W. Dewey *v.* Louis Christie, involving the timber-culture entry made by the latter, May 3, 1880, upon the NE. ¼ of Sec. 18, T. 6 S., R. 5 W., Concordia district, Kansas, on appeal by contestant from your office decision of December 23, 1884, dismissing the contest.

The complaint alleged failure to comply with the law in regard to planting and cultivation. Hearing was held February 19, 1884. After the testimony on the part of the plaintiff was closed, the defendant filed a demurrer thereto upon the ground that no failure to comply with the law had been shown. The local officers were requested to render an opinion thereon, the counsel for the defendant stating that he should submit no testimony except in the event of your decision overruling such demurrer. They declined to render any decision upon that point, and declared the case closed. The defendant excepted. The only testimony in the case, therefore, is that submitted by the plaintiff.

Your office decides that the action of the local office in refusing to either sustain or overrule the demurrer was error—quoting in support of this position from section 275 of the Code of Civil Procedure of the State of Kansas, which provides that, after the party on whom rests the burden of proof "has closed his evidence, the adverse party may interpose and file a demurrer thereto, upon the ground that no cause of action or defense is proved. If the court shall sustain the demurrer, such judgment shall be rendered for the party demurring, as the state of the pleadings or the proof shall demand. If the demurrer be overruled, the adverse party will then produce his evidence."

Your office decision asserts that the local officers should have pursued the course above indicated. This is error. Proceedings before the local land officers are not controlled by the provisions of the codes of the several States or Territories in which such land offices are situated, but by the Rules of Practice of this Department—which recognize no such course of procedure as counsel for contestee demanded, and as your office decision directs, in the case at bar.

Said decision further holds that the testimony taken in the case "fails to establish facts sufficient to warrant the cancellation of the entry"—therein reversing the decision of the local officers.

The testimony indicates very meager results in the shape of timber actually growing upon the tract. This seems to be accounted for, in part at least, by drouth; and while there may have been some neglect,

I do not consider that bad faith in the premises is affirmatively shown. In view of the facts set forth, and of the principle of law that the burden of proof is upon the attacking party, I concur in your opinion that a case has not been made out against the contestee, and that the contest should be dismissed.

With the modifications hereinbefore indicated, your office decision is affirmed.

COMMUTATION ENTRY—RESIDENCE—INNOCENT PURCHASER.

R. M. CHRISINGER.

The proffer of commutation proof within the shortest possible period after entry, invites special scrutiny into the qualifications of the settler and his compliance with the law.

Residence must be shown as an essential pre-requisite to the right of commutation.

The purchaser after commutation entry, and prior to patent, takes no better title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the Land Department.

An entry will not be sent to the Board of Equitable Adjudication where there is inexcusable failure to comply with the law.

Secretary Lamar to Commissioner Sparks, January 25, 1886.

I have before me the appeal of R. M. Chrisinger from the decision of your office rendered December 1, 1884, holding for cancellation his commuted homestead entry for the SE. $\frac{1}{4}$ of Sec. 6, T. 4 N., R. 32 E., La Grande, Oregon.

Chrisinger made his original entry for this land December 5, 1882, and submitted commutation proof thereon June 9, 1883, on which final certificate issued June 18, 1883.

Acting upon the adverse report of a special agent, your office February 16, 1884, ordered a hearing as to the character of the entry, which was held on April 24, 1884. As the result of this hearing the local office advised the cancellation of Chrisinger's entry, and your office affirming such conclusion, held his entry for cancellation, on the ground that it was made for the benefit of one D. W. Bailey, and that said Chrisinger did not comply with the law in the matter of residence.

The day following the issuance of final certificate Chrisinger, for the named consideration of $500, transferred the land, by warranty deed, to said Bailey, who, after placing a mortgage thereon in favor of the American Mortgage Company for $850, sold the said land, November 24, 1883, for the sum of $900 to John J. Balleray.

The conclusions heretofore reached in this case, especially with respect to the finding that the entry was made for Bailey's benefit, rest, in the main, upon the testimony of the special agent, there having been no other witness sworn on behalf of the government at the hearing.

The special agent visited the land in October, 1883, and at the same

time procured from Chrisinger an affidavit, in which it was substantially admitted that the entry was made for Bailey's benefit. At the hearing, however, Chrisinger testified to the effect that the special agent obtained the said affidavit by means of threats, together with promises of immunity, and that several important changes were made in said affidavit after its execution. That as a matter of fact the entry was made in entire good faith and not for the use of Bailey. In this Chrisinger is corroborated by Bailey, who swears that he had no interest whatever in the entry, further than that he loaned Chrisinger the money to make final payment for the land, with the understanding that he should be secured by mortgage on the land after the issuance of final certificate. That subsequently Chrisinger offered to sell the land to him and that he concluded to purchase. There is also evidence to show that Chrisinger tried to sell to other persons before he closed with Bailey, so that to my mind this part of the charge does not seem to be made out. This conclusion is reached without allowing any weight to the charge made against the special agent; a motive apparently sufficient to account for Chrisinger's affidavit being found in a disagreement that arose between him and Bailey over an attorney fee that Bailey claimed from him in another matter. As to the manner in which Chrisinger complied with the law, the evidence shows that he is a single man, and that he built a house on the land December 4, or 5, 1882, of the value of $33.00, placing therein bedding, bench, shelf, and carpet. He slept on the land the night after he built the house. Was there then two nights and one day. In January he visited the land, staying a day and a night. He went to the land as often as once in two weeks, staying each time a day or two. Was at other times at Pendleton, fourteen miles away, staying with his father, but had no home save that on the land. In February was there at least four nights; in March three nights; in April six days or nights; May seven or eight, and was on the land once in June before final proof. He alleges extreme cold weather, and his being obliged to work for a living, as excuses for his absence from the land. His improvements comprised, in addition to the foregoing, eighteen acres of breaking and a half mile of wire fence, valued at about $150.

The proffer of commutation proof within the shortest possible period after entry suggests naturally that the settler intended from the first to avail himself of his statutory right of purchase and invites special scrutiny into his qualifications and compliance with the requirements of the law.

Chrisinger appears to be qualified to make the entry desired, and to have complied with the law satisfactorily, so far as cultivation and improvement are concerned, and only to have come short in the matter of residence. The entry was made at the beginning of winter, when the entryman knew that without extraordinary provision against the inclemency of the approaching season, it would be practically impossible

for him to remain on the land. Hence, when within six months after entry he made his commutation proof, with but little to show in the way of actual residence, it was not consistent with good faith for him to allege climatic reasons to excuse his failure to comply with the law. Cleaves *v.* French (3 L. D., 533).

Though residence is often largely a matter of intention, yet it can usually be readily ascertained from the acts of the claimant. The intention to claim a residence, unless supported by acts based upon and consistent therewith, will not constitute residence, under any law, no matter how honestly entertained. So, sleeping on a claim a night, with hasty visits to the land, at long intervals thereafter, has always been held by the Department as insufficient to establish or maintain residence. Elliott *v.* Lee (4 L. D., 301). Again, where temporary absence from the land has been justified, such conclusion has invariably rested upon the finding that residence had been fairly established prior thereto. J. H. Abrams (3 L. D., 106).

Subjecting the evidence herein to the test of the foregoing rules, it becomes obvious that, if the right of Chrisinger to purchase depends upon his residence, he has made out no claim to title; and additional force is lent to this determination when it is remembered that it rests solely upon the testimony of Chrisinger himself.

Must residence be shown as an essential prerequisite to the right of commutation?

Section 2301 of the Revised Statutes, which permits the cash purchase of land entered as a homestead, follows in substance the language of section 8 of the act of May 20, 1862 (12 Stat., 392), and provides: "Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine, from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights."

The right to consummate a homestead entry by cash purchase, as will be observed, is coupled with the condition that the requisite proof shall be made as provided in the pre-emption law, hence the regulations adopted under that law governing final proof, including that with respect to a required term of six months' residence, have been uniformly applied to cases of purchase under this section. Joseph Hoskyn (4 L. D., 287). So, without residence shown, the right of purchase does not exist.

It is insisted by counsel, and ably argued at length, that the assignees of Chrisinger, being *bona fide* purchasers after entry, are entitled to intervene and have their interests protected as they took without notice of any defect in the final proof.

This proposition is not tenable. It involves the principle that al-

though the claim for title while in the hands of the entryman is worthless, on account of his failure to comply with the law, such claim may be strengthened and made a matter of absolute right by virtue of a transfer to an innocent purchaser. The converse of this, however, is true. Conceding the right of sale after the issuance of final certificate and prior to patent, the purchaser takes no better claim for title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the Land Department. Myers *v.* Croft (13 Wall., 291); Margaret Kissack (2 C. L. L., 421). Again, the Department must deal directly with its own vendees, with the persons with whom it contracts. It cannot undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matter for determination in the courts. C. P Cogswell (3 L. D., 23).

It is also suggested by counsel that if Chrisinger's entry in its present condition should not be approved for patent, it is a proper case for reference to the Board of Equitable Adjudication.

This suggestion is met by section 2457 of the Revised Statutes, which defines the character of entries for submission to the Board as cases "where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake, which is satisfactorily explained." Chrisinger's case fails on the finding that he has not substantially complied with the law, hence his entry is not within the provisions of the statute.

The decision of your office is therefore affirmed.

PRACTICE—REJECTED APPLICATION.

MAHIN *v.* CHAPPELL.

On the presentation of an application for public land, the local office, in the event of not accepting the same, should duly indorse upon such application the reason for such action, and note upon the record a memorandum of the transaction.

Secretary Lamar to Commissioner Sparks, January 25, 1886.

I have considered the case presented by the appeal of Matthew S. Mahin from your office decision of June 23, 1883, affirming that of the local officers in refusing his application to make timber-culture entry for the SE. ¼ of Sec. 19, T. 112, R. 63, Mitchell (now Huron) land district, Dakota.

The facts, as set forth by affidavit of said Mahin, and supported by the records of the local office in so far as they are susceptible of corroboration thereby, are in substance as follows:

April 9, 1882, Mahin applied to the register and receiver of the land office at the Mitchell (now Huron) district, Dakota, to file upon and enter, under the timber-culture act of June 14, 1878, the tract above

described. The affidavit accompanying said application was made out upon the usual printed form, with the exception that at the end thereof, after the words, "and that I have not heretofore made an entry under this act, or the acts of which this is amendatory," affiant added, "Except timber-culture entry No. 2699 for the SW. ¼ of Sec. 26, 5 N., 12 W., 6th P. M., Bloomington, Nebraska, district, for which right was restored by Commissioner's letter 'C,' August 1, 1879, to Reg. and Rec., Bloomington, Nebraska."

Thereupon the local officers, stating to affiant that they "had never had a decision on such a case for a precedent" refused to accept and place upon record his application. Affiant then requested and demanded that the register and receiver should *reject* his application, endorsing thereon their reasons for so doing, in order that he might appear of record and appeal from their decision—at the same time tendering the fee and commissions allowed by law to the register and receiver; but they refused to either accept, or reject, or to take official cognizance of his application in any manner whatever. Subsequent events can best be narrated in the language of the register's letter of June 17, 1882, to your office:

"Mr. Mahin made affidavit alleging that he had been allowed by the Commissioner to make a timber-culture entry without fees and commissions, but had no evidence of the fact which would allow or warrant me in placing said entry upon the plat or record. He then wished to leave the papers until his return to Bloomington, Nebraska, when he would forward the evidence allowing him to make a second timber-culture entry. The papers were left with a clerk in the office. On May 3, 1882, the timber-culture entry of George H. Chappell, regular in form and accompanied by the proper fee and commissions, were presented by his attorney, for the SE. ¼—19—112—63. The circumstances were at the time explained to the attorney who presented the papers for Chappell, and he wished to file the same, unless rejected by the office. In my opinion no valid reason for rejection could have been placed upon the application of Chappell. It was therefore received and placed upon the plat and record. From this action Mr. Mahin appeals. * * * * The entry of Mahin was certainly not complete until the reception of the certified copy of Commissioner's letter 'C,' August 1, 1879, which was not until May 20, 1882, at which time the tract was embraced in the legal entry by Chappell."

The Commissioner's letter of August 1, 1879, referred to above by the register, was one authorizing Mahin to make a second entry—a former entry, made in the Bloomington land district, having been canceled by the Commissioner "without prejudice." Your office decision holds, in view of the facts above stated, that—"The register's action was proper, as the party might never have returned. Mahin's appeal is therefore dismissed."

I cannot concur in the conclusion of your office. The action taken by the local office was such as to defeat the purpose of the law and the ends of justice, by a denial of statutory rights to the first applicant, who made affidavit that he possessed, and who as the event proves *did* pos-

sess, all the legal qualifications of a timber-culture appl cant. The reasons given for the course pursued are insufficient and inconsistent. The register says he had no evidence of Mahin's right to make a second timber-culture entry. This was one among the elements which constituted Mahin's qualifications as an entryman, and the register had the same evidence respecting it that he had of Mahin's other qualifications—to wit, the oath of the applicant. And this was all the proof he had of Chappell's qualifications. This was at least *prima facie* proof; and if the register, in the absence of positive instructions or precedents to guide him, had in his discretion demanded additional documentary proof before allowing the application, he ought to have followed the course prescribed in Rule 66 of practice:

"For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands, the following rules will be observed:

1. The register and receiver will endorse upon every rejected application the date when presented, and their reasons for rejecting it.

2. They will note upon the records a memorandum of the transaction."

Had this been done, all subsequent complications would have been avoided; any applicant of later date would have been met by Mahin as contestant with right initiated at an earlier date, which would have become the paramount right in case he produced, as he did produce, the required proof of his qualifications. The register places himself in this dilemma: he writes that he allowed Chappell's application "because no valid reason for rejection could have been placed upon it." Then he ought to have allowed Mahin's application "because no valid reason for rejection could have been placed upon" that—or else he ought to have rejected it, and endorsed upon it his reasons for so doing as directed by Rule 66. Equally invalid is the argument of your office that Mahin might never have returned with the documentary proof required, and reiterate his demand for the acceptance of his application. Said application was continually present and pending in your office, and he was diligently seeking to procure, and within a reasonable time did procure, the documentary evidence demanded. He had announced his intention to procure the document requested; he had manifested in his every act a desire to make entry of the tract in question; and the local officers might as well refuse to allow Chappell's entry, because it was barely possible that after application he might never claim and cultivate the land, as to refuse Mahin's application because it was barely possible he might never return. In both cases, and equally, there was a manifest intention to obtain the land, if possible. Finally the equities are all on the side of Mahin; he was the prior applicant, he has made the affidavit required by law, and produced the documentary evidence demanded by the local officers, to prove his qualifications as a timber-culture entryman; he has proceeded strictly according to the rules and regulations of the Land Department; he has exhibited laud-

able diligence in pursuit of his rights. There are no equities on the side of Chappell; the facts in the case were fully stated to his attorney, who deliberately decided to run the risk of applying for the tract notwithstanding the prior application of Mahin.

It is to be observed, however, that the evidence now before the Department is wholly of an *ex parte* character—the affidavit of Mahin and the statement of the register; Chappell has not been heard from in the case. You will therefore order a hearing in the case, at which Mahin will be given an opportunity to substantiate the statements made in his affidavit, and whereto Chappell will be cited to show cause why his entry should not be canceled.

RAILROAD GRANT—OFFERED LAND.

POINTARD *v.* CENTRAL PAC. R. R. CO.

An unperfected settlement claim for offered land, existing at the date the grant becomes effective, held sufficient to except the land therefrom.

Secretary Lamar to Commissioner Sparks, January 27, 1886.

I have considered the case of Auguste Pointard *v.* The Central Pacific Railroad Company, as presented by the appeal of said company from the decision of your office, dated March 6, 1884, rejecting its claim for the SE. ¼ of Sec. 27, T. 13 N., R. 7 E., M. D. M., Sacramento land district, California, and allowing Mrs. Pointard to make homestead entry of said tract.

The record shows that the land in controversy is within the limits of the grant by act of Congress, approved July 1, 1862, (12 Stat., 489,) to said company, the right whereof to the public lands in the odd numbered sections is held to have attached by filing its map of definite location on June 1, 1863.

On July 10, 1883, Mrs. Pointard made application to enter said tract, basing her claim upon the allegation under oath, duly corroborated, that long prior to the date of said grant, and at the time when the right of said company attached, the land was occupied and cultivated by a duly qualified settler entitled to pre-empt said tract, which claim served to except said tract from said grant. At a hearing, duly ordered, Mrs. Pointard appeared, with her witnesses, and offered testimony in support of her claim. The company was represented at the hearing by counsel. From the testimony submitted at said hearing, the register and receiver were of the opinion that Mrs. Pointard had sustained her allegations, and should be allowed to enter said tract. Upon appeal, your office affirmed the action of the district land officers, and held the selection of said tract for cancellation.

It was strenuously insisted by the resident counsel for said company, upon an application for review of said decision, that said claim relied

upon by Mrs. Pointard was for *offered* land, and under the ruling of this Department in the case of said company *v.* Orr (2 L. D., 525,) the claim had become *extinguished* and could not serve to except the land from the grant.

The case above cited is not exactly similar to the one under consideration, and if it was, it has been subsequently modified by the decisions of this Department, notably in the case of said company *v.* Wolford's heirs (3 L. D., 264), wherein it was held that although Wolford failed to file for the tract at the date when the right of said company attached, yet he had a valid pre-emption claim at that date, which served to except the land from the grant. To the same effect are the decisions in the case of Emmerson *v.* said company (3 L. D., 117), and on review, (idem., 271).

A careful examination of the whole record discloses no reason why said decision should be reversed, and the same is accordingly affirmed.

PRACTICE—APPEAL.

FULTZ *v.* ELDER.

The case being dismissed by the local office, on the motion of the contestee, and no appeal taken therefrom, it was error to thereafter hold the entry for cancellation, and a further hearing is accordingly ordered.

Secretary Lamar to Commissioner Sparks, January 25, 1886.

I have considered the contested case of George A. Fultz *v.* William A. Elder, on appeal by the latter from your office decision of December 3, 1884, holding for cancellation his homestead entry for the SW. ¼ of Sec. 13, T. 1 N., R. 25 W., Bloomington, Nebraska.

Elder made entry October 20, 1879, and on April 12, 1884, Fultz gave notice of contest, alleging abandonment.

Notice issued citing the parties to appear at the local office on May 23, 1884, and furnish testimony concerning said alleged abandonment, and appointing a certain notary public to take testimony at Beaver City, Nebraska, on May 20. On said last date contestant submitted his testimony at Beaver City, claimant not appearing. The allegations therein set forth, if true, clearly warrant a cancellation of the entry. The testimony was received at the local office on May 22, and on the following day—the day set for trial—claimant appeared specially, and filed motion to set aside the notice in the case, for the reasons:

1st, The notice does not state the land office at which said entry was made.

2d, The return to said notice does not show the place of service.

3d, There is no certificate showing that the notary administering the oath to the person who made said return *was* a notary.

The local officers sustained said motion and set aside said notice.

The record fails to show any further proceedings at that date. The papers were transmitted to your office, endorsed, "Decision in favor of contestee. No appeal taken July 24, 1884," and signed by both local officers. On examination of said papers, and in the absence of an appeal by contestant, your office held that the register and receiver erred in setting aside said notice; that the notice was sufficient, and that the testimony warranted a cancellation, and thereupon held said entry for cancellation. I concur in the finding that said notice was sufficient, and that the local officers erred in holding otherwise. The land office at which said entry was made *is* stated; and the seal of the notary attached to said affidavit is sufficient in this case. But the fact remains that the local officers sustained the motion to set aside the notice, and the effect of that action was to dismiss the contest as it then stood. Claimant was not obliged to take further action in the matter until served with notice of appeal. No such appeal was ever taken.

The action of your office in holding said entry for cancellation under such circumstances was erroneous, and is hereby set aside; and said decision, in that far, reversed.

Claimant states, in an affidavit filed on appeal, that the allegations of abandonment are false; that he rested on the decision of the local office, and that he believed said prosecution had been abandoned, until he was served with notice of your office decision. This case is further complicated by the fact that on November 10, 1884, claimant submitted his final proof, and the local officers approved the same and issued final certificate, No. 5410, to Elder. This action was not communicated to your office until after said decision of December 3, 1884.

You will instruct the local officers to notify the parties hereof, and to fix another day for hearing, according to the rules of practice, at which testimony may be taken as to the charges in the original affidavit of contest. Said final certificate, pending such contest, will be suspended.

PRE-EMPTION—QUALIFICATION OF SETTLER.

HATCH *v.* VAN DOREN.

Under the laws of Dakota, a deed from the husband to the wife is permissible, and a conveyance so made by the pre-emptor, apparently in good faith, prior to his filing, followed by a conveyance of record to a third party, before the inception of an adverse claim, removes any objection to the pre-emption claim under the second clause of section 2260 Revised Statutes.

Secretary Lamar to Commissioner Sparks, January 27, 1886.

I have considered the case of Elmer A. Hatch *v.* Thomas H. Van Doren, as presented by the appeal of Hatch from the decision of your office, dated October 10, 1884, affirming the action of the district land officers in awarding the NW. ¼ of Sec. 18, T. 106 N., R. 52 W., Mitchell land district, Dakota Territory, to Van Doren.

The record shows that Van Doren filed his pre-emption declaratory statement upon said tract on December 20, 1880, alleging settlement thereon same day. On March 8, 1881, Hatch made homestead entry of said tract. Van Doren gave due notice by publication, in which Hatch was specially cited to appear before the register and receiver and show cause why Van Doren's final proof and payment should not be received. At the time and place designated, both parties appeared with their witnesses, represented by counsel, and offered testimony. It was alleged by Hatch that Van Doren was not qualified to make said settlement, for the reason that he moved from land of his own to reside on the tract in question, and that he had not resided upon the land as required by law. It appears that Van Doren made homestead entry of the NE. ¼ of Sec. 12, T. 106 N., R. 53 W., and final certificate issued thereon September 11, 1880. On the same day, as appears from a duly certified copy of the record, Van Doren conveyed said tract, by warranty deed, to Amelia Van Doren, his wife. Said deed was duly acknowledged on the same day and filed for record on January 26, 1881. On March 1, 1881, Mrs. Van Doren conveyed the tract covered by said homestead entry to one Philip H. Harth, which conveyance was duly acknowledged and filed for record with the proper officer on March 4, 1881. On March 8, 1881, Hatch made homestead entry for the tract embraced in Van Doren's said filing. The testimony shows that the real consideration for said deed to his wife was a liability incurred jointly with said Harth by reason of signing an appeal bond to reverse a judgment for the sum of five hundred dollars recovered against said Van Doren. Said judgment was affirmed in the district court of said Territory and the land was conveyed to Harth, as aforesaid.

It does not appear that said conveyance by Van Doren to his wife was fraudulent. The laws of said Territory permit the husband and wife to contract with each other (Dakota Code, Vol. 2, p. 753, Sec. 79), and the conveyance to Harth was of record prior to the time when Hatch made his homestead entry, and he was charged with notice of its contents.

It is strenuously insisted that the residence was not such as the pre-emption laws require. The evidence is conflicting on this point. It is shown that Mrs. Van Doren was in bad health for some time prior to March 3, 1881, when she died, and was buried on the pre-emption claim of her husband. The preponderance of the proof shows that from the time of his wife's death, which was prior to the date of Hatch's entry, Van Doren's residence was continuous upon the land in controversy up to the time of making his proof, which was for a period of more than seven months. The register and receiver so found, and your office affirmed their finding. There does not appear to be any good reason for disturbing the decision of your office that the land should be awarded to Van Doren.

Said decision is therefore affirmed and Hatch's entry will be canceled.

REVIEW DENIED.

CLARK *v.* TIMM.

Motion for review of departmental decision of October 6, 1885 (4 L. D. 175), denied by Secretary Lamar, January 29, 1886.

RAILROAD GRANT—PRIVATE CLAIM.

SANSOM *v.* SOUTHERN PAC. R. R. CO.

Under the general rule that the judgment of a court cannot be attacked in a collateral proceeding, the question as to whether the Department had legal jurisdiction of the matters formerly acted upon herein, will not be entertained.

Specifically defining the exterior boundaries of the Rancho Azusa and determining the settlement of the claim therefor, it is held in conclusion that said claim was *sub judice* until May 29, 1876, when patent issued thereon, consequently that the odd numbered sections within the common limits of said claim and the grant of March 3, 1871, to the company were in reservation and did not pass under said grant.

Secretary Lamar to Commissioner Sparks, January 30, 1886.

I have considered the case of Elias Sansom *v.* Southern Pacific Railroad Company, involving the NW. $\frac{1}{4}$ of Sec. 7, T. 1 S., R. 10 W., S. B. M., Los Angeles land district, California, on appeal by the company from your office decision of December 31, 1883, permitting Sansom to make pre-emption filing for the land described.

The tract is within the twenty miles (granted) limits of the grant of March 3, 1871, (16 Stat., 579,) to the company, which became effective April 3, 1871, and the withdrawal for which was made May 10, 1871. Township plat was filed in the local office April 21, 1877. April 19, 1883, Sansom applied to make pre-emption filing, alleging settlement October 31, 1881.

The decision appealed from held that, as shown by the records of your office, "said tract of land was within Azusa Rancho at the date of the railroad grant, and was not excluded therefrom until May 29, 1876, the date of the patent of the final survey of said rancho; and under the Newhall-Sanger decision (92 U. S., 761), and the excepting clause of the act, was excepted out of the railroad grant." The authority cited as a basis for such conclusion was the decision rendered February 5, 1883, by the Department, in the case of Eberle *v.* Southern Pacific R. R. Co. (10 C. L. O., 13), which involved land in the same section as that now in dispute.

The main ground of objection to the decision is found in the allegation contained in the appeal, "that the land involved herein is not within the claimed limits of the Azusa Rancho."

The finding of fact by your office decision is thus directly traversed by the appeal, and presents for my consideration a question which can

only be determined by an examination of the grant diseño, the petition for confirmation, the exceptions to the surveys, (if any,) and such other evidence as may tend to throw light upon the matter in controversy.

Upon an examination of the records of your office, relative to the Azusa claim and grant, I find in the petition, dated August 17, 1841, of Luis Arenas, the claimant under said grant, the following language: "That having conveyed myself to the western part of the tract, which contained a piece of unoccupied land and destitute of water, the greater part of it composed of desert shrubbery; that said land forms a small tongue, bounded by the river of San Gabriel and the road of San José; that its extent will not be more than one league, which I request may be added to me in property, joined to property which I possess," etc.

By these last words, he evidently referred to land owned by him on the east, said land forming a part of the grants San José and San José addition, the first named of which had on April 15, 1837, been made to Ygnacio Palomares and Ricardo Vejar. The same was regranted March 14, 1840, to Palomares, Vejar, and Arenas, jointly. At the same time and by the same grant, they were also declared joint owners of San Jose addition.

Upon examination of the petition of Arenas, Jimeno, acting governor, on the 8th of November, 1841, made the grant in accordance with the petition, using therein the following words: "Having examined the petition which gives beginning to this expediente, the report of the prefect of the 2d district, and that of the 2d judge of the peace of the city of Los Angeles, with the further steps which have been taken, all of which are seen to be in conformity with the laws and regulations on the subject, Don Luis Arenas is declared owner of one league of grazing land in extension of the land which had been granted him on the 14th of March of the past year, (1840,) the boundaries of which shall be defined by the river of Azusa, the road of San José and the land of this name."

The following is found, bearing the same date, (November 8, 1841,) and also over the signature of Manuel Jimeno: "Whereas the citizen, Luis Arenas, has asked in addition to the place, which he occupies, a league of grazing land on its western part, in a tract covered with thickets, joining the mountain, the road of San José, river of San Gabriel, and boundary line of the citizen Duarte, having previously gone through the proceedings and relative inquiries, according to the direction of the laws and regulations, using the authority conferred upon me in the name of the Mexican Nation, I have concluded to grant him the addition aforesaid, declaring it to be his property by the present letters," etc.

These two papers have reference to the same subject matter, to wit, a grant to Arenas of one league of land within certain larger exterior boundaries, which are found to be a little more fully described in the document last quoted from.

Possession was duly given to Arenas under this grant, April 27, 1842. On December 27, 1844, he conveyed to Henry Dalton by deed duly executed, approved and delivered, all his right, title and interest to and in the Ranchos Azusa, San José and San José addition, the consideration named being seven thousand dollars. At that date the said Arenas owned as joint grantee one undivided third of the Ranchos San José and San José addition.

Subsequently, in February, 1846, partition of these two ranchos was made, setting off to each of the three owners his respective portion. This was done by judicial proceedings had before the proper alcalde of the jurisdiction within which the land lay, pursuant to the application of the parties in interest, and upon survey duly made and acquiesced in.

The three claims were thereafter, after the acquisition of California by the United States, separately presented to and confirmed by the Board of Land Commissioners, under the act of Congress of March 3, 1851, (9 Stat., 351.) These confirmations went on appeal by the United States to the U. S. District Court, under section 9 of the act of 1851, (supra,) the title of the case being "Henry Dalton, appellee, *v.* the United States, appellant," and numbered 121.

As Dalton was interested, as owner, not only in Azusa as granted, but in Jan José and San José Addition, of which he was part owner, his case called for action of the court on all of the three grants, as confirmed by the Board of Land Commissioners. The court, in March, 1856, entered a degree affirming the action of the Board. In referring to the Azusa, it used the following language, descriptive of the land covered by the confirmation: "And also all lands granted to Luis Arenas by Manuel Jimeno, governor *pro tem.* of the department of the Californias, on the 8th day of November, 1841, to the extent of one square league of land, and no more, within the boundaries described in the grant and map of (to) which the said grant refers, to wit: The Sierra on the north, the western lines of the lands last above described on the east, the road of San José on the south, the river of Azusa and the boundary of Andres Duarte on the west." The lands referred to as on the east are San José and San José addition. The judgment of the court become final by the dismissal of the appeal April 4, 1857. The proceedings thus far all indicate very clearly that, as to Azusa, the grant was for a specified amount of land, to be selected within larger exterior boundaries.

Surveys of the three claims, San José, San José addition and Azusa, were made by Henry Hancock, United State deputy surveyor, in October and November, 1858, and approved by the surveyor-general in January, 1860. Dalton objected to the survey of Azusa, but his objections were overruled by the United States District Court December 9, 1864. He subsequently applied for a rehearing, but the court on November 21, 1867, dismissed his application, as it appears, for want of prosecu-

tion, and remitted the papers and proceedings to the surveyor-general for the district of California.

Instead of proceeding under the Hancock survey, another survey was ordered and was made in August, 1868, by United States Deputy Surveyor Thompson, which survey was approved by the surveyor-general and forwarded to your office for its action. This was done atfer your office had in May, 1868, remanded the case with instructions to publish, as required by the act of 1864, the Hancock survey of 1853. A like course was pursued relative to the San José and San José addition. The result was a prolonged controversy, in the course of which your office on the 17th of June, 1871, rendered an elaborate decision embracing all of the three claims mentioned. In that portion of said decision which treats of Azusa, the following language is found: "From the examination had I am convinced that the Hancock survey of Azusa is not the only survey of the one square league confirmed which could have been made, and that Dalton was not satisfied with that survey."

It, however, adhered to the Hancock survey, and sustained the same as rendering substantial justice to all concerned, the reason being, not that the Land Department was without authority to change the survey, but, in effect, that Dalton should be held estopped by his own acts of occupancy, use and ownership exercised over portions thereof, which he was seeking to exclude. Upon appeal this Department by its decision of September 20, 1872, announced its unqualified approval of that portion of your office decision relating to Azusa. The plat of the Hancock survey thereof was approved by your office May 29, 1876, patent issuing to Dalton on that date for Azusa, as described by said survey, containing 4,431.47 acres.

Patents had previously in 1875, issued to Palomares, Vejar, and Dalton for San José, containing 22,840. 41 acres, and for San José addition, containing 4,430.64 acres.

Even after that Dalton persisted in his attempt to acquire additional land in Azusa, excluded by the Hancock survey, and acordingly in 1878 he applied under section 7 of the act of July 23, 1866, (14 Stat., 218,) to purchase certain lands thus excluded, which he alleged constituted a portion of the original grant of Azusa. That application was not finally disposed of until departmental decision thereon May 24, 1881.

I refer to all these proceedings to show that as a matter of fact Dalton up to and even after the issue of patent continued to claim under the grant to Arenas, his grantor, certain land outside of the Hancock survey of Azusa, but within the exterior boundaries of said rancho as originally granted and confirmed.

On the question of fact raised by the appeal that the land involved is not within the claimed limits of the Azusa rancho, I am led, after a careful examination and consideration of all the attainable evidence relating to the grant, and in view of the facts herein recited, to conclude that said rancho as originally claimed and granted embraced all land

having for its boundaries the Sierra, or mountain on the north, the western lines of San José and San José addition on the east, the road of San José (which seems to be platted as San Bernardino road) on the south, and the Azusa, or San Gabriel river and the boundary of Andres Duarte on the west.

The particular tract in question in this case lies on the Azusa river, where it forms the western boundary of said rancho. On which side of said river it lies is a matter which I am unable from the data and exhibits before me definitely to determine. That is a question which it will become necessary for your office, in the application of this decision, accurately to determine, after a careful examination of the different plats of survey, some of which, as appears from official tracings before me, locate the tract on the eastern bank of the river, while others locate it largely on the western bank and extending into the bed of the river, which it appears is dry, or was so at the date of the grant and of the survey.

On the theory that it lies east of the river, and therefore within the claimed limits of Azusa, as originally granted, it is nevertheless argued by counsel for the railroad company that the Hancock survey designated and segregated the one league granted from the Azusa rancho; that said survey became final and conclusive on the United States and Dalton by the decree of the District Court, dated November 21, 1867, dismissing Dalton's objections thereto and remanding the papers and proceedings to the Surveyor-General, and that Azusa was finally and absolutely located before April 3, 1871, the date when the grant to the railroad company took effect. In other words, that Azusa land found to be in odd numbered sections, outside of the Hancock survey, and not otherwise appropriated, passed on the 3d of April, 1871, to the company under its grant.

As already stated, your office in June, 1871, and the Department on appeal in September, 1872, had under consideration the Azusa grant, as well as the grants for San José and San José addition. The question then was as to the correctness of the Hancock survey of the grants mentioned. Both your office and the Department then assumed and exercised full jurisdiction of all questions relating to the boundaries of said grants and the surveys thereof.

The result of that action was the approval of the Hancock survey of Azusa, and further and new survey in 1874 of the San José grants. Subsequently, and pursuant to the departmental decision of 1872, patents issued, as before stated, in 1875 for San José and San José addition, and in 1876 for Azusa. It is true the Department, in its decision of 1872, approved the Hancock survey of Azusa, but it did so for reasons of its own, assigned in the decision, after a full examination of the whole case on its merits, and without reference to any judicial decree on the questions involved. In so acting it in effect declared that it had full jurisdiction of the matter presented, and that the questions touch-

ing the competency and accuracy of the survey were pending in the proper tribunal. If the Department then acted within the scope of its authority, the Azusa claim must be regarded as having been *sub judice* at the date of the decision of 1872 and until patent issued in 1876. Under the general rule that the judgment of a court cannot be attacked in a collateral proceeding, which rule applies with equal force to the Dement in a case like this, I must decline to go into the question as to whether the Department had legal jurisdiction of the questions upon which it acted in its decision of 1872. It must be presumed, in the absence of any affirmative showing in the record of the case as then presented to the contrary, that the Department had complete jurisdiction of all the questions then before it and acted upon.

On the theory that the tract here in dispute fell within the claimed limits of the Azusa rancho, as herein defined, I, for the reasons stated, affirm your office decision, and hold, on the doctrine of Newhall *v.* Sanger, (92 U. S., 761,) that the Azusa claim must be regarded as having been *sub judice* at the date (April 3, 1871,) when the railroad grant took effect, and that land embraced therein was therefore excepted from the operation of said grant.

MINING CLAIM—CONSOLIDATED LOCATIONS.

CHAMPION MINING COMPANY.

Following the doctrine enunciated in the case of the Smelting Co. *v.* Kemp, and the Good Return Mining Co., an application for the survey of a claim embracing several contiguous lode locations is granted.

Secretary Lamar to Commissioner Sparks, January 30, 1886.

I have examined the appeal of the Champion Mining Company from the decision of your office, dated February 4, 1885, denying its application for a survey of the Champion Consolidated Mines, in Tp. 16 N., R. 8 E., M. D. M., California.

It appears from the papers submitted that said company, a corporation organized and existing under the State of California, by its attorney, on January 7, 1885, made application to the surveyor general of California for an official survey of the mining claim known as the "Champion Consolidated Mining claims," which claim embraces several contiguous lode locations, located in Nevada City mining district, Nevada county, in said township, range and State.

The application requests that an estimate of the amount required to be deposited for the work to be done in the surveyor general's office be sent to the attorney of said company, and that, after such deposit shall have been made, the surveyor general will cause said mining claim to be surveyed by R. H. Stretch, United States deputy surveyor at San Francisco.

It is alleged that said consolidated claim consists of several lode locations upon different parallel lodes, some cropping out and some "blind," all marked by one system, consisting at present of about 2,900 feet of tunnel and cross cuts run in from the surface at the south end of the claim, and an inclined shaft, 300 feet deep, which is sunk at the northerly end of said mine and designed to connect with said tunnel, and is intended to open and work all ledges through said shaft and tunnel, which exist in said consolidated claim.

It is further alleged that said company is the owner by purchase, and that all of said locations have been duly consolidated; that all work upon said consolidated claim for seven years past has been done for the consolidated claim; that over five hundred dollars worth of work has been done on each lode location, and over sixty thousand dollars worth of work has been done upon the consolidated claim within the past seven years; and that said corporation has been in the sole and continuous possession of, and has worked continuously, said consolidated claim for over seven years, which exceeds the time required to complete the bar of the statute of limitations in said State. Said consolidated claim consists of thirteen separate locations named in said application.

The application was denied, for the reason that by the first paragraph of circular instructions, approved July 6, 1883, (10 C. L. O., 191,) it is provided that "no application will be received, or entry allowed which embraces more than one lode location." Said paragraph was fully considered in departmental decision in case of Good Return Mining Company (4 L. D., 221,) was held to be erroneous, and therefore overruled. It would seem that under the authority of said decision and the decision of the United States Supreme Court, in the case of Smelting Company *v.* Kemp (104 U. S., 636), said application for survey should be allowed.

The decision of your office is therefore reversed.

RELINQUISHMENT—CONTEST.

LEE *v.* GOODMANSON.

The filing of a relinquishment accompanied by a pre-emption declaratory statement defeats a simultaneous application to contest the entry thus vacated.

Secretary Lamar to Commissioner Sparks, January 30, 1886.

I have considered the case of John J. Lee *v.* Peter Goodmanson, on appeal by the former from your office decision of May 23, 1884, rejecting his application to contest the timber culture entry of Goodmanson for the E. ½ of NE. ¼, Sec. 18, T. 96, R. 56, Yankton, Dakota.

On May 31, 1883, a relinquishment of said entry was presented to the local office by one Mathias Helgerson, together with his pre-emption declaratory statement for said tract, alleging settlement the same day.

Simultaneously therewith Lee filed affidavit of contest, together with an unsigned application to enter the tract under the timber culture law. The register indorsed on said affidavit, "This contest is refused as being superfluous, a duly executed relinquishment. . . . having been presented by Mathias Helgerson. . . . Both parties appearing at the same time this 31 day of May, 1883." Your office sustained the action of the local officers, but, for the reason that as the application to enter, "filed by Lee, bore no signature, it was in reality no application at all, and such defect alone I consider sufficient ground for dismissal." I do not find it necessary to pass on the validity of the reason relied on by your office. There is no evidence in this case showing collusion between the entryman and Helgerson. The filing of said relinquishment served to terminate the timber culture entry instantly, and at the same moment the pre-emption filing of Helgerson attached. The affidavit of contest, filed simultaneously with the relinquishment, found no entry to contest. The entry expired simultaneously with the filing of the affidavit.

The decision appealed from is affirmed, for the reasons stated herein.

CASH ENTRY—RESERVATION.

ALEXANDER POLSON.

The prior pending claim having been rejected, the entry herein, allowed before the record was thus cleared, is permitted to remain intact.

Secretary Lamar to Commissioner Sparks, January 30, 1886.

I have considered the case of Alexander Polson, on appeal from your office decision of December 20, 1884, holding for cancellation his private cash entry, made April 10, 1883, for Sec. 6, T. 18 N., R. 9 W., Olympia, Washington Territory.

The reason assigned for the action of your office is that, at the time Polson made said entry, the land embraced therein was "withdrawn from entry by the pending application of George A. Barnes, presented October 19, 1882, and rejected finally by the Secretary of the Interior March 19, 1884.

The application of Barnes had been finally rejected by this Department prior to the action of your office holding the entry of Polson for cancellation. Polson had paid for the tract, and there was no other claim of record.

I do not deem the reason assigned sufficient under the circumstances to warrant the cancellation of said entry. Said decision is therefore reversed. The cash entry of Polson will be allowed to remain intact.

ENTRY—APPLICATION TO AMEND.

MATHIAS FLOREY. } On review.
SAMUEL MOAT. }

A pending application to amend an entry constitutes a reservation of the land so applied for.

Secretary Lamar to Commissioner Sparks, February 3, 1886.

I have examined the application made by Samuel Moat for a review of my decision of August 27, 1885, (4 L. D., 112,) permitting Mathias Florey to amend his timber culture entry, which originally covered the S. ½ of NW. ¼ and N. ½ of SW. ¼, Sec. 28, T. 110 N., R. 66 W., Mitchell, (now Huron,) Dakota, so as to embrace in lieu thereof the S. ½ of NE. ¼ and the N. ½ of SE. ¼, same section.

My decision allowed Florey's application to amend on the showing that the local office had erred in marking on the tract book the land covered by his entry, it being marked as the tract covered by his application to amend, instead of the tract for which he in fact originally applied. It also appeared that the land embraced in his original entry had subsequently thereto, and prior to his application to amend, been covered in part by a pre-emption filing by one Ebenezer Noyes, and the residue by a homestead entry made by one Benjamin F. Warren. He stated that they as well as he had been misled by reason of the erroneous marking on the tract book, and from the action of the register and receiver in allowing the filing and homestead entry, respectively, it would seem that they also were misled by the same error. He also set out that, by reason of said error, parties employed by him to break five acres were misled and did the breaking on the tract to which he wishes to amend. It further appeared that the tract which he sought to take by his application to amend was vacant unappropriated land.

Though the Department is slow to act favorably upon applications to amend entries deliberately made in accordance with the intention of the applicant, this case seemed one which, in view of all the facts, would justify such a course, and therefore the decision, a review of which is now asked.

It is here to be remarked, that Moat, the homestead entryman of the tract covered by Florey's amended and approved timber culture application, was not a party to the record when Florey's case was acted upon. The tract was, so far as I am aware, vacant land at the date when the local office acted upon Florey's application, and also at the date (June 2, 1884) of your office decision in the same case. On the 17th of July, 1884, however, Moat was allowed to make homestead entry for the tract, and hence his objection to my decision permitting Florey to amend his entry.

Said entry was made while Florey's application to amend was pend-

ing. Under the general rule that pending an application to enter, application by another to enter the same land should not be allowed, this Department, in the case of Sarah Renner, (2 L. D., 43,) held that an application to enter should not be entertained pending an application for re-instatement, and in the case of Johnson *v.* Gjevre (3 L. D., 157), it was held that a pending application to amend a homestead entry reserves the land from any other appropriation until the application is disposed of.

Applying the doctrine thus enunciated to this case, it becomes apparent that the local office erred in allowing Moat to make homestead entry for the tract in question, since at the time it was made said tract was for the time being at least practically withdrawn by the application of Florey to amend. For this reason, and because the record of Florey's application was notice to Moat, I should, were the facts herein recited all that relate to the land described and to the parties interested therein, direct the cancellation of Moat's entry. I find, however, from an abstract from the records of the local office, certified by the register, and filed by the attorney for Moat, that certain proceedings in contest are pending, to which several of the persons mentioned herein, including Florey and Moat, are parties. As one or the other of these contests may result in clearing the record on the ground of failure to comply with the law in the matter of residence or cultivation, and thus remove the complication, without injury to any one who has acted in entire good faith, I decide that the homestead entry of Moat be allowed to remain of record pending the contests mentioned, in order that should it be developed by said contests that no one else has a superior right to the land, he may then hold it under his said entry, subject to his compliance with the requirements of the law.

The motion for review and revocation of my decision of August 27, 1885, is accordingly denied.

SUIT TO SET ASIDE PATENT.

MARY YANCEY.

As the applicant herein may assert her right in the courts, and the government has no interest in the land involved, the application for the institution of suit to set aside certain patents is denied.

Secretary Lamar to Commissioner Sparks, February 3, 1886.

I am in receipt of your office letter of the 21st ultimo, submitting for my consideration the letter of the attorney of Mrs. Mary Yancey, asking "that proceedings be instituted to set aside patents, which appear to have been inadvertently issued February 1, 1860, on Centre, Alabama, cash entries No. 21,942, Richard Taylor, E. ½ of NW. ¼ and SW. ¼ of NE. ¼ of Sec. 7, T. 19, R. 13, and No. 21,949, James H. Parmer, for N. ½ of SE. ¼ and SE. ¼ of SW. ¼, same section, which entries are in conflict

with pre-emption cash entry No. 22,633, Mary Yancey, NW. ¼ of SE. ¼ and SW. ¼ of NE. ¼ of said section 7.

It appears that the entries of Taylor and Parmer were allowed as private entries under the act of Congress, approved August 4, 1854, known as the "Graduation act," in face of the apparent prior right of Mrs. Yancey, who had filed her pre-emption declaratory statement upon the tracts claimed by her December 17, 1858, and made entry of the same on December 17, 1859.

It may be, as stated in your letter, that the issue of patents to Taylor and Parmer was erroneous, but it is not evident what interest the United States now has in the premises. There does not seem to be any reason why Mrs. Yancey may not assert any legal or equitable right she may have in the land in the courts of the country in her own name. (See Bagnell *v.* Broderick, 13 Pet. U. S., 436; Brush *v.* Ware, 15 Pet. U. S., 93; Garland *v.* Wynn, 20 How., 6; Samson *v.* Smiley, 13 Wall., 91; Bohall *v.* Dilla, 114 U. S., 47.)

The Supreme Court in the case of the United States *v.* Minor, (114 U. S., 233,) say: "If, by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question, whether the United States could bring this suit for Spence's benefit. The government, in that case, would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property, or in the subject of the litigation, to use its name to set aside its own patent for which it has received full compensation, for the benefit of a rival claimant."

The court did not decide that question as it did not properly arise in the case before them.

In the present case, it is clear that the government has no interest in the land, and I see no reason why Mrs. Yancey should not assert her rights in the courts in her own name. The request of her attorney therefore should be denied, and you will so direct.

ALABAMA—ACT OF MARCH 3, 1883.

MARY E. JEFFRAY.

On the cancellation of an entry existing at the date of the passage of the act of March 3, 1883, for land theretofore classed as "coal," such land cannot be disposed of as agricultural until after public offering.

Secretary Lamar to Commissioner Sparks, February 5, 1886.

I have considered the case of Mary E. Jeffray, on appeal from your office decision of January 21, 1885, rejecting her application to file soldier's declaratory statement for the W. ½ of SE. ¼ and W. ½ of NE. ¼, Sec. 18, T. 16 S., R. 3 W., Montgomery, Alabama.

On December 15, 1884, Mrs. Jeffray, by her attorney, offered said declaratory statement at the local office. It was rejected under the act of March 3, 1883, (22 Stat., 437,) because the records of the local office showed that said tract was "classed as valuable for coal." The records of your office show that said tract was reported in the lists of 1879 as "valuable coal."

On April 9, 1881, one James D. Lykes made homestead entry for this land, which was canceled November 25, 1884, for abandonment. The attorney for appellant urges that said entry, subsisting at the date of the passage of the act of March 3, 1883, served to except said tract from the operation of that law. I fail to find any grounds for such assertion. Said law enacts that all public lands within the State of Alabama, whether mineral or otherwise, shall be subject to disposal only as agricultural lands; provided 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 homestead laws heretofore made may be patented, when the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

In the present case, the lands had been reported to the General Land Office as coal lands prior to the passage of said act; upon the cancellation of said Lykes' entry, they became public lands, and could not be disposed of as agricultural lands until offered at public sale. Such offering had not been made at the time of the application herein, and said declaratory statement was properly rejected. The decision appealed from is accordingly affirmed.

TIMBER CULTURE ENTRY—CONTEST.

SHOEMAKER *v.* LEFFERDINK.

Where the default is cured prior to the initiation of contest the entry will not be canceled.

Secretary Lamar to Commissioner Sparks, January 30, 1886.

I have considered the case of David Shoemaker *v.* John H. Lefferdink, as presented by the appeal of the former from the decision of your office dated December 15, 1884, reversing the action of the local land officers' holding that Lefferdink had failed to comply with the requirements of the timber culture law and that his timber culture entry No. 859 of the N. ½ of the NE. ¼ of Sec. 24, T. 7 N., R. 5 E., Lincoln land district, Nebraska, should be canceled.

It appears that Shoemaker initiated a prior contest against said entry, charging a failure to comply with the requirements of the timber culture law, and upon a hearing duly had the register and receiver decided in favor of the contestant, which decision was affirmed by your

office and reversed by this Department July 7, 1883, upon the authority of Bartlett *v.* Dudley (1 L. D., 186), holding that the contestant had no right of contest, because he had not filed a proper application to enter the contested tract. The contestant was allowed the right to initiate a new contest, and on August 10, 1883, filed another affidavit, as set forth in your office decision. A hearing was had, and the local land officers decided in favor of the contestant. Your office, however, reversed their action, as above stated.

One of the reasons assigned for the decision of the register and receiver is, that the entryman was not entitled to any consideration for the six acres planted to walnuts, after the commencement of the first and before the initiation of the second contest. But your office, under the authority of departmental decision in Galloway *v.* Winston (1 L. D., 169), held that if the defect was cured prior to the initiation of contest, the entry must stand.

An examination of the record discloses no reason for disturbing your decision, and it is accordingly affirmed.

TIMBER CULTURE ENTRY—CONTEST.

SIMS *v.* BUSSE ET AL.

Where fraud or illegality is relied upon as the ground of contest the allegations thereof should be specifically made.

Secretary Lamar to Commissioner Sparks, January 30, 1886.

I have considered the appeal of Alex. B. Sims from the decision of your office, dated August 11, 1884, dismissing his contest against timber culture entry covering the NW.¼ of Sec. 17, T. 107 N., R. 62 W., 5th P. M., Mitchell land district, Dakota Territory, made by Colon C. Billinghurst on November 4, 1881.

It appears from the record that Sims initiated a contest against said entry on November 12, 1883, alleging that the tract had been repeatedly offered for sale to different persons and that it was then and had been held solely for speculation. January 14, 1884, was set for the hearing in said case, and on the day set for the trial the register and receiver dismissed said contest upon the ground of the insufficiency of the allegation in the affidavit of contest, and Sims appealed. On February 25, 1884, said entry was canceled upon relinquishment, dated October 13, 1883, and Henry W. Busse was allowed, on the same day, to make timber culture entry of said tract. On March 3, 1884, Sims applied to enter the tract in controversy, which application was rejected on account of the entry of Busse, and Sims again appealed.

If the contest affidavit of Sims was insufficient, then, certainly, it should have been rejected by the district land officers and no hearing

ordered. It is provided by Section 2 of the timber culture act of Congress, approved June 14, 1878, (20 Stat., 113,) that the applicant shall make affidavit, among other things, " that this filing and entry is made for the cultivation of timber and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly, or indirectly, for the use or benefit of any other person or persons whomsoever," and the third section of the same act makes provision for contesting the timber culture entry "after the filing of said affidavit and prior to the issuing of the patent for said land," whenever the claimant shall fail to comply with any of the requirements of said act. Under this section no contest can be initiated until the expiration of one year from the date of the entry, because the entryman has one year within which to comply with the requirement of the law as to breaking. If, however, the contestant alleges that the entry was illegal in its inception, and sets forth sufficient allegations showing wherein the illegality consists, then the Government may and should receive such affidavit and allow the contestant to prove his allegations, and if successful and the entry is canceled, then, under the second section of the act of May 14, 1880, (21 Stat., 140,) the contestant would be entitled to his preference right of entry.

It is not sufficient to allege in the contest affidavit that the entryman "has repeatedly offered said land for sale to different persons and that the same is now and has been held solely for speculation." Such an allegation does not necessarily contradict the affidavit required by the statute. *Non constat* that the applicant did not make the affidavit honestly, and afterwards by reason of change of circumstances wish to dispose of his improvements and interest in the claim.

If, however, the contestant had alleged that Billinghurst's entry was fraudulent in its inception in this, that it was not made in good faith, but for the purpose of sale and speculation, he may then set out the fact that the entryman had repeatedly offered said land for sale, as inducement to said allegation, and proof of that fact would be evidence proper to consider in support of the allegation that the entry was fraudulent in its inception. Or, when Sims applied to enter, his application should not have been rejected, if at the same time he had offered to contest Busse's entry upon the ground that Billinghurst's relinquishment was made in the interest of Busse, as the result of a fraudulent confederation between them.

If Sims can amend his contest, or application to enter in accordance with the ruling here made, and offers to do so within thirty days from date of notice of this decision, such right should be accorded him. Otherwise your decision will be affirmed.

SWAMP LAND—SEGREGATION SURVEY.

STATE OF CALIFORNIA *v.* UNITED STATES (ON REVIEW).

Under the State act of April 27, 1863, a survey made prior to application therefor, is without official sanction, and in no sense constitutes a segregation survey.

Secretary Lamar to Commissioner Sparks, February 5, 1886.

I have considered the motion of counsel of the State of California for a review and revocation of departmental decision of May 1, 1885, (3 L. D., 521), rejecting the claim of said State to the NE. ¼ of Sec. 27, Tp. 3 N., R. 7 E., M. D. M., Stockton land district, California, under section 2488 of the Revised Statutes, as swamp and overflowed land.

The grounds of said motion are, 1st, Error in the findings of fact; 2d, Error in the conclusions of law.

The motion recites that the State claimed said tract upon three grounds. 1st, That the land was surveyed by the United States in 1865, and returned by the United States deputy surveyor as, in fact, swamp and overflowed; 2d, That the land was in fact swamp and overflowed at the date of the grant (September 28, 1850,) within the meaning thereof. 3d, That the State title was confirmed by the 4th section of the act of July 23, 1866, now section 2488 of the Revised Statutes.

After a careful consideration, the Acting Secretary decided each of the propositions adversely to the State, and cited numerous authorities in support thereof. Counsel for the State have again presented, in the main, the arguments so ably and ingeniously urged before said decision was rendered. It is not asserted that any new evidence has been discovered, or that the whole record was not before this Department when said decision was rendered.

There can be no question that the returns of the surveyor-general did not represent said land as swamp and over flowed within the meaning of the act of September 28, 1850. In addition to the adjudication of this Department in the case of Wallace *v.* The State of California (5 C. L. O., 22), in which it was expressly held that the land in said township was not subject to certification to the State, by virtue of the return of the surveyor-general, United States Deputy Surveyor Wallace testified at the hearing as follows:

Q. "Did you consider this land in question swamp land, at the time you made that survey?"

A. "No. I considered those distinct from swamp lands; if they had been swamp lands, I should have entered it so in my notes."

But counsel strenuously insist, that even if the land was not returned as swamp and overflowed by the United States surveyor-general, and if it was not in fact swamp and overflowed, yet it was confirmed to the State under the second clause of section 2488 of the Revised Statutes.

The same question was carefully considered in said decision, and it was held that the evidence submitted was insufficient to sustain the claim. A careful re-examination shows no error in said conclusion. Counsel rely upon the copy of survey No. 992, purporting to have been made by the county surveyor on April 17, 1865, under the act of the legislature of said State, dated April 27, 1863, and allege that said decision erroneously "recites that only the application for survey was thus approved by the State surveyor-general."

The language of the decision is, "The only evidence offered in support thereof is a copy of a survey No. 992 of the W. ½ of Sec. 26, and the E. ½ of Sec. 27 in said township made April 17, 1865, by the county surveyor under the act of the State legislature, approved April 27, 1863, and the application of Stephen Rogers to purchase said land under said act, dated May 22, 1865, approved by the State surveyor-general on November 22, 1865. . . . . It does not appear that any other survey was approved by the State surveyor-general prior to July 23, 1866, showing a State segregation of said land." It is true that the approval of the surveyor-general by his deputy is indorsed upon the copy of the alleged survey, and the application of Rogers is attached thereto. The copy shows upon its face that the survey was made more than a month prior to said application and upon the authority of People *v.* Cowell, (60 Cal., 403,) construing sections 3 and 7 of the act of 1863, was in no sense a segregation survey. Counsel, however, insist that whether the application conforms to the State law is not a matter for the consideration of this Department and cite in support of said contention the case of George W. Frasher *et al. v.* O'Connor, (115 U. S., 102.) I do not think that the case cited supports this contention. In the case before the court the land in controversy had been selected by the State in lieu of sections sixteen and thirty-six, granted for school purposes by the act of Congress of March 3, 1853, and the land had been certified over to the State, and it was held that in adjusting Congressional grants of lands to a State, the only questions for consideration by the officers of the United States are whether the State possessed the right to claim the land under the grant, and whether the land was subject to selection by its agents. The court say, "But if the locating agents of the State were satisfied with the applications to purchase, and the selections thus made were approved by the Land Department of the United States, and the lands were listed to the State as part of the grant to her, it is not perceived what grounds of complaint the loose character of the proceedings furnish to the defendants." There is nothing in said decision to militate against the uniform decisions of the Supreme Court of California and of the United States Supreme Court, as to the duty of this Department relative to the adjustment of the grant of swamp and overflowed land to said State.

Counsel for the State have asked that a decision upon the motion for review be postponed until they can be heard in oral argument thereon.

In view of the fact that counsel have already argued the case once orally before this Department, it is not deemed advisable to further prolong the discussion.

The motion is accordingly denied.

VIRGINIA MILITARY DISTRICT, OHIO.

JEREMIAH HALL.*

Suit to set aside patent not advised in the absence of any interest on the part of the government.

Secretary Lamar to Attorney-General Garland, February 8, 1886.

I am in receipt of your letter of December 29, 1885, transmitting for my consideration and for an expression of my views thereupon, a copy of a letter, dated December 28, 1885, from Jeremiah Hall, Esq., asking "leave to bring several actions, or at least one, in the Circuit Court of the United States on your relation as Attorney-General against parties in possession of land located in violation of the proviso of the act of March 2, 1807," etc.

I have carefully examined the matter thus presented. I find that the questions raised by Mr. Hall's letter have frequently been before the General Land Office and this Department in connection with applications for patents for certain of these lands. Mr. Hall, as attorney, has with great energy and persistency been for years urging claims of the class referred to. He appears to have tried every remedy available, not only in this Department, but in the courts of Ohio, not excepting the Supreme Court of that State, the latest decision of which, so far as I am aware, was rendered during the October term in 1883, in the case of Ruggles *v.* Crew *et al.*, and was adverse to his client. See also Fussell *v.* Gregg *et al.*, (113 U. S., 550). A claim of Ruggles *et al.* had previously been before the Land Office and this Department, in both of which a conclusion adverse to claimants was reached, and the issue of patent refused. These decisions, to be found at pages 11 and 17, respectively, of "Decisions of Department of Interior," published by the Land Office, and a copy of which, I presume, is in the library of your Department, contain a full and detailed history and review of the legislation of Congress relative to lands in the Virginia Military District in Ohio. They bear date, respectively, May 9, 1882, and January 31, 1883.

Upon a careful reading of the same and full consideration of Mr. Hall's application, I am unable to see that any interest of the government would be subserved by its lending its name in suits to be instituted as suggested, or that for any reason it should be made a party, either directly or indirectly, in the prosecution of suits as proposed. I have the honor therefore to recommend that Mr. Hall's application be denied.

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*For a full history of the question involved, see Vol. 1, of Land Decisions, page 11 *et seq.*

MINING CLAIM—EXPENDITURE.

CIRCULAR.

Commissioner Sparks to registers and receivers, and surveyors-general, December 14, 1885.

1. For reasons stated in decision dated October 31, 1885, in the case of the Good Return Placer Mine, (4 L. D. 221), the Hon. Secretary of the Interior holds that the "circular instructions of 9th December, 1882, and the first requirement of the circular of 8th June, 1883, are erroneous, and the same are accordingly overruled."

2. Said decision also holds—

That the annual expenditure to the amount of $100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

3. That "compliance 'with the terms of this chapter', as a condition for the making of application for patent according to section 2325, requires the preliminary showing of work or expenditure upon each location, sufficient to the maintenance of possession under section 2324, either by showing the full amount for the pending year, or if there has been failure it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment."

4. "That as section 2325 only directs proof of expenditure to the amount of five hundred dollars by certificate of the surveyor general on the claim embraced in the application for patent, it must be error to hold that it further requires that amount on each individual original location, in lieu of the amount already provided for by section 2324."

5. Registers will, therefore, before receiving any applications or permitting entry upon applications already made, require a satisfactory preliminary showing of work or expenditure, under paragraph 3 hereof, upon or for the benefit of each location embraced in the claim, which may, where the matter is unquestioned, consist of the affidavit of the applicant, clearly and specifically setting out all the *facts* constituting the compliance with the law by himself or grantors. Where application is made by an incorporated company, or where an applicant satisfactorily shows by affidavit that he is not personally acquainted with the facts, the applicant's affidavit may be made by the duly authorized agent who has such knowledge, but whether made by principal or agent it must be specifically and fully corroborated by the affidavits of at least two disinterested and credible witnesses familiar with the facts. This showing must include the year in which the application for patent is filed. The evidence specified in paragraph 32 of circular N of October 31, 1881, will still be required. Where the abstract of title is dated prior to the date of filing the application for patent, a continuation of the abstract to and including such date must be filed before the applicant is allowed to make entry.

6. Where an application for patent embraces several locations or claims *held in common*, constituting one entire claim, whether lode or placer, an expenditure of five hundred dollars, under section 2325, R. S., upon such entire claim embraced in the application will be sufficient and need not be shown upon each of the locations included therein.

You will observe carefully the modification of the practice and regulations as above indicated.

Approved.

L. Q. C. LAMAR,
Secretary.

PRACTICE—COURT OF CLAIMS.

ANTONIO VACA.*

A case will not be sent to the Court of Claims for its action or opinion on questions of administrative nature that are clearly within the jurisdiction of the General Land Office, where the matter is pending.

***Secretary Lamar to Commissioner Sparks, February* 3, 1886.**

I am in receipt of a letter, dated January 25, 1886, from Robert B. Lines, Esq., of this city, in which, as attorney for Messrs. John Ledyard Hodge and Andrew H. Sands, he refers to a letter, addressed by him to this Department on the 11th of November last, relating to the opinion of the Court of Claims, in the case of Hodge and Sands *v.* The United States, involving certain questions growing out of the private land claim of Antonio Vaca, deceased. Said opinion was by departmental letter of July 7, 1885, transmitted to your office for its guidance in further acting upon the case. Said letter of Mr. Lines, of November 11, 1885, was also referred to your office for appropriate action in connection with the Vaca claim.

His letter, now before me, suggests that the case be again transmitted to the Court of Claims for its opinion on the following points:

1st: Is it the duty of the Secretary to issue patents upon the scrip in question (or upon that portion of it for which cash has not been substituted)?

2d: If so, in what form should those patents be issued?

3d: To whom, if issued, should they be delivered?

It does not occur to me that the above questions raise any point which calls for a return of the case to the Court for its further action or opinion, or that they suggest any good reason why it should be so returned. They suggest matters action in which will be largely administrative and ministerial, and which not only fall within the jurisdiction of your office and the scope of your authority, but which, as the case

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*See page 13 of this volume.

now stands, it seems to me peculiarly appropriate and fitting that you should decide when the case is reached for action in the regular course of business.

I must therefore decline to consider the request of Mr. Lines.

MINING CLAIM—PRACTICE.

ALBION CONSOLIDATED MG. CO.

On application for entry, proceedings were stayed by the intervention of an adverse claim which was subsequently waived in the local office. The district officers, holding that such waiver did not remove the stay, refused to exercise jurisdiction. On appeal the Department reversed said decision. *Held*, that good practice requires the return of the record to the local office for a decision on the merits.

Secretary Lamar to Commissioner Sparks, February 10, 1886.

I have considered the petition of the Albion Consolidated Mining Company for a writ of certiorari, in the matter of their application for patent of the Albion No. 1 lode claim, Eureka land district, Nevada.

The papers before me disclose the fact that, after departmental decision of August 27, 1885, in the case of The St. Lawrence and Richmond Mining Companies *v.* The Albion Mining Company (4 L. D., 117), request was made by said Albion Company for a final decision by your office upon the record in their application, without transmission of the papers to the local officers for their preliminary decision. This request was denied, and thereupon the company filed an appeal. But your office held that said action was taken upon a matter of simple administration, resting in its discretion, and was therefore not subject to appeal. Hence this petition under Rule 83.

The contention of the petitioners is that the appeal from the local officers removed the case from their jurisdiction, that it now becomes the duty of your office to pass on the case finally, and that such is the uniform practice. In so reasoning, the company overlook the fact that, until the date at which adverse claim was filed, the local officers merely received the various papers of the applicant, and that said adverse claim and subsequent suit prevented the attachment of their jurisdiction to decide upon the applicant's right of entry. By force of the statute, the proceedings were stayed until the decision of the court, or the waiver of the adverse claim. When afterwards a certain waiver of the adverse claim was filed with them, the real question was whether it removed the stay and gave them jurisdiction to decide the application on its merits, and they ruled that it did not. This was the question which was brought before your office and this Department by the company's appeal, and which was decided on August 27, 1885. Said decision held that said waiver gave jurisdiction to the local officers, and it would seem that good practice requires the return of the record to

them for decision on its merits. Both the law and the rules of practice contemplate that the primary decision on the merits of the mineral applicant's case shall be made by the local officers, subject to your supervisory control or to the usual right of appeal which is allowed in other applications for land.

A case of this kind, where the local officers never assumed jurisdiction, is to be distinguished from one wherein they have taken jurisdiction and decided upon the applicant's right of entry. In such a case, whether the rejection is based upon matter of law or fact, the appeal brings up the whole record, and the decision of the appellate tribunal disposes of it finally.

For the foregoing reason, the Albion Company's petition is denied.

EVIDENCE—DEPOSITION.

JACKSON *v.* FARRALL.

Though an affidavit for continuance may not be strictly in accordance with rule 20 of practice, yet if held sufficient by the local office, it is not error to consider said affidavit as evidence on the admission that the witnesses if present would testify as alleged.

The right of cross-examination, in taking evidence by deposition, is exercised by filing cross-interrogatories as provided in rule 25 of practice.

Secretary Lamar to Commissioner Sparks, February 10, 1886.

I have considered the case of Charles B. Jackson *v.* Thomas Farrall, as presented by the appeal of Jackson from the decision of your office, dated December 13, 1884, dismissing his contest against the homestead entry of the SW. ¼ of Sec. 32, T. 11 N., R. 18 W., Grand Island land district, Nebraska, made April 25, 1882, by said Farrall.

The record shows that Jackson initiated contest against said entry, on November 2, 1883, upon a charge of abandonment and change of residence for more than six months, and a hearing was had on December 20, same year, both parties being present, with counsel and offering testimony. From the evidence taken at the hearing, the register and receiver rendered their joint opinion that the allegations were sustained, and they recommended that said entry should be canceled. Upon appeal, your office reversed their action and dismissed the contest. At the hearing, the defendant moved for a continuance, upon the ground of the absence of material witnesses, and filed his affidavit stating what he expected to prove by the absent witnesses named therein. Counsel for plaintiff objected to the sufficiency of said affidavit, but admitted that the witnesses, if present, would testify to the statements made therein.

While the affidavit does not strictly comply with the requirements of rule of practice No. 20, yet having been adjudged sufficient by the district land officers, who state in their decision that the plaintiff "admits

that the parties named in motion, if present, would testify as stated," it was not error to consider said affidavit for continuance as evidence in the case. The defendant objects to the consideration of the depositions offered by the contestant, because, as he avers, that the officer taking the depositions refused to allow him to cross-examine the witnesses. This objection has no force. The contestant served upon the defendant a copy of his interrogatories as required by rule of practice No. 24, and it does not appear that the defendant filed any cross-interrogatories. His failure to do so was his own fault.

Much of the testimony is conflicting and has nothing to do with the issue involved. The evidence on the part of the contestant is, in a great degree, of a negative character, while the testimony of the defendant is positive to the effect that he went upon the land in good faith, within the time prescribed by law, built one house that was subsequently burned, and afterwards another that was also destroyed, and that the reason that he has not maintained a better residence is that he feared that his life would be taken. If the testimony of the defendant be true, that there was in that community an organization known as the "Fire Bug Company," the members of which perpetrated the deeds sworn to by him, and he had incurred the hostility of its members, that would be a good reason why Farrall should not expose himself unnecessarily.

After an examination of the whole record, no good reason appears for disturbing your office decision, and the same is accordingly affirmed.

CONTEST—NOTICE—JURISDICTION.

MILNE *v.* DOWLING.

Actual notice or knowledge of a pending contest does not render it incumbent upon the defendant to appear and defend, in the absence of due legal service of notice.

Objection to jurisdiction is not waived by proceeding to trial after motion to set aside the service of notice is overruled, and exception duly taken thereto.

Secretary Lamar to Commissioner Sparks, February 10, 1886.

I have considered the case of William Milne *v.* Thomas Dowling, involving homestead entry, made November 15, 1881, on the SW. ¼ of Sec. 31, T. 157, R. 56, Grand Forks, Dakota, on appeal by Dowling from your predecessor's decision of September 27, 1884, holding his entry for cancellation.

The primary question raised by the appeal is that of the jurisdiction of the local officers. It appears from the record that contest was initiated May 23, 1883, and notice was given by publication; but there is no proof of the service by registered letter as required by rule 18 of practice. At the hearing August 5, 1885, counsel for contestee entered a special appearance for the purpose of making, and made, a motion to dismiss the proceedings for failure to mail him a registered letter.

Said motion was overruled, and an exception was taken. Counsel for the parties thereupon stipulated for a continuance to October 16, which was requested by counsel for contestant for the purpose of furnishing evidence in regard to service by registered letter. On said last-named date the parties appeared at the local office, and, no evidence of the required service being offered, counsel for contestee again moved to dismiss for want of jurisdiction, and the motion was again overruled and an exception noted. Whereupon the case went to trial, contestee and his witnesses being present and testifying, and his counsel cross-examining contestant's witnesses. Judgment was rendered against the contestee by the local officers. On appeal your predecessor sustained their decision, as aforesaid.

Their reason for overruling the motion to dismiss is stated by the local officers to be this: "That while it appears that no registered letter containing a copy of the summons was mailed to the claimant as required by the rules of practice, it does appear that he received notice of the contest, and thus he had an opportunity to prepare to defend his claim." This position is untenable, being in violation of the plain rule of law, that a defendant is not in court without a legal service of summons, unless he voluntarily enters a general appearance. The mere fact that a claimant has knowledge of a pending contest against him does not bring him into court, and does not render it incumbent on him to defend his claim; for the local office has no right to cancel his claim without first obtaining jurisdiction over him; and that they can only obtain in the manner pointed out by the law or the regulations.

When the case came up to your office, your predecessor held that the contestee was entitled to the notice required by the rules; but that "the agreement setting October 16, as a day for hearing was sufficient notice, and placed the claimant in a condition to defend his rights." I can discern no difference between this ruling and that of the local officers. In effect, it holds that actual notice, without legal notice, of the contest is sufficient to vest jurisdiction in the local office; and it is overruled, for the reasons above stated.

The important point is whether the contestee waived his objection to the jurisdiction by proceeding to trial after his motion to dismiss had been overruled. I think that this question is settled by the decision in Harkness *v.* Hyde (93 U. S., 476), in which it was the point in issue. In said case it appears that legal service was not had, and the defendant thereupon appeared specially by counsel appointed for the purpose, and moved the court to dismiss the action. Upon stipulation of the parties, the motion was adjourned to the Supreme Court of the Territory, and was there overruled, and an exception was taken. The case was then remanded to the district court, the defendant filed an answer, and on trial the plaintiff recovered. Upon motion for a new trial, plaintiff again recovered, and judgment was entered, and, on appeal to the Supreme Court of the Territory, the judgment was affirmed. Then the

defendant took the case to the Supreme Court of the United States, raising the question of jurisdiction, and the Court reversed the decision below for want of jurisdiction, and directed that the service be set aside. In so deciding, they said: The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or, what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. It is only where he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

I have not considered the testimony taken, because it was illegally taken and ought not to be given any effect.

For these reasons your predecessor's said decision is reversed, and the case will be returned to the local officers, with directions to them to set aside the service, and with leave to the contestant to proceed with his contest by a new summons to the defendant, provided he applies for it within thirty days after receipt of notice of this decision, and to dismiss the contest in the event of his failure to so apply.

ACT OF JUNE 3, 1878—*ADVERSE OCCUPATION.*

BLOCK *v.* CONTRERAS.

Prior occupancy and improvement of land removes the same from purchase under the timber act, without respect to the qualification of the person so holding or improving the land to legally appropriate the same under the settlement laws.

Secretary Lamar to Commissioner Sparks, February 10, 1886.

I have considered the case of J. N. Block *v.* J. L. Contreras, on appeal by Block from your decision of August 26, 1884, denying his right to purchase, under the timber act of June 3, 1878, the S½ of the SW¼ of Sec. 14, T. 4 S., R. 3 E., M. D. M., San Francisco, California.

Block filed application to purchase the above tract April 19, 1883. June 15, same year, Contreras made homestead entry of the same, alleging settlement two years preceding. A hearing followed, to determine the character of the land and the nature of Contreras' adverse claim.

It was shown at the hearing that the tract consisted almost entirely of a barren hillside, precipitous and rocky, unfit for agricultural purposes, while the scattering "scrub-oak" trees thereon were unworthy to be termed "timber," being useless except for firewood. A few acres of it furnished good grazing for a part of the year, and Contreras had for the past five years used it for that purpose, pasturing a few horses and cows thereon. The tract was not fenced nor otherwise improved except by the erection (in April, 1882,) of a small cabin, worth perhaps twenty

dollars, in which Contreras slept occasionally after returning from work elsewhere. He swears that it has been for the past two years his intention to make this place his home, and that he has no home elsewhere.

The local officers found that the land was timber land within the meaning of the act of June 3, 1878; and that Contreras has no adverse claim to the land which would prevent the sale of the same to Block under said act.

Your office decision holds as follows:

In my opinion Mr. Contreras has failed to prove that he was a *bona fide* claimant of the land under any statute at the date of Block's sworn statement. He has, however, sworn that he *occupied* the land long prior to the date of said sworn statement, for grazing purposes, and has improvements thereon, consisting of the cabin above described. To be subject to entry under the act of June 3, 1878, land must contain no improvements except for ditch or canal purposes, and be unoccupied. As the land in question contains improvements and is occupied, I am of the opinion that it is not subject to entry under the act. Mr. Block's application is therefore rejected.

From this decision Block appeals to the Department, on the ground that granting that, at the date of Block's application to purchase, the land in question was occupied and contained improvements previously made by Contreras, your office erred in denying Block's right to purchase "for the reason that at that date Contreras was not a citizen of the United States, and had not filed his declaration of intention to become such, and did not file such intention until the 15th day of June, 1883; and hence any improvements he claims to have put upon said tract previous to June 15, 1883, cannot be considered in the controversy."

The act of June 3, 1878, under which Block claims the tract in question, does not prescribe that the person by whom the land is occupied must be a citizen of the United States, in order to withhold it from the operation of said act. It concerns itself solely with the character of the land, and makes no reference whatever to the qualifications of the individual inhabiting it. All the terms in familiar use in laws of prior date, prescribing the qualifications of claimants, and all limitations upon the character of the claim (for instance, as being under some specific law, or being a "valid adverse claim,") are carefully and evidently intentionally avoided. The applicant to purchase must file his written statement (see section 2 of act) that the *land* is "uninhabited." He must afterward furnish satisfactory evidence (see section 3) that the land is "unoccupied and without improvements" (excepting such as may have been made by the applicant). If the land is "inhabited," "occupied and improved," it makes no difference by whom, (so it is not by the applicant,) it is not of the character contemplated by the act as being subject to disposal.

The point presented by counsel for the applicant to purchase is therefore not well taken. It having been shown that the tract in contro-

versy was "inhabited," "occupied and improved" at the date of said application, I affirm your said office decision of August 26, 1884, rejecting Block's application to purchase.

CONTEST—APPEAL—WAIVER.

HOLDRIDGE *et al. v.* CLARK.

The contestant's right of appeal from an adverse decision is waived by the initiation of a second contest.

Secretary Lamar to Commissioner Sparks, February 10, 1886.

I have considered the case of D. D. Holdridge and George W. Scutt *v.* Henry T. Clark, involving the timber culture entry of the latter, No. 2571, Yankton series, for the NE. $\frac{1}{4}$ of Sec. 27, T. 108, R. 56, Mitchell, Dakota.

In January, 1883, Holdridge initiated contest against said entry, alleging failure to comply with the law, which was dismissed by your office on October 18, 1883, on account of the insufficiency of the affidavit for publication. Holdridge was notified thereof, and on October 29, 1883, commenced a second contest against said entry. The testimony of contestant showing failure to comply as alleged was regularly taken, claimant not appearing. The local officers recommended the cancellation of said entry, and your office held the same for cancellation. Claimant alleges on appeal that the second contest of Holdridge was invalid, for the reason that it was initiated before the expiration of sixty days allowed for appeal from your office decision dismissing his former contest, in other words, that it was commenced while another contest was pending.

The record shows that Holdridge, upon receiving notice of the dismissal of his first contest on account of a defect in the affidavit for publication, immediately instituted a new contest, based on the same allegations as the former, and furnished a proper affidavit for publication. I hold that in so doing he waived his right of appeal in the prior contest. The action of your office in sustaining said second contest and holding said entry of Clark for cancellation is therefore affirmed.

On July 31, 1884, one George W. Scutt applied to contest said entry, alleging also failure to comply with the law on the part of the entryman. The local officers rejected said application, because of the pendency of Holdridge's second contest. On appeal to your office, Scutt contends that said contest was invalid, for the reason that it was commenced while another was pending. Said second contest of Holdridge having been held to be valid, your action in sustaining the rejection of the contest papers of Scutt by the local office is affirmed.

PRACTICE—REVIEW.

BARTCH *v.* KENNEDY.*

A second application for review will not be entertained by the Department.

Secretary Lamar to Commissioner Sparks, February 12, 1886.

On March 3, 1885, the judgment of your predecessor was affirmed by this Department, dismissing the contest of Edward W. Bartch *v.* Owen Kennedy, involving timber culture entry, Bismarck, Dakota Territory, March 22, 1883, for the E. ½ of NE. ¼ and E. ½ of SE. ¼ of Sec. 18, T. 144, R. 86.

Afterwards a motion was made to review said decision, which was overruled on March 30, 1885, when it was said that the motion for review was "based alone upon the assumption of error in the construction of the law of the case. Nothing new is alleged, only an argument submitted to show error—said argument being the same in substance, if not in words, as has been submitted three times before in the case."

On July 6, 1885, a second motion for review was filed in this Department, and what was said of the former motion may be repeated with more emphasis, if possible, as to the last. It is based alone upon the assumption of errors in the two former decisions. No new facts are alleged, no new points of law presented, but the motion seems to have been presented simply because the views of this Department did not accord with those of the attorney in the case.

I repeat here what I had occasion to say in a similar application in the case of Parker *v.* Castle, September 17, 1885:

"If when this Department, on review, determines a cause, it is again to be called upon to entertain a second application for review, I see no reason why such applications may not be continued indefinitely, whilst the rights of parties are left unsettled and the officials of the Department continuously and hopelessly employed in the task of iterating and reiterating conclusions long since deliberately arrived at and formally asserted. There certainly must be some point in a case where litigation ends and the rights of parties become finally determined." I think that point was reached in this case when I declined to review and revoke the former decision of my predecessor.

The present application is accordingly denied.

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* 3 L. D. 437.

COMMUTATION PROOF—RESIDENCE.

REUBIE A. DUNCAN.

The condition coupled with the right to commute a homestead entry, "at any time before the expiration of the five years," renders residence a proper element of commutation proof.

Secretary Lamar to Commissioner Sparks, February 11, 1886.

I have considered the motion of counsel for Reubie A. Duncan for a review of my decision of November 9, 1885, affirming that of your predecessor of October 21, 1884, rejecting the commuted homestead proof of said Duncan and requiring her to furnish new proof showing a proper compliance with law in the matter of residence, on the NW. ¼ of Sec. 28, T. 112, R. 65, Huron, Dakota Territory.

No new facts are set forth.

Counsel urges that "Section 2301 Revised Statutes of the United States, the section under which this final proof was made, does not say the claimant must reside on the land six months or any other length of time, but claimant can make proof *at any time* before the expiration of the five years, and obtain a patent therefor from the government as in other cases directed by law, on making proof of settlement and cultivation as provided by law granting pre-emption rights."

But it seems to be overlooked that the law granting pre-emption rights in section 2263 of the Revised Statutes provides that, "Prior to any entries being made under and by virtue of the provisions of section 2259 proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeable to such rules as may be prescribed by the Secretary of the Interior." In pursuance of the power therein conferred, the Secretary of the Interior has prescribed that the homestead settler offering commutation proof must prove actual settlement, improvement and cultivation from the date of entry to the time of offering proof, which must be a period of not less than six months.

The proof submitted by claimant herein did not show a compliance with the law in the matter of residence. I see no reason for disturbing said decision. The motion for review is accordingly dismissed.

PRACTICE—CONTINUANCE—RECORD.

HOSEK *v.* GLINEICKI.

An order for continuance should not be made without giving the opposite party opportunity to admit that the absent witnesses would, if present, testify as alleged.

An order having been granted, the entry thereof on the record should not be obliterated, upon the vacation of the order.

Under rule 41 of practice, frivolous, and obviously irrelevant matter should be excluded from the record.

Secretary Lamar to Commissioner Sparks, February 12, 1886.

I have considered the case of John A. Hosek *v.* Matiias Glineicki, as presented by the appeal of the former from the decision of your office, dated December 18, 1884, reversing the action of the district land officers in holding for cancellation Glineicki's timber-culture entry, made November 13, 1882, of the SE. ¼ of Sec. 33, T. 20 N., R. 16 W., Grand Island land district, Nebraska, because the same was not made by him in person.

The record shows that Hosek initiated contest against said entry, alleging that the brother of the entryman made the entry and signed his brother's name to the papers; that Matiias Glineicki was not present at the time the application was made to enter said tract, and did not sign or make oath to the affidavit upon which said entry was made, and that he is now in Russia.

A hearing was ordered, notice given by publication, and January 16, 1884, was fixed for the trial. Counsel for defendant appeared at the hearing and moved for a continuance of the trial, alleging under oath, among other things, that the defendant was then sick at Stephens Point, in the State of Wisconsin, that, if present, he would testify that he made said entry in person, signed the application and made oath to the affidavit upon which the entry was allowed. Counsel further averred that other witnesses, naming them, were absent without the procurement or consent of the entryman; that their evidence was material; that he had used due diligence to procure their attendance, and that for lack of time he had been unable to procure their depositions. It is shown that the clerk recording the testimony entered the following order, "Continuance granted to February 25, 1884. Attorney for contestant excepts to the ruling granting a continuance." Thereupon the counsel for contestant admitted that the witnesses for defendant would, if present, testify to the statements set forth in said application for continuance. The contestant was sworn and the counsel for defendant objected to his examination, for the reason that a continuance had already been granted.

The decision of your office holds that this was error, because that, after it had been formally declared that the case had been continued

until February 25, 1884, and a record had been made of the same, the district officers could not, except upon the express consent of the parties, proceed with the trial prior to the date to which the continuance had been granted. It appears, however, that the contestant had not been given an opportunity to admit "that the witnesses would, if present, testify to the statement set out in the application for continuance," prior to granting said order. This was error, as under rule of practice No. 22 he had a clear right to admit that the witnesses would so testify, and if such admission was made, then, the rule says, "No continuance shall be granted."

It was error for the clerk to draw his pen through the order of continuance. The record should have shown the facts, and then from the record it would have appeared that the district officers committed no error in proceeding with the examination.

Your office found that the allegations of the contestant had not been proven, and dismissed the contest.

A careful examination of the testimony in the case shows an irreconcilable conflict and leads to the irresistible conclusion that wilful perjury must have been committed at the trial. The record also shows that many frivolous objections were made by the attorneys of both parties and badinage used that was unbecoming and should not have been allowed. Under rule of practice No. 41, the district land officers are required to record all the testimony offered, and if excepted to the exceptions, with the testimony, will be transmitted to your office for consideration. But that rule was never intended to allow attorneys to fill the record with lengthy arguments, grave charges against and facetious flings at the opposing counsel. Attorneys, who indulge in such practice, must remember that the interests of their clients are not benefited thereby.

In the case at bar it is not alleged that the entryman has failed to comply with the requirements of the law as to breaking, cultivating, and planting, but that said entry was fraudulently made. If this charge be true, it is important that it shall be clearly and conclusively proven. The testimony of the contestant tends to show that the entry papers were prepared in the office of Thompson Brothers, in the city of Grand Island, Nebraska, and yet the person preparing said papers is not produced, nor his deposition taken in the case.

In view of the fact that the defendant was absent from the trial, and also the unsatisfactory and contradictory statements, it is considered advisable that a further hearing be had in this case, after due notice, to enable the parties and witnesses to be present and give their testimony in the case. The attention of the register and receiver should be called to rule of practice No. 41, as amended, viz: "Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning."

The decision of your office is modified accordingly. Upon the receipt of the testimony at the further hearing, which you will order, in accordance with the rules of practice, you will adjudicate the case *de novo*.

PRE-EMPTION—FILING—AMENDMENT—SETTLEMENT.

WALKER *v.* SNIDER.

Failure to amend a filing, in accordance with the application asking for such privilege and the order granting the same, after the intervention of an adverse claim, defeats the right of amendment.

Priority of settlement must be protected by some legal assertion thereof, to be of avail as against the subsequent settler.

Secretary Lamar to Commissioner Sparks, February 12, 1886.

I have considered the case of Robert Walker *v.* Benjamin Snider, involving lots 1 and 2 of Sec. 29, lots 1 and 2 of Sec. 28, and lots 1 and 2 of Sec. 27, T. 164, R. 56, Grand Forks, Dakota, on appeal by Snider from your predecessor's decision of December 9, 1884, awarding the land to Walker.

It appears from the record that the township plat was filed on March 13, 1882. Three days afterwards Walker filed declaratory statement No. 3243 for the N. ½ of SE. ¼ of Sec. 30, alleging settlement in August 1881. At said date he was actually residing on lot 1 of section 30. In May 1882 he moved his house from said section 30 upon lots 1 and 2, section 29, and in June following he applied to make a new filing for part of the lands in controversy. This was not an application to amend, but to file for other land; his reason being that there was another settler (one Spaulding, who filed for the SE. ¼ of Sec. 30 on March 30, alleging settlement March 13, 1882) on the land, who had first improved it. This application your office rejected in September 1882, and no appeal was taken. In the same application, Walker had stated that prior to survey he had settled on lot 2 of Sec. 28, lots 1 and 2 of Sec. 29, and lots 1 and 2 of Sec. 30, and your office notified him that he might file an application to amend for said tracts, which would be duly considered. No application to amend was filed until March 1883.

Meanwhile Walker made a timber-culture entry upon the tracts in section 30. On November 13, 1882, Snider made homestead entry No. 6472 for the land in controversy, then unappropriated on the tract books. At said date, Walker was residing and had improvements on lot 2 of section 29; but he had no improvements whatever on the tracts in sections 28 and 27.

On March 27, 1883, Walker applied to amend for the tracts in controversy, and, the application was rejected; but, on his *ex parte* showing, your office allowed him to make a new filing for them. Herein, I

think, the action was erroneous, because his allegation that he had settled on this land in 1881 was in material conflict with that made by him in June 1882, and because a homestead entry had meanwhile attached to the land. In 1883, he had stated that he had settled on lots 1 and 2 in sections 30 and 29 and lot 2 in section 28; thereafter he made timber-culture entry of the lots in section 30, and moved from section 30 upon section 29, claiming to have originally settled on the lots in sections 29, 28 and 27. In his affidavit of June 12, 1883, he swears that he always thought he was living on the N. ½ of section 30; and this is probably the truth. Prior to the filing of the plats, making this tier of sections fractional, the settlers seem to have supposed that the northern line of the section was on the international boundary line. Walker was on section 30, probably believed that he had no right to any land in section 29, and doubtless filed for the tract that he supposed he had settled on. This is what the record tends strongly to show. And on this state of facts, it was certainly error to allow his new filing in the face of Snider's prior homestead entry.

The new filing thus allowed, however, left Snider's entry intact, and in due course he offered to make final proof. Walker served notice of contest against him, hearing was had on January 30, 1884, and Snider filed his proofs showing settlement on the land within the legal period, continued residence, and the cultivation required. Neither his house nor his improvement was on the lots in section 29, and he testified that he had no knowledge of Walker's settlement thereon. The local officers, in view of the fact that Walker had actually settled on section 29 in May 1882 and was residing there when Snider's entry was made, and that he had failed to file for the land for more than three months after said settlement and until after Snider's entry, awarded the land in section 29 to Walker, and that in sections 28 and 27 to Snider. This was a ruling in favor of Walker, which seems to be excessively liberal. Nevertheless, Walker appealed from it, claiming the entire tract in controversy, and your predecessor held that the case was disposed of by his decision of September, 1882, aforesaid, allowing Walker's new filing; and therefore he held Snider's entry for cancellation.

I am at a loss to find any warrant of law for this decision. The decision of Atherton *v.* Fowler (91 U. S., 143), which was founded on a trespass upon the inclosure of a claimant, will not support it. Walker settled in May 1882 on the lots in sections 30 and 29 and on lot 2 in section 28. Within three months thereafter he was required, under section 2265, Revised Statutes, to file his claim in the local office, under pain of forfeiture in favor of the next settler. He filed a claim for said tracts, in the nature of a request for a new filing, which was rejected in September 1882, and he took no appeal therefrom. He was allowed, however, to amend his filing so as to include said tracts; but he took no steps in that direction for some eight months, and for some six months after Snider's entry of it. When he finally applied to amend, he applied for

tracts other than those first indicated, and which were then claimed by a bona fide settler. I cannot discern good faith in these proceedings. And I think that by his failure to appeal, or to amend or assert a new claim within three months after the rejection of his application of May 1882, he forfeited whatever rights he might have acquired by moving his house upon section 29.

For the reasons above stated, said decision is overruled, and the land is awarded to Snider.

ENTRY BY LOCAL OFFICER.

F. H. MERRILL. (ON REVIEW.)

The quality of a settler's residence will not be considered in anticipation of a proposed application for the right of entry.

Secretary Lamar to Commissioner Sparks, February 13, 1886.

The Department on April 21, 1884, (2 L. D., 106,) had under consideration the application of F. H. Merrill to relinquish a portion of his desert land entry for six hundred and forty acres, in sections 4 and 5, T. 29 N., R. 13 E., Susanville, California, and substitute homestead entry therefor, with credit for residence made on the tract while held under said desert land entry.

* * * * * * *

I have now before me the informal request of Mr. Merrill, dated December 10, 1885, asking a reconsideration of the said departmental decision, alleging mainly as grounds therefor the want of equity in said decision, and that he was fairly entitled to have credit for the alleged residence.

A favorable consideration of the application, preferred at this late day, is not possible, there appearing to be no reason why the decision of my predecessor should be disturbed. The whole question raised now, is, under the rule governing the decisions of the heads of department, *res judicata* and not subject to review except for special cause shown. In making this disposition of the case it is remembered that the right of Mr. Merrill to make this entry as soon as he ceased to act as register has never been denied, and that if an entry should be so made by him, he might then properly present all evidence showing his compliance with the law in the matter of residence.

The motion is therefore dismissed.

SCHOOL LANDS IN WASHINGTON TERRITORY.

HUGH BARCLAY.

The act forming the Territory, and providing for its government, reserved sections sixteen and thirty-six for the purpose of being applied to common schools, but did not authorize the Territory to exercise jurisdiction over those sections for any purpose.

Suit may be instituted by the United States against parties occupying school lands, who entered upon them after survey, although such occupancy is under color of Territorial authority.

Secretary Lamar to the Attorney General, October 15, 1885.

Referring to the letter of the Acting Attorney General of the 16th ult., transmitting copy of a letter from the U. S. Attorney for Washington Territory, dated August 31, 1885, relative to the unlawful occupancy of public lands of the Territory by one Hugh Barclay, and others, for the consideration of this Department and such suggestions as the Secretary may desire to make, I have the honor to enclose herewith a copy of a communication from the Commissioner of the General Land Office relative to the question involved, to whom your letter and enclosure were referred. The report of the Commissioner is quite full, and seems to cover the whole case. I concur in the conclusion therein stated, and can see no reason why the U. S. Attorney for Washington Territory should not act in accordance therewith.

COMMISSIONER'S REPORT.

I am in receipt, through reference from the chief clerk of the Department, of a letter from the Hon. Attorney General, under date of the 16th ultimo, enclosing one from W. H. White, Esq., U. S. Attorney for Washington Territory, asking, in the case of occupancy of reserved school sections where settlement is made after survey, on affidavits filed under the act of February 25, 1885, what course he shall pursue. This letter was referred to the Department for "consideration and such suggestions" as the Honorable Secretary might desire to make.

Mr. White says, that affidavits have been received by him to the effect that one Hugh L. Barclay, in 1884, settled upon Sec. 36, T. 9 N., R. 44 E., Asotin County, in said Territory, and has the entire section enclosed with a fence, and is cultivating about one hundred acres thereof, and is breaking up more for cultivation; that he has a dwelling house on said land; that there is a public school-house in the center of the section which is used for school purposes, but that there is no way of getting to it except "through heavy bars," and so forth. He says there are several thousand acres of school lands occupied in this way, having been rented from the county commissioners.

The question to be determined is, what is the status of sections sixteen and thirty-six in Washington Territory, after they are identified by government survey?

It is well enough understood that where a grant has been made of lands for school purposes title absolutely passes, if they are vacant at the date of survey. In Michigan and Wisconsin no grant, in terms,

was ever made; but a clause in the act of Congress enabling said Territories to provide for admission into the Union, set apart section sixteen in each township, and declared that they "shall be granted for the use of schools." In Beecher *v.* Wetherby (5 Otto, 517,) and in Cooper *v.* Roberts (18 How., 173,) the Supreme Court held that this reservation was such a compact as could not be ignored by Congress when the States should be admitted, and that all that it was necessary for the government to do was to identify the sections by appropriate surveys; and as these states were a part of the territory ceded by Virginia, the ordinance of 1787, providing for legislation by the people of the Territory and requiring the lands to be set apart for educational purposes, applied.

In Washington Territory, the condition of sections sixteen and thirty-six is entirely different. The reservation of these sections for school purposes was no compact, nor was it a grant, or in the nature of a grant; but was contained in the act forming the Territory and providing for its government. It reads as follows.

"*Be it further enacted*, that when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said territory. And in all cases where said sections sixteen and thirty-six, or either, or any, of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated shall be and the same are hereby authorized to locate other lands to an equal amount in said sections, or fractional sections, as the case may be, within their respective counties in lieu of said sections so occupied as aforesaid." (10 Stat. 179.)

The act declares that these lands are "reserved for the purpose of being applied to common schools in said territory." The word "territory" as used in the act is evidently intended to designate the geographical limits of the section of the country within which the reservation was made, and not intended to authorize the Territory to rent, lease, or otherwise exercise jurisdiction over those sections for any purpose whatever. The same may be said with respect to lieu lands which the county commissioners were authorized to select in place of lands occupied and claimed at date of survey. They were merely authorized to locate such lands in order that the future state might not be deprived of the donation which Congress intended to make. But when so located they are simply reserved, the title as well as all jurisdiction over them, still remaining in the United States.

The county commissioners have selected or located under said act, from time to time, quite a quantity of lands in lieu of lands leased in sections sixteen and thirty-six in said Territory.

The act further declares (in Section 6,) that no tax shall be imposed upon the property of the United States; and that "all laws passed by the legislative assembly shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

By an act of the legislative assembly of said Territory approved November 28, 1883, the board of county commissioners was "authorized and empowered, for and in the name of the Territory, to have the care, custody and management of all the lands, in their several counties, reserved by Congress for the use of schools within the Territory."

Mr. White's letter contains a quotation from the act of the legislative

assembly of 1869, which authorizes the county commissioners of the several counties to lease or rent sections sixteen and thirty-six, or any portion thereof, for a number of years, not exceeding six, or until the lands shall be sold. It appears, therefore, that the county commissioners have leased sections sixteen and thirty-six in pursuance of an act of the legislative assembly of the Territory. Upon the face of it this act bears the authorization of Congress, not having been disapproved. The validity of this act is a question that may be inquired into in the civil proceedings for the right of possession. The question asked by Mr. White is, whether such civil suits shall be instituted under the act of February 25, 1885, (23 Stat. 321).

The first section of this act declares unlawful all enclosures of public lands to which the party "had no claim or color of title made or acquired in good faith, or asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made," etc. The second section is mandatory, and makes it the duty of the U. S. Attorney for the proper district, "on affidavit filed with him by any citizen of the United States that Sec. 1, of this act is being violated * * * to institute a civil suit," in the proper court, etc.

Section sixteen and thirty-six may be considered to be lands for purposes contemplated in the act of February 25, 1885.

It is true the lands were reserved for a specific purpose; but no title has passed, and the absolute control of the lands reserved, so far as it may be necessary to protect them from occupation or use by any person who had not a settlement claim thereto at the time of survey, lies in the United States. But independently of the act of Feb. 25, 1885, it is competent for the United States to protect its lands from waste or trespass, by due process of law, the same as any private person owning title might do. (Cotton *v.* United States, 11 How., 229; United States *v.* Bank of the Metropolis, 15 Pet., 377; United States *v.* Grear, 3 How., 120.)

Notwithstanding parties who have leased such lands from the commissioners in pursuance of the act of the general assembly of the Territory, hold possession under color, at least, of lawful authority, the right to have the question as to title and the right of possession judicially determined, still remains.

The Land Department has repeatedly exercised jurisdiction over the school sections in the Territories to the extent of causing the prosecution of parties for removing timber therefrom, since the passage of the act of March 3, 1878. (20 Stat., 39.) See the case of William Beadle, 11 C. L. O., 134.

In case of a homestead entry the land is reserved, and the reservation is of such a character that no other disposition can be made of it. (Wilcox *v.* Jackson, 13 Pet., 488; L. L. & G. R. R. Co. *v.* The United States, 92 U. S., 733.) But the Land Department, under implied authority of law, has in numerous instances procured the prosecution of homesteaders for removing timber from land covered by their homesteads. It rightfully assumes this jurisdiction until the pre-requisites to entitle the entryman to patent have been complied with. It has equal authority for exercising supervision over the lands reserved for school purposes in the Territories.

Even if it should be held that the reservation of sections sixteen and thirty-six in Washington Territory would, upon her admission into the Union as a state, amount to a grant without further legislation (and I

have been unable to find anything in all the numerous decisions of the courts, in any parallel case, supporting such a view), still, until that time, the general government only can exercise any supervision over them. It will not be contended that the Territory can dispose of the fee in these lands. They are simply reserved *for the purpose of being applied.* The Territory cannot apply them to any purpose. It is proper for the Executive, however, to see that they are not diverted to any other purpose, and that after they are identified by surveys, if vacant they shall remain so.

I am of opinion, therefore, that civil suits may be instituted, either under act of February 25, 1885, or independently thereof, against parties occupying the school lands in said Territory, who entered upon them subsequently to survey. In case suit should be commenced in pursuance of the above act it does not appear that the authority of the Attorney General would be required, as the law is mandatory.

HOMESTEAD SETTLEMENT—PREFERENCE RIGHT OF ENTRY.

MOORE *v.* LYON.

The additional time given to make settlement by the act of March 3, 1881, will not be allowed, where it is evident that the failure to settle, prior to contest, cannot be properly attributed to climatic reasons.

The preferred right of a contestant will not be considered by the Land Department until it is asserted by an application for the land.

Acting Secretary Muldrow to Commissioner Sparks, February 18, 1886.

I have before me the case of Wesley Moore *v.* W. F. Lyon, involving the latter's homestead entry of the NE. ¼ of Sec. 14, T. 107, R. 58, Mitchell, Dakota, on appeal by Lyon from your predecessor's decision of December 9, 1884, holding the entry for cancellation.

On examination of the testimony taken at the hearing, I concur in his opinion that Lyon wholly failed to comply with the requirements of the homestead law prior to the initiation of contest, and that he is without a valid excuse for such failure. In argument he invokes the act of March 3, 1881, (21 Stat., 511), urging that he should be allowed the additional period in which to commence his residence on the land. In my judgment, said act does not apply to this case. The entry was made in July, and there is no evidence that Lyon was prevented from settling before the advent of winter, and no evidence of such unusual climatic conditions as would have prevented his settling prior to date of the contest. For the foregoing reasons, said decision is affirmed.

In said decision it was also ruled that, by reason of a certain attempt to withdraw the contest, the contestant had forfeited his preferred right of entry. This ruling was premature, I think, and is therefore overruled. In consonance with the ruling in the case of F. S. Graham (4 L. D., 310), it is held that the preferred right of a contestant will not be considered by the Land Department until it is asserted by an application for the land.

AFFIDAVIT FOR CONTINUANCE—RESIDENCE.

STROUD *v.* DE WOLF.

A defect in an affidavit for continuance will not be considered where it was admitted, that if present, the witnesses would testify as alleged.

In the absence of proof to the contrary, the place where a married man's family resides is held to be his residence.

Secretary Lamar to Commissioner Sparks, February 25, 1886.

I have considered the case of Rachel Stroud *v.* Marcus J. De Wolf, as presented by the appeal of the latter from the decision of your office, dated September 18, 1884, holding for cancellation his homestead entry of the NE. ¼ of Sec. 22, T. 105 N., R. 61 W., 5th P. M., Mitchell land district, Dakota Territory, made March 1, 1882, and also his commutation cash entry, dated November 9, 1883, of the same tract.

The record shows that Rachel W. Stroud initiated contest against said entry, alleging abandonment and change of residence for more than six months, and that the entryman has established a new residence since making his homestead entry. A hearing was ordered, and July 25, 1883, was set for the trial of the cause. At the trial, counsel for contestant moved for a continuance upon the grounds set forth in her affidavit, to wit: "That De Wolf is a wealthy man, residing in Madison, Wisconsin, and there owning and operating two large stores; that said De Wolf owned said stores and resided at Madison at the time he made said homestead entry on said land, and has ever since owned said stores and continued to reside in Madison, Wisconsin; that said De Wolf has only moved a very small portion of his household goods to this Territory, and that the balance of his said goods are still at Madison, Wisconsin; that said De Wolf has ample means and has had ample time to move his goods and establish his actual residence upon his said land, but that he has failed to comply with the law in that respect, but on the contrary has only built a small house or shanty on his said land, about fourteen feet by twenty feet in size." The affiant further avers that she knows of no witnesses residing in said Territory by whom she could prove the allegations contained in her affidavit. But she alleges that she can prove the same by six witnesses, naming them, who reside at Madison, Wisconsin, and, hence, she asked that the contest be continued to enable her to have the depositions of said witnesses taken to be used in the trial of the cause. The counsel for the claimant, thereupon, admitted that the witnesses would testify to the truth of the statements in said affidavit of the contestant, and the trial proceeded.

The affidavit is defective in several respects, but the counsel for claimant, having made said admission, will be held bound thereby. The contestant introduced only said admission and affidavit of contestant. The claimant was not present, in person, but his counsel introduced the wife of the claimant, who testified that she had resided on the land in question; that the house sixteen by twenty feet was erected the last of July

and the first of August, 1882, it has three windows, does not leak and is comfortable to live in; that her husband established his residence upon the land in question August 2, 1882; that he remained away from Madison, Wisconsin, about two weeks at this time, and that she first moved on to said claim on August 29, 1882, and has resided thereon for nine weeks; that she returned to Madison temporarily for the purpose of sending her boy to school, and also to be treated by her family physician; that claimant tried to go to his claim in February, was prevented by snow, and reached the same on March 14, 1883; that she returned to the land on April 27, 1883, and has continued to reside thereon ever since. Mrs. De Wolf further testified that the improvements consisted of three acres broken in July, three in October, 1882, and in June, 1883, about fifteen acres, and that at the date of contest about twenty acres were broken and in crops. She also swears that they have never abandoned the land; that her husband does not maintain any residence at any other place than on the land in question; that it is her intention and the intention of her husband to continue and maintain their residence upon said tract and comply with all of the requirements of the homestead law, and that her husband has never sold, offered to sell, or talked about selling the land in question. This testimony was not materially weakened on cross-examination. Two other witnesses were examined by counsel for claimant, tending to corroborate the testimony of claimant's wife in material respects.

From the testimony taken at the hearing the register and receiver held that the allegations were not proven, and that the contest should be dismissed. Upon appeal, your office reversed their action holding that the actual settlement and residence on the land was by proxy, and that where the wife of the claimant resided is only a circumstance to be considered in determining the question of residence.

It must be conceded that, in the absence of proof to the contrary, the place where a married man's family resides must be deemed to be his residence. Story on Conflict of Laws, Sec. 47.

In the case at bar, the fact that claimant continued to do business at Madison is not sufficient to disprove the positive testimony of witnesses that his residence was upon the land in question. It is conceded in said decision that claimant built a comfortable house on the land and remained there for two weeks; that his family lived on the land up to the time of the contest, with the exception of the temporary absence, which is accounted for; that the improvements and cultivation are sufficient to show compliance with the requirements of the law. The evidence is not sufficient to warrant the conclusion that the claimant never settled in good faith on said tract, or established his residence thereon. Grimshaw *v.* Taylor (4 L. D., 330).

It appears, however, that after an appeal had been filed in the local land office from the decision of the register and receiver, the claimant, having published notice of his intention, was allowed to make proof and payment for said tract under section 2301 of the Revised Statutes.

This was error. No action should have been allowed by the district land officers until said contest had been finally determined. The cash entry will remain suspended, and the claimant will be allowed to make new commutation proof after due notice showing full compliance with the law. Said decision is accordingly modified.

SUIT TO SET ASIDE PATENT.

STORY *v.* SOUTHERN PAC. R. R. CO.

An application to enter patented land confers no right upon the applicant, either in the courts or before the Department, to question the validity of the patent by which title passed from the government.

Secretary Lamar to Commissioner Sparks, February 25, 1886.

I have examined the case of Charles Story *v.* The Southern Pacific Railroad Company, involving the NW. ¼ of Sec. 31, T. 1 N., R. 8. W., S. B. M., Los Angeles, California, on appeal by Story from the decision of your office, dated March 14, 1884, adverse to him.

The tract in question is within the twenty mile (granted) limits of the grant by act of March 3, 1871, (16 Stat., 573,) to said company, the right of which is held by your office to have attached April 3, 1871. The withdrawal thereunder was made May 10, 1871. The township plat was filed in the local office September 21, 1875.

It appears from the record that the above tract was selected by said company January 28, 1876, List 1, and the same was patented March 29, 1876.

It further appears that the land was within the limits of the Rancho San Jose as surveyed by U. S. Deputy Surveyor Thompson in 1868, but was excluded therefrom by the survey upon which patent was issued January 20, 1875.

January 16, 1884, Story applied to enter said tract under the homestead law. His application was "rejected, on the ground that the tract applied for is within the limits of the withdrawal for the Southern Pacific Railroad."

From this action Story appealed to your office, alleging that the land never passed to the railroad company under its grant, because of its being within the claimed limits of the Rancho San Jose at the date the right of the company attached to lands within its granted limits. By decision of March 14, 1884, from which the appeal under consideration was taken, your office properly held that patent having issued to the railroad company, the land had passed beyond its jurisdiction. The appeal to this Department is in the nature of a motion asking that action be brought by the United States to cancel and set aside the patent issued to the railroad company, as aforesaid; and that pending such action in the courts, the application to enter said tract under the homestead law should be received and filed.

I am unable to discern any rule of law to warrant the action asked for by the appellant. He has no standing either in court or before this Department to impeach the patent issued to the railroad company. There is no privity existing between him and the government in relation to the land in question, and consequently he has no grounds for equitable relief on that score. He made application for this tract, with full notice that the United States had parted with the legal title to said tract, and now seeks to take advantage of such act, and in reality have the patent canceled for his benefit. This can not be done. If for any reason the patent herein should be canceled and set aside, the government is the party to file the bill for such action, it being the only party injured, if anybody; and justice can only be done if at all in a suit by the government for its benefit.

For reasons herein set forth, the decision of your office is affirmed, and the appeal dismissed.

Your attention, however, is called to the state of facts which seem to exist in relation to the title to this tract of land. It appears to have been *sub judice* at the date the right of the railroad company attached to odd sections within its granted limits, and under the doctrine of courts and the rulings of this Department was therefore excepted from the grant to the company. Yet patent was issued to the company. Upon the face of the papers this appears to be a case in which the United States may bring suit to vacate said patent. You are therefore requested to investigate thoroughly all the facts connected with the issuance of the patent aforesaid. In this connection, I further direct that you investigate the facts and circumstances connected with the issuance of patent to this railroad company, for any other land similarly situated to the tract in question.

If in your judgment, after making a careful examination, as above directed, there appears sufficient reason why this, or any other patent above mentioned should be vacated, you are directed to make one full report of the matter to this Department, for further action in the premises

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CANCELLATION OF ENTRY.

WILLIAM JOHNSON.

It appearing that the entry in question was canceled without notice, it is re-instated and a hearing ordered.

Secretary Lamar to Commissioner Sparks, February 26, 1886.

On January 22, 1883, William Johnson made timber culture entry for the NW.¼ of Sec. 14, T. 113, R. 75, Huron, Dakota. On October 5, 1883, Special Agent Burke reported that many of the United States soldiers then forming the garrison of Fort Sill had been induced by one Charles Spencer an attorney and notary of that vicinity, to make timber cult-

are entries, and then sell the relinquishments of the same to him. wherefore the special agent recommended the cancellation of said entries, a list of which was furnished. Among them was the above entry of William Johnson. An inspection of the papers therein shows that the qualifying affidavit, dated January 20, 1883, was made before said Spencer as notary. The roster of the garrison of Fort Sill showed thereon the name of William Johnson, who was reported as a deserter June 9, 1883. Under these circumstances, highly suspicious in themselves, and apparently almost conclusive when taken in connection with the admissions of a number of entrymen belonging to the garrison, and of Spencer himself, your predecessor, on November 2, 1883, informed the register and receiver that said entries, including Johnson's, were held for cancellation, and directed that notice be given to said entrymen that sixty days were allowed them to show cause why said cancellation should not be made final. Notice was mailed to Johnson at Fort Sill and returned as uncalled for, and his entry finally canceled. Afterwards efforts were made to have a hearing before the local officers with a view to the re-instatement of the entry, and also to appeal from the denial of the same, it being alleged that Johnson the soldier and Johnson the entryman were two different men—the latter being a resident of Michigan, who had made his entry in good faith and had fully complied with the requirements of law thereafter.

It is not necessary to repeat here a history of the efforts thus made by Johnson, as they are fully recited in my letter of July 6, 1885, (4 L. D., 11,) directing you to certify and transmit all proceedings in relation to said matter to this Department, for action; all the efforts of Johnson for relief from your office having proved futile. Thus certified the case is before me now.

From a careful examination of the papers therein and a consideration of the whole case, it appears that the cancellation of Mr. Johnson's entry was made not only mistakenly, but improvidently and illegally; and further that, under the circumstances alleged by him and his attorneys, he should not have been denied a hearing or appeal on mere technical grounds as was done.

I think Johnson is entitled to the relief asked. You will therefore cause his entry to be re-instated and direct a hearing before the local officers to the end that the matters alleged against the integrity of said entry, and the identity of the entryman may be inquired into fully and in a regular manner, so that if said entry is fraudulent it may be canceled legally.

As it appears from the papers in the case that a second entry has been made on said tract, you will direct the register and receiver to give to the party who made the same due notice of said hearing, in order that he may protect his interests in the premises, inasmuch as his said entry will be canceled should the investigation not result in the cancellation of that of Johnson's.

HOMESTEAD ENTRY BY SOLDIER—COMMUTATION.

SHANNON *v.* HOFFMAN.

That the entryman was in the military service, as an officer in the regular army, when he filed his declaratory statement, made his entry and proof, cannot affect his right under the homestead law, he having shown full compliance therewith in the matter of settlement, residence and improvement.

The right to file a soldier's homestead declaratory and make entry thereunder, if exercised, does not prevent the commutation of the entry so made.

Secretary Lamar to Commissioner Sparks, February 26, 1886.

I have considered the case of Oliver Shannon, jr., *v.* William Hoffman, involving the NE. ¼ of Sec. 21, T. 121 N., R. 78 W., Aberdeen, Dakota, on appeal by Shannon from your office decision of December 11, 1884, holding his homestead entry, No. 694, for cancellation, and allowing Hoffman's homestead entry, No. 1126, to remain intact. The decision appealed from recites that Hoffman filed soldier's homestead declaratory statement for the tract in question October 18, 1882, commenced settlement March 15, 1883, made entry on the 24th of the same month, and commenced actual residence April 16th following, which residenee was continuous for six months thereafter.

December 13, 1882, Shannon made his homestead entry covering the same tract. His residence commenced nearly simultaneously with his entry, and it appears has been continuous. His entry, it will be observed, was made a little more than three months prior to that of Hoffman, but was nearly two months after the latter had filed his soldier's declaratory statement. Said declaratory statement, if Hoffman was entitled to file such a paper, operated to give him the superior right to the land, should he enter it and commence settlement and improvement thereon, at any time within six months from the filing thereof. He gave notice by publication of his intention to offer final proof in support of his claim, October 23, 1883. Shannon was also specially notified by the register and receiver and called upon to appear on the day named, and show cause, if any, why Hoffman's proof should not be received and his (Shannon's) entry be canceled.

Hoffman appeared and offered his proof, showing settlement in March, 1883, and commencement of actual residence April 16, 1883, followed by continuous residence to date of proof, a period of over six months. He at the same time made application to commute his homestead to cash entry.

Shannon filed his protest and objections to the allowance of said entry, alleging generally that Hoffman, being an officer in the regular army, could not, while such officer, legally make a homestead entry; that entries made pursuant to the filing of a soldier's declaratory statement can not under the law be commuted, and finally, that the title of protestant to the tract in dispute is by virtue of his homestead entry,

together with his residence, improvement and cultivation, superior to that of Hoffman.

The register and receiver overruled all of the objections presented by the protest and held Shannon's entry for cancellation. Your office affirmed this finding and held that Lieut. Hoffman did make a legal entry, and having complied with the law in every particular, his commutation proof should be approved and certificate and receipt issued. I fully concur in the conclusions of law and of fact arrived at by the decision appealed from. Hoffman, having served as a soldier in the army of the United States during the recent rebellion, and having been honorably discharged, is clearly entitled to the benefits of Section 2304 of the Revised Statutes. The fact that he was in the service as an officer in the regular army at the dates when he filed his declaratory statement, made his entry and offered his proof, can not of itself affect his right under the homestead law. It is true, such service might possibly have defeated his right by preventing his compliance with the law in the matter of residence, but the proof shows that it did not, for he made the settlement and improvement required by the law. The claim of protestant that a homestead entry made pursuant to soldier's declaratory statement, as provided by Section 2304 of the Revised Statutes, can not be commuted, but must be perfected, if at all, by residence, with credit for military service as provided by Section 2305 of the Revised Statutes, is not in my judgment well founded.

The homestead law must be regarded as a whole, and its different sections and provisions must be so construed as not only to harmonize with each other, but to carry out the obvious purpose of the law, and the intent of Congress in its enactment.

In this view it can not be supposed that Sections 2304 and 2305 of the Revised Statutes were intended to curtail or take away any right already existing, in any one qualified to make a homestead entry. Their purpose was manifestly just the opposite. By their language they conferred certain special benefits and privileges upon the classes mentioned therein. First, they permit an honorably discharged soldier or sailor to hold for his subsequent entry, settlement and improvement, at any time within six months from the filing of his declaratory statement, the tract described therein, provided said tract is subject to entry. Second, they confer the additional benefit of allowing to an honorably discharged soldier or sailor credit for his service not to exceed four years, so that such service may be counted and credited as actual residence on any tract properly entered under the homestead law.

The first of these benefits was claimed and exercised by Hoffman, the appellee in this case. The second, he concludes to waive, and pay for the land, though he might, it appears, by waiting six months longer have acquired full title without the expense of purchase, as four years' service during the war is testified to. By such waiver and application to commute, he simply placed himself upon the law applicable to every

qualified entryman, civilian as well as soldier. This he had a perfect right to do, and his doing so in no way or degree impeaches his good faith, which is manifest from the evidence, the character and value of his improvements, placed by the proof at one thousand dollars, as well as by his statement at the hearing that he took this homestead for the purpose of preparing a home for his family in his declining years, and that he there intends to end his days. I find as a conclusion that Hoffman had a legal right to do just what he did in connection with his homestead entry; further that he has shown full compliance with the law in the matter of settlement, residence and improvement, and is entitled to final certificate upon payment of the money for the land as proposed by his application to commute.

In view of the foregoing, Shannon has no right to the tract as against Hoffman, and your office decision holding his homestead entry for cancellation is affirmed.

RAILROAD GRANT—SETTLEMENT RIGHTS.

SCHLEIN *v.* CEN. PACIFIC R. R. CO.

The pre-emption claim of the settler, as declared in his filing, not covering the tract in dispute, the land is held to have not been excepted from the grant thereby, though a small part of his improvements, placed there prior to survey, were on said tract.

Secretary Lamar to Commissioner Sparks, February 25, 1886.

I have before me the appeal of the Central Pacific Railroad from the decision of your office, dated September 18, 1884, wherein it was held that it had no rights under its grant to the S. ½ of SW. ¼ and the SW. ¼ of SE. ¼ of Sec. 23, T. 12 N., R. 10 E., M. D. M., Sacramento, California, and G. H. C. Theo. Schlein's application to enter said tracts along with another tract under the homestead law was allowed, subject to appeal.

Said tracts are within the twenty mile (granted) limits of the grant to said company under the act of July 2, 1864 (13 Stat., 356). The map of the definite location of this section of the road was finally accepted by the Secretary of the Interior October 27, 1866.

The township plat was filed in the local office July 10, 1871.

On February 27, 1884, Schlein applied at the local office to enter said tracts, along with the NW. ¼ of NW. ¼ of Sec. 26, same township and range, and filed affidavits to the effect that said tracts had been occupied and improved from 1854 to the present time by qualified pre-emption settlers, and as a consequence thereof the land in the odd numbered section was excepted from the grant to the railroad company.

A hearing was thereupon ordered and had April 10, 1884, at which the testimony of two witnesses was taken.

The local office, after deploring the fact that the evidence was very meager and unsatisfactory, and being somewhat at a loss to come to a

definite conclusion, finally decided on the 9th of May, 1884, that the evidence offered was not sufficient to establish such a claim to the tracts in the odd numbered section as would except them from the operation of the grant to the company. They accordingly rejected Schlein's application, subject to appeal.

No appeal was taken, and the case came up to your office under the Rules of Practice in such cases made and provided.

Your office, on the 18th of September, 1884, rendered its decision reversing that of the local office, rejected the claim of the railroad company, and allowed Schlein's application as aforesaid.

A careful examination of the evidence submitted and the records of your office leads me to concur generally in the finding of the local officers. The first witness, in his direct examination, testified generally that from 1854 to 1858 the land in question was occupied and cultivated by one Keifer; that Keifer sold out to Daniel B. Craig, who continued to reside there and raise grain and general farm crops from 1858 till 1873; that his family resided there with him, and that his improvements were of considerable value. But upon cross-examination he testifies that Mr. Craig did business in Georgetown, several miles distant from the land in controversy, and that he and his family resided there most of the time—in fact all the time, except in the hay season of the year, when he went upon the land and cut hay there. The second and last witness testifies generally that he thinks Mr. Craig occupied the land in controversy from 1858 until about 1861 or '62, when it fell into the possession and under the control of the California Ditch Company; that the house which Craig occupied was mainly upon the land in section 26 of this township, and that his orchard was also in the same section, but that his barn was upon the land in section 23. His testimony is somewhat vague and meager. As before stated, he thinks Craig left the land in 1861 or '62. Afterwards he states that Craig continued to occupy the land until Schlein took possession of it in 1873. In reference to Craig's improvements, he appears to have very indefinite notions. He says: If I had those improvements I don't believe I would give them up for less than $500 or $600; although I might sell out for $25." He further testifies that Schlein was the successor of Craig and has resided upon the land from the time Craig left up to the present time.

An examination of the records of your office discloses the fact that on the 10th day of October, 1871, just three months after the filing of the township plat, Daniel B. Craig filed declaratory statement No. 3169 for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 26, township and range aforesaid, alleging settlement thereon February 20, 1858. Final proof appears never to have been made on this claim.

It is thus seen that Craig himself has indicated what he considered was his pre-emption claim; and that claim did not include any of the land here in dispute. I am of the opinion that no one can now say

Craig's claim was other than what he made it, when he himself never at any time alleged any error in his filing aforesaid.

In view of the meager and unsatisfactory nature of the testimony, coupled with the fact that Craig himself has said that his claim (which is here sought to defeat the railroad grant for the lands in section 23) was in section 26, I am clearly of the opinion that the appeal of the company herein is well taken.

The decision appealed from is reversed, the application of Schlein is rejected, and the land in dispute awarded to the railroad company.

RAILROAD GRANT—SELECTION—RIGHT OF ENTRY.

OLSON *v.* LARSON ET AL.

Selections made while the land is *sub judice* are invalid.

A rejected application to file a pre-emption declaratory statement, pending on appeal, is no bar to the reception of a homestead entry.

Secretary Lamar to Commissioner Sparks, February, 25, 1886.

I have considered the case of Samuel Olson *v.* Peter Larson, St. Paul, Minneapolis & Manitoba and Hastings & Dakota Railway Companies, involving the NE. ¼ of Sec. 1, T. 117, R. 29, Benson, Minnesota, on appeal by Larson and the two companies from your office decision of April 28, 1884.

The case arises upon the application of Samuel Olson, April 5, 1883, to make homestead entry of said tract; and of Peter Larson, November 26, 1883, to make like entry of the N. ½ of said quarter section.

The land was within the withdrawal for the St. Paul and Pacific Railway Company under the act of March 3, 1857, but was restored to market by proclamation No. 700, dated April 18, 1864. On November 18, 1864, William R. Cosgrove made homestead entry No. 1110 on the tract. By act of March 3, 1865, the company became entitled to four additional sections on each side of its road to be selected by the Secretary of the Interior: the land in question is within this extended area, withdrawal of which was made by the Secretary July 10, 1865, and received at the local office July 20, 1865. Said tract is also within the twenty miles indemnity limits of the grant of July 4, 1866, in favor of the Hastings and Dakota Railway Company, the withdrawal for which became effective August 8, 1866. On September 30, 1872, the entry of Cosgrove was canceled, because he failed to make final proof.

On June 14, 1878, Olson applied to file declaratory statement on the S. ½, and same day Larson made like application as to the N. ½ of said quarter section. Both applications were rejected, as it appears, on the ground that the land was within the supposed granted limits of the act of March 3, 1865; and also that of July 4, 1866, and therefore was not

subject to pre-emption. Each party appealed, but only the appeal of Larson appears to have been prosecuted, notwithstanding the assertion of his attorney to the contrary. At a later date Olson ordered his appeal to be dismissed, whereby the decision of the register and receiver in his case became final.

Your predecessor, Acting Commissioner Armstrong, affirmed the decision of the local officers in the case of Larson, holding that inasmuch as an examination showed that the entry of Cosgrove was made by a single man, while in the military service of the United States, without residence on the tract, and whose affidavit was made before his commanding officer, said entry was null and void, and did not except the land from the railroad grant, as was held in the Kniskern case, and awarded the land to the St. Paul and Pacific Company, construing the act of March 3, 1865, to be a grant of four additional sections in place to that company. (See 6 C. L. O., 78.) From this judgment no appeal was taken by Larson, but the Hastings and Dakota Railway Company appealed and the judgment therein was affirmed as between the two companies, by Secretary Kirkwood, on April 20, 1881.

On September 18, 1880, the St. Paul, Minneapolis and Manitoba Railway Company, successor to the St. Paul and Pacific Railway Company, selected this land.

On April 5, 1883, Olson applied to make homestead entry of the whole of said NE. $\frac{1}{4}$, which application was refused, "under rule 53," because of the supposed pendency of the appeals of himself and Larson in relation to the pre emption filings. From this rejection, on June 2, 1883, Olson appealed, and at the same time dismissed his former appeal. On November 26, 1883, Larson applied to make homestead entry on the N. $\frac{1}{2}$ of said quarter section, which application was denied, because of the pending appeal of Olson relative to his homestead entry. From this rejection Larson also appealed. On April 28, 1884, on consideration of both appeals, your office held for rejection the selection of the St. Paul, Minneapolis and Manitoba Railway Company; denied that the Hastings and Dakota Railway Company had any preferred rights in the premises, by virtue of the withdrawal in its favor; affirmed the action of the register and receiver rejecting the application of Larson to enter; reversed that rejecting Olson's entry, and awarded the whole of said NE. $\frac{1}{4}$ to him. (See 2 L. D., 501.) On appeal from this decision, the case is now before me.

The rejection of Olson's homestead application, because of the pendency of the former appeals in relation to the right to file declaratory statements on the tract, was error on the part of the register and receiver, inasmuch as said filings, even if they had gone to record, would not have precluded the recording of an entry for said tract and a rejected application pending on appeal certainly ought not to deprive one otherwise qualified to make entry from doing so on land properly subject thereto.

At the time of the homestead application of Olson, this Department had reversed the ruling in the Kniskern case, and declared that a homestead entry like that of Cosgrove, while intact upon the records, exempted the tract covered thereby from any railroad grant which became effective during the existence of said entry. So that, at the date of Olson's said application, under the rulings of this Department, the land in question was public land, subject to entry, sale or selection.

The appeal of Larson was disposed of by the Commissioner's decision of September 4, 1879, from which Larson failed to appeal, and that of Olson was withdrawn June 2, 1883, at the time he filed appeal from the rejection of his homestead application; so that then the right of entry was entirely disembarrassed of any question growing out of the first appeals.

At all events, Olson's said application was the first presented after the rulings of this Department that lands in a similar category were public, and subject to such entry; therefore his should have been allowed, unless there was some special reason for rejecting the same. Two such reasons are alleged.

The first is, that as between Olson and the St. Paul and Pacific Company the right to this land had passed in *rem judicatam*. This contention is not tenable under my decision in the case of the Hastings and Dakota Company *v.* Whitnall, (4 L. D., 249.)

The second reason is, that the St. P., M. & M. Company, successors of the St. Paul & Pacific Company, having on September 13, 1884, selected the land under the provisions of the act of March 3, 1865, said selection precluded entry of the same.

This selection was made whilst the appeal of Olson as to the S. ½ of said quarter section was yet pending in your office, and also whilst the appeal of the Hastings and Dakota Company, as to the whole of said quarter section was pending in this Department. Selections made while lands are thus *sub judice* are invalid and are not to be regarded as conferring any rights. See St. P., M. & M. Ry. Co. *v.* Paulsen, (4 L. D., 232.)

Cosgrove's entry, subsisting at the date of the withdrawal for the Hastings and Dakota Railway Company in 1866, and the said company not having made selection of said tract, afterwards, while the same was vacant, has acquired no rights thereto. The existence of said entry, at the date of the withdrawal of said tract, July 20, 1865, for the benefit of the St. Paul and Pacific Company, under the act of March 3, 1865, also excepted the tract from its operation. I must therefore hold that said tract was at the date of Olson's application to make entry free from any claims on behalf of either of said companies, and he being the first applicant was entitled to make entry thereof, unle s some further objection is shown.

It appears that on same day Olson made application to file on the S. ½ of said quarter, Peter Larson made a similar application to file on the the N. ½ thereof; that afterwards on December 18, 1883, Larson offered

to file homestead entry on said N. ½, alleging settlement in May, 1876, which application was rejected, and appeal taken as before stated. Larson alleges settlement at the time stated, improvement, cultivation of said tract and continuous residence thereon since. He also alleges that at the time he and Olson originally settled upon said quarter section, a division fence was established, which has since been maintained. Olson, on the other hand, whilst claiming settlement in 1877, improvement, cultivation and residence on the tract claimed, denies that Larson ever settled upon or improved according to law any portion of said tract, and asks for a hearing to ascertain their respective rights in the premises.

I think, under the peculiar and anomalous circumstances of the case, this would be a just and proper disposition of it. I therefore direct that Olson's homestead entry be received; and that a hearing be ordered before the register and receiver to determine the respective rights as between him and Larson to the N. ½ of said quarter section. Should the same be awarded to the latter, then the homestead entry of Olson will be canceled to that extent and Larson permitted to enter the same.

Your decision is accordingly modified.

FINAL PROOF—PUBLICATION OF NOTICE.

FOREST M. CROSTHWAITE.

Error appearing in the published description of the land, the final proof is suspended, for further publication of notice.

Secretary Lamar to Commissioner Sparks, February 25, 1886.

Forest M. Crosthwaite made homestead entry No. 19 October 3, 1883, for the E. ¼ of NE. ¼ of Sec. 9 and NW. ¼ of NW. ¼ Sec. 10, and SW. ¼ of SW. ¼ Sec. 3, T. 154 N., R. 64 W., Devil's Lake, Dakota, and commuted the same to cash entry, No. 718, October 3, 1884.

In publishing notice of intention to make final proof, the NE. ¼ of Sec. 9 was erroneously described in the notice as the NW. ¼. You held this to be a material defect, and therefore rejected the final proof and held the entry for cancellation, allowing sixty days for appeal.

This was error. The case should have been returned to the local office, with instructions to require the applicant "to make final proof and entry after due and proper notice," as held in the case of A. S. Frick & J. S. Powell, 3 L. D., 460, which you cite in support of your ruling.

By letter of June 29, 1885, from the register, sent to your office before this appeal was filed, it appears that the notice presented to the local office properly described the entry, but the error was made by the printer. You will therefore direct the local office to notify the applicant that she will be required to make proper publication of notice, and after expiration of said notice, if no objection is filed to said entry, the proof formerly submitted may be accepted as final proof.

Your decision is reversed.

RAILROAD GRANT—INDEMNITY SELECTION.

St. Paul & Duluth R. R. Co.

The amendatory act of 1866, did not make any additional grant of lands, but merely extended on the west the indemnity limits to provide for selections in case of loss occasioned by the road running nearer than ten miles to the boundary line of the State; and said amendment did not operate upon lands lying east of the road.

Lands within the granted limits, excepted from the grant, are not afterwards subject to selection as indemnity.

The "deficiency lands" are in effect upon the same basis as the lieu lands, provided for in the original granting act.

Secretary Lamar to Commissioner Sparks, February 27, 1886.

I have before me the appeal of the St. Paul and Duluth Railroad Company from the decision of your office, dated September 10, 1884, rejecting its selection of the E. ½ of SW. ¼; and W. ½ of SE. ¼, Sec. 27, T. 42 N., R. 20 W., 4th P. M., Taylor's Falls, Minnesota.

The tracts in question are within the ten mile (granted) limits of the grant to the State of Minnesota in aid of the Lake Superior & Mississippi (now St. Paul & Duluth) Railroad Company, act of May 5, 1864, (15 Stat., 64), the right of which is held by your office to have attached to odd sections within its granted limits September 25, 1866, upon the filing and acceptance of its map of definite location by the Secretary of the Interior.

The record shows that at the date of the attachment of the company's rights as aforesaid the tracts in question were covered by homestead entry No. 113 of date February 5, 1864, in the name of Robert S. Campbell, which was canceled July 22, 1871.

On the 28th of December, 1881, the land aforesaid was selected by the agent of the said railroad company, and the list embracing said selection was duly transmitted to your office.

The decision appealed from held that the lands being covered by a homestead entry *prima facie* valid at the date of the definite location of the road were thereby excepted from the operation of the grant; and as a consequence, the selection thereof by the company should be rejected and canceled.

The appeal under consideration alleges three grounds of error on the part of the Commissioner, to wit:

"1. In holding that the entry of Robert S. Campbell excepted the land in question from the operation of the grant.

"2. In holding the selection of said land for cancellation.

"3. In not approving the said selection."

As to the first ground of error, it is sufficient to say that the law on that point is well settled. It has been held so often that a *prima facie* valid homestead entry, covering a tract of land in an odd section within the granted limits of a railroad, and subsisting at the date of the defi

nite location of the road, is sufficient to except said tract from the operation of the grant, that no authorities need be cited to support that proposition. In fact the argument in support of the appeal is silent upon that point, and in effect abandons said ground of appeal.

The remaining grounds of error may be grouped together and treated as one. It is claimed by the company that under and by virtue of the act of July 13, 1866 (14 Stat., 93), which was amendatory of the said act of 1864 making the grant, the said selection of these tracts should be approved.

The original grant was of lands in the State of Minnesota, and for the purpose of building the road from St. Paul to Lake Superior. In order that the road be built upon the most direct and suitable line practicable it was found that said line would run near the boundary line between the States of Minnesota and Wisconsin. Wherefore the said amendment, which is entitled "An act to amend 'An act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior,'" approved May 5, 1864, and provides that section one of said act be amended by adding thereto the following:

"*Provided, further*, That in case it shall appear, when the line of the Lake Superior and Mississippi Railroad is definitely located, that the quantity of land intended to be granted by the said act in aid of the construction of the said road shall be deficient by reason of the line thereof running near the boundary line of the State of Minnesota, the said company shall be entitled to take from other public lands of the United States within thirty miles of the west line of said road such an amount of lands as shall make up such deficiency: *Provided*, That the same shall be taken in alternate odd sections as provided for in said act."

The original grant of 1864 had a twenty mile or indemnity limits within which the Secretary of the Interior was to select lands in odd sections in lieu of those lost in place in the granted limits by reason of sale, reservation, or appropriation, or the attachment of a homestead or pre-emption claim, at the time the line of the road was definitely fixed. The amendment of 1866 was designed and intended to provide for another and different deficiency, and to do so provided for a shifting westward of the boundary lines of the grant, in order to satisfy its intent and purpose. It did not make any additional grant of lands; but merely changed the boundaries of the grant already made. That is to say that for any deficiency arising because of the route of road running nearer than ten miles to the boundary line of the State the company would be allowed to select public land in odd sections within a thirty miles limit on the west. The amendment was never intended to operate upon any lands lying east of the road, and as I understand your office in practice has so understood and construed it.

But even if the amendatory act should be held to apply to any land in odd sections east of the company's road, I am of opinion it could not

be held to apply to this particular tract, which is within the granted limits. If the lands were excepted out of the grant once, they were so excepted for always and for all purposes.

In the case of L., L. & G. Ry. Company *v.* United States (92 U. S. 749), the court in considering the question of indemnity selections say:

"If the company did not obtain all of them [odd sections] within the original limit, by reason of the power of sale or reservation retained by the United States, it was to be compensated by an equal amount of substituted lands. The latter could not, on any contingency, be selected within that limit. . . . . . It would be strange, indeed, if the clause had been intended to perform the office of making a new grant within the ten-mile limit, or enlarging the one already made."

See also, Winona & St. Peter R. R. Co., *v.* Barney, (113 U. S., 618).

It may be urged that this language of the court upon this question was in a certain sense mere *dictum*, inasmuch as it was not really necessary in the decision of the case then under consideration. But however this may be, I am of opinion that the doctrine therein announced is sound and reasonable, and for the present will be adopted as a rule of construction.

In fact, any other construction would be against the spirit, if not the letter, of the law and would lead to inconsistencies. For let it be once conceded that the railroad company have the right to select as lieu lands any odd section within its granted limits, which at the time the right of the road attached to its granted lands was, from any cause, in a state of reservation, but which, at the date when the company chose to make its selections of lieu lands, was freed from such reservation, and again public land, and the reservation clause in the granting act would be practically nullified. Under such a construction there would be no reason why the company might not thus select as *lieu* lands the identical tracts which were lost in place by reason of their being in a state of reservation at the time the rights of the company attached as aforesaid. This is a *reductio ad absurdum*, and finds no place in the administration of the law by this Department.

But it is intended in the appeal under consideration that the *deficiency* lands, as they are called, that is, the lands which are to be selected to make up the deficiency arising by reason of the line of road running near the boundary line between the States of Minnesota and Wisconsin, are not *lieu* lands as that term is usually understood.

Such a distinction is more subtle than sound, and is not looked upon with favor. The original granting act provided for indemnity for the loss of lands in place in the granted limits, by reason of such lands being in a state of reservation at the time the right of the road attached to its granted lands, and that loss was to be made up by selection of other lands within the twenty mile limits in Minnesota on either side of the road. The amendatory act provided for indemnity for the loss of lands occasioned by the line of the road running near the boundary line of the State, and that loss was to be made up by selection of other

lands within the thirty mile limits on the west. In both cases the lands were to be selected to compensate the company for any loss sustained by it, by reason of any failure in the original grant; and in neither case did any rights attach until actual selection. I am unable to discern any material distinction, in principle, between the two kinds of loss.

In view of the foregoing, I am clearly of the opinion that the appeal of the company ought to be, and it hereby is, dismissed. The decision appealed from is accordingly affirmed.

ENTRY OF RECORD—SETTLEMENT RIGHTS.

GEER *v.* FARRINGTON.

Conceding that while an entry stands uncanceled upon the record settlers upon the land, covered thereby, acquire no rights as against the record entryman or the United States, yet as between such settlers, priority of settlement may be properly considered.

There is no authority under the law for the allowance of a joint entry for lands settled upon after survey.

Secretary Lamar to Commissioner Sparks, March 3, 1886.

In the case of Luron H. Geer *v.* Nancy E. C. Farrington, involving the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 20, W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 21, T. 22 S., R. 30 E., Gainesville, Florida, your office on November 5, 1885, held "that each party should be allowed to enter the legal subdivisions embracing their principal improvements." From this decision Geer duly appealed.

This land, it appears, was entered as a homestead by W. S. Floyd, July 22, 1875, and the entry canceled in the local office August 10, 1883, for failure to make final proof. Geer on the same day made homestead entry for the land, and subsequently, though on the same day, Mrs. Farrington filed declaratory statement therefor, alleging settlement June 15, 1883.

On the submission of final proof by Mrs. Farrington, Geer filed protest and your office, on May 8, 1884, directed that a hearing be held to determine the rights of the parties.

The evidence shows fairly the following: The homestead entryman, Floyd, never exercised any of the rights of a homesteader on the land, and in no way attempted to comply with the law. In 1882 two men, Redmond and Bryant, went upon the land and built a log cabin, and girdled trees with a view to a future clearing. In April, 1883, Geer bought the possessory claim of Redmond and Bryant, paying the sum of $55.00. Thereafter Geer went upon the land and during the months of May, June and July exercised the rights of ownership over said place in various ways, occupying the cabin at nights, and making prep-

arations to build a better house, his family in the meantime living at Orlando, four miles away. In the way of procuring cancellation of the existing entry, Geer through counsel opened correspondence with your office and the local office.

Mrs. Farrington, on or about June 15, 1883, visited the land, and examining the same, set on foot certain improvements. June 30, 1883, during a temporary absence of Geer, Mrs. Farrington took possession of his cabin, putting outside the articles he had left there—bedding, cooking utensils, etc. She thereafter held possession of the same, against the protest of Geer, until she could build herself a house, which she moved into prior to August 10, 1883. Mrs. Farrington also made various efforts toward procuring the cancellation of the Floyd entry, such as attempting to initiate contest, and correspondence through attorneys.

Both Geer and Farrington at the time of the hearing appear to have had valuable improvements on the land, all of which are located on the same legal subdivision of forty acres. When the Floyd entry was canceled neither party, as it transpired, had secured any right as a preferred contestant, and both were relying upon their settlement rights through which to secure title to the land.

There is no authority under the law for the allowance of a joint entry for lands settled upon after survey, hence this case must be determined upon some principle recognizing an acquired right of priority.

Proceeding upon the hypothesis that while the original entry stood uncanceled upon the record, neither of these parties could secure any right by virtue of settlement as against the record entryman, or the United States; it, however, does not follow that as between the parties hereto, under the peculiar circumstances of the case, the settlement first made in point of time is not entitled to the higher consideration. This conclusion is emphasized when the manner of making the respective settlements is duly scrutinized. Geer, deferring to the claim of possession and occupation set up by Redmond and Bryant, paid for the improvements they had placed upon the land, and assuming peaceable possession, began the performance of such acts of settlement as were necessary to the establishment of a permanent home. Subsequently Mrs. Farrington, taking advantage of the absence of Geer, moved into his cabin and began her residence upon the land. Though she insists in her evidence that the results of Geer's prior settlement and occupation were not to be discovered at the time she first went upon the land, it is not denied that she took and held forcible possession of his cabin, setting outside such articles of property as she found therein. It is apparent therefore that the equities are in favor of Geer who was not only found to be the first settler, but whose acts of settlement are not tainted with wrong and violence as against the adverse claimant.

Your decision is accordingly reversed. The final proof of Mrs. Farrington is rejected and the land awarded to Geer, subject to his future compliance with the law.

HOMESTEAD—RESIDENCE; PRACTICE.

WEST *v.* OWEN.

Residence is not maintained through occupation by a tenant.

To establish residence there must be a combination of act and intent; the act of occupying and living upon the land, and the intention of making the same a permanent home.

The case of James Copeland (4 L. D. 276) cited and followed.

Secretary Lamar to Commissioner Sparks, March 3, 1886.

On the 21st of April 1882, George B. Owen made homestead entry No. 19388 for the SW. ¼ Sec. 14, T. 105 N., R. 61 W., 5th P. M., Mitchell, Dakota Territory; and November 25, 1882, he commuted the same to cash entry, final certificate No. 8560 issuing therefor.

January 29, 1883, Eugene H. West initiated contest against said entry alleging that the entryman never established a residence on said tract as required by the homestead law but has resided for several years in Marion, Linn county, Iowa; and that during the existence of said entry one H. S. Deland was in sole possession of said tract as the tenant of Owen.

By letter "C" of date March 2, 1883, your office ordered a hearing in the case, at which contestant offered evidence in support of his allegations. Claimant offered no evidence in his own behalf, but moved a dismissal of the contest on the ground that the evidence offered failed to sustain the allegations in the affidavit of contest. The local office sustained said motion and dismissed the contest; and upon appeal their action was sustained by your office November 28, 1884.

The case is now before me on appeal by West from the said decision of your office.

I cannot concur in the conclusion of the local office and of your office. The evidence shows that in a few days after making his entry the entryman had a suitable house erected upon the tract, into which H. S. Deland and family moved. This was under and in pursuance of an agreement made and entered into in the State of Iowa by which the claimant was to bring Deland and family to Dakota and furnish them a place to live, in return for which Deland was to break a quantity of ground on the claim. Deland and family lived in this house during all the time of the existence of the entry, and all the cultivation done there in 1882 was done by him. Claimant visited the claim every three or four weeks during the summer of 1882, at each time staying one or two days and nights. His only furniture there was a cot; and when there he took his meals with Deland's family. It is shown that for several years prior to making his entry, the entryman resided in Marion, Linn county, Iowa, where he had some property of his own. His family consisted of his wife, one or two children, and his wife's sister. So far as can be determined from the evidence, neither the wife nor children ever saw the land in contest; but it is shown that some time in the spring or early

summer of 1882 his family went to the east on a visit, and did not return until in the fall of same year, about the time final proof was made. It is further shown that claimant was in Marion during the summer of 1882 fully as much as on the land in question, and after proving up he continued to reside with his family in the same house in which they resided prior to the making of said entry.

I think this is a clear *prima facie* case of failure to establish and maintain a residence on the land as required by the homestead law. The idea that an individual can acquire or maintain a residence on a tract o. public land by making occasional visits thereto while his family are residing elsewhere and while all his interests and household effects, apparently, are with his family, has been long since exploded, if, indeed, it ever had any real existence. That is to say, in order for an individual to establish residence on a tract of public land as required under the homestead law, it is necessary that there be a combination of act and intent on his part, the act of occupying and living upon said tract, and the intention of making the same his home to the exclusion of a home elsewhere. That is "a true, fixed and permanent home, and principal establishment, and to which whenever he is absent he has the intention of returning." Story's "Conflict of Laws," page 35.

Judged by this test it would appear that claimant's residence in Iowa comes nearer the standard than his residence on the tract in question.

But the sustaining of claimant's motion to dismiss the contest obviated the necessity of his submitting any evidence in support of his claim. As was said in the case of James Copeland (4 L. D. 276): "Had the motion been overruled, he would still have had the right to offer evidence to rebut the proof offered against him."

The said decision of your office is accordingly reversed; and you will direct the local office to continue the hearing of this contest at as early a day as practicable, giving all parties in interest due and sufficient notice thereof. If at the time set for said hearing the claimant fail to submit any evidence, his said entry will then be canceled.

PRACTICE—RELINQUISHMENT—EVIDENCE.

CROUGHAN *v.* SMITH ET AL.

A relinquishment, executed prior to contest, and filed after the same was properly dismissed, cannot be held to inure to the benefit of the contestant.

An entry should not be canceled upon evidence taken in a case between other parties and dismissed prior to the allowance of the said entry.

Secretary Lamar to Commissioner Sparks, March 3, 1886.

I have before me the case of Bridget Croughan *v.* Daniel Y. Smith and T. K. Long, involving the NW. ¼ of Sec. 10, T. 138 N., R. 81 W., Bismarck, Dakota, on appeal by Long from your predecessor's decision of November 29, 1884, awarding the land to Croughan.

It appears from the record that Croughan brought contest against Smith's timber-culture entry on August 31, 1883, for failure to break and cultivate during the second year; that hearing was set for October 17 following, but on stipulation the case was continued, and a commission issued to take testimony, the return day being fixed at November 1, 1883; that, as alleged, the contestant having submitted his testimony before the commissioner, by stipulation a continuance to a day to be subsequently agreed upon was granted, in order to enable the defendant to produce his witnesses; that said day was, however, not agreed upon, and further testimony was not taken, nor was the testimony already taken transmitted to the local office; that on the day of final hearing defendant's counsel moved the dismissal of the contest, and, neither contestant nor her counsel being present, the motion was granted; that on the following day Smith's relinquishment, executed August 6, 1883, was filed by one Johnson, who in turn relinquished April 22, 1884, and the entry of Long, the appellant here, was allowed; that meanwhile Croughan appealed from the action of the local officers dismissing her contest, your office sustained their action on June 7, 1884 (without knowledge, however, of the proceedings before the commissioner), and from this decision, of which the contestant had due notice, there has been no appeal; that on October 7, 1884, after the expiration of the time limited for appeal, the contestant forwarded certain papers purporting to be the testimony taken before the commissioner and his certificate to the proceedings had before him, as above recited; and that thereupon your predecessor, in the decision aforesaid, reversed his former action, re-instated Croughan's contest, held that the relinquishment inured to her benefit, and canceled Long's timber-culture entry.

For the several reasons hereinafter stated, I must decline to concur in this action. In the first place, the papers purporting to be the testimony taken before the commissioner have not been properly put in evidence, so as to affect Long, who is a party in interest, and to warrant this summary cancellation of his entry. Second, the ruling that Smith's relinquishment inured to the contestant's benefit was erroneous, because the relinquishment was executed before the contest's initiation and filed after it was properly dismissed. Third, the action of contestee's attorney, even admitting that he was employed by Johnson, in obtaining a continuance before the commissioner and then moving the local officers to dismiss, wrought no injury to the contestant's interests; it was because of her non-appearance at the final hearing, and her neglect to protect her own interests before and at said hearing, that the local officers dismissed the contest. Fourth, she again grossly neglected her case by her failure to appeal from the decision of your office sustaining the action of the local officers. By such failure, said decision became final. The contestant sets up that the decision was made without knowledge of the proceedings before the commissioner; but, if so, that want of knowledge was caused by her own neglect to state the

facts when she appealed from the local office. Contestant urges that Long made his entry pending her appeal to your office, and took his chances of its successful issue; but, adopting this view of the case, I think that he has a right to stand on the law, and to insist that her failure to appeal terminated her right of contest absolutely as against his lawfully-acquired adverse interest in the tract.

For the foregoing reasons, your predecessor's said decision is reversed, and the land is awarded to Long.

SWAMP LAND—BOIS BLANC ISLAND.

W. H. CUSHING ET AL. *v.* STATE OF MICHIGAN.

Where the field notes of survey have been adopted as the basis of adjustment, and the character of the land cannot be determined therefrom, it is incumbent upon the State to establish its alleged right by other satisfactory evidence.

Secretary Lamar to Commissioner Sparks, February 25, 1886.

I have considered the appeal of W. H. Cushing, and thirty-seven other homestead claimants, from the action of your office holding for cancellation their homestead entries of certain lots of land on Bois Blanc Island, Reed City Land District, Michigan. Separate appeals have been filed in each of said cases, and they have been transmitted with your letters of October 21, 1885, and January 29, 1886, and are as follows:

* * * * * * *

These cases involve the title to certain lots of land on Bois Blanc Island, in the State of Michigan, which the State claims to be swamp land, and which therefore inured to the State, under the grant of September 28, 1850. A decision upon that question will decide the issue presented in each case.

Bois Blanc Island was surveyed in 1827, and the survey thereof approved by the surveyor-general the same year. By that survey it was subdivided into thirty-four irregular sections, according to the legal subdivisions provided for by the act of May 24, 1824. By Executive order of November 8, 1827, part of said island was reserved for lighthouse and military purposes, and until January, 1884, the impression prevailed that the entire island was so reserved. About this date the appellants made their entries, and the State of Michigan also asserted her right to it as swamp land.

The State claims title under the act of 1850, and that having shortly after the passage of said act elected to take the field notes and plats of official survey as the basis of selection of the lands, under the grant, that her title is perfected and the issue of patent is not necessary or essential to complete it.

The principle has been firmly established by the decision of the courts and of this Department that the grant of swamp lands, made to the several States, was a grant *in presenti*, and conferred a present vested right to such lands as of the date of the grant, and that the field notes

of survey may be taken as a basis in determining the character of the land, if the State so elects. If the State does not so elect, they shall then furnish satisfactory evidence that the lands are of the character embraced in the grant.

By the third section of the act, it is provided that all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included as swamp land; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded.

Hence, to establish the right of the State to these lands, under the contract claimed by them, to govern in the selection of the lands, the survey relied upon must show the character of the land in each smallest legal subdivision. If the character of the land can not be determined by the survey, the State must show the character of the land by other satisfactory evidence.

The survey of 1827, relied on by the State as establishing their right to these lands, does not pretend to show it, and their claim is therefore not supported by the evidence relied upon.

But the right of the State to each smallest legal subdivision, the greater part of which was swamp and too wet for cultivation, vested at the date of the grant, and has remained so vested ever since, and their title to such land is perfected when it is identified.

As the survey furnishes no satisfactory evidence of the character of this land, and the State cannot be deprived of it if it is of the character claimed, you are hereby directed to return the record of these several cases to the local office, with instructions to order a hearing to determine the character of these lands at the date of the grant, as near as may be obtained, after notice to all parties, and if it should appear from such examination that the greater part of any subdivision was swamp and unfit for cultivation, such subdivision will inure to the benefit of the State under the grant, and if the evidence shows that the greater part of any subdivision was not of such character, such subdivision shall be subject to entry.

Your decisions in the several cases are accordingly modified.

SUIT TO VACATE PATENT—STATE OF CALIFORNIA.

LAKES KERN AND BUENA VISTA.

The United States could convey, by patent, no title under the swamp grant for land covered by navigable waters of the State.

A patent of such character having been improvidently and illegally issued, through which a great public wrong may be perpetrated, it is held that public policy requires the institution of suit to vacate the same.

Secretary Lamar to the Attorney-General, March 3, 1886.

In 1879 your Department transmitted to this Department certain communications from A. A. Cohen, Esq., of San Francisco, relative to the previous action of the General Land Office in issuing to the State of

California patents, under the swamp land act, for the lands covered by Lakes Kern and Buena Vista. It was alleged by Cohen that said patents had been illegally issued, inasmuch as the waters of said lakes were navigable, and he asked that suit be brought by the government to cause said patents to be canceled.

On May 31, 1881, Acting Secretary Bell of this Department declined to recommend that such suit be brought. Afterwards, on February 13, 1884, your predecessor, Mr. Brewster, transmitted to this Department a communication from Ward McAllister, Esq., Assistant U. S. Attorney for California, and from others, all asking that suit be brought to cancel said patents. On August 7, 1885, by letter to you, I declined to make the recommendation sought, stating, among other things, that the action of my predecessor should be regarded as final lest a reversal thereof, after a lapse of four years, would result in "destroying property rights, which may have been purchased and paid for in the meantime upon the faith of this, presumably, final action of the Executive."

Since the above was written, direct application has been made to me in behalf of Miller, Lux, Cornwell, and other parties in interest, to reconsider my former action.

It having been made to appear to me by certified copy of part of the assessment list of property in Kern County, California, covering the lands in question, that all of them belong now and always have belonged to J. B. Haggin, who was the original purchaser of the same from the State of California, I have deemed it proper to re-examine said matter.

The report of the Commissioner of the General Land Office, which was transmitted to you by my letter of August 7, 1885, gives a full and detailed history of all the facts and circumstances connected with the issuing of the patents. It is not necessary at this time to rehearse all the matters therein stated. But it appears from the plats of the original survey of the lands circumjacent to these lakes, that the latter were displayed thereon as bodies of water, surrounded within the meander lines by tule swamp lands not embraced by the subdivisional surveys and not designated by descriptive areas and allotments.

After the passage of the act of July 23, 1866, (14 Stat., 218,) to quiet land titles in California, it was considered important that such descriptive designations should be carried into the swamp land lists and patents as would identify the lands obtained by the State, and the surveyor general was directed to protract the surveys over lands theretofore noted as unsurveyed, swamp and overflowed.

Under these instructions, through a palpable, if not inexcusable, error, without making an actual survey, or without regarding the water margin of these lakes, the lines were protracted upon plats directly across from meander to meander, including both lake and swamp in the subdivisions. The surveyor general certified to the correctness of copies of the plats and forwarded them to the General Land Office, where, ap-

parently without examination, patents were issued on July 14, 1869, for the whole area of swamp and lake surface.

Afterwards the State of California sold these lands to Haggin, the present owner, who it is charged proposes to drain said lakes for his own purposes and to the great injury of the surrounding land owners, who have purchased from the Government of the United States. It also appears that each of these lakes is a large body of water, permanent in character, and will so remain if let alone. The two have an aggregate area of about forty-four square miles, with a depth of upwards of sixteen feet. They are capable of being navigated, and being without interstate or foreign connection, while not navigable waters of the United States, they are clearly navigable waters of the State of California. Therefore when the United States issued patents for the land covered by such waters, it exceeded its powers, its patents conveyed no title, because it had none to convey, and are absolutely nullities, of no efficacy whatever. See act of March 9, 1850 (9 Stat., 452), admitting California to the Union; also section 2476, R. S.

Though satisfied of the correctness of the above conclusion when my decision of August 7, 1885, was written, I hesitated to advise the institution of suit to obtain an authoritative cancellation of patents of no validity, and for other reasons stated. But since then, on further reflection, I am brought to the conclusion that in this particular case the patents thus improvidently and illegally issued, though absolutely void, can be made the instruments of oppression and the means of perpetrating a great public wrong. Therefore, inasmuch as the Government, through the faulty action of its officers, is responsible for this condition of things, I deem that public policy and public interests alike demand that I shall revoke my former decision and recommend to you that suits be instituted in the name of the United States, in the proper tribunal, to obtain the cancellation of said patents.

Any information in the possession of this Department, relating to said matter, which may be desired by you, will be promptly furnished upon call.

COMMUTED HOMESTEAD ENTRY.—RESIDENCE.

JAMES W. CONELLA.

In making commutation proof it is not absolutely essential that the residence shown should cover a period of six months after entry.

Acting Secretary Muldrow to Commissioner Sparks, March 5, 1886.

I have considered the case of James W. Conella, presented by his appeal from your office decision of July 3, 1885, rejecting the commutation proof offered by him upon his homestead entry for the S. ½ of the

SW. ¼ of Sec. 1, and the N. ½ of the NW. ¼ of Sec. 12, T. 157 N., R. 66 W., Devil's Lake district, Dakota.

The rejection of Conella's proof is based upon two grounds:

1. That it was prematurely made;

2. That it was insufficient as regards residence, cultivation and improvement.

As to the time of making said proof the following are record facts:

The homestead entry was made May 17, 1884; final proof was taken before the register and receiver August 5, 1884, after the lapse of two months and nineteen days from the date of entry. The claimant, however, in his testimony and final affidavit, alleges settlement August 14, 1883, and residence upon the tract from that date until making final proof—a period of eleven months and twenty-one days. Referring to this branch of the case, your office decision says:

"Except for reasons shown to be exceptional, this office does not allow final proof to be made, either under Section 2291, or Section 2301, R. S., until the homestead entry has been of record six months, even where more than the requisite period of residence is claimed."

Your office letter, therefore, directed the rejection of the final proof.

This Department has decided that residence for six months after entry, before making final proof, is not in all cases absolutely necessary. As was stated in the case of Joseph Hoskyn, (4 L. D., 287), "the reason and purpose of the rule under consideration is, to furnish evidence of good faith under the settlement laws, ... therefore, the purpose of that rule is subserved, though its letter may not have been strictly complied with." In the case at bar as in that of Hoskyn, "when appellant applied to commute his homestead to cash entry, he proved an actual residence of six months" (in the case of Hoskyn; in the present case of nearly twelve months;) "evidently under the impression that by so doing he was fully complying with the law and regulations as to residence. His belief that he was doing so was confirmed by the action of the register and receiver. No bad faith can, therefore, be imputed."

The second reason given by your office for rejecting the commutation proof offered in the case at bar is that, "The answers relative to residence are indefinite and unsatisfactory, and the improvements shown are meager. It is uncertain what period or periods the claimant was absent from his claim since he alleges establishing actual residence thereon."

Claimant's testimony as to residence is as follows: "I was absent during the cold weather of winter because nothing could be done in the way of improvements, and being thirty miles from fuel it was impossible for me to supply myself."

Undoubtedly it would have been better if the entryman had been more specific as to the dates and length of his absences from the land; but since it is not denied that he established his residence thereon, August

14, 1883, and that such residence was continuous during the year thereafter, with the exception of the winter months; since his good faith in the premises is unquestioned; since the local officers deemed his residence and improvements sufficient, accepted his proof, and received payment for the land, I see no adequate reason for reversing such decision of the local officers and cancelling the entry.

Your said office decision of July 3, 1885, is, therefore, reversed.

PRE-EMPTION ENTRY—BOARD OF EQUITABLE ADJUDICATION.

THOMAS ERVINE.

A pre-emption entry, made through mistake of the law, by one disqualified by reason of removal from land of his own to make settlement, in the absence of an adverse claim, is referred to the Board of Equitable Adjudication, upon a showing of residence subsequent to the sale of the land from which said removal was made.

Acting Secretary Muldrow to Commissioner Sparks, March 5, 1886.

I have before me the appeal of Thomas Ervine from your predecessor's decision of January 12, 1885, holding for cancellation his pre-emption cash entry made November 21, 1881, for the NW. ¼ of Sec. 24, T. 46 N., R. 24 W., Marquette, Michigan, on the ground that, at date of his settlement he abandoned a residence on land of his own in the same State.

Applicant admits that in 1881 he was residing on a homestead in Michigan, for which he had made final proof September 6, 1880, and that he removed therefrom to make settlement on the land in question. Hence he was not a qualified pre-emptor, and his said entry was illegal.

It appears, however, that the entry was not fraudulently made, but was allowed through a mistake in the law by the local officers as well as by the pre-emptor. Ervine alleges that he has been residing on the land prior to and since January, 1885, and that there is no adverse claim to it, and he therefore asks that his entry may be allowed to stand.

I think that, if the facts are as alleged, this is a case which may properly be presented to the Board of Equitable Adjudication. Though there is no rule specifically covering it, there are several rules which provide for the equitable confirmation of entries made against and in ignorance of the law, where there has been otherwise a compliance with requirements and the disability has been removed. Wherefore the said decision is modified, so as to allow Ervine sixty days within which to file his petition, accompanied by affidavits showing the sale of his homestead and his residence on the land for six months subsequently.

RAILROAD GRANT—LANDS EXCEPTED.

NORTHERN PACIFIC RAILROAD CO. *v.* URQUHART.

The status of a tract of land, held to be excepted from the grant by the existence of a *prima facie* valid entry when said grant became effective, is not affected by the subsequent declaration of the entryman that the entry was not made in good faith.

Acting Secretary Muldrow to Commissioner Sparks, March 5, 1886.

I have considered the appeal of the Northern Pacific Railroad Company from your office decision of March 31, 1884, rejecting its claim to the SW. ¼ of NW. ¼, N. ½ of SW. ¼ and SE. ¼ of SW. ¼, Sec. 17, T. 22 N., R. 31 E., W. M., Spokane Falls, Washington Territory.

The tract is within the limits of the grant of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company. The road was definitely located opposite said tract October 4, 1880, and the withdrawal of the granted limits. including said tracts, is held to have become effective upon that date.

The records of your office show that on March 10, 1880, one George Urquhart made homestead entry for said tract. On March 7, 1884, the local officers forwarded an affidavit made by said Urquhart, and bearing date November 24, 1883, setting forth that "I never established a residence upon either of said tracts, * * * nor did I ever intend to establish a residence upon the tracts covered by said homestead entry (No. 945), intending merely to use said land for the purposes of draining a swamp thereon and cutting wild grass therefrom."

In his original homestead affidavit Urquhart swore, "that said application No. 945 is made for the purpose of actual settlement and cultivation," and the entry papers are in every respect regular. The entry went to record in the usual order, and might have been perfected to patent. Said entry was therefore *prima facie* valid and segregated the tracts covered by it from the public domain, and so subsisting at the date of the withdrawal excepted the lands herein from the operation of the same. The statements of Urquhart as above quoted, made subsequent thereto, cannot affect the *prima facie* validity of said entry at the date said withdrawal became effective.

Said decision is affirmed for the reasons herein stated.

VARIANCE BETWEEN APPLICATION AND CERTIFICATE.

HICKSON'S HEIRS *v.* WITT.

The certificate of a warrant location covered land in range twenty-one, though the application was for land in twenty-four. Patent issued in accordance with the application, but was not delivered. Subsequently a homestead entry was allowed for the land in twenty-one, and a claim thereto being set up under the warrant purchase, a hearing is ordered.

Acting Secretary Muldrow to Commissioner Sparks, March 5, 1886.

I have before me the case of John Hickson's Heirs *v.* Alice A. Witt, involving the N. ½ of SW. ¼, and the N. ½ of SE. ¼ of Sec. 2, T. 13 S., R. 21 E., Gainesville, Florida, on appeal by Witt from your predecessor's decision of March 17, 1885, holding her cash entry for cancellation.

One of the grounds of said decision is that Witt's final proofs fail to show a compliance with the law. This I must overrule.

The record shows that John Hickson made application on June 24, 1854, to locate military bounty land warrant No. 16,325 on the N. ½ of SW. ¼, and the N. ½ of SE. ¼, of Sec. 2, T. 13 S., *range* 24 *E.;* and that on the same day the local office issued to him a certificate for the land in controversy, which is in *range* 21 *E.* There was therefore an error in description committed, but whether by Hickson or by the local officers does not satisfactorily appear. It is clear to my mind that the United States sold to Hickson the land he intended to buy, and none other; and it becomes necessary to determine the tract actually sold to him after careful scrutiny, in view of the subsequently-acquired conflicting title of Witt.

It would appear that, while the local office recorded Hickson's purchase in their books as in range 21, they report to your office as in range 24. Patent issued to Hickson for the tract in range 24 on April 2, 1855, but was never delivered. In 1881 attention was attracted to the discrepancy between the patent and the records of the local office, and your office, after some correspondence, directed said records to be changed so as to conform to the patent. This change was made, and the land in range 21 appearing on the public plats to be unappropriated, was entered as a homestead by Witt on March 16, 1883; and on March 21, 1884, upon satisfactory proof, she made commutation cash entry No. 8009. In 1885 the attention of your office was again brought to the matter by Hickson's Heirs, who assert that their ancestor purchased the land in range 21, and not that in range 24.

Your office partly decided the controversy upon certain facts set out in several affidavits filed by Hickson's Heirs, and without affording Witt, who denies some of their material allegations, an opportunity to be heard. This was error, and you will please order a hearing before the local officers, to which both parties shall be cited, and the controversy thereafter determined. Your predecessor's decision is modified accordingly.

ERROR BY LOCAL OFFICER—RIGHT OF ENTRY.

WERTMAN *v.* BLUME.

An entry, made under erroneous information from the register that the tract was vacant, is fully subject to the assertion of a prior pre-emption claim then of record.

The intervention of a valid adverse claim cuts off the right of a pre-emptor who is not protected by an actual prior settlement.

Acting Secretary Muldrow to Commissioner Sparks, March 6, 1886.

I have considered the case of Herbert E. Wertman *v.* Frank Blume, as presented by the appeal of the latter from the decision of your office, dated November 28, 1884, holding for cancellation his pre-emption declaratory statement for the NW. ¼ of Sec. 31, T. 112 N., R. 63 W., Huron land district, Dakota Territory.

The record shows that Blume filed for said tract on October 17, alleging settlement thereon September 26, 1882. On March 15, 1883, Wertman made homestead entry of said tract. On May 22, 1883, Blume gave notice, by publication, of his intention to offer final proof and payment for said tract, and that said proof would be made before the register and receiver of said office on June 23, 1883. Wertman filed his protest, dated June 23, 1883, against allowing said final proof, alleging under oath "that said Blume has failed to reside on said tract of land and make the improvement required by law." Said protest was corroborated by one witness. On September 21, 1883, a hearing was had before the receiver at which both parties appeared in person, represented by counsel, and offered testimony.

On May 2, 1884, the register and receiver rendered their joint opinion awarding the land to Blume. Said opinion is singularly inconsistent in this, that it finds that Blume built his house on said tract on September 27, 1882, and in the very next sentence states that he built his house by mistake on the school section, and Wertman was misled as to there being a settlement on the tract.

It is further found by the register and receiver that "Blume's family has made a continuous residence on the tract since time of settlement and he has lived there except during the time he was compelled to be absent to work;" that the fact that he built his house on the school section by mistake could not operate to defeat his rights, and that since Blume has shown his intention to comply with the law by his subsequent acts, the land should be awarded to him. On appeal, your office reversed the action of the district land officers, and held that the evidence showed that Blume's legal residence was in Huron, and that, even admitting that Blume had acted in good faith, there were strong equities in Wertman's favor.

It is insisted that prior to making said entry, Wertman went to the local office and made inquiry concerning the status of said tract, and was told by the register of said office that the same was vacant and

subject to entry, and that afterwards he examined said tract and found no evidence of settlement thereon, and thereupon he made said entry. It is evident that Wertman could not acquire any rights by reason of the erroneous information given him by the register. The filing of Blume was of record and his rights could not be prejudiced by any statement which the district land officers might make.

In Call *v.* Swaim (3 L. D., 46) this Department held that "a pre-emption certificate, stating erroneously that the settler had thirty-three months within which to make final proof, will not protect him if he fails to prove up in twelve months in the face of an adverse claim."

Even the United States will not always be bound by the acts of its officers and does not guarantee their integrity. Moffatt *v.* United States (112 U. S., 25); Talkington's Heirs *v.* Hempfling (2 L. D., 46).

It, however, appears, and the district land officers so found, that Blume built his house on the school section and not on the tract in controversy, and there was no other settlement alleged upon said tract prior to the making of said homestead entry. It has been repeatedly held by this Department that a pre-emption filing to be valid must be based upon a prior actual settlement. Thompson *v.* Jacobson (2 L. D., 620); Slate *v.* Dorr, (ibid., 635).

It is true that, although a filing is made before settlement, yet, where the settlement is made prior to the inception of an adverse claim, the same will be held good from date of settlement. Charles C. Martin (3 L. D., 373); Hunt *v.* Lavin (Id., 499).

In the case at bar, the adverse claim of Wertman had intervened and his superior right must be recognized. It will be unnecessary to comment upon the testimony showing the want of residence upon said tract by Blume.

Upon a careful consideration of the whole record, no good reason is disclosed for reversing said decision, and it is accordingly affirmed.

PRACTICE—VARIANCE BETWEEN NOTICE AND INFORMATION.

SHINNES *v.* BATES.

The right to contest a homestead entry is not limited to an applicant for the land.

In case of variance between the information and notice, and failure to amend, on objection raised thereto, the evidence must be confined to the charge as laid in the notice.

Acting Secretary Muldrow to Commissioner Sparks, March 6, 1886.

I have considered the case of Thorald Shinnes *v.* George E. Bates as presented by the appeal of the former from the decision of your office dated September 5, 1884 dismissing his contest against homestead entry of the SW. ¼ of Sec. 6, T. 157 N., 56 W., Grand Forks land district, Dakota Territory, made January 25, 1882, by said Bates.

The record shows that on March 21, 1883, Shinnes made affidavit before a notary public, who is his attorney, charging that said Bates had changed his residence from said tract for more than six months since making said entry. Thereupon notice was issued and duly served calling upon the parties to appear before one Upham, a notary public and commissioner, on July 9th, 1883, and furnish testimony upon the charge of abandonment.

At the time and place appointed both parties appeared in person, with their attorneys and offered testimony. Before proceeding with the examination of the witnesses, the attorney for Bates objected to the taking of any testimony in the case for the reason that there is no record evidence before the commissioner that the contestant has taken the necessary steps "as a pre-emptor of homestead to contest". Just what is intended by this objection is difficult to determine. If the objection means that the contestant has not filed an application to enter the land covered by the contested homestead entry, it is sufficient to say that in such contests an application to enter is not required. It is observed, however, that the complaint charges change of residence for more than six months since making said entry while the notice requires the parties to respond and furnish testimony upon a charge of abandonment.

If objection had been made by the claimant that the allegation in affidavit of contest did not correspond with the charges in the notice which he was called upon to defend, then the contestant could have been required to amend or the testimony could have been limited to the charge in the notice. For it is by notice that jurisdiction is acquired, and it is the notice that informs the claimant of the charge preferred against his entry. Houston *v.* Coyle (2 L. D., 58).

Upon the evidence submitted the register and receiver found that no bona fide residence had been established, but that the evidence showed that there had been no abandonment of the land.

On appeal your office found that the claimant settled upon the land in May, 1882, and made valuable improvements thereon, that the contestant failed to prove abandonment, and that while the evidence did not clearly show continuous residence upon the land, it was not shown that he was absent therefrom for six months prior to the initiation of contest. The appeal was, therefore, dismissed.

It is quite unnecessary to pass upon the sufficiency of the affidavit of contest, as no objection to the same was made by the claimant at the hearing. The testimony is conflicting, but a careful examination of the whole record fails to show a change of residence or abandonment by the claimant for more than six months since making his said entry. Said decision is accordingly affirmed.

RAILROAD GRANT—COMMON LIMITS.

ST. PAUL M. & M. RY. CO. *v.* NORTHERN PAC. R. R. CO.

Priority in selection determines the right to land within common limits, where such right is wholly dependent upon the act of selection.

The right of a road having attached to specific tracts by its definite location, the subsequent extinction of an Indian title will not bring the land, excluded thereby, within the operation of the grant.

Acting Secretary Muldrow to Commissioner Sparks, March 6, 1886.

I have considered the case of the Saint Paul, Minneapolis and Manitoba Railway Company, successor to the Saint Paul and Pacific Railroad Company, *v.* The Northern Pacific Railroad Company, as presented by the appeal of the former from the decision of your office, dated October 9, 1884, rejecting its claim to certain lands in the odd numbered sections in townships 131 and 132 of ranges 47 and 48, and also in township 131 of range 49, Fargo land district, Dakota Territory.

The record shows that the agent of said first named company offered to file in the district land office, on February 18, 1884, a list of selections covering the land claimed by it, amounting to 12,879.29 acres, which list the register and receiver declined to certify, for the reason that "each and every tract thereof was selected by the Northern Pacific Railroad Company March 19, 1883, and by us certified to them on that day." The company duly appealed, and your office affirmed the decision of the district land officers, on the ground that the claim of the St. Paul, Minneapolis and Manitoba Railway Company had been adjudicated by a former decision of this Department, adverse to it, and, therefore, the questions raised by the appeal of said company from the action of the local office would not be considered.

The appellant company allege three specifications of error:

(1) In declining to consider the questions raised by the appeal of said company from the action of the district land officers rejecting its said list of selections.

(2) In holding that the claim of the company to said lands has ever been adjudicated by this Department.

(3) In not sustaining the appeal of the company and approving said selection.

It appears that a portion of the tracts selected are within the six miles or granted limits of the grant by act of Congress, approved March 3, 1857, (11 Stat., 195,) to the Territory of Minnesota, to aid in the construction of railroads from points therein specifically named, and the rest, with the exception of a few tracts, appear to be between the six miles, or granted limits, of said act, and the ten mile limits of the grant by act of Congress approved March 3, 1865 (13 Stat., 526), granting additional land to Minnesota for railroads.

At the date of the granting act of 1857 and also at the date of the definite location of the road, said tracts were within the Indian country.

Said act of March 3, 1865, increased the grant to the State to ten sections per mile, and amended the first proviso to the first section of said act of 1857, so as not to allow any land to be taken further than twenty miles from the lines of the roads, and to require the lands in all cases to be indicated by the Secretary of the Interior.

The company, through its agent, under date of September 7, 1871, filed in your office a map, purporting to show the ten and twenty mile limits of its grants, which was extended across the Bois des Sioux River into Dakota Territory, and requested that the lands west of said river be surveyed as early as possible, and that the limits of the grant be extended as indicated by said map. On November 24, 1871, your office refused to order a withdrawal of said lands, upon the ground that since the road was not completed until after the admission of said State into the Union, the grant must be confined to the limits of the State, and for the additional reason that the lands applied for were a part of the territory of the Sisseton and Wahpeton Indians, whose title had not then been extinguished.

On May 4, 1874, the company again insisted upon its claim to said lands, but in view of the fact that the same had been largely taken up by settlers, the company asked to be permitted to take other lands in lieu of the same within the indemnity limits of said grant in Minnesota. This request was denied by your office on May 11, 1874, because of the former decision of November 24, 1871, upon the same question, but the company was allowed the right of appeal.

On September 2, 1874, this Department decided that, without passing upon the question whether the right of the company under said act of March 3, 1857, was affected by the act of Congress approved May 11, 1858, (11 Stat., 285,) admitting Minnesota into the Union and excluding the lands in question from her boundaries, or by the act of Congress approved March 2, 1861, (12 Stat., 239,) establishing the Territory of Dakota, the lands being a portion of a tract now and for many years prior to the grant, claimed by the Sisseton and Wahpeton bands of Sioux Indians, whose title has never been extinguished, and whose claim was recognized by the government in the treaty of February 19, 1867, (15 Stat., 505,) could not be considered as included in said grant, so far as to permit any present appropriation of the same by the company.

The attention of this Department was called by the attorney of said company to a manifest error in said decision of September 2, 1874, in stating that the Indian title to said land had not been extinguished, when the same was extinguished on May 19, 1873. By departmental decision of September 28, 1875, it was held that upon full consideration of the provisions of the act of June 22, 1874 (13 Stat., 167), confirming

the agreement of said Indians, relinquishing their claims, and also upon a reconsideration of the other points upon which your office rejected the application of the company, it would not reverse the decision of your office upon the merits, or of the Department affirming the same on appeal

Upon the foregoing state of facts, your office held that the claim of the appellant company was "*res judicata*," and declined to consider the questions raised upon appeal.

It is strenuously contended by counsel for appellant that said decisions of your office and of this Department do not render the present application *res judicata*, for the reason that the four essential conditions do not exist; that the former application was for the withdrawal of lands for the benefit of the St. Paul and Pacific Company, while the present application is for certification of specific tracts, which the appellant company claims by reason of being a successor of said company. It appears that one of the claims was for indemnity lands, while the present application is for lands alleged to have been granted. Again, the Northern Pacific Company was no party to the former adjudications, and said departmental decision of September 2, 1874, was distinctly placed upon the ground that the lands claimed were within said Indian reservation, and for that reason were not subject to appropriation at that time, for the benefit of said company.

It is concluded, therefore, that the question is not *res judicata*, and the claims of said companies will be considered upon their merits. There can be no question that the appellant company could acquire no right to the lands outside of the six miles, and within the ten miles limit, until it had made a selection of the same.

The United States Supreme Court, Miller J., in the case of St. Paul Railroad *v.* Winona Railroad (112 U. S., p. 729), speaking of the act of 1864 (13 Stat., 72), and the act of March 3, 1865 (13 Stat., 526), say: "There is nothing in either of these statutes which indicates or requires that the six-miles limit of the original grant is to be enlarged, so that within a limit of ten miles all the odd sections fall immediately within the grant on the location of the road. * * * The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road." And the Justice delivering the opinion quotes with approval the case of Ryan *v.* Railroad Company (99 U. S., 382), wherein it was held that the company could not have any claim to land within the indemnity limit until it had been specially selected for that purpose. See also Grinnell *v.* Railroad (103 U. S., 739); Cedar Rapids Railroad Company *v.* Herring (110

U. S., 27); Kansas Pacific Railroad Company *v.* Atchison, Topeka & Santa Fé Company (112 U. S., 414).

It follows, therefore, that the Northern Pacific Railroad Company, having made the prior selection for the lands in controversy, within the limits above indicated, is clearly entitled to the same as against the appellant company. The Supreme Court, in the case of St. Paul Railroad *v.* Winona Railroad (*supra*), expressly decided that said grant of March 3, 1857, was a present grant, and "that the title to the alternate sections to be taken within the limit when all the odd sections are granted becomes fixed, ascertained and perfected in each case by this location of the line of the road, and in case of each road the title relates back to the act of Congress."

It will be unnecessary to cite authority for the proposition that lands which were not public, either at the date of the granting act or of the definite location of the road, could not pass under the grant. By the third proviso of the granting act, it is provided, "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act." It is clear that under this proviso it was not the intention of Congress to grant lands to the Territory of Minnesota under said act, which had been reserved by competent authority, or were occupied by Indian tribes, unless such intention can be gathered from the sixth section of said act, which reads as follows: "That in case any lands on the line of said roads or branches are within any Indian territory, no title to the same shall accrue, nor shall the same be entered upon by the authority of said Territory or State until the Indian title to the same shall have been extinguished."

It has been repeatedly held by the Supreme Court of the United States that a grant by the United States must be strictly construed against the grantee, and that this rule applies as well to grants to a State to aid in building railroads, as to one granting special privileges to a private corporation. Dubuque and Pacific R. R. Co. *v.* Litchfield (23 How., 66); Rice *v.* R. R. Co. (1 Black, 330); Charles River Bridge *v.* Warren Bridge (11 Pet., 120); L. L. & G. R. R. Co. *v.* U. S. (2 Otto, 733).

The Indian title was not extinguished until long after the definite location of the road, and the company could acquire no right to the lands in controversy, by reason of such extinguishment, after its rights had attached to the specific tracts granted by the definite location of its road.

The question of allowing indemnity for lands lost by the appellant company does not arise in this case, and no opinion is expressed thereon.

For the reasons herein stated, the decision of your office is modified and the action of the district land officers rejecting said selection is affirmed.

PRIVATE CLAIM—APPEAL—PRELIMINARY SURVEY.

TRES ALAMOS.

An appeal will properly lie from a decision of the Commissioner, which passed upon the merits of the case.

The claimant of an unconfirmed private land grant is entitled to a preliminary survey, on the deposit of a sufficient sum to cover the expense thereof.

Secretary Lamar to Commissioner Sparks, March 8, 1886.

Geo. Hill Howard represents that he is the owner by purchase of a grant of land in the Territory of Arizona, known as the Tres Alamos grant, made the twentieth day of September, 1852, by the governor of the State of Sonora, Mexico, to Don Jose Antonio Crespo. That under the acts of July 22, 1854, and July 15, 1870, the surveyor general of Arizona made a report on said grant, recommending the confirmation of title to ten square leagues of land at a place known as Tres Alamos, lying along the San Pedro river, to petitioner. That in May, 1885, petitioner filed with the surveyor general of Arizona an application for the survey of said land. While there was an appropriation available for such purposes, and while the surveyor general was considering such application, you instructed him to execute no further contracts with deputy surveyors from special deposits or the apportionment of appropriations until otherwise ordered. On the 30th of June, 1885, the unexpended balance of the appropriation for such surveys was covered into the Treasury. That on October 8, 1885, petitioner filed in your office an application for an order directing the surveyor general to make a survey of said claim upon a deposit being made by applicant of a sum sufficient to cover the expense of such survey and office work. That by letter of November 3, 1885, you refused said application, upon the ground that no authority of law exists for the survey of unconfirmed private land claims under the deposit system. That on December 30, 1885, petitioner filed his appeal from your decision of November 3d. That by letter of January 14, 1886, you denied his right of appeal, holding that an application for survey should be first filed with the surveyor general, and, in the event of his rejection of such application, an appeal should be taken to the Commissioner of the General Land Office, and from his ruling an appeal may then be taken to the Secretary of the Interior.

If by your letter of November 3, 1885, you had refused to pass upon petitioner's application, upon the ground that it had not been filed with the surveyor general and passed upon by him, an appeal would not lie from that decision, because such decision would be merely interlocutory; but when you decided the application upon its merits, holding that there is no authority of law for the survey of unconfirmed private land claims under the deposit system, such a decision was so far a finality as to authorize an appeal under Rule 81 of Rules of Practice, and after your decision on the merits the Department will not inquire into the i

regularity of the proceedings by which this case reached you. An inspection of the record shows that the facts are correctly set forth in the application and exhibits, and it will be treated as an appeal and decided without requiring the record to be certified.

The only question presented by this appeal is, whether you have authority to order the surveyor general to make a survey of an unconfirmed private land grant on application of the claimant, accompanied by a deposit of a sum sufficient to cover the expense of such survey and office work. The law authorizing *settlers* in any township to have a survey made of such township upon making a deposit therefor, provides that such deposit shall be made by the settler, the certificates of which may be used in the purchase of public lands and are assignable. Practically it is an advance to the government for the expense of surveying its own land.

Clearly the deposit contemplated by the application could not be allowed under that law, nor governed by it, because it is for the survey of a private claim, and no certificate can be issued to the depositor as provided for by that law.

But why is the claimant not entitled to have a survey of said claim under the acts of July 22, 1854, and July 15, 1870, upon depositing the sum sufficient to cover the cost of such survey?

Under these acts the surveyor general is required "to ascertain the origin, nature, character, and *extent* of all claims to land under the laws, usages and customs of Spain and Mexico—to make a full report thereof—and until final action of Congress on such claims, all lands covered thereby shall be reserved from sale, or other disposal by the government."

The surveyor general has made his report, recommending the confirmation of title to ten square leagues of land at the place known as Tres Alamos, lying along the San Pedro river; but how can he determine the extent of the claim, or what lands shall be reserved from sale, until the final action of Congress, without a preliminary survey?

Recognizing the duty of the government to reserve from sale lands covered by such claims, and to designate them by preliminary surveys, Congress from time to time made appropriations for this purpose. In May, 1885, while there was an appropriation available for such survey, you suspended action upon an application for a survey until such appropriation lapsed. The act of March 3, 1885, making appropriation for the survey of *confirmed* private land grants provides, "That hereafter in all cases of the survey of private land claims, the cost of the same shall be refunded to the Treasury by the owner before the delivery of the patent."

It being the duty of the government to ascertain the extent of land covered by this grant and to reserve the same from sale until the final action of Congress, and no appropriation being made for that purpose, I can see no reason why claimant should not be entitled to have a sur-

vey made upon depositing a sum sufficient to cover the expenses of the same, especially in view of the fact that he would be required finally to pay for such survey, whether there was an appropriation or not.

In the case of the Rancho San Rafael de la Zanja, reported in 3 L. D., 438, it was held: "There being an issue here taken as to the validity of this claim for an extent greater than has been awarded by the surveyor general, the duty to reserve the lands is clearly incumbent upon this Department, and if that can best be done by a preliminary survey to fix their identity, the claimants paying the expense, I am of the opinion it is lawful and should be allowed."

This decision clearly holds that the claimant of an unconfirmed private land grant may be entitled to have a survey of his claim made by paying the expenses thereof.

Your decision is reversed, and you will direct a survey of this claim under the direction of the surveyor general, upon a proper application being made, accompanied by a sum sufficient to pay the expenses of such survey and office work.

PRE-EMPTION—RIGHT OF ENTRY.

POWER *v.* BARNES.

Under the local laws, the ownership of land by the husband and wife, as shown herein, does not disqualify the former as a pre-emptor.

Acting Secretary Muldrow to Commissioner Sparks, March 11, 1886.

I have considered the case of Michael Power *v.* James W. Barnes, as presented by the appeal of the former from the decision of your office, dated June 20, 1885, allowing Barnes to make final proof and payment for the SE. ¼ of Sec. 15, T. 1 N., R. 49 W., Watertown land district, Dakota Territory.

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It is urged that Barnes is disqualified from making said entry, because he is the owner of three hundred and twenty acres of land. It is shown, however, that Mr. Barnes owns, besides one hundred and sixty acres, only a one-half undivided interest in one quarter section, his wife being the owner of the other half. Since the local laws allow the husband and wife to contract with each other, as was held by this Department in the case of Hatch *v.* Van Doren (4 L. D., 355), in the absence of any sufficient evidence showing fraud, it cannot be held that the ownership of one-half of the quarter section is equivalent to the ownership of the whole quarter, so as to complete the bar provided for by section 2260 of the Revised Statutes.

The evidence shows that Barnes has made valuable improvements upon said tract to the amount of over four thousand dollars, and a careful

examination of the whole record discloses no good reason for disturbing the findings of the local office, and the conclusion of your office.

Your attention is directed to the absence from the record of the proper proof of publication of notice of intention to make final proof. The deficiency should be supplied.

The decision of your office is accordingly affirmed.

HOMESTEAD—STATUS OF HEIRS.

TAUER *v.* THE HEIRS OF WALTER A. MANN.

The widow of a deceased homestead entryman who had complied with the law up to the date of his death, is not required to reside on the land, but may, by continued cultivation thereof, for the remainder of the period, complete the claim and receive patent therefor.

Acting Secretary Muldrow to Commissioner Sparks, March 13, 1886.

I have considered the case of Wenzel Tauer *v.* The heirs of Walter A. Mann, deceased, involving the NE. $\frac{1}{4}$ of Sec. 20, T. 115 N., R. 51 W., Watertown, Dakota, on appeal by Tauer from your office decision of December 19, 1884, dismissing his contest.

The facts, so far as they bear on the matter in controversy, are as follows:

Walter A. Mann made homestead entry for the tract described February 13, 1882, having established his residence thereon in September 1881. In the way of improvement he built a house and stable, dug and walled up a well, plowed five acres of old breaking and broke between one and two acres additional. April 17, 1882, he died, leaving a widow, Mrs. Mary E. Mann, and one child less than a year old. He continued to reside with his family upon the land from the date when he moved thereon in 1881 to the date of his death, and his remains lie buried on the tract.

His widow remained on said tract but a short time after his death, and in the fall of 1882 went to relatives in Arkansas, where she has since remained. In the meantime she has kept the land under cultivation, and raised crops thereon, having at the date of the hearing in October, 1883, about twenty-five acres broken. Wheat, oats, and barley have been grown on the land thus cultivated. This was done for her and by her procurement.

Her house not being occupied, contestant moved into it in May or June, 1883, without her knowledge or consent, and notwithstanding he found the land under cultivation, and has since resided therein and upon the tract in question, though such residence and occupancy were objected to by and in behalf of the widow of the homestead entryman, and notice was given contestant to leave the premises, the reason for said notice being that the tract was appropriated by and subject to the homestead entry of Mann and was still claimed by his heirs.

Instead of leaving, Tauer, in September, 1883, initiated contest, charging abandonment and change of residence for more than six months, since the entry was made and since the death of the entryman, and that said tract is not settled upon and cultivated as required by law. Hearing was ordered and finally had November 28, 1883, after continuance from October 30, 1883, the day named in the original notice. At said hearing it was shown that the widow had through agents continued the improvement and cultivation of the tract, but had not resided thereon, nor does she claim to have done so.

The testimony shows that before leaving the Territory to go to Arkansas she took the precaution to make inquiry of attorneys and also at the local office as to the requirements of the law relative to residence, and was advised and given to understand that as the widow of the deceased entryman it would not be necessary for her to remain on the land as an actual occupant, and that if she should continue to improve and cultivate the tract, her acts would be regarded as a compliance with the law. Acting upon this advice, she did continue improvement and cultivation, but did not continue to inhabit the land.

I am satisfied from the testimony that she has acted in good faith, and that there was no intention to abandon the land, or to evade the law. On the other hand, her course clearly indicates that it was her intention to perfect the entry and secure full title thereunder, and it seems equally manifest that she intended to do what the law required in order to secure such title.

The sole question for determination, therefore, is whether she, as the widow of a deceased entryman who resided upon his claim up to the date of his death, can perfect the claim and receive full title for the land without her actual and continued residence thereon after his death. In other words, will her cultivation and continued improvement of the tract without actual personal occupancy entitle her as the widow of the deceased entryman to patent under the homestead law?

Section 2291 of the Revised Statutes, having reference to homesteads, reads as follows:

> No certificate, however, shall be given or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

The section quoted is the law governing this case. As an answer to the question raised relative to the necessity for continued actual residence by the widow upon the tract entered by her husband, since deceased, it is not without ambiguity.

It contains certain provisions and requirements which apply (1) to the entryman, (2) to the widow, and (3) to the heirs or devisee.

He, she, or they must prove residence upon or cultivation of the tract entered for the term of five years "immediately succeeding the time of filing the affidavit." What affidavit? Manifestly that required by section 2290 of the Revised Statutes, in which, among other things, the applicant must declare "that his entry is made for the purpose of actual settlement and cultivation."

When this language is considered in connection with that used in section 2291 it is clear that, so far as the party making the entry is concerned, (designated by the word "he" in said section,) actual residence is required, notwithstanding the use of the disjunctive "or" in the clause "have resided upon *or* cultivated." As to the widow or heirs, however, the intention of the law-making power is not so easily gathered from the language of the statute. It may mean that "she or they" may secure the benefit of the act by either residing upon or cultivating, the one or the other as is most feasible—either being sufficient, both not being required; or the words "have resided" may be construed as having reference solely to the entryman who took the oath above mentioned, and not to the widow or heirs, and that "she or they" are required to cultivate and to cultivate only in order to hold the land and secure title. Whether either of the interpretations above given, or whether the view contended for by contestant, which is to the effect that the words "have resided upon or cultivated" should be construed as if the word "or" were "and," meets the intent of the law, is a question not without doubt, when the general tenor and purpose of the homestead law as a whole is considered. When it is remembered that the general object of the law was and is to encourage the making and establishing of homes upon the public lands, while at the same time developing and utilizing the resources of the country, the view last mentioned would seem most nearly to conform to what Congress intended; but when we recollect on the other hand that it is not the intent of the law to require an unreasonable or impossible thing, we find a reason for the more liberal interpretation.

Upon the death of a husband and protector, it might, and in many cases would, be impossible, by reason of ill health, remoteness from neighbors, natural timidity, poverty, or other causes, for the widow to remain upon land which had been entered by her husband and resided upon by him and her.

May it not be that Congress, recognizing these contingencies, and the danger of forfeiture if continued residence were required, intended to

provide that the widow or heirs might save the rights acquired by the entryman and perfect the claim by cultivation without actual residence?

I find that the question here involved has several times been before this Department for its decision and action. December 4, 1875, it was held by Secretary Chandler, in the case of Dorame *v.* Towers (1 C. L. L., 438), "that the proper construction of section 2291 does not require the heir or devisee to reside in person upon the land, but that its provisions are substantially complied with by continual cultivation of the tract for the prescribed period of five years." Again "the words 'or cultivated' in section 2291, although heretofore held to apply more strictly to what are designated as 'adjoining farm entries,' may, I think, without violence to the rules of construction, receive this broader application as being evidently intended to provide for all cases where personal residence could not, in the nature of things, be reasonably demanded."

Accepting and following the interpretation of the law as above announced, Secretary Schurz, in the case of Stewart *v.* Jacobs, decided May 14, 1878, (1 C. L. L., 459,) that "the heirs or devisees, though not required to reside upon, must, nevertheless, show continued cultivation of the land."

My immediate predecessor, Secretary Teller, in the case of Cleary *v.* Smith, decided by him June 14, 1884, (3 L. D., 465,) cited approvingly Dorame *v.* Towers (*supra*) and held "that the possession of an administrator or executor of a deceased claimant's estate is constructively the heirs' or devisees' possession; such possession can only be sustained by continual cultivation of the claim until the expiration of five years." The principle thus enunciated and the interpretation of the law as thus announced and acted upon by three of my predecessors, together with the reasons therefor, apply to this case, and, unless I change the rule and adopt a different construction, must govern it, for, so far as residence or cultivation is concerned, the rule must be held the same, whether the party in interest be the widow or the heirs or devisee. I find no departmental decision holding a different view from that expressed in the cases cited. I therefore conclude that the decisions heretofore made have been uniform whenever a question similar to that now before me has been involved. They have uniformly been to the effect that in such cases as this continued cultivation is necessary, but actual residence is not required. I also find on page 15 of the General Circular, issued by your office March 1, 1884, with the approval of the Department, and intended as a channel of general information to the public, that, following the rule laid down by the decisions herein cited, it has been promulgated in substance that the failure of the widow, children, or devisee to reside upon land which the husband or father had entered, he having died, does not of itself subject the entry to forfeiture on the ground of abandonment, but that cultivation in good faith will be treated as a substantial compliance with the law. This regulation

evidently had its origin in the decisions herein referred to, and in view thereof its promulgation seems to have been justified. After a full and careful consideration of the question here involved, I am led to the conclusion that the law does not either in its letter or spirit require of the widow of a deceased homestead entryman, who had up to the date of his death complied with the law, that she must, in order to hold and perfect her deceased husband's claim, continue to reside thereon until the expiration of the five years from the date of entry.

In my judgment the law contemplates that continued cultivation and raising of crops may, in such cases, be regarded as a constructive continuance by the widow of residence once established by the husband and becoming hers at his death, or at least as such evidence of intention and good faith as will save to the widow the rights acquired by her husband and inuring to her at his death, so that she may without actual personal residence complete the claim and receive patent for the land.

Your office decision dismissing the contest is affirmed.

RAILROAD GRANT—STATE SELECTION.

SOUTHERN PAC. R. R. CO. *v.* THE STATE OF CALIFORNIA.

A *prima facie* valid school selection existing when the grant took effect, excepts the land embraced therein from the operation of the grant, and the subsequent discovery of the invalidity of the selection will not inure to the benefit of the company's claim.

Acting Secretary Muldrow to Commissioner Sparks, March 13, 1886.

I have considered the case of the Southern Pacific Railroad Company *v.* the State of California, as presented by the appeal of the former from the decision of your office, dated December 22, 1884, rejecting its claim to the NW. ¼ of Sec. 17, T. 5 S., R. 2 W., S. B. M., Los Angeles land district, California.

The record shows that said tract was selected by said State on June 5, 1869, R. & R. 2108, List No. 68, in lieu of the NW. ¼ of Sec. 16, T. 9 N., R. 25 W., which selection, at the date of said decision, remained uncanceled.

The tract in controversy is in an odd numbered section within the limits of the grant to said company by act of Congress approved March 3, 1871, (16 Stat., 573.) The right of said company is held to have attached to the granted lands upon the filing of the map of designated route in your office on April 3, 1871. On April 21, 1871, a withdrawal was ordered for the benefit of said company, notice of which was received at the local office on May 10th, same year. On October 25, 1884, the State selected the same tract in lieu of the SW. ¼ of Sec. 16, T. 9 S.,

R. 15 W., S. B. M., which selection was rejected by the district land officers, because of conflict with the withdrawal for said company. The ground of the second selection was that the State was not entitled to indemnity for said tract in Sec. 16, T. 9 N., R. 25 W., S. B. M., and it was sought to substitute the tract in Sec. 16, T. 9 S., R. 15 W., as the basis for the tract applied for.

The sole question presented is, did said selection in 1869 operate to except the tract covered thereby from the withdrawal and from the grant to said company.

It will be unnecessary to review the numerous decisions of this Department relative to the effect of selections or entries within the limits limits of a grant to the railroad company, such as that made to the Southern Pacific Company.

The present ruling of this Department is, that a selection or entry *prima facie* valid and subsisting at the date when the right of the railroad company attaches excepts the land covered thereby from the grant.

In the case at bar the selection was allowed and was *prima facie* valid, and the fact that long after the date of said grant and the time when the company's right attached, it was discovered that said selection was invalid, cannot affect the company's claim. Its right had already been fixed, and the selection of said tract being intact upon the record, was such an appropriation of the land as excepted it from the grant. Such was the doctrine announced by this Department in the case between the same parties, reported in 3 L. D., 88.

Counsel for the company cite in support of the appeal, among others, the case of Weimar *et al. v.* Ross (2 L. D., 129). But said decision was expressly vacated, on review, and the question to be determined was held for further consideration (ibid., 441). After an exhaustive oral argument, this Department decided in the case of Pecard *v.* Camens *et al.* (4 L. D., 152), that such entries were not void, but voidable, and such was the final decision in the case of Weimar *et al. v.* Ross (ibid., 285). Said decision rejecting the claim of said company is therefore affirmed.

It is suggested in the argument of counsel for the company that the State has already selected much more land than she is entitled to under the school grant. If that assertion be true, then the amendment applied for should not be allowed. Said decision, however, does not pass upon that question, and hence concerning the same no opinion is expressed herein.

Your attention is called to the fact that said selection has been canceled by your office since said decision was made. This was error. No action should have been taken until the final determination of the appellant's claim.

You will cause said selection to be re-instated, and then pass upon the question of the right of the State to substitute the tract upon which said selection is based.

REVIEW DENIED.

FELLER *v.* SUMMERS.

Application for review of departmental decision of October 20, 1885, (4 L. D., 194) denied by Acting Secretary Muldrow, March 16, 1886.

CONTEST—NOTICE—JURISDICTION.

THE UNITED STATES *v.* RAYMOND.

In the absence of proper service of notice, objection to the jurisdiction is not waived by proceeding to trial after a motion to dismiss is overruled.

Milne *v.* Dowling cited and followed.

Secretary Lamar to Commissioner Sparks, March 18, 1886.

On June 23d last your office canceled the homestead entry No. 10,445 of the E. ½ of the SE. ¼, NW. ¼ of SE. ¼ and SW. ½ of NE. ¼ of Sec. 1, T. 4 S., R. 27 E., Gainesville land district, Florida.

It is shown from the record that said entry was made by Francis G. Raymond on June 17, 1882. On March 17, 1884, upon the report of a special agent of your office, said entry was held for cancellation for failure to comply with the requirements of the homestead law as to residence and cultivation. Upon the application of the entryman a hearing was ordered before the district land officers, and February 23, 1885, was set for the trial. It is further shown that prior to said hearing an effort was being made by the attorney for claimant to have the testimony taken before some proper officer in Jacksonville, in said State, before whom the entryman would be able to appear in person and produce his witnesses to testify in his behalf. This attempt appears to have been unsuccessful, and on the day appointed the district land officers proceeded with the trial, and examined the witnesses offered by the government. Upon the testimony taken, the register and receiver rendered their joint opinion that said entry was illegal; that the entryman had failed to reside upon and cultivate said tract as required by law, and that the same should be canceled.

At the trial, the United States was represented by said special agent, and the opinion of the district land officers states that, "the defendant appeared by counsel, C. O. Hampton." The record of the testimony shows that the case was called at 3 p. m., February 23, 1885, and that the words "no appearance" have two lines drawn through them, and above is written "C. O. Hampton, esq." The counsel for claimant moved to dismiss the case upon the ground of the insufficiency of notice, which motion was overruled by the register, upon the ground that "appearance upon the day of hearing was sufficient evidence that defendant had received notice." Your office sustained the ruling

of the district land officers, for the reason that the objection to the notice was made on a "technical ground."

It has been repeatedly held by this Department that, under section 2297 of the Revised Statutes, jurisdiction rests in the local land office by the issue of due notice to the settler. Houston *v.* Coyle (2 L. D., 58); Edward F. Fritzsche (3 L. D., 208).

If the proper service of notice upon the settler has not been made, objection to the jurisdiction is not waived by proceeding to trial after a motion to dismiss the case is overruled. This doctrine is sustained by the recent decision of this Department in the case of Milne *v.* Dowling (4 L. D., 378) citing Harkness *v.* Hyde (93 U. S., 476). In the case at bar the notice was clearly insufficient. There was no personal service of notice, as required by rule of practice No. 10, and the registered letter sent by the receiver does not appear to have been received until February 2, when the hearing was ordered for February 23, 1885.

It is not deemed necessary to examine in detail the testimony in the case offered by the government.

Neither Raymond, nor his witnesses, were present at the trial. It is shown that he is a very poor man, over seventy years of age; that he was a soldier in the Union army; and that, when he first applied to make entry, he told the register that he had made a homestead entry of forty acres in one of the western States, and that he wanted to make another entry of one hundred and twenty acres, under the law giving additional rights to soldiers, section 2306 of the Revised Statutes. The opinion of the district land officers states that "upon being informed by the register that having once elected to take a homestead of forty acres, he was thereby estopped from taking more." Mr. Raymond insisted that because he had not received any benefit from his former entry he was entitled to make another entry, and he alleges that the register told him he could make another entry, if he would settle upon the land, and thereupon he made said entry.

Rule of practice No. 35, as amended, (1) provides that, "In contested cases and hearings ordered by the Commissioner of the General Land Office, testimony may be taken near the land in controversy before a U. S. Commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by the register and receiver and stated in the notice of hearing." There appears to be no good reason why such action should not be taken in the case at bar. It is therefore considered that said decision of your office be and the same is hereby reversed, and the case will be returned to the local office, and the register and receiver should be directed to order a new hearing, in accordance with the rules of practice, allowing the testimony to be taken near the land in controversy, in accordance with said rule. Upon the receipt of the evidence so taken, your office will duly consider the same, and render judgment thereon.

ENTRY IN EXCESS OF QUARTER SECTION.

LEGAN *v.* THOMAS ET AL.

An entry covering more than one hundred and sixty acres will be canceled to the extent of the illegal excess, but prior to such cancellation the entire tract is reserved from all other appropriation.

Acting Secretary Muldrow to Commissioner Sparks, March 16, 1886.

I have before me the appeal of Maria Jane Legan from your predecessor's decision of December 29, 1884, rejecting her application to file a homestead declaratory statement on the S. ½ of the N. ½ of Sec. 3, T. 112, R. 69 W., Huron district, Dakota.

The record shows that she made said application on June 5, 1884, and that it was rejected by the local officers on the ground that the tract was covered by the subsisting pre-emption cash entries of George W. Thomas, made November 29, 1882, and Lake J. Watson, made December 7, 1883. She then appealed, alleging that said entries were void, because they covered 219.57 and 180.33 acres respectively, and that therefore they were not a bar to her filing. Your office, however, sustained the decision of the local officers.

In my judgment, these cash entries were not void. The remedy which the Land Department applies to cases where an entry covers an illegal excess of land, is to cancel it to the extent of such excess. Until such cancellation the entry reserves the entire tract from all other appropriation. In Simmons *v.* Wagner (101 U.S., 260), the court said:—"It is well settled that when lands have once been sold by the United States and the purchase-money paid, the lands sold are segregated from the public domain and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force." I think that this ruling applies to the case before me, and I therefore affirm said decision.

PRE-EMPTION AND HOMESTEAD RIGHTS.

JAMES BRITTIN.

One who has had the benefit of the pre-emption law, and secured the full amount of land allowed thereunder, may also enter one hundred and sixty acres as a homestead.

The commutation of a homestead entry under section 2301 R. S. is not an exercise of the pre-emptive right.

Secretary Lamar to Commissioner Sparks, March 16, 1886.

James Brittin made pre-emption cash entry December 31, 1883, of the SE. ¼ of Sec. 23, T. 154 N., R. 64 W., 5th P. M., Devil's Lake, Dakota.

February 9, 1884, Brittin also made homestead entry of lots 1 and 2, and E. ½ of NW. ¼ of Sec. 30, T. 158 N., R. 66 W., 5th P. M., Devil's Lake, Dakota, and commuted the same to cash entry No. 669 September 9, 1884.

You held this last entry for cancellation, upon the ground that he exhausted his pre-emption right with his first entry and that his cash entry No. 669 was therefore illegal.

The effect of your decision is, that a commutation of a homestead entry is virtually a change of such entry to a pre-emption, and as the applicant is only entitled to one pre-emption right, he cannot secure the benefit of another by making entry under the homestead law.

Two questions are presented by the issues made in this case.

1st. Whether a person, who has availed himself of the benefit of the pre-emption act and has received the full number of acres allowed under that act, can also secure an additional 160 acres under the homestead law?

2d. Admitting that a person who had availed himself of the benefit of the pre-emption act may also be entitled to the benefit of the homestead act, whether a commutation of the homestead entry to a cash entry under section 2301, Revised Statutes, is not an exercise of the pre-emption right, and whether the allowance of such an entry is not practically awarding to such applicant a second pre-emption right?

In his report of 1866 (2 Lester, 267) Commissioner Wilson, in speaking of the question whether a person who commutes a homestead entry can afterwards enter other land under the pre-emption act, says:

"On this point it has been ruled that where a party legally entitled makes an entry under the homestead law of May 20, 1862, and thereafter at any time before the expiration of five years shall come forward, make satisfactory proof of his actual settlement and cultivation to a given day, and then pay for the tract, the proceedings merely consummate his homestead right as the act allows; the payment being a legal substitution for the continuous labor the law would otherwise exact at his hands.

"A claim of this character is not a pre-emption, but a homestead, and as such will be no bar to the same party acquiring a pre-emption right, provided he can legally show his right in virtue of actual settlement and cultivation on another tract at a period subsequent to the consummation of his homestead."

The only limitation upon his right under this interpretation is, that he shall not be permitted to consummate both entries at the same time. This construction of the law has been uniformly followed ever since by the land office and the Department in administering the law governing the disposition of the public lands under the homestead act; and even if this statute would bear a different construction, I do not think that it would be in accordance with sound policy, or the exercise of a legal discretion, to give to that law a different interpretation in the decision of a case in which the conduct of the parties affected thereby was evidently controlled by the interpretation of that law as then pronounced

by the Department. The official duties of the heads of departments are not merely ministerial, but they are required to expound and interpret the laws and resolutions of Congress under which they act. But independent of this view, I concur in the construction of the statute as given by my predecessors.

Section six of the homestead act (2299 R. S.) provides: "That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing pre-emption rights." And provided further, "That all persons who have filed their application for a pre-emption right prior to the passage of this act, shall be entitled to all the privileges of this act." Clearly the first part of this proviso intended to secure to those, who might avail themselves of the benefits of this act, the then existing right of entry under the pre-emption law; and the second part of this proviso was intended to secure to those who had theretofore availed themselves of the pre-emption right the benefit of the homestead law in addition thereto. For these reasons, I reverse your decision.

REVIEW DENIED.

CHICAGO ROCK ISLAND & PAC. R. R. CO. *v.* EASTON.

Review of departmental decision of November 28, 1885, (4 L. D., 265) denied by Acting Secretary Muldrow March 18, 1886.

COURT OF CLAIMS—ACT OF MARCH 3, 1883.

LESSEPS AND LEPRETRE.

The reference of a case to the Court of Claims, for its findings and opinion is a matter entirely within the discretion of the Department, and such action will not be taken except where assistance in the proceedings is deemed desirable.

Secretary Lamar to Commissioner Sparks, March 18, 1886.

By act of March 3, 1835 (4 Stat., 779), was confirmed the private land claim of Alexander Lesseps, Charles Lesseps, and John B. Lepretre, described as No. 2 in class B in the report of the register and receiver of the southeastern land district of Louisiana, to be found on page 673, Vol. 6 Public Lands (33 Vol., Am. State Papers, Gales & Seaton's edition).

Application was made to the surveyor general of said district in behalf of the legal representatives of the confirmees for the issue of scrip in satisfaction of said claim, in pursuance of the provisions of section 3, act of June 2, 1858 (11 Stat., 294). This application was rejected by that officer, whose decision on appeal was affirmed by your predecessor, from which affirmance an appeal is now pending in this Department.

Under date of February 10, 1886, Mr. Robert B. Lines, of this city, as attorney for the legal representatives of the confirmees, made application that said case be referred to the Court of Claims under section 2 of the act of March 3, 1883 (22 Stat., 485). It is urged that this last application should be granted because the adverse decisions of the surveyor general and of your predecessor are based upon a decision made by Secretary Schurz, April 25, 1879, in the case of Madam Bertrand, where the facts were nearly the same, and which case is to be found in the report of the Commissioner of the General Land Office for 1879, pages 214-15. While insisting that this decision of Secretary Schurz was inconsiderately made and is in clear violation of the language and intent of the act of 1858, it is assumed "that in view of that precedent, the Department will prefer to have a judicial decision of the question involved." It is also urged that such a course (reference to the Court of Claims) will "relieve the over-crowded docket of cases before the law officers of the Department and advance" the case of claimants.

I am not greatly impressed with the force of these arguments.

The second section of the act of March 3, 1883, commonly known as the Bowman act, provides, "That when a claim or matter is pending in any of the executive departments, which may involve controverted questions of fact or law, the head of such department may transmit the same" to the Court of Claims "and the same shall be proceeded with under such rules as the Court may adopt. When the facts and conclusions of law shall have been found, the Court shall not enter judgment thereon, but shall report its findings and opinions thereon to the department from which it was transmitted for its guidance and action."

Said act is intended as its title shows "to afford assistance and relief to . . . . executive departments" in the investigation of matters pending before them. A reference under said act therefore is one entirely within the volition and discretion of the head of a department, and is intended "to afford assistance and relief to" him only when it is deemed by him to be desirable. Therefore the fact that such reference in this case would "advance the interests of claimants" and expedite the hearing of their application for scrip, is not a matter properly to be considered by me. Should this case be sent to the Court of Claims for such reason, it could be urged with propriety that many other cases should also be sent there, now pending in this Department and which may not be passed upon as expeditiously as the parties interested therein may desire.

Nor do I see that said case should be referred because the questions involved therein have heretofore been passed upon by this Department adversely to the contention of claimants. To refer cases because of such state of facts, at the instance of parties interested, would be to treat the act of Congress as establishing a new Court of Appeals for reviewing the decisions of this Department, and could be urged with propriety on every motion for review after an adverse decision.

When the case of the applicants herein comes up in its regular order it will receive a full and fair consideration. If they are entitled under the law to the scrip asked for they will get it, if not it will be refused. The questions involved will be as carefully considered as though never before passed upon by my predecessor. Though his opinion as to the law of the case will have, as it ought, due weight with me, it will not be blindly followed; if believed to be wrong, it will be disregarded and the case decided according to the dictates of my own judgment.

Inform Mr. Lines that his application to refer said case to the Court of Claims is denied, inasmuch as I do not at present feel any necessity for seeking "assistance and relief" from it in the premises.

DESERT LAND ENTRY—COMPACTNESS.

STANTON *v.* DURBIN.

An entry for three hundred and sixty acres extending along a stream for the distance of two miles is not compact.

Secretary Lamar to Commissioner Sparks, March 18, 1886.

I have considered the case of Frank F. Stanton *v.* John H. Durbin, involving the N. ½ of SW. ¼, N. ½ of SE. ¼, and SE. ¼ of NE. ¼ of Sec. 10, and S. ½ of NW. ¼ and S. ½ of NE. ¼ of Sec. 11, T. 19 N., R. 66 W., Cheyenne, Wyoming, on appeal by Durbin from the adverse decision of your office, dated June 13, 1884.

The local office decided against Durbin, and recommended the cancellation of his desert land entry No. 199 of above tracts; and on appeal your office affirmed that decision.

A careful examination of the whole case discloses no reason for reversing said decisions; but on the contrary discloses several reasons why they should be affirmed.

In the first place, the entry in its present shape should not have been allowed in the first instance. It will be observed that the entry is of three hundred and sixty acres, and the tracts embraced in it extend for a distance of two miles along and on both sides of a considerable stream of water called Bear Creek. An entry of that character is not *compact* in any sense of the word. See General Circular, page 35; and case of Maren Christensen, (4 L. D., 317).

Secondly, it is very doubtful from the evidence whether these tracts ever were desert land at all within the meaning of the act of March 3, 1877 (19 Stat., 377).

But leaving out of consideration the question of the compactness of the said entry, and also the character of the land embraced in it (for those were questions not directly involved in the contest herein,) and considering the testimony as to abandonment and failure to comply with the law, and it is clear that the contestant has made out his case.

It is shown that the entryman not only failed to comply with the law, but also made no attempt at compliance. His entry was made in the interest of other parties, who have been in possession of a part of the same for several years, and who conducted water upon said part a few days prior to the hearing in the case.

It is contended by the attorneys for defendant, that said third parties are merely the agents of Durbin to do the work necessary for the reclamation of said tracts. But a fair and impartial view of the testimony leads rather to the conclusion that Durbin is the agent of said third parties for the purpose of acquiring the legal title to the lands embraced in his said entry, and then conveying to said parties.

Upon the whole, I am clearly of opinion that the decision appealed from ought to be, and it hereby is, affirmed.

PRACTICE—PROOF FILED PENDING APPEAL.

F. A. SEAMAN.

Supplemental proof having been filed during the pendency on appeal before the Department, of an *ex parte* case, it is returned for the further consideration of the General Land Office.

Acting Secretary Muldrow to Commissioner Sparks, March 11, 1886.

On October 27, 1885, you rejected the final proof of, and held for cancellation the homestead and cash entry of F. A. Seaman for the NW.¼ of Sec. 7, T. 117, R. 68, Huron, Dakota Territory. From said decision Seaman appealed.

Since the pendency of said appeal before this Department Seaman has filed certain affidavits, by way of supplementary proof, intended to show his good faith in the matter of settlement, improvement and residence on said tract.

Inasmuch as said entries were held for cancellation by you because of want of good faith and a proper compliance with the requirements of law as to settlement, improvement and residence, I have concluded, instead of passing upon said appeal, the better practice would be to return the case to you, in order that you may pass upon the newly filed testimony; accordingly the letter is sent to you, together with the papers transmitted by your letter of December 19, 1885.

APPLICATION FOR RE-INSTATEMENT.

MILLIS *v.* BURGE.

An application for the re-instatement of a canceled entry constitutes an appropriation of the land involved, subject however to intervening adverse rights.

Secretary Lamar to Commissioner Sparks, March 20, 1886.

I have before me the case of George E. Millis *v.* Alfred Burge, involving the NE. ¼ of Sec. 35, T. 17 S., R. 18 W., Wa-Keeney, Kansas, on appeal by Millis from your predecessor's decision of November 1,

1884, rejecting his pre-emption filing and allowing Burge to make final proof.

The record shows that Burge made homestead entry No. 521 for this tract on March 25, 1877, and that at the expiration of seven years thereafter he had failed to make the final proof required by law. Thereupon he was notified by your office to show cause why his entry should not be canceled and the land restored to the public domain, and, failing to make any appearance within the time limited, his entry was duly canceled at 9 o'clock A. M., on July 28, 1884. On the following day, Burge made application for re-instatement of his entry and for leave to make final proof, which was granted by your office on August 16, 1884. In said affidavit he alleged compliance with the law for five years after entry, but admitted that he had not resided on his homestead thereafter. While said application was pending, to-wit, August 7, 1884, Millis applied to make pre-emption filing for the tract, alleging settlement July 27, 1884, or the day before the cancellation of Burge's entry, with subsequent residence and improvement; but the local officers rejected said application because settlement was alleged as of a date prior to the cancellation of Burge's entry. Millis duly appealed to your office, protesting against the re-instatement of Burge's entry and his right to make final proof until his, Millis's, right to make his filing was disposed of, and alleging in a corroborated affidavit that Burge had failed to comply with the law for the first five years after entry. This appeal your office dismissed in the decision aforesaid, for the reason that Millis's filing was offered after the date of Burge's application for re-instatement, and on December 18, 1884, Millis took the appeal now before me. Meanwhile, to wit, November 24, 1884, Burge gave notice of his intention to make final proof, and, after due publication, it was made before the clerk of a court on January 7, 1885, Millis filing a protest against its allowance prior to the determination of his appeal. It does not appear that a hearing has been ordered, or that Burge's final entry has been allowed.

If the facts alleged by Millis be true, under the settled rulings of the Land Department he had a legal settlement on the land *eo instanti* that Burge's entry was canceled; and, as he offered to file his claim within the legal period, it was error to reject it, notwithstanding the pendency of Burge's application for re-instatement. It was ruled in the case of Sarah Renner (2 L. D., 43), and approved in Florey and Moat (4 L. D., 365), that a pending application for re-instatement constitutes an appropriation and reservation of the land; but these cases are not to be taken as ruling that such an application prevents a prior appropriation by settlement, and the filing or entry based thereon within the period provided by law. In the case at bar, Burge's application for re-instatement was properly subject to the right which Millis acquired, by his alleged settlement and subsequent residence, because made after date that said right was initiated. It was, therefore, error to allow Burge to make final proof without a hearing, and especially so in the face of Millis's pending appeal

Your predecessor's decision is accordingly reversed, all proceedings at the local office subsequent to the date of Millis's appeal are hereby set aside, and you will please direct that his filing be placed of record at the date it was offered, and that a hearing be ordered, with notice to both parties, at which their several rights may be determined.

VOID ENTRY—HOW ATTACKED.

SHURTLEFF *v.* KELLY ET AL.

An application to enter land covered by a *prima facie* void entry, accompanied with information charging the invalidity of said entry, is held only for the ascertainment of the status of the entry thus attacked. If said entry is adjudged void from inception, the pending application should be received as of the date made.

Secretary Lamar to Commissioner Sparks, March 20, 1886.

I have before me the appeal of Edward Shurtleff from the decision of your office, dated February 4, 1885, rejecting his application to make homestead entry of the NW. ¼ of Sec. 26, T. 118 N., R. 57 W., Watertown, Dakota Territory.

An examination of the case discloses the following state of facts: On the 23d of October, 1882, one Samuel Edwards made timber culture entry No. 8229 of the SW. ¼ of same section, township and range. By letter "C" of date January 31, 1883, your office, not being aware of the said entry of Edwards, allowed William Kelly the right to make timber culture entry of the tract in question. Accordingly, on February 24, 1883, Kelly made timber culture entry No. 8535 as allowed. On the 21st of January, 1885, Shurtleff made his application above mentioned, and asked: *First*, That Kelly be ordered to show cause why his said timber culture entry No. 8535 should not be canceled; *Second*, That a hearing be ordered and notice issued; *Third*, That in case Kelly fails to show cause why his said entry should not be canceled, that said entry be canceled, and he (Shurtleff) be permitted to perfect his homestead entry upon said tract in accordance with his said application, he (Shurtleff) agreeing to pay the expense of said notice and hearing. The local office on the same day transmitted said application to your office. Upon consideration of the same, your office on the 4th of February following, rendered the decision from which the appeal under consideration is taken: held Kelly's said entry for cancellation, because of its being illegal, and held further that Shurtleff could derive no benefit from his application to enter said tract during the existence of Kelly's said entry, and that when said entry is canceled the land would be subject to entry by the first legal applicant.

I am of the opinion that the ruling of your office, that Shurtleff could derive no benefit from his said application during the existence of the said entry of Kelly, was erroneous. Said entry being a second timber

culture entry in a section was, for that reason, *prima facie* void. If void, it was no segregation or appropriation of the land embraced in it. The question of its validity, however, would have to be tried in a proper manner and before the proper tribunal, but in such trial the burden of proof would be upon the entryman. An application to enter by a party who is the informant, as in the case under consideration above, and who is seeking to take advantage of such illegality, made pending the determination of the validity or invalidity of such entry, should be suspended only to await such determination; and the entry having been adjudged illegal and void in its inception, said application should be received and relate back as of the date when it was made.

In the case under consideration, the entry of Kelly was held for cancellation by your office on the 4th of February, 1885, as above related. He took no appeal from such action, thereby admitting the charge of illegality and invalidity of his entry in its inception. Prior to the expiration of the time allowed for appeal, to wit: March 27, 1885, Kelly relinquished his said entry to the United States, thus terminating whatever rights he had to the tract in question.

Under the rule above announced, and the circumstances of this case, Shurtleff's application thereby attached, and by the doctrine of relation was referred back to the date it was offered.

It further appears that on the same day the relinquishment was filed, the local office permitted one Matthew S. Kelly to make homestead entry No. 14,451 of the tract in question. This entry in the face of the said prior application of Shurtleff should not have been allowed; or if allowed at all, should have been subject to said application. Said entry No. 14,451 will accordingly be canceled without prejudice.

The decision of your office is accordingly reversed.

RELINQUISHMENT—SETTLEMENT RIGHTS.

SMITH AND CRAWFORD.

The right to file a relinquishment is not dependent upon the legality or illegality of the entry concerned.

Though the record filing preceded settlement, a second filing is not necessary to protect the pre-emptor in subsequently acquired settlement rights.

Secretary Lamar to Commissioner Sparks, March 20, 1886.

I have before me the appeal of Albert E. Smith from the decision of your office, dated February 3, 1885, refusing his application to make a second pre-emption filing for the S. ½ of the NE. ¼ and the S. ½ of the NW. ¼ of Sec. 1, T. 4 N., R. 4 E., Olympia, Washington Territory.

The record shows that Smith filed pre-emption declaratory statement No. 6109 for this tract March 10, alleging settlement March 1, 1883;

and that George A. Crawford made homestead entry No. 6645 of same land June 10, 1884.

January 14, 1885, the local office transmitted the said application of Smith, accompanied by his affidavit to the effect that when he filed said declaratory statement No. 6109, he had not made actual settlement upon the land; that he afterwards settled upon said land and made valuable improvements thereon; that upon consultation with an attorney he was informed that his first filing was illegal, not having been preceded by settlement; and therefore asked to be allowed to make a second filing for the same land. By the same letter was transmitted a relinquishment, executed by Crawford upon the back of his duplicate receipt, of his said homestead entry No. 6645 of said tract. Accompanying this relinquishment is an affidavit of Crawford, duly corroborated, to the effect that when he made his homestead entry he knew of the said filing of Smith, but that he was uncertain as to the validity of said filing; that he is now satisfied that Smith has a valid claim to the land, and he does not desire to contest, because of Smith's superior rights and equities in the premises; and he therefore asked a restoration of his homestead rights.

The decision of your office, from which the appeal under consideration is taken, held: *First*, That the application of Smith must be rejected, because his failure to establish a settlement before filing being his own willful act, he cannot avail himself of such *laches* to file again; *Second*, His application must be denied, because, in said application he alleges settlement six days after the homestead entry of Crawford was made; and, *Third*, "The application of Crawford to be allowed to relinquish his entry is also denied, it being a legal one, apparently in all respects, and not a right which can be defeated by that of Smith."

I am not aware of any law forbidding an entryman from filing a relinquishment of his claim because of its being a legal one in all respects. Section one of the act of May 14, 1880, (21 Stat., 140,) contains no such doctrine, but on the contrary recognizes the right to file a relinquishment of a homestead claim, whether it be legal or illegal.

Your office evidently went upon the theory that Crawford's relinquishment and his application for restoration of his homestead rights were one and the same instrument, and that the relinquishment was to be filed only on condition that said right be restored. This was error. A careful examination of the papers discloses the fact that the relinquishment was filed unconditionally; and the application for restoration, after reciting the fact that the entryman has relinquished his claim, then prays for a restoration of his homestead rights. The relinquishment of a claim is one transaction, and the application to make a new entry is another. The relinquishment should always be filed when offered and the entry canceled without any further action on the part of the General Land Office.

The application for a restoration of homestead rights can only be considered when the applicant shall apply to make entry for some particular tract of land. See case of Fremont S. Grahan (4 L. D., 310).

The relinquishment of Crawford's claim removed the only bar, if there ever was any, to that of Smith. Consequently a second filing on his part is unnecessary, and his claim may be prosecuted under his rights obtained by settlement. Charles C. Martin (3 L. D., 373); Hunt *v.* Lavin (*ib.*, 499; Wertman *v.* Blume (4 L. D., 423).

The decision of your office is accordingly reversed, and the land awarded to Smith, subject to his future compliance with the pre-emption law. The homestead entry of Crawford will be canceled under his relinquishment.

ACCOUNTS--SURVEY CONTRACTS.

G. W. BAKER ET AL.

The survey of a township, under the deposit system, should not be allowed on the application of one settler, but a claim should not be rejected where the services were rendered in good faith, under a contract entered into when such an application was held sufficient.

That the amount claimed is in excess of the estimated liability on the contract, or that the work was not performed within the time specified therein, does not invalidate the claim; though in the latter case the rate of payment may be affected thereby.

For work completed within the specified time, the account should be audited at the contract price, and for work performed thereafter, at a rate measured by the value of such work, not exceeding the maximum rate allowed for such period.

It lies with the Commissioner of the General Land Office to determine by what method the accuracy and justness of accounts shall be ascertained, but where the evidence required by the regular practice is furnished, an arbitrary rejection is not authorized.

Secretary Lamar to Commissioner Sparks, March 22, 1886.

I have considered the appeal of G. W. Baker and others from your office decision of December 30, 1885, refusing to adjust and approve the accounts for balances claimed to be due on certain surveying contracts, numbered and dated as follows:

* * * * *

Of these contracts numbers 109, 132, 149, and 272 were made under the special deposit system. Numbers 79, 94, 309, and 322 were made by order of the Commissioner of the General Land Office, to be paid out of the annual appropriations for that purpose, and number 346 was made payable from a deposit by California and Oregon railroad companies.

One of the grounds for the rejection of the first class of these contracts was that the application of one settler is not sufficient to authorize the survey of a township under the deposit system, and there is no authority in the Department to allow such practice.

I concur with you in this view, but at the time the contracts under consideration were made, and the work under them was done, the rule of the Department was, that the application of one settler for survey was sufficient. While for future action we should administer the law as we understand it, it would be eminently unjust to apply this view of the law retrospectively, and in consequence of the difference of views of those legally charged with the administration of the law, deprive those who did lawful work in good faith on a contract made by competent authority from the compensation for their work. Hence, while the interpretation that the application of one settler is not sufficient, should be adhered to in all future contracts, the doctrine should not be applied retrospectively to contracts which were made and work thereon performed in accordance with rulings that were in force when the contract was made.

Contracts for the survey of the public lands (when within his general powers) become binding upon the United States when approved by the Commissioner of the General Land Office. As under these contracts work was not to be commenced until after the approval of the Commissioner, the contractors were authorized to presume that all proceedings were regular and legal upon which such approval was obtained, and after work has been commenced under a contract so approved, the government should not on account of difference of opinions in those intrusted with the administration of the law be heard to impeach the authority of the surveyor general to make such contract in the absence of fraud on the part of the contractors.

The second ground on which you base your decision is, that the amounts claimed are in most instances for balances in excess of the estimated liability on the contract.

The object of the bond is to require faithful performance of the contract, and as security for reimbursement of money paid upon contracts that have not been fulfilled. Therefore, if the contract has been faithfully complied with and the work performed, the contractors are entitled to be paid for such services, although the amounts claimed exceed the estimated liability; and if the bonds filed are insufficient, additional bond should be required to cover the balance in excess of the entire liability.

The failure to complete the work within the time specified in the contract does not authorize you to refuse 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 appropriation for surveys for that year, and the rate of payment stipulated in the contract cannot apply to work completed after the expiration of the time agreed upon.

The annual appropriation for the survey of public lands provides for a maximum rate that may be contracted for, and the Commissioner of the General Land Office can not contract for a greater rate. Hence, where a contract stipulates that the work shall be performed within a

given period, the rate agreed upon can only apply to work performed within that period; and for work done under such contract after the expiration of that period of time, the rate of payment must be governed by the value of the work, but in no case to exceed the maximum rate fixed by the statute for such subsequent period, nor the rate fixed in the contract. Nor can the Commissioner, in extending the time for the performance of the contract, retain the rate therein stipulated, if at the time of such extension the law has fixed a lower maximum rate.

When a contract is made, although time in its interpretation may not be treated as of its essence, yet every contract is presumed to be made with a full knowledge of the law. As these contracts were made with the knowledge that the rate fixed could only be obligatory on the United States during the time agreed upon in the contract, and the rate for each year was subject to change, if the rate after the expiration of the time specified in the contract should be fixed below the contract price, such lower rate would be the maximum that could be paid on the contract.

"The Commissioner of the General Land Office has power and it shall be his duty to fix the prices per mile of public surveys, *which shall in no case exceed the maximum established by law*." (Sec. 2400, R. S.) The maximum rates are established by acts making annual appropriations for that purpose.

There is not sufficient record before me to determine how these contracts may be affected as to the time the work was completed and the rate then existing, but they should be audited under the rule above stated, to wit: at the rate included in the contract for work completed within the time prescribed therein; and for work completed thereafter at a rate measured by the value of such work, but not to exceed the maximum rate allowed for that period, nor the price fixed in the contract; and the maximum rate for that period may be accepted as the value of such work, if it does not exceed the contract price.

I concur with you that there is no authority for the application of special deposits, to pay for surveys which were contracted to be paid for the general appropriation; and even if such authority existed, it would be a question of administration resting in the discretion of the Commissioner, which I should hesitate to interfere with. The contracts made payable from special deposits should be paid from such deposit. Those made payable from the annual appropriations should when certified and approved, be paid from the deficiency appropriation; and those made payable from railroad deposits should be provided for according to the law governing such cases.

This disposes of every question presented by this appeal except as to the last ground, to wit: That the account should not be passed to final adjustment without an examination of the work in the field.

It is insisted upon by appellants that the approval of the surveyor-general, together with the intrinsic evidence furnished by the field

notes and plats themselves, now on file in the General Land Office, ought to satisfy the Commissioner that the surveys have been actually and faithfully made.

The general rule certainly is, that the oath of the surveyor before he enters upon his work that he will faithfully perform his duties according to law, and his oath after the work is done that he has done so, corroborated by the oaths of his chain-carriers, with the additional assurance of a bond in double the amount of all money paid on the contract, conditioned that he will perform the work according to contract, and accompanied by the certificate of the surveyor-general of the district approving the field-notes and plats, should be regarded as sufficient *prima facie* evidence that the work was done, and if not done the bond offers sufficient indemnity. If there is no fact or presumptive evidence apparent from an inspection of the papers to support or suggest the impression that the work was not done according to contract, the accounts should be audited according to rule, unless there is some affirmative fact within the knowledge, or some affirmative or extrinsic evidence to rebut the *prima facie* case which a compliance with the general rule affords.

The contract stipulates that no payment shall be made until approved plats and certified transcripts of field-notes of the survey for which the accounts are rendered are filed in the General Land Office; and this the law requires. But while the Commissioner may be justified in approving and auditing accounts for surveys upon the filing of such approved filed-notes and plats, it is not obligatory upon him to do so. In the case of George K. Bradford (4 L. D., 269,) it was held that "it lies within the discretion of the Commissioner of the General Land Office to adopt such methods in the examination of accounts as may seem to him best calculated to ascertain the justness and accuracy of the same." But where the evidence required by the regular practice is furnished, with no evidence to rebut it, an arbitrary rejection should not be exercised.

While these contractors are entitled to have their accounts adjusted and certified according to the rule above stated without unnecessary delay, yet if you have just reason to believe that the work for which the accounts are rendered have not been fully and faithfully performed, it is not only your right but your duty to satisfy yourself of this fact by such means as you may adopt before finally adjusting them. If you are not satisfied to accept the work and audit the accounts upon the certificates of the surveyor-general, whatever mode you adopt to satisfy yourself that the work has been faithfully done should be put into execution at once, that the parties may not be further delayed in this matter.

CONTEST—RELINQUISHMENT; APPLICATION—ENTRY.

PFAFF *v.* WILLIAMS ET AL.

A relinquishment, filed with due notice of a pending contest and application to enter, must be regarded as resulting from the contest, and therefore inuring to the benefit of the contestant.

A legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon.

Secretary Lamar to Commissioner Sparks, March 24, 1886.

I have considered the case of Michael Pfaff *v.* William R. Williams, involving the SE. ¼ of Sec. 24, T. 102 N., R. 56 W., Mitchell, Dakota, as presented by the appeal of *A. D.* Williams from your office decision of December 3, 1884, which, among other things, held for cancellation timber culture entry, No. 11,380, made by appellant, A. D. Williams.

The following recital seems necessary in order to show clearly the relations of the several parties to each other and to the questions involved under the somewhat anomalous and certainly unique proceedings had relative to the tract in question. It appears that William R. Williams made timber culture entry No. 1315, Yankton series, for the tract July 18, 1878; that Pfaff initiated a contest against said entry February 23, 1883, charging failure "to cultivate and plant to trees, seeds or cuttings or cause the same to be done during the years 1881 and 1882, since making said entry."

Notice of contest, dated March 1, 1883, was given by publication in a weekly newspaper for five consecutive weeks, commencing with the issue of March 8, 1883, and ending with the issue of April 5, 1883, as sworn to by S. M. Figge, publisher of the Bridgewater Times, in which the notice appeared. A printed copy of the notice is annexed to the affidavit of the publisher. A copy of said printed notice was also posted upon the land embraced in the contested entry on the 28th of March, 1883, as appears by the sworn statement of George Bunning, jr. Said notice summoned the parties to the contest to appear at the local office on the 2d of May, 1883, at 9 A. M., to respond and furnish the testimony concerning the alleged failure. Said notice, which was duly signed by the register, further directed that testimony in the case be taken before one J. B. Nation, at Bridgewater, Dakota, on April 26, 1882, 9 A. M., as provided by rule 35 of Rules of Practice. It appears that the notice contained several errors:

First, it set out that the allegation of contestant charged failure to cultivate or plant during the year 1881, whereas the affidavit of contest read "during the years 1881 and 1882." Second, it named "April 26, 1882," as the date when testimony should be taken, when April 23, 1883, was the date intended. The publisher swears that the error in date was a mistake in his office, which was corrected as soon as noticed. On April

23, 1883, contestant with counsel and contestee by counsel appeared before the notary public designated to take testimony.

Counsel for contestee objected to having said notary take the testimony, on account of the close business relations of the latter with the attorney for contestant. He also moved the dismissal of the contest, because of the defective notice. Testimony was taken, however, both sides participating. The witnesses examined on April 23d were all for contestant, but were cross-examined by counsel for contestee. An adjournment was had to April 26, when testimony was offered and taken in behalf of contestee. Further adjournment, it appears, was had, but no additional testimony was taken before the notary.

On May 2, 1883, the day named in the published notice for the appearance of the parties at the local office, both appeared either in person or by counsel, and further testimony was taken and sworn to before the register. This was in compliance with the request of one of the attorneys for contestee, made April 27, 1883, in a sworn statement, to the effect that he was called away before the conclusion of the hearing by the death of a relative, and asking that the testimony of the witness or witnesses in behalf of contestee be taken before the register and receiver on the 2d day of May, 1883.

On said 2d of May, said attorney asked further continuance on the ground of the absence of contestee in Illinois, and his desire to procure testimony to show said contestee's inability, by reason of serious and protracted illness, to attend to his timber culture claim, or to any other business. Said attorney on the same day filed before the register and receiver a motion to dismiss the case, on the ground of defective and improper notice, and also because of the close and intimate business relations of the notary before whom testimony was taken and the attorney for contestant, and generally upon the ground of gross irregularity in the proceedings.

The register, on the 25th of June, 1883, rendered judgment in the case, finding the irregularities and defects as to notice. He, however, proceeded to pass upon the testimony taken and to decide the case on its merits, which he did, holding that contestant had failed to show by the testimony in the case that contestee had failed to comply with the law; on the other hand, that he had acted in good faith, and therefore that the contest should be dismissed. In this opinion the receiver concurred, as shown by his indorsement made thereon July 27, 1883. Upon notice of this finding contestant August 11, 1883, moved for a new hearing, after due notice properly and correctly published. This motion the register and receiver overruled January 21, 1884, on the ground that it was incumbent upon contestant, pending the proceedings under the defective published notice, to move for a continuance to enable him to make full and legal service of notice of all the allegations contained in the affidavit of contest, and that having failed to do this, he could not subsequently be allowed to cure his laches in the manner proposed.

Thereupon contestant, February 4, 1884, appealed to your office from the action of the local office dismissing the contest and overruling the motion for rehearing.

Pending the proceedings aforesaid, contestee, W. R. Williams, on the 3d of August, 1883, executed a relinquishment to the United States of the tract in question, which was filed in the local office and marked "canceled October 8, 1883, 2 p. m." On the same day Albert D. Williams, who, it appears, was a brother of W. R. Williams, applied and was allowed to make a timber culture entry, No. 11380, for the tract, this while the contest of Pfaff against W. R. Williams was pending before the local office on the motion of contestant for rehearing, he (contestant) also having applied to enter the land.

From the foregoing it becomes apparent how A. D. Williams got into the case as a party in interest, and why he is here as appellant from your office decision.

The decision appealed from held that contestant Pfaff should have been allowed a new hearing. It also finds that the published notice, though irregular, proved sufficient to bring contestee to his defence by counsel, and decides that the local office erred in receiving the contest of A. D. Williams pending the settlement of the contest of Pfaff still pending and under consideration, and that said Williams's entry could only be allowed subject to the right already acquired by any other person.

I do not find among the papers anything showing that A. D. Williams filed an affidavit of contest as intimated by your office decision. The record before me simply shows that on October 8, 1883, the day on which W. R. Williams's relinquishment was filed, A. D. Williams made timber culture entry for the land thus relinquished. The allowance of said entry was error.

It is well settled that an entry of record, and *prima facie* valid, reserves the land covered thereby so that, until cancellation, it is not again subject to entry by another. Graham *v.* H. & D. Ry. Co., (1 L. D., 380); Henry Cliff, (3 L. D. 216); Ernest Trelut, (3 L. D., 229.)

Further, a legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition, until such time as it may be finally acted upon. Townsend *v.* Spellman, (2 L. D., 77); Davis *v.* Crans et al., (3 L. D., 218.)

Pfaff had applied to enter the tract in question, and his application was pending at the date when A. D. Williams's entry was allowed.

In view of the foregoing I do not find it necessary to discuss the effect of the defect in published notice of contest. The affidavit of contest was regular, and the defect or irregularity in the notice was the fault of the register over whose signature it was made, and not of contestant. Whatever the proper proceeding by the register and receiver would have been on the objections and motions made during the

trial of the case, two facts are evident: First, that as a matter of fact, contestee had knowledge of the initiation of contest by Pfaff, for he appeared by counsel, and made certain objections as to the character of the notice; and, second, with that knowledge and pending Pfaff's contest and application to enter, he (contestee) on the 8th of October, 1883, more than seven months after the initiation of said contest, filed his relinquishment of the tract.

On these facts, and in view of all the circumstances, I am of the opinion that said relinquishment may very properly be regarded as resulting from the contest, and therefore as inuring to the benefit of contestant, so as to give him the preference right of entry. This, notwithstanding said contest, was at the date of relinquishment pending and had not been prosecuted to final judgment.

This view I do not regard as in conflict with Departmental decision of May 20, 1885, in the case of Mitchell *v.* Robinson, (3 L. D., 546.) In that case the facts were widely different from those found here, and were such as to throw great doubt upon, if not to rebut, a finding that the relinquishment was *prima facie* the result of the contest. It was there claimed, (1) that the relinquishment had been offered at the local office and there refused before the initiation of contest, and (2) that Robinson, the party claiming adversely to contestant, had made settlement before said contest was commenced, and on the day when the relinquishment was tendered and refused.

I concur in the conclusion reached by your office decision that the entry of A. D. Williams should be canceled.

RAILROAD GRANT—ORDER OF WITHDRAWAL VACATED.

ATLANTIC AND PACIFIC RAILROAD COMPANY.

By the terms of the grant the terminus of the road was fixed at a point on the Pacific Coast, when the same was reached by a route selected by the company and approved by the Secretary of the Interior; hence there was no authority in the Department to accept maps of definite location showing an extension of the road beyond such point, therefore, the withdrawal, made in accordance with such maps, for the road as located between San Buenaventura and San Francisco, is vacated, and the land restored to the public domain.

Secretary Lamar to Commissioner Sparks, March 23, 1886.

On the 1st day of February 1886, on special reports received from you, a rule was entered on the Atlantic and Pacific Railroad Company "to show cause why so much of the orders of withdrawal, dated the 22d day of April 1872, and the 23d of November 1874, of public land on the alleged line of the Railroad of said company from San Buenaventura on the Pacific Ocean, to San Francisco, should not be revoked, and the land embraced therein restored;" returnable on the 3d day of March 1886 at ten o'clock a. m.

On the 4th day of February 1886, a copy of the rule was served on Messrs. Britton & Gray, attorneys for the railroad company. In response to which the said company, by its attorney appeared and, on the 3d, on request of the attorneys for the road, final determination of the rule was adjourned till the 4th of March 1886 when, upon consideration of the law and the evidence, it appears: That the first section of the act of the 27th of July 1866, (14 Stat., 292) provides for the construction of the railroad and defines the route as follows:

"Beginning at or near the town of Springfield in the State of Missouri, thence to the western boundary line of said State, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque on the River Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence *by the most practicable and eligible route, to the Pacific.*

By the 3d section of the act, a land grant was made to aid in the construction thereof of twenty alternate sections per mile, on each side of the railroad line, as said company may adopt, through the Territories of the United States; and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State.

On the 16th day of April 1874, 12th day of March 1873, and the 16th day of April 1874, several respective maps of definite location, of different sections of the road, were filed, which carried the definite location thereof to San Buenaventura, on the Pacific Ocean.

On the 12th day of March 1872, and the 16th day of April 1874, maps of definite location of sections of the road, were filed, by which its line of definite location was carried from San Buenaventura to San Francisco. These maps were approved, and, in pursuance thereof, the lands in the grant were withdrawn.

On the 26th day of October 1869, the company filed a map of definite location, directly from the Colorado River to San Francisco, which the Secretary of the Interior declined to approve. No portion of the road between San Francisco and San Buenaventura has been built.

By the filing of the several maps of definite location two distinct routes from the Needles, a point near the eastern line of California, to the Pacific Ocean, were selected by the company, the northern route reaching the Pacific Ocean at San Francisco, the southern at San Buenaventura.

By the filing of maps of definite location on the 12th day of March 1872, and the 16th day of April 1874, the line was intended to be established, connecting San Francisco and San Buenaventura. To this portion of the line the rule to show cause applies. The questions necessary to be determined in this rule are; Is there any land granted to the road

on this portion of the line? And if there is no grant, is the former action of the Department in accepting the maps of definite location and withdrawing the land from sale, such final action as to now preclude revocation by the Department on the principle of *res judicata?*

On the determination of this rule it is not necessary to decide whether the route claimed by the company in 1869 to San Francisco, or that claimed in 1874 to San Buenaventura, is the legal route of the road, as in either event the same result would follow, as both points are on the Pacific Ocean. The language of the grant is, "To the Colorado River at such point as may be determined by the company for crossing, thence by the most practicable and eligible route to the Pacific."

While this legislation leaves the company, with the approval of the Secretary of the Interior, to determine what is an eligible and practicable route to the Pacific, it makes the Pacific, when reached, the terminus of the road; and when the Pacific was reached by a route which was selected by the company and approved by the Secretary, the terminus was reached and it was beyond the power of either or both to extend the road about three hundred and eighty miles beyond the terminus fixed by law, and increase the grant of the lands by the government to that extent. The same assumption of power that could justify the extending of the line in this case, after the ocean was reached, could have carried it to the northern line of Washington Territory or the southern line of California,—which certainly was not the intent of the act of 1866. Hence, as there was no power in the officers of the government to thus extend the grant, after the legal terminus of the road had been reached at the Pacific Ocean, the acceptance of the maps of definite location between the points described in the rule, was without power and void.

In answer to the principle of *res judicata* asserted in response to the rule, (with full recognition of the doctrine when applicable) it does not apply in this case.

The principle only exists when the tribunal which renders the decision has jurisdiction of or power over the subject decided. As the only power to approve maps of definite location in this case is conferred by the act of 1866 and that power only extended to the Pacific Ocean, when that terminus was reached the power was exhausted and the approval of all beyond was in excess of the authority of the departmental officers and could have no greater obligatory legal force than should have been accorded to like action by any other person who was not an officer of the Department.

To the claim that the line included in the rule has been mortgaged and money raised on its credit, it is a sufficient reply that the mortgagees could have a lien upon no greater title than the mortgagor and if, through negligence or a mistake they took a mortgage on that to which the mortgagor had no legal claim, and which reasonable diligence in the examination of the title would have shown them, the misfortune is their own and should not be borne by the nation.

Then, as the legal terminus of the road, whether at San Francisco or San Buenaventura, terminated the grant, there is no occasion longer to reserve the land included in the orders of withdrawal referred to in the rule.

The rule to show cause is made absolute and, after the publication of the usual restoration notice, which you are hereby directed to give, the land withdrawn between San Buenaventura and San Francisco, will be restored to the public domain.

CONTEST—PREFERRED RIGHT OF CONTESTANT.

AUSTIN *v.* NORIN.

The local office may properly entertain a contest wherein the legality of a homestead entry is called in question.

The contestant in such a case is entitled to all the benefits incident to the successful termination thereof, although the facts alleged as the basis of such contest were of record prior thereto.

Secretary Lamar to Commissioner Sparks, March 27, 1886.

I have before me the case of William Austin *v.* Frank L. Norin, involving homestead entry of the NE. ¼ of Sec. 25, T. 107, R. 67, Mitchell, Dakota, on appeal by Norin from your predecessor's decision of November 14, 1884, holding this said entry for cancellation.

On October 22, 1883, Austin filed a contest against Norin's homestead entry. The affidavit of contest is written on the usual printed form which charges abandonment for more than six months, but written between the printed lines is the allegation that Norin is living on his pre-emption claim, while holding the homestead claim, and has not made proof on his pre-emption. It is very clear from an inspection of this affidavit that the contest was based on the illegality of the entry.

At the hearing before the register and receiver, the claimant appeared and moved to dismiss the contest for want of jurisdiction in the local land office; the illegality of the entry being involved.

Said motion was granted and the contest was dismissed by the local officers, on the ground that it was premature as to abandonment, and that they had no jurisdiction of the question of illegality; that such proceedings should have been initiated before the Commissioner of the General Land Office. On appeal by Austin your office held that the contest was premature in respect to the allegation of abandonment; that as Norin was living on his pre-emption claim for some months after entry, his homestead must be canceled; but that the contestant could not acquire a preferred right of entry, "for the reason that the office was already in possession of the facts of the case."

From this decision Norin appealed, alleging as error (1) In holding that Norin's homestead entry should be canceled, without first giving

him a hearing. (2) In holding that Norin's homestead entry should be canceled, because he had entered land under the pre-emption law.

The record shows that when Norin made his entry, to wit: on May 9, 1883, he had a subsisting pre-emption filing for a different tract, made April 25, 1883, on which he was then residing, and where he continued to reside until November 6, 1883, when he made final pre-emption proof.

The residence of the homestead claimant commences from the date on which he makes his entry. Whilst a pre-emption claim is pending, the claimant can not make a homestead entry without abandoning his pre-emption claim, because *bona fide* residence can not be maintained upon two different tracts at the same time. J. J. Caward, (3 L. D., 505); Rufus McConliss, (2 L. D., 622); Collar *v.* Collar, (4 L. D., 26).

In McConliss's case, the expression occurs: "He was not required to commence residence on his homestead tract until within six months from the date of his entry; but having done so immediately upon his entry, he must be held to all the legal consequences that result therefrom." This expression which is mere dictum is not in harmony with the decision of the case, nor the current of authority, and will not be followed.

The fact that Norin in the record admits that he was at the time of his homestead entry living upon his subsisting pre-emption filing, for which he had not offered final proof, dispensed with the necessity of a hearing, and your office committed no error in cancelling his entry upon the evidence presented by the record.

When a contest is initiated on the ground of illegality of entry, the government is a necessary party, acting on the information of the contestant. If the affidavit of the contestant develops such a state of facts as to show that an attempt is being made to acquire title to public lands in violation of existing laws, the local officers should take testimony upon the issues made therein, and forward the same to the General Land Office; Smith *v.* Brandes, (2 L. D., 95); Condon *v.* Arnold (id. 96). Austin therefore had the right to initiate this contest upon the ground alleged, with all the rights incident to a successful termination of such contest, notwithstanding the land office may have been in possession of the facts alleged by him.

Your predecessor held that Austin acquired no prior right of entry of the said land, for the reason that the office was already in possession of the facts in the case. From this part of your decision there was no appeal. An appeal from this decision was not necessary to preserve his rights. He made no application to enter the land, nor was such an application essential to his right to initiate the contest. The sole question made by Austin's contest was the legality of the entry of Norin, and it is upon the successful termination of this issue that his rights depend.

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or tim-

ber-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.

Austin may not have intended to enter the land at the time of filing the contest, but that does not bar him of the privilege of exercising that right at any time within thirty days after notice of the cancellation. Hence, as the question as to whether the cancellation was the result of Austin's contest, and whether he had a right of entry by virtue thereof was not put in issue, this decision was upon matter foreign to the record. I therefore make no ruling as to Austin's right of entry, that being a matter that should be passed upon hereafter, if he should elect to exercise it. Your decision cancelling the entry of Norin is therefore affirmed.

On September 16, 1884, while this case was pending in your office, Thomas H. Null made application to enter this same tract. The local officers rejected his application, and on appeal your office affirmed their decision. From this decision Null appealed to the Department. The decision of your office rejecting his application is also affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

GILBERT *v.* SPEARING.

The right of entry is complete, and in contemplation of law the land is entered, from the moment when the application, affidavit, and legal fees are placed in the hands of the local officers, if the land is properly subject to such appropriation.

A purchase under this act cannot be allowed during the pendency of a contest involving the right to make the entry in question.

No action should be taken under a contest relating to land already involved in a suit, pending on appeal, until the final disposition of the first case.

Secretary Lamar to Commissioner Sparks, March 27, 1886.

I have considered the case of Gustav Gilbert *v.* David Spearing, as presented by the appeal of Spearing from the decision of your office, dated September 30, 1884, refusing his application to purchase under the act of June 15, 1880, (21 Stat., 237,) the land covered by his homestead entry of the NW. ¼ of Sec. 20, T. 99 N., R. 55 W., Yankton land district, Dakota Territory, and holding said entry for cancellation.

The record shows that Spearing made his homestead affidavit at Swan Lake on June 4, 1880, before the clerk of the district court of Turner county, in said Territory, which sets forth that he was duly qualified to make homestead entry, and that he then resided upon the land applied for. The application, affidavit and fees were transmitted to the district land office, and on June 15, 1880, said entry was placed upon record, and the receiver's receipt issued therefor.

It appears that one Benjamin H. Minturn filed his pre-emption declar-

atory statement for said tract on August 18, alleging settlement thereon May 27, 1880. Spearing initiated a contest against said filing. A hearing was had and the case finally decided by this Department on March 7, 1883, holding that Minturn's "filing for the tract in contest was illegal and must be canceled, and the land awarded to the plaintiff."

On August 9, 1882, Gilbert filed his affidavit of contest, alleging abandonment for more than six months and non-compliance with the requirements of the homestead law, and November 8, same year, was set for the trial of the case. Upon the day set for trial, both parties appeared in person and with counsel. Spearing, by his attorney, moved to dismiss the contest, on the ground that a prior contest involving the same tract was still pending on appeal, which motion being overruled, he made another motion to dismiss because of the insufficiency of the affidavit, which motion was also overruled. To the action of the register and receiver in overruling each motion, Spearing duly excepted. Spearing then offered proof and payment for said tract under the second section of said act of June 15, 1880. With said proof Spearing offered his affidavit setting forth that the homestead affidavit was made before said clerk of said court, and the legal fees for entry were paid to him on June 4, 1880; that said clerk undertook to transmit said affidavit, application and fees to the local land office; that there was a daily mail from the place where said affidavit was made to the local land office in said Territory, and that the affiant believed that said entry papers and fees were duly mailed, and were received at the local land office on or about June 5, 1880, but that on account of press of business, or for some other reason, said entry was not placed of record until June 15, same year. The district land officers refused to accept said proof and payment for the following reasons, to wit:

1. "Claimant's homestead entry was placed on record June 15, 1880, and therefore can not come under the provisions of the act of June 15, 1880."

2. "The right of claimant to make proof under act of June 15, 1880, should be determined by the date his entry was put on record at this office."

3. "The fact that Mr. Spearing's homestead application and affidavit for the tract in controversy were made before the clerk of the district court for Turner Co., Dakota, on the 4th day of June, A. D. 1880, is undoubtedly correct, but his further statement that he believes that said clerk immediately forwarded said papers to this office, and that said papers were received by us June 5, 1880, is neither substantiated by any record evidence, nor by the testimony of the said clerk of the court."

The claimant excepted to the ruling as above set forth. Upon appeal, your office held that the pending contest between Spearing and Minturn was no bar to a contest against said entry; and that, because said entry was not made a matter of public record prior to June 15,

1880, and was not placed upon the records of the local land office prior to said date, therefore the proof and payment must be rejected.

Rules of Practice No. 52 and 53 provide that after a specified time, upon the closing of a contest, the register and receiver shall forward their report, together with the testimony and all the papers in the case, to your office, describing the case by its title, the nature of the contest, and the *tract involved*, and they shall thereafter take no further action affecting the disposal of the land in contest until instructed by your office.

In the case at bar a contest had been previously terminated before the local office involving the same tract which was still pending on appeal.

The filing of the affidavit of contest by Gilbert did not authorize the local land officers to order a hearing against Spearing's entry already involved in a suit pending on appeal. No action should have been taken until the case of Spearing *v.* Minturn had been finally determined. Such was the ruling of this Department in the case of Durkee *v.* Teets (3 L. D., 512), and adhered to in the same case on review (4 L. D., 99).

The second section of said act of June 15, 1880, provides "that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry * * * * * may entitle themselves to said lands by paying the government price therefor * * * * * Provided, this shall in nowise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

It has been uniformly decided by this department that the right of purchase under said section depended upon three conditions, to wit: (1) That the entry was made prior to June 15, 1880; (2) That the land entered was "properly subject to entry;" and (3) That the land has not been subsequently entered or the right of entry has not been subsequently acquired by some other person. Gohrman *v.* Ford (8 C. L. O., 6); John W. Miller (1 L. D. 83); Bykerk *v.* Oldemeyer (2 L. D., 51); Whitney *v.* Maxwell (ibid., 98); Pomeroy *v.* Wright (ibidem, 164).

What then does the word entry mean as used in the land laws of the United States? The Supreme Court of the United States, in the case of Chotard *v.* Pope, reported in 12 Wheaton, p. 586, uses the following language: "It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker and corresponding very much in his functions with the register of land offices, under the acts of the United States." This definition was accepted by this Department in the case of John W. Hays (3 C. L. O., 21). In the case of Thomas *v.* St. Joseph and Denver City R. R. Company (ibid., 197,) this Department, construing Sections 2289 and 2290, said:

"Each of the three elements of which this transaction is composed

forms an essential part thereof—the application, the affidavit, and the payment of money; and when the application is presented, the affidavit made and the money paid, an entry is made, a right is vested."

In Section 2297 of the Revised Statutes the date of filing the affidavit is the time from which abandonment or change of residence must be proven, in order to cause a forfeiture of the land so entered. It will be observed that the word "entered" is also used in the proviso, and it was held by this Department, in the case of George S. Bishop (1 L. D., 95), that although the proviso stated that this right of purchase "shall in no wise interfere with rights or claims of others who may have subsequently entered such lands under the homestead laws," yet a pre-emption filing made for the land after the cancellation of the entry would bar the applicant's right of purchase under said act.

To the same effect is the departmental decision in the case of Charles Martin (3 L. D., 373). Both the register and receiver and your office refused said application to purchase, upon the ground that said entry had not been placed upon the record prior to the date of the passage of said act.

It has been repeatedly held by the Department and by the Supreme Court of the United States, that when an applicant to enter public land has done all that the law requires of him, his rights will not be lost by the failure or neglect of the district land officers to do their duty. Lytle *v.* Arkansas. (9 How., 333).

When the homestead application, affidavit and legal fees are properly placed in the hands of the local land officers, and the land applied for is properly subject to entry, from that moment the right of entry is complete and in contemplation of law the land is entered.

In the present case there is no positive evidence when the entry papers were received at the local office. It was the duty of the local officers to indorse upon the papers when received. The district land officers do not say that they were not received prior to June 15, 1880, nor do they say that they were acted upon the day they were received by them. The homestead affidavit shows, and Spearing swears that he made it before the clerk of said court on June 4, 1880, and paid him the fees required by law, and that said clerk undertook to transmit said entry papers and fees to the local land office, distant forty-five miles, and to which a mail was carried every day, and therefore it may be true that said papers were received at the local land office prior to June 15, 1880. But the same rule which forbids the initiation of a second contest, equally forbids the purchase of said land until the final determination of the prior contest. Hence, Spearing's application to purchase under said act was made prematurely, and should have been held to await the decision in the contest pending on appeal.

Since this Department determined the contest between Spearing and Minturn in favor of the former and awarded the land to him, the case should be returned to the local office to be disposed of in accordance

with the rules of practice. Spearing should be required to furnish such additional evidence as he may be able to show the exact time when said entry papers and fees were mailed to the local land officers, and in case it shall appear that the same were transmitted to the local office prior to June 15, 1880, Spearing's application should be allowed and the contest dismissed. If not so shown, then Gilbert should be allowed to proceed with his contest.

The decision of your office is modified accordingly.

TIMBER TRESPASS.

FREDERICK FISH ET AL.

The government will not institute proceedings in case of trespass committed upon lands included within the pre-emption entry of another.

Secretary Lamar to Commissioner Sparks, March 27, 1886.

I have received and considered your communication of July 11th 1885, transmitting two reports by Special Agent Harlan relative to an alleged timber trespass in Dakota, by Frederick Fish and John Rosencrans, of Newport, said Territory, on pre-emption claim of one John C. Hackett, during the month of February 1885.

Hackett filed pre-emption claim for the land trespassed on in November 1884, has made final proof therefor since the date of the trespass, and is still residing upon the land.

As the government has no pecuniary interest in the question involved in this case, and the pre-emptor who is to be benefited has an ample remedy through the courts for the injury caused to his land by the removal of the timber, the mere fact that the title remains in the government, patent not having issued, does not *per se* impose upon the United States the duty, under the circumstances, of instituting and carrying forward legal proceedings against the trespassers, either to punish them for their violation of law in cutting and removing the timber, or to recover damages for the injury done to the land by its removal.

VOID ENTRY OF RECORD.

JEREMIAH H. MURPHY.

A subsisting void entry is no bar to the subsequent legal application of the person who made such entry.

Secretary Lamar to Commissioner Sparks, March 27, 1886.

I have considered the appeal of Jeremiah H. Murphy from the decision of your office of August 30, 1884, rejecting his application to make timber culture entry for the NW. 1/4 of Section 8, Township 113, Range 77, Huron, Dakota.

This tract was embraced in a lot of entries known as the Spencer entries, and was entered by Louis Bernchein, January 22, 1883, as timber culture entry No. 1005. By letter of November 2, 1883, the Commissioner of the General Land Office notified the register and receiver that all of these entries were held for cancellation, as being fraudulent in their inception, and directed the local officers to notify the parties to show cause within sixty days why they should not be canceled. By letter of January 25, 1884, the Commissioner, referring specially to "T C. Entry No. 1005, Louis Bernchein, January 22, 1883," and reciting that no cause being shown why these entries should not be canceled, says: "I have this day caused said entries to be canceled on the files and records of this office, and you will so note on your records . . . . notifying the several parties of the action taken, and that they will be allowed sixty days in which to appeal therefrom."

Before the expiration of the time allowed for appeal Jeremiah H. Murphy, on February 6, 1884, made timber-culture entry No. 4502 for this tract. By letter of April 29, 1884, the Commissioner notified the local officers that, no appeal having been taken by Bernchein within sixty days from the decision canceling his entry, the decision had become final; and they were notified to hold the land subject to entry by the first legal applicant. On May 20, Murphy presented to the local officers a second application for this tract, his application and affidavit bearing date May 14th. This application was rejected by the local officers, and your office affirmed this decision, on the ground that appellant's entry No. 4502 was intact on the records of the local office (although subsequently canceled) when the second application was made. By letter of May 31st, 1884, from the Commissioner of the General Land Office, Murphy's entry No. 4502, of February 6, 1884, was canceled, upon the ground that it was erroneously allowed, and was "illegal and void *ab initio*."

June 5, 1884, Joseph Slater made timber-culture entry No. 5314 for this tract.

If the cancellation of Bernchein's entry did not become final until after the expiration of sixty days from the Commissioner's decision of January 25, 1884, the entry of Murphy, of February 6, being erroneously allowed, was as you decided illegal and void *ab initio*. A void act is an absolute nullity, and has no force or effect whatever. Therefore Murphy's entry of February 6 was not a bar to his application of May 20, and it was not necessary that his first entry should be finally canceled to authorize his second application. This principle is fully announced in the case of David Litz, (3 L. D., 181.) The decision of your office is therefore reversed, and Murphy's application will be allowed.

The entry of Joseph Slater of June 5, 1884, made pending the appeal of Murphy, should be canceled.

TIMBER TRESPASS—CRIMINAL SUIT.

J. C. CALHOUN ET AL.

Criminal suit advised, under section 5440 R. S., in case of fraudulent entries made through conspiracy.

Acting Secretary Muldrow to the Attorney-General, March 29, 1886.

Herewith I transmit the papers in the timber trespass case alleged against J. C. Calhoun of Mobile, Alabama, and James F. Bailey of Slidell, Louisiana, consisting of a communication from the Commissioner of the General Land Office dated the 24th instant, a report of Special Agents Griffin and Vancleave of December 16th 1885, and a letter from Agent Griffin of February 3d, ultimo.

These papers represent the trespass to have been committed during the time intervening between November 30th 1879 and December 1st 1884, and to have consisted in boxing for turpentine purposes 78,920 pine trees on certain described public lands in Tammany parish, Louisiana, and removing therefrom 10,335 barrels of crude gum, which was manufactured by the trespassers into 62,010 gallons of turpentine and 10,335 barrels of resin.

The records of the General Land Office show that all the lands trespassed on are vacant public lands, or covered by homesteads made after the trespass began, except one tract, entered as a homestead in 1878 by B. Williams, and canceled in February 1886. All these entries have been held for cancellation, it appearing they were made merely as an excuse to box the pine trees for turpentine.

* * * * * * *

Your attention is respectfully called to the Commissioner's recommendation that criminal suit be instituted against Calhoun and Bailey for their unlawful act in conspiring to procure the fraudulent entry of certain of the lands involved in the trespass, specifically designated in the agents' reports.

Referring to part of the entries of the lands trespassed upon, the agents say in their report, "The entrymen Aaron Welch, Nelson Fields, Isaac Kemp, Randolph Whilly, and Lewis Kelly, all being experienced turpentine hands, were brought to this locality from Alabama, by Calhoun and Bailey, and these entries made for them."

All the evidence in the case goes to show these entries to have been made only to secure the turpentine, and not for residence and cultivation. The entrymen resided on each in a log house worth $40, but there was no cultivation at all. All have been held for cancellation.

If these facts are true, as alleged, and the entries were made by an agreement between the entrymen and Calhoun and Bailey for the purpose of securing the turpentine, and not for the *bona fide* purpose of residence and cultivation under the homestead laws, then the parties to the

entries are guilty of a conspiracy to defraud the United States, under section 5440 Revised Statutes, and subject to the penalties prescribed therein.

I therefore respectfully request, that if an examination of the facts in the case shall show said Calhoun & Bailey, and Aaron Welch, Nelson Fields, Isaac Kemp, Randolph Whilly, and Lewis Kelley, or any two or more of them to be guilty under said section of unlawfully conspiring to procure the fraudulent entry of said lands, the proper U. S. Attorney be directed to institute criminal suit against them therefor, if such course shall be deemed best for the interests of the United States.

TIMBER-CULTURE CONTEST.

FERRIER *v.* WILCOX ET AL.

Whether the doctrine in the case of Bundy *v.* Livingston is followed, or not, a pending contest, in which application to enter was filed on the day of hearing, is a bar to the prosecution of a second suit against the entry involved therein.

Acting Secretary Muldrow to Commissioner Sparks, March 30, 1886.

I have before me the appeal of William W. Ferrier from the decisions of your office, dated, respectively, March 18, June 26, and July 21, 1884, holding for cancellation his timber-culture entry No. 11,441, of the SE. ¼ of SW. ¼ and Lots 1, 2, and 3 of SE. ¼ of Sec. 34, T. 108 N., R. 55 W., Mitchell, Dakota Territory.

June 18, 1880, William S. Wilcox made timber-culture entry No. 4862 of the tract in question at the local office at Sioux Falls, Dakota Territory. Subsequently, this land came under the jurisdiction of the Mitchell office, and on October 26, 1882, William W. Ferrier initiated contest against Wilcox for failure to comply with the requirements of the timber culture law. The contest was initiated under the practice in force at the time of its initiation, and consequently no application to enter was then filed. On the day of hearing, January 3, 1883, Ferrier, it seems upon the advice of the local office, filed his application to enter the land, together with an affidavit showing the necessary qualifications to do so. He alleges, in an affidavit corroborated by the affidavits of his attorney and one of his witnesses, that he was told by the then register that his papers were "all right." No defense was made by Wilcox, and the allegations in the affidavit of contest were substantially proven upon the day of hearing. The local office, in a letter to your office dated May 7, 1884, states, "This application was filed with the other papers in the case. There is no record of any further action having been taken subsequent to January 3, 1883, relative to the Ferrier contest."

January 23, 1883, James Brown began contest against the entry of Wilcox aforesaid; a hearing was had in pursuance thereof March 27,

1883, and by letter "C" of October 6, 1883, your office canceled the timber culture entry No. 4862 of Wilcox, giving Brown the preference right of entry to the tract.

Ferrier alleges that being at the local office October 26, 1883, he was informed that the entry of Wilcox had been canceled, and that he would be allowed to file for the land; and that supposing such cancellation the result of his contest, he accordingly made said timber culture entry No. 11,441 for the tracts. On November 15, 1883, within the time in which he was required to exercise his preferred right, James Brown made timber culture entry No. 11,616 of the same tracts.

Your said office decision of March 18, 1884, was rendered without knowledge of the prior contest of Ferrier. Upon a motion to review said decision, your office on June 26, 1884, affirmed its previous decision. Upon a second motion for review, your office, on July 21, 1884, again adhered to its former ruling. The decisions of your office held that inasmuch as Ferrier did not file an application to enter on the day he initiated his contest, said contest should be dismissed, under the doctrine in Bundy *v.* Livingston (1 L. D., 179), and the Circular Instructions of December 20, 1882 (ib., 38).

If the Bundy doctrine be the correct interpretation of the law relating to timber culture contests, then this case is ruled by the cases of Pierce *v.* Benson (2 L. D., 319), and Dayton *v.* Scott (11 C. L. O., 202), wherein it was held that, if the application to enter the land had been filed on the day of the hearing, it would have cured the defect of not filing at the date of the initiation of the contest, and that the offer to file is equivalent to filing. Or if, as is contended, the Bundy doctrine be erroneous, then as a matter of fact there was no irregularity or informality in Ferrier's contest.

It seems clear from the record, and from the three affidavits filed on behalf of Ferrier, that in either view of the case the local office sadly neglected its plain duty. On the day set for the hearing of the Ferrier contest, the testimony was taken and his allegations of abandonment on the part of Wilcox were proven. His application to enter the land was then filed, upon the advice of the register that "the contest was all right."

Nothing further was done by the local office in the matter of this contest. It was not formally dismissed, no decision was rendered on the merits of it, and no report of the proceedings was forwarded to your office under the rules of practice. Consequently, Ferrier's contest was pending at the time Brown initiated his contest; and, under the rules, that of Brown was erroneously allowed.

The entry of Wilcox has been canceled. Inasmuch as Ferrier has the prior right to the land by virtue of his contest, his said entry, No. 11,441, will remain intact. The claim of Brown is rejected, and his said entry will be canceled.

The decisions of your office are reversed

PRIVATE CLAIMS—LOUISIANA.

HOUMAS GRANT.

Rule upon the grant claimants to show cause why the survey should not be closed upon the line fixed by the court as the limit of said grant.

Secretary Lamar to Commissioner Sparks, April 1, 1886.

I am in receipt of your letter of the 4th ultimo, transmitting the letter of Hon. John McEnery, agent for the State of Louisiana, relative to certain lands within the limits of the Houmas grant, as originally claimed together with certain papers from the record and files of that claim.

The application of Mr. McEnery, on behalf of the State of Louisiana, is that the grant claimants, through their attorney, J. L. Bradford, Esq., be required to show cause at an early day why the order of the Department of April 3, 1884, suspending from disposal all land in rear of the Houmas grant (La.) for a distance of one and a half leagues, should not be revoked. When this order was granted, a suit was pending in the Supreme Court of the United States, involving the depth of the grant. The court had rendered a decision limiting the depth of the grant to forty-two arpents, but granted a rehearing in the case. Pending this rehearing the order of the Department was issued, reserving said lands from disposal or attempted appropriation for one and a half leagues from the front line for a reasonable period to enable the claimants to obtain a final decision on the rehearing, and until the further order of the Department.* Shortly thereafter the Supreme Court decided that this grant was only valid to the depth of eighty arpents from the Mississippi river, and that the grant claimants have no title to the lands beyond this depth. Slidell *v.* Grandjean, (111 U. S., 412).

You will therefore require the claimants, through their attorney, J. L. Bradford, Esq., of New Orleans, to show cause before you why the survey should not be closed upon the eighty arpents line fixed by the court as the limit of said grant, and why the lands in rear thereof should not be disposed of under the general land laws. You will also notify Mr. McEnery of this action.

**Secretary Teller to Commissioner McFarland, April* 3, 1884.

On the 25th ultimo, J. L. Bradford, Esq., attorney for claimants under the Houmas grant, filed a petition, dated 13th ultimo, with accompanying papers, asking, in view of the recent decision of the United States Supreme Court in the cases of Alfred Slidell *et al. v.* Grandjean, Richardson, and others, respectively, that the lands within one and one-half leagues of the front line of the original grant to Conway and Latil may be reserved from sale or disposal or any attempted appropriation for a reasonable period, to enable the claimants to obtain a final decision upon a motion for re-argument (which motion has been allowed by the court), and to apply to Congress for such other protection, in the event of a final adverse decision, as may be necessary to preserve their valuable property and improvements upon the lands. The papers are transmitted herewith, and you will give such orders and directions to the register and receiver and surveyor-general, as will effectuate the object of the petition, by reserving the lands until the further order of this Department.

PRE-EMPTION AND COMMUTATION FINAL PROOF.

CIRCULAR.

Commissioner Sparks to registers and receivers, March 30, 1886.

Hereafter the following rules will be observed in making final proof in pre-emption and commuted homestead cases:

1. The entire final proof, including the final affidavit of the claimant, his testimony, and the testimony of his witnesses shall be taken before the officer designated in the published notice of intention to make final proof, and at the time therein named.

2. Such final proof shall be taken only before the following officers: the register or receiver of the proper land district, or the clerk of the county court, or of any court of record, of the county and State, or district and Territory, in which the land is situated, or before such clerk in some adjacent county, in case the land lies in an unorganized county.

3. Cases wherein notice of intention to make final proof shall have been given under the former practice, prior to the promulgation of this circular, shall be in no manner affected by the regulations herein contained.

Approved:

H. L. MULDROW,
Acting Secretary.

PRIVATE CLAIMS—PRACTICE—APPEAL.

NEW ORLEANS CANAL & BANKING CO. *v.* STATE OF LOUISIANA.

A decision of the General Land Office dismissing proceedings wherein a hearing had been ordered and evidence taken, is not interlocutory, and is therefore subject to appeal.

As the determination of the status of the private claim was reached in an *ex parte* proceeding, without notice to adverse parties, the right of the State is not affected thereby, and the case is accordingly remanded for consideration under the hearing heretofore ordered to ascertain the nature of the claims set up by the State.

Secretary Lamar to Commissioner Sparks, April 3, 1886.

The New Orleans Canal and Banking Company claim certain lands situated on and near the Bayou de la Metairie, in townships 12 and 13 S., range 10 E., New Orleans consolidated land district, Louisiana, which it is claimed are within the limits of two French grants to Louis C. Le Breton—one bearing date October 6, 1757, and the other February 15, 1764.

These grants were the subject of a decision made by the Honorable Secretary of the Interior January 18, 1884, in which he held that, "Upon consideration of the proofs in the record of the grant of 1757, and of the recognition of the confirmatory grant of 1764 by the Span

ish authorities, while in possession of the country, I am of the opinion that a valid grant of the lands in question has been established, and that it was a complete grant under the former government" (referring to the French government).

In this decision the Honorable Secretary further directed, "that the surveyor-general of Louisiana be instructed to cause a corrective and additional survey to be made of the lands in controversy and covered by the French grants of October 6, 1757, and February 15, 1764." (10 C. L. O., 384.)

In accordance with this ruling, a survey was made July, 1884, of the land covered by the grants, to which no objection was filed. It appears that some of the land embraced in this survey is swamp land, which was selected by the State June 22, 1872, and that others were indemnity school selections made by location of school warrant, upon application of Andrew W. Smyth.

On January 23, 1885, upon application of the Canal and Banking Company, the Commissioner of the General Land Office ordered a hearing for the purpose of determining "fully the validity or invalidity of all the State selections in controversy."

This hearing was had, and the testimony duly forwarded to your office, when, on the 23d of July, 1885, you, without considering the same, upon your own motion, ordered it to be dismissed, on the ground that the matters in controversy had been compassed by the decision of the Secretary aforesaid, and on the 27th and 31st of August rendered decision holding for cancellation the State selections within the surveys aforesaid, but allowed appeals therefrom.

The State filed appeals from all three of said decisions, which you held to relate almost entirely to the decision dismissing the hearing, and notified the State that the decision dismissing the hearing was merely interlocutory, and allowed them to perfect their appeal, so as to include distinct specification of errors in the decisions of August 27th and 31st, or to apply for an order of certification. Amended appeals were then filed, covering all of your decisions. Subsequently, an application for certiorari was filed, together with a plea to jurisdiction, all of which are now before me.

The decision of July 23d, dismissing the hearing, was not interlocutory, but final, and was therefore appealable. The decisions of August 27th and 31st were not the result of this hearing, but were made as the result of the decision of the Secretary of the Interior, and were not dependent upon the hearing. The appeal filed by the State to that decision is specific and distinct as to the error alleged; and if your decisions of August 27th and 31st, holding for cancellation the State selections, were final decisions in a matter in which the decision of dismissal was merely interlocutory, then the appeal filed to that decision was specific as to the error therein alleged, and the two appeals considered together were sufficient to bring up the entire case.

It is therefore unnecessary to consider the application for certiorari, and the case will be considered with reference to the errors alleged in the appeals from the decisions dismissing the case and in holding for cancellation the State selections, and the plea to the jurisdiction in connection therewith.

From the decision of January 18, 1884, under which your office held that the title of these claimants had been finally settled to the lands in controversy, it appears that in July, 1873, the Canal and Banking Company made application to the register and receiver for a confirmation of this claim under the act of June 22, 1860, (12 Stat., 85), describing the tracts by metes and bounds. At this hearing the register and receiver decided that the claim should be rejected, which decision was approved by the Commissioner of the General Land Office, but said approval was afterwards canceled, and claimant dismissed the proceedings because of pending proceedings instituted by the Bank in the United States district court, praying for a judicial confirmation of said claim. On this application judgment was rendered dismissing the same for want of jurisdiction.

On January 8, 1875, the Canal and Banking Company filed another application before the register and receiver, claiming title under the two French grants of 1757 and 1764. The register and receiver decided that these two grants were complete, and that no further action was necessary on the part of the government than to place them upon the official plats, as requiring no confirmation. The Commissioner did not concur in this opinion, and appeal was taken to the Secretary of the Interior, who decided that the claim of the Canal and Banking Company was derived from two complete French grants that required no confirmation, and ordered a survey to be made to exhibit their location.

In the decision the Secretary says: "This claim is presented to my consideration as an *ex parte* case. The decision of the register and receiver was rendered without notice to adverse claimants, and no appeal from their decision seems to have been taken to your office."

This decision, relied upon by your office as disposing of the question of title to this claim, was therefore made upon an appeal from a decision of the Commissioner on an application for confirmation of a private claim under the act of June 22, 1860; and, while the Secretary assumed jurisdiction to pass upon the validity of these grants and in effect confirm the same, upon the ground that the State selections were in conflict with the grants, yet the subject of the appeal before him was a decision of the Commissioner disapproving the report of the register and receiver, upon an application for confirmation of a private claim, under the act of June 22, 1860.

Section 5 of said act provides, "That all claims comprehended within any of the three classes aforesaid, on which there shall be disapproval by the Commissioner of the report made by the boards of Commis-

sioners aforesaid (registers and receivers) shall be reported to Congress for its action and final decision thereon."

Passing by the question whether the Secretary of the Interior has any jurisdiction to review the decision of the Commissioner on an application for confirmation of a private claim under said act, it may be safely asserted that no judgment rendered upon such *ex parte* proceedings could in any manner affect the rights of other claimants who were not parties thereto, and who had no opportunity of defending their own title, or of showing the invalidity of an adverse claim.

For this reason I do not consider that the rights of the State were in any manner affected by the *ex parte* proceedings in which the decision of January 18, 1884, was rendered, nor that said decision concluded any one, however much I might approve the conclusions therein reached upon a proper case made in which all the parties in interest were represented.

Without passing upon the question as to the validity of these grants, or the question of jurisdiction raised by the plea of the State, I reverse the decision of your office of July 23, 1885, dismissing the report of the register and receiver of the hearing had before them, without passing upon the same, and I also reverse your decisions of August 27th and 31st, holding for cancellation the State selections, before passing upon the report submitted by the register and receiver.

You will therefore notify all parties that the report of the register and receiver is now pending before you, and after due notice to all parties, giving them time in which to file briefs and be heard, you will decide upon the matters submitted in said report, at which hearing the question of jurisdiction as well as the validity of these grants may be considered.

MINING CLAIM—ACT OF MARCH 3, 1883.

Cordell Placer Mine.

A mineral location, under which all requirements of the law had been fairly met prior to the passage of said act, confers a vested right, that is not impaired by the provisions thereof.

Secretary Lamar to Commissioner Sparks, April 3, 1886.

I have considered the case of Stephen E. Dobbs, as presented by his appeal from the decision of your office, dated December 12, 1884, holding for cancellation his mineral entry for the Cordell Placer, embracing the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 12, T. 6 S., R. 9 E., Huntsville, Alabama, and containing fire clay and kaolin.

The decision appealed from held that the said entry should not have been allowed by the local office, and that it should now be canceled, because the application for the same was filed and the entry made sub-

sequent to the passage of the act of March 3, 1883, the first section of which provides: "That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands." Several provisos follow, which do not affect the present case.

It is alleged on behalf of Dobbs that he had complied with all the requirements of the mineral law prior to the passage of the act of March 3, 1883, and that therefore his right to a patent was complete at that date and cannot be defeated by said act. His proof, sworn to June 18, 1883, (a little more than three months after the passage of the act aforesaid) shows at that time his improvements were valued at over $500, but it does not show what were the improvements, etc., on March 3, 1883.

Inasmuch as there is no adverse claimant, and the government cannot be injured by allowing him to make mineral entry of this tract, I see no objection to allowing the claimant to furnish supplemental proof, showing fully the nature, character and value of his improvements, etc., made each year subsequent to the location and up to March 3, 1883. If he show that up to that date he had complied with the law in relation to placer mining claims; that he had performed all the acts and conditions imposed upon him by the law under which his location was made; then and in that case, his right to a mineral patent is a vested one, and should be so treated. American Hill Quartz Mine (C. M. L. 257); Gold Blossom Mine (2 L. D., 767). The laws of Congress are not intended to have a retroactive effect and acts done under a law in force, endure and are not interfered with by a subsequent repeal of that law. (12 Ops., 251.)

You will call upon the claimant to furnish satisfactory proof in accordance with the views above expressed. The decision of your office is modified accordingly.

COMMUTATION FINAL PROOF.

L. AND B. KNIPPENBERG.

The proof submitted, not showing conclusively good faith in the matter of residence, is rejected, and additional evidence required.

Secretary Lamar to Commissioner Sparks, April 3, 1886.

I have considered the joint appeal of Louisa and Barbara Knippenberg from your office decision of January 12, 1885, rejecting the final proofs offered in support of their respective entries, the former for the NE. ¼ of Sec. 7, T. 112 N., R. 61 W., and the latter for the NE. ¼ of Sec. 6, T. 112 N., R. 61 W., Huron, Dakota.

* * * * * * *

The regulations of this Department require in commuted homestead entries that residence for the space of six months shall be proven.

Such residence must be not only continuous, but personal. It is true the settler may be excused for temporary absences under certain circumstances, but in such cases where absence is the rule, the claimant must conclusively show his good faith as to residence, before the officers of the government can be justified in parting with the title to public land so sought to be acquired.

In the case at bar claimant was actually on the land in question but a small portion of the time covered by the final proof. From the meagre testimony adduced, I am unable to determine whether her actual residence was on the tract in question, or elsewhere. Said decision rejecting her final proof is therefore affirmed, and claimant will be required to make new proof in accordance with the rules now in force.

The proof in the case of Barbara Knippenberg presents facts in all respects similar to those indicated above, and is also rejected, and new proof will be required.

LAND CLAIMED AS MINERAL.

CLEGHORN *v.* BIRD.

The mineral character of land, as a present fact, must be shown to exempt the same from entry as agricultural.

Secretary Lamar to Commissioner Sparks, April 3, 1886.

I have considered the case of Lucinda C. W. Cleghorn *v.* William Edgar Bird, as presented by the appeal of the latter from the decision of your office, dated November 29, 1884, holding for cancellation mineral application, for Lot No. 304, in Shaler Mining District, Pennington county, Dakota Territory, made at the Deadwood land office, in said Territory on September 15, 1881.

* * * * * * *

The only question for determination is, whether the land is more valuable for agricultural purposes than for mineral. The testimony is bulky and much of it conflicting. It has been repeatedly held by this Department that it must appear, "not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character." Hooper *v.* Ferguson (2 L. D., 712); Dughi *v.* Harkins (ibid., 721); Roberts *v.* Jepson (4 L. D., 60); Lientz *et al.*, *v.* Victor *et al.* (17 Cal., 271); Alford *v.* Barnum *et al.* (45 Cal., 482).

A careful examination of the whole record discloses no sufficient reason for disturbing the finding of the district land officers and the decision of your office. Said decision is accordingly affirmed.

PRIVATE CLAIM—LANDS OPENED TO ENTRY.

GERVACIO NOLAN.

On review the Department adheres to its former decision, and recommends, in opening to entry the lands in question, the adoption of the regulations formulated in the case of the Santee Sioux Reservation.

Secretary Lamar to Commissioner Sparks, April 5, 1886.

After full consideration of the matters connected with the Mexican land grant to Gervacio Nolan and his two associates, Arágon and Lucero, on January 9th last (4 L. D., 311), I directed you to restore to the local office the plats of survey of public lands covering the territory embraced in said grant, that the same might be thrown open for filings and entries under the land laws. Since that time application has been made for a re-hearing in said matter in behalf of parties alleging interest in said grant and charging error in the conclusions arrived at by me and stated in my said letter.

Said parties were heard on the 26th instant, through their counsel, orally and fully, as to the facts and the law; and after full consideration of the showing made, I see no reason whatever for reversing my former action, and the same is hereby affirmed; and you will at once proceed to take proper action to carry out my order of January 9, 1886.

In this connection, I recommend, inasmuch as the body of land to be thus thrown open to the public is quite large, embracing about 575,000 acres, that you be guided by the rules and regulations adopted May 8, 1885, in relation to the opening to entries and filings of the Santee Sioux or Niobrara Indian Reservation (3 L. D., 534,) so far as the same can be made applicable.

SWAMP LAND—FIELD NOTES OF SURVEY.

LACHANCE *v.* THE STATE OF MINNESOTA.

Though the survey returned may show the land as falling within the terms of the grant, the return may be attacked and vacated on the charge of fraud.

Secretary Lamar to Commissioner Sparks, April 7, 1886.

I have considered the case of Mikell Lachance *v.* The State of Minnesota, involving Lot 1, the SE. ¼ of the NE. ¼, and the NE. ¼ of the SE. ¼ of Sec. 4, T. 61 N., R. 15 W., 4th P. M., Duluth, Minnesota, on appeal by Lachance from your office decision of October 13, 1884, awarding the tract to the State.

Lachance made settlement on the tract in controversy April 6, 1883, with the intention of entering the same under the homestead laws when the plat of survey should be filed in the local land office. He alleges that, between that date and the 21st of the same month, he had erected

and established his actual residence in a substantial log house, ... and claims that his improvements are worth $250.

June 11, 1883, the township plat of survey was filed in the local office. June 20, the same year, Lachance went to the local land office for the purpose of making homestead application for said tract, when he found that on the day of the filing of township plat the State had made selection of the same tract as swamp land, under the act of March 12, 1860, (12 Stat., 3.) Thereupon, Lachance makes affidavit, strongly corroborated by the affidavits of several of his neighbors, setting forth the fact of his settlement and residence as herein stated, and the further fact that no part of said tract is swampy, but on the contrary that all of it "is high and dry, and in every way fitted for agricultural purposes;" that any survey upon which it is noted as "swamp land" is and must necessarily be "false and fraudulent"; and he asks that a date be designated for a hearing at which he may be allowed "to substantiate any and all the allegations above set forth."

Your said decision of October 13, 1884, denies Lachance's request for a hearing to determine the character of the land on the following grounds:

"Preliminary to entering upon the adjustment of the swamp land claim of the State of Minnesota, under date of March 12, 1860, two propositions were submitted to the State by the Department, with a view to the adoption of a method which should be adhered to and be conclusive, as a basis upon which all questions arising respecting the character of the lands should be determined, which were as follows:

1. Whether the State would abide by the field notes of the survey, or—

2. Would prefer to furnish evidence that the lands were of the character contemplated by the grant.

Under authority of an act of legislature, approved March 10, 1862, the governor of Minnesota accepted the surveys on file in the surveyor general's office as the basis for the adjustment of the interests granted by act of March 12, 1860; and this method having been, in all cases, strictly adhered to, no other will now be considered, nor will any other class of evidence be received, in the adjustment of the claim, until after the survey, in each case, has been conclusively proven to have been fraudulently made. In view of the foregoing the application of Lachance is rejected."

As Minnesota elected to accept the returns of the surveys on file in the surveyor general's office as the basis of the adjustment of its grant there can be no question of the propriety and correctness of your decision in so far as it insists on abiding by the field notes of survey, until such survey shall have been proven to be fraudulent. Nor. Pac. R. R. Co. *v.* State of Minnesota (11 C. L. O., 75); State of Ohio (3 L. D., 572.)

But your office decision goes further than this: it denies Lachance's application to be afforded an opportunity to prove said survey to be false and fraudulent. In so doing said decision arrives at a conclusion not justified by its premises. It applies to both contesting parties a

rule and an inhibition manifestly intended for but one. Observe that the questions to be decided by the Legislature of Minnesota were: (1) Whether *the State* would abide by the field notes of survey, or (2) Whether *the State* would prefer to furnish evidence that the lands were of the character contemplated by the grant. Thereupon the State agreed to accept the surveys on file in the surveyor general's office as the basis of settlement; hence it is eminently proper that the State should abide by its own decision—that it should not be allowed to introduce evidence with a view to obtaining as swamp land any tract not shown to be such by the survey, nor called upon to introduce corroboratory evidence regarding the character of lands that are shown to be such by the survey, unless evidence be introduced to invalidate the claim of the State; then, and only then, can rebutting evidence to show the swampy character of the land be introduced by the State. The subject under discussion throughout is the power of the State in the premises. But this inhibition upon the State relative to the introduction of extraneous evidence except after proof of fraud in the survey does not exclude a denial, but rather an affirmance, of the right of any other party, as against the State, to allege and prove such fraud. In other words: Your office decision admits the possibility of such a thing as fraud in a survey. It admits the further possibility of the fraud being proven. Admitting thus much, then it is certainly competent for a person aggrieved to allege such fraud, and to be allowed an opportunity to prove it. This is precisely what Lachance alleges, and applies to be permitted to prove. To deny him the right to do so would involve a manifest absurdity. It would be equivalent to saying: "It is possible that a wrong has been committed: it is legal and proper that such wrong should be corrected; but it is illegal and improper for any one to attempt to correct it!"

As I understand the matter, the acceptance of the field notes as the basis of settlement simply makes them *prima facie* evidence of the condition of any given tract; it is not tantamount to an assertion that the field notes shall govern always and absolutely, irrespective of demonstrated fraud or falsity, but it places the burden of proof of such fraud or falsity on the party alleging it. The grant in question was a grant of swamp land; and if it can be proven affirmatively that any given tract was not swamp land at the date of the grant, then such tract did not pass by the grant. That the above conclusion is correct, is corroborated by the correspondence which took place between the governor of the State of Minnesota and the Commissioner of the General Land Office immediately after the passage of the granting act, relative to the details of its execution. Governor Ramsey, on the 14th of July, 1860, wrote to your predecessor, the Hon. Joseph S. Wilson, making the following inquiry (*inter alia*):

If the State of Minnesota should elect to be governed in the selection of the lands allotted to her by the notes and plats of survey in the Land

Office, would the general government also be concluded by this selection? Would a patent issued to the State preclude individuals thereafter taking any of these lands, upon showing that in fact they were not swamp lands?

To this inquiry Commissioner Wilson replied under date August 8, 1860:

As to the second point in your letter, I have to state that, by whichever of the two modes submitted the lands may be selected, *the general government reserves to itself the right to supervise the selecting,* and *holds them subject to its control until they shall have been approved and patented to the State.*

In view of the fact that the general government has thus explicitly reserved to itself the right to supervise the selecting of swamp lands in the State of Minnesota, and to hold the tract in controversy subject to its control until it shall have been patented to the State, and in view of the manifest equities in behalf of Lachance, in that he settled, with a view to entry under the homestead law, and prior to survey, upon land then open to homestead settlement and then unselected by the State, you are directed to order a hearing, at which Lachance will be afforded an opportunity to prove the character and condition of the tract in controversy at the date of the swamp land grant to the State of Minnesota.

For the reasons herein given, your said office decision is reversed.

PRIVATE CLAIM—ACT OF JUNE 22, 1854.

RANCHO SAN RAFAEL DE LA ZANJA.

Under section 8 of this act, a preliminary survey is authorized by which the extent of the claim may be properly defined; and the surveyor general's return thereof should be accompanied by his decision as to the character of the claim, and whether the same should be confirmed.

Secretary Lamar to Commissioner Sparks, April 12, 1886.

I have considered your communication of the 22nd of May 1885, wherein you recommend the revocation of the action of my predecessor with reference to the survey of the Rancho San Rafael de la Zanja, in Arizona, of the date of March 3, 1885. It is unnecessary to determine what conclusion I might reach if the question as to the issue of the order was before me as an original question; but having been passed upon by my predecessor with all the facts and law before him that are now submitted to me, I do not deem it consistent with good administration to reconsider his action. Unless the principle of *res judicata* is recognized administrative action may become involved in chaos; the labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances, vested rights would be endangered. Our present

duties are amply sufficient to command our whole time and attention without entering unnecessarily into the inquiry as to the intelligence with which every past duty was performed.

As early as October 1825 Attorney General Wirt in 2d, Opinions page 8, gives expression to his views in the following language,—"If it has such authority, the Executive which is to follow us must have the like authority to review and unsettle our decisions and to set up again those of our predecessors, and upon this principle no question can be considered as finally settled . . . . . . hence I have understood it to be a rule of action prescribed to itself by each administration to consider the acts of its predecessors conclusive as far as the Executive is concerned." This opinion has been substantially corroborated by like opinions of Attorneys-General Taney, Nelson, Toucey, Johnson, Black, Stanbery, Hoar, and Bristow in 2d, Opinions, 464, 4th, Id. 341, 5th, Id. 124, 9th, Id. 101, 301, 387, 12th, Id. 355, 13th, Id. 33, 387, 456.

The doctrine has been adopted generally in the practice of the Department, as is illustrated in 3, L. D. pp. 21, 196, 199, 537, 559, 595, and many other earlier cases. That there may be, and are exceptional cases which justify a departure from the general rule, is undoubtedly true, but I see nothing in this case sufficient to bring it within the exceptions. Even if the order of my predecessor is erroneous (which is neither admitted nor denied) it can be productive of no serious harm or wrong. The action contemplated by the order whose revocation you recommend is to be had at the expense of the applicant; hence no pecuniary burden is imposed upon the government. If the claimant's right is as extensive as his claim and should be finally so adjudicated, it would be unjust to settlers who might enter upon the lands and expend their money their labor and their time upon improvements from which, after years of the best of their lives have been spent, they might be ejected by the superior title of the claimant. It is no kindness to a settler to allow him to make his home upon lands to which it may be out of the power of the government to ever make him a title.

By the 8th section of the act of June 22, 1854, the power to finally pass upon claims of this character is reserved to Congress. As preliminary to intelligent action, the surveyor general, under instructions of the Secretary of the Interior, is endowed with full power "to ascertain the origin, nature, character and *extent of the claim*, and is required to make *full report* . . . . with his decision as to the validity or invalidity of each of the same . . . . according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper . . and until final action by Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government." This enactment clearly contemplates a full examination by the surveyor general and a full report to Congress. That examination in-

cludes all *bona fide* claims whether valid or invalid. It embraces claims which may be good as a part and invalid as to the residue. The extent of the claim should be determined by a survey made and returned, embracing the land which the claimant in good faith alleges to be his with all the competent and relevant facts which he may produce to sustain his view. It includes all the facts that are accessible to rebut and otherwise limit his claim or correctly locate it. The surveyor general should also return a survey defining what, in his opinion, is the rightful extent of the claim, if under all the evidence the right of the claimant is not co-extensive with his claim, and render his decision as to whether the whole or a part, and if a part what part, of the claimant's claim is rightful, and what is in excess of his legal right, in order that Congress, when its action is had, may have before it all the facts on both sides on which to found "just and proper" legislation. I therefore decline to revoke the order of my predecessor and upon the claimant's properly providing for the payment of the expenses as referred to in his letter of March 3, 1885, you will direct that under the instructions contained in his, and the additional instructions in this, the work proceed and report be made.

RAILROAD GRANT—WHEN EFFECTIVE.

HARDEN *v.* CENTRAL PAC. R. R. CO.

Under the grant of July 25, 1866, to the California and Oregon R. R. Co., the right of the company attached to its granted lands on the filing of the map of survey of its road in the General Land Office.

Odd sections within the over-lapping primary limits of the grants to the Central Pacific, and the California and Oregon Railroad companies, excepted out of the grant to the former company, passed to the latter, if vacant public land when the right of said road attached.

Acting Secretary Muldrow to Commissioner Sparks, April 12, 1886.

I have before me the appeal of William Harden from the decision of your office, dated April 8, 1881, holding for cancellation his pre-emption cash entry No. 7216 of lots 1 and 15 of Sec. 25, T. 11 N., R. 3 E., M. D. M., Marysville, California, and awarding the same land to the Central Pacific Railroad Company.

The tracts in question are within the twenty mile (granted) limits of the grant to the Central Pacific Railroad Company, the right of which is held by your office to have attached July 1, 1864. The withdrawal thereof was made August 2, 1862. At the dates of the grant for said railroad, the withdrawal thereunder, and when the right of the road attached to odd sections within its granted limits, the tracts above mentioned were within the exterior limits of the New Helvetia Rancho. This rancho was patented June 30, 1866, the tracts in question being excluded therefrom.

On the 25th of July, 1866, Congress passed an act granting lands to the California and Oregon and the Oregon Railroad Companies (now a branch of the Central Pacific Railroad), to aid in the construction of said railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon, (14 Stat., 239.) the second section of which act provides as follows:

"That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line . . . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified."

The lands in question are within the twenty mile limits of this road, and were withdrawn for its benefit by the Secretary of the Interior November 25, 1867. The township plat was filed in the local office December 1, 1870.

The records show that Harden's application for this and other lands was rejected July 2, 1872, by your office, and that that action was affirmed by this Department December 5, 1872. This rejection was on the ground that the land was withdrawn August 2, 1862, for the Central Pacific Railroad Company, and that Harden's settlement was long subsequent to said withdrawal. The claim of the California and Oregon Railroad Company was not at that time considered. Harden again made application for the land, and his application was again denied by your office January 20, 1875, on the ground that the case was *res adjudicata*. Harden again, on July 1, 1876, filed declaratory statement No. 10,328 for the land in question, alleging settlement thereon December 20, 1868. He made final proof for the same October 14, 1879, and final certificate No. 7216 therefor issued to him.

As before stated, when the withdrawal of August 2, 1862, was made for the Central Pacific Railroad Company, the lands in question were within the claimed limits of the New Helvetia Rancho, whch was then *sub judice;* consequently they were not affected by that withdrawal, and being *sub judice* at the date the right of the company attached to odd sections within its granted limits, they did not pass to it under its grant. Newhall *v.* Sanger (92 U. S., 761).

Having been excluded from that Rancho by the survey thereof, on which patent was issued June 30, 1866, these lands then became public lands and so remained until Harden settled upon them December 20, 1868, unless they passed to the California and Oregon Railroad Company under its grant above mentioned. Upon the determination of this question the whole case rests. Your office based its decision upon the theory that they did so pass; and held, therefore, that Harden's entry should be canceled. The appellant denies the correctness of that decision.

The question to be considered naturally divides itself into two distinct parts, viz: First, At what date did the right of the California and Oregon Railroad attach to its granted lands? and Second, In the overlapping primary limits of the two grants before mentioned, is the California and Oregon Railroad Company (the subsequent beneficiary) authorized under its grant in 1866 to take odd sections which did not pass to the Central Pacific Company because of their being *sub judice* at the date when the right of the latter company attached to its granted lands?

It was held by this Department in the case of Swift *v.* California and Oregon Railroad (2 C. L. O., 134), that the right of the road attached to its granted lands upon the filing of the map of survey of its road in the office of the Commissioner of the General Land Office. This ruling has been followed since that time and appears to be well settled. Your office, however, held that the right of the road attached to its granted lands upon the withdrawal thereof by the Secretary of the Interior November 25, 1867. The precise date that the company filed its map of survey in your office does not appear in the papers sent up with this case. But so far as the determination of this case is concerned, it is not necessary to ascertain the precise date. It is certain, however, that it was some time subsequent to July 25, 1866, the date of the granting act, and prior to November 25, 1867, the day when the Secretary of the Interior ordered a withdrawal from sale and pre-emption and homestead entry of all public lands in odd sections within the primary limits of the California and Oregon Railroad in the Marysville and Sacramento land districts. The tracts were, as before stated, within the limits of said withdrawal, and were, so far as the record shows, at that date, as well as at the date of the grant in 1866, vacant public land. They therefore passed to the California and Oregon Company, if it had the right to take vacant odd sections within the overlapping primary limits of the two grants, which did not pass to the Central Pacific Company under its grant.

The grant to the California and Oregon Company in 1866 was to aid in the building of a road from Portland in Oregon to the Central Pacific Railroad in California; and was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line." The point of junction of the two roads is at Roseville, in the Sacramento

district. The lands in question are in an odd section within ten miles of the line of the California and Oregon railroad, between Roseville and Portland; and were vacant public land when the right of the road attached to its granted lands. They were withdrawn November 25, 1867, for the benefit of the company, and I am of opinion such withdrawal was proper. I can see no reason therefore why they did not pass to said last named company under its grant.

Having passed to the railroad company in 1867, they were not subject to settlement and entry under the pre-emption and homestead laws in December, 1868, when Harden first settled thereon, and his said entry was erroneously allowed.

The decision appealed from is accordingly affirmed.

TIMBER TRESPASS—RAILROAD LIMITS.

ORDWAY ET AL.

Prosecution, civil and criminal, advised for trespass upon an odd section within the primary limits of the Northern Pacific grant, covered by an order of withdrawal pending definite location of the road.

Acting Secretary Muldrow to the Attorney-General, April 15, 1886.

I have the honor to transmit, herewith, copy of letter, dated the 7th instant, from the Commissioner of the General Land Office, inclosing duplicate report of Special Agent W. E. Anderson, dated November 27th last, relative to timber trespass alleged against Julius Ordway, G. W. Weidler, and Milton Weidler, composing the firm of Ordway, Weidler & Co., also known as the "Willamette Milling and Manufacturing Company," of Portland, Oregon. The trespass consisted in the cutting of some six million feet of logs, during the years 1883 and 1884, upon the SE. ¼ of Sec. 11, T. 2 N., R. 5 E., W. M., Washington Territory. Said logs were run down the Washougal river and through the Columbia river to the said company's mill at Portland, where they were manufactured into lumber and sold in the general market.

The lands described are within the primary limits of the grant to the Northern Pacific Railroad Company, and Ordway claims that the timber in question was cut with the company's permission. The tract is included in the limits of the withdrawal made by my predecessor, Mr. Secretary Cox, August 13, 1870, to await the filing of map of the definite location of the road. No map of definite location, however, has ever been filed, nor has the road ever been constructed opposite said tract. I concur in the opinion expressed by the Commissioner in his letter herewith, that the title to the land is still in the United States, and that therefore the Northern Pacific Railroad Company had no authority to dispose of or permit others to dispose of the timber thereon. United States *v.* Childers, (8 Sawyer, 171.)

I therefore have the honor to request that you will direct the U. S Attorney for the proper district, if in his judgment upon examination he shall deem it for the interest of the United States, to institute civil suit against said firm of Ordway, Weidler & Co., and also against said Julius Ordway, G. W. Weidler, and Milton Weidler, individually, to recover the value at $12 per thousand feet of the six million feet of timber unlawfully taken by them from the public lands of the United States; and also criminal proceedings against said parties individually for the trespass hereinbefore described.

DEPOSIT SURVEYS.

CIRCULAR.

Commissioner Sparks to receivers of public moneys, April 15, 1886.

Paragraphs 20, 21, and 22, of the circular of this office "Relative to deposits by individuals for the survey of public lands," dated June 24, 1885,* are hereby amended to read as follows:

Paragraph 20. Triplicate certificates issued on and after August 7, 1882, can be received in payment for lands *only in the land district* in which the surveyed township is situated, *except when issued for additional deposits upon contracts entered into prior to August* 7, 1882.

21. Certificates issued subsequent to March 3, 1879, and prior to August 7, 1882, may, if assigned, be used in any land district.

22. Certificates issued prior to March 3, 1879, can be used only by the settlers in the purchase of lands in the township, the surveying of which was paid for out of such deposits; but they must be transmitted to this office for examination as to excess repayments, if any, before they can be accepted by the receiver, who will be governed by the certificates indorsed on or attached to them by this office.

Approved.

H. L. MULDROW,

Acting Secretary.

CONTEST—GOOD FAITH OF PARTIES.

ABBAS *v.* VON ZEE ET AL.

As a contest regularly initiated should not be dismissed, except after due notice to the parties of record, a rehearing is ordered herein.

Acting Secretary Jenks to Commissioner Sparks, April 15, 1886.

I have considered the case of Arund G. Abbas *v.* Engel Von Zee and Jacob Postma, as presented by the appeal of the former from the decision of your office, dated October 15, 1884, refusing to allow him the

* 3 L. D., 599.

preference right of entry of the S. E. ¼ of Sec. 29, T. 100, R. 66, Yankton land district, Dakota Territory.

The record shows that Postma made homestead entry No. 7047 of said tract on March 30, 1883. On September 27, 1883, Abbas filed his affidavit of contest against said entry sworn to before the receiver, alleging that "claimant has relinquished his right to said tract, has wholly abandoned said tract," and on the same day notice was issued summoning the defendant to appear at the local land office on December 14, 1883, and respond to said allegation. Service of said notice was duly accepted by said Postma on November 19, 1883.

The report of the district land officers, under date of January 20, 1884, states that at the time appointed the contestant appeared for the purpose of submitting testimony, and at the same time Von Zee appeared with a contest against said entry, and that a motion to dismiss the former contest was made by the attorneys for Von Zee. Said motion appears to have been filed in the district land office on December 14, 1883, and recites that "on the day of trial, to wit, December 14, 1883, the contestant appeared, claimant in default. Testimony was submitted on behalf of contestant, showing relinquishment, and in corroboration the relinquishment is filed." The motion further alleges that said relinquishment was executed August 25, 1883, less than six months after entry; that said entry was not made in good faith, and that said tract was relinquished to and in favor of the contestant, and therefore all the proceedings had in the case of Abbas *v.* Postma should be dismissed and Von Zee should be allowed to proceed to trial and prove his allegations.

No notice of said motion was served upon Abbas, nor does the motion appear to have been made until after the trial had ended upon the allegations of the first contestant. On February 23, 1884, the district land officers made the following order: "Motion sustained. The contest was illegal,

"1st. Because it was prematurely made, alleging abandonment before six months from date of entry had expired.

"2d. Because it alleged sale and relinquishment, which is not a sufficient ground for contest.

"3d. Because the relinquishment presented bears evidence of collusion between the contestant and claimant."

An inspection of the relinquishment indorsed upon the duplicate receiver's receipt shows that the words, "Arund Abbas and abandon all my claim to him," were stricken out by drawing a line through them, and "the United States" written in lieu thereof. Said relinquishment was acknowledged before a notary public on August 25, 1883.

There was no allegation by Von Zee, in his affidavit of contest, that the prior contest of Abbas was illegal for any cause, nor was there any other evidence, except the record, to prove the allegations made in his

said motion. Abbas duly appealed from the action sustaining said motion, and your office sustained the action of the district land officers, and held that the alteration in the attempted relinquishment was ground for their conclusion that there was collusion between the contestant and the entryman. It was further decided that said relinquishment, though irregular, was sufficient to warrant the cancellation of said entry; that Von Zee was entitled to the preference right of entry, and that if the allegation of appellant, that he presented his application with said relinquishment before instituting contest and the same were rejected, be true, yet he had lost his right by failure to appeal from said rejection.

It appears that the following indorsement, signed by the register, was made upon Postma's affidavit of contest:

"We hereby certify that contestant has this day filed his conditional homestead application and affidavit for the tract in controversy, and tendered the amount of the fee and commission required by law."

While it is true that said interlineation was a suspicious circumstance, yet, after the register and receiver had received the same, the contest of Abbas should not have been dismissed without giving the parties an opportunity of showing their good faith.

With the appeal of Abbas from the action of the register and receiver are filed several ex parte affidavits, denying the charge of bad faith on the part of the entryman and collusion with the contestant. The evidence is not sufficient to make a final adjudication of the rights of the parties.

In view of all the circumstances of this case, it is deemed advisable that a hearing should be ordered to determine the truth of the allegations that said entry was not made in good faith; that there was collusion on the part of Postma and Abbas, and to ascertain all of the facts concerning the execution of said relinquishment and the bona fides of all parties in interest. Pending such investigation, Von Zee's said entry will be suspended, and said decision dismissing said contest will be vacated. You will direct the local land officers to order a hearing under the rules of practice, with a view of ascertaining all of the facts relative to the making of the original entry, the execution of the relinquishment, the circumstances attending the first offer to file said relinquishment, with an application to enter said tract, if any such was made by Abbas, and any other facts tending to show the good or bad faith of all parties in interest. Upon the receipt of the testimony and opinion of the register and receiver, the case will be re-adjudicated by your office.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

FERGUSON *v.* HOFF.

Pending attack upon an entry for illegality, but prior to service of notice therein, the petition of the entryman for permission to make a new entry for the land was received; *Held*, that as mistake of law was apparent, and good faith manifest in complying with the law, such petition should be allowed, especially as no diligence to secure service of notice was shown by the contestant.

Acting Secretary Jenks to Commissioner Sparks, April 15, 1886.

I have considered the case of Francis H. Ferguson *v.* Augustus F. Hoff, as presented by the appeal of the latter from the decision of your office, dated December 10, 1884, holding for cancellation his timber culture entry No. 6280 of the NW. ¼ of Sec. 17, T. 113 N., R. 60 W., made May 8, 1882, at the Watertown land district, Dakota Territory.

It appears from the record that Ferguson filed his affidavit of contest against said entry on April 26, 1883, alleging that "Hoff effected said entry by fraud, in this he was not in the Territory at the time of making said timber culture affidavit, but it was made out by a notary public located at Cavour, Dakota, while he was in the State of Minnesota; that said tract was not entered as required by law."

It appears from the report of the register and receiver dated July 5, 1884, that hearing was set for March 20, 1884, and continued until May 21, 1884, in order to perfect service on the defendant. On May 5, 1884, Hoff filed in the local land office his application to have his said entry canceled, and to be allowed to make another entry for the same tract. Hoff alleges under oath, which is duly corroborated, that when he made said application and affidavit he was advised that it was unnecessary for him to come to the Territory for the purpose of executing said papers and making the entry, but that the same could be done as well without the Territory, and that it would have the same force and effect, and be in conformity with all provisions of the timber-culture laws; that relying upon such information, he employed one Sweetser, a land agent and notary public, from whom he had received said advice, to prepare said entry papers and send the same to the affiant then residing at Zumbrota, Minnesota, and having signed the same, he returned them to said agent, with the necessary fees, and thereupon said entry was made and the receiver's receipt, No. 6280, was sent to said affiant. Hoff further alleges that he has fully complied with the law in regard to breaking and cultivation; that he made said entry in good faith, and that he is willing to make the necessary affidavit before the proper officer; wherefore he prays that his said entry may be canceled and that he may be allowed to make a new entry for said tract under the timber culture law. With said application is filed the receiver's receipt upon which

is indorsed Hoff's relinquishment of said tract. On May 21, 1884, counsel for Hoff entered an appearance at the local office and made a written stipulation with counsel for contestant that in lieu of evidence it should be and was admitted that Hoff was not in said Territory when said affidavit was made, and that the allegations in said affidavit in that respect are true. Upon that agreed statement, a decision was asked by said counsel.

The district officers report that said contest was continued until May 21, 1884, on proper showing, and on that day no appearance was made in behalf of claimant. *Ex parte* testimony was filed by the contestant and default duly entered against Hoff. This report is evidently erroneous, and is contradicted by the record. The motion for continuance was made by counsel for contestant, "in order that due service may be obtained upon the claimant herein," and the only evidence of such service is the appearance by counsel as per said stipulation. It is clear that no judgment by default could be properly rendered where the counsel for the defendant has entered a general appearance.

It is admitted that the entryman has complied with the requirements of the law as to cultivation and breaking and has furnished affidavits denying any intention to violate the provisions of the timber-culture law. The only serious question involved is, whether the contestant has acquired such a right as would bar the entryman's application to make a new entry. It will be observed that the affidavit of contest was filed on April 26, 1883, alleging that Hoff was a non-resident and the hearing set for March 20, 1884, almost a year thereafter. No effort appears to have been made by the contestant to perfect proper service of notice upon the defendant, but on the day set for the hearing counsel for contestant moved for a continuance, in order that due service might be obtained upon the defendant. The record fails to show that any such notice was issued, certainly no publication was made, and prior to the appearance of counsel for defendant under said stipulation, the defendant had relinquished said entry and made application to make a new entry for the same land. Again, under the practice then in force, no contest for illegality was allowed against a timber culture application, except by direction of your office. This practice was changed on April 29, 1884, by departmental decision in the case of Caroline Halvorson (2 L. D., 302).

After a careful consideration of the whole record in this case, I am of the opinion that the timber culture entry No. 6148 of said tract, made by Ferguson on January 7, 1885, should be canceled, and that the application of Hoff to make a new entry of said tract should be allowed. Said decision of your office is modified accordingly.

HOMESTEAD—ACT OF JUNE 15, 1880.

PATRICK RODERICK.

A pre-emption filing constitutes an adverse claim, within the meaning of the proviso to the second section of said act, and bars the right of purchase thereunder.

Acting Secretary Muldrow to Commissioner Sparks, April 16, 1886.

I have examined the appeal of Patrick Roderick from the decision of your office, dated April 17, 1885, refusing to allow his application to purchase under the second section of the act of Congress approved June 15, 1880, (21 Stat., 237), the N. ½ of the NE. ¼ of Sec. 22, T. 11 N., R. 24 W., North Platte land district, Nebraska.

Said application was rejected for the reason that Roderick's homestead entry No. 196, made March 28, 1874, was canceled by your office on July 5, 1884, and on July 15th, same year, William N. Hibbs filed his pre-emption declaratory statement No. 4304 for said tract, and the same constitutes a valid adverse claim under the proviso to said section, and bars the right of purchase under said act. The question raised by the appeal has been expressly decided by this Department adversely to the claim of the appellant in the case of Charles C. Martin (3 L. D., 373). (See also George S. Bishop, 1 L. D., 95.)

Said decision is accordingly affirmed.

TIMBER CULTURE ENTRY—AGENT.

HEMSTREET *v.* GREENUP.

The work required under the timber culture law may be performed by an agent, but the entryman cannot plead the contract with his agent, in the event that the entry is attacked for non-compliance with the law.

Acting Secretary Muldrow to Commissioner Sparks, April 16, 1886.

I have considered the case of Ashael B. Hemstreet *v.* Charles Greenup, as presented by the appeal of the latter from the decision of your office, dated July 24, 1885, holding for cancellation his timber culture entry No. 2603 of the NW. ¼ of Sec. 30, T. 16 N., R. 13 W., made September 22, 1879, at the Grand Island land district, Nebraska.

The record shows that Hemstreet initiated a contest against said entry upon the charge of failure to comply with the requirements of the timber culture law, as to breaking, cultivation and planting. Said decision states, "Both parties were present at the trial March 5, 1884," but the record shows that Hemstreet was absent in the State of New York, on account of the death of his mother. He was, however, represented by counsel, and testimony was taken in behalf of both parties. Upon the evidence submitted, the register and receiver rendered their joint opinion "that less than ten acres have been broken, but a sufficient amount to show good faith, that the cultivation before planting, and

the planting was properly done, that there was no cultivation of trees at any time," and they recommended that, as the defendant had shown good faith, the contest should be dismissed. On appeal by the contestant, your office concurred in the finding of facts by the district land office, but held that good faith, however apparent, should not excuse a non-compliance with specific and essential requirements of the statute.

It will be quite unnecessary to lay down as an invariable rule that a strict compliance with the specific requirements of the timber culture law will be insisted on by the government in every case when perfect good faith is shown by the entryman. Such has not been the ruling of this Department in the adjudicated cases. It has been repeatedly held that where the default has been cured prior to the initiation of contest, no action will lie. Fitch *v.* Clark (2 L. D. 262); Worthington *v.* Watson (ibid., 301); Galloway *v.* Winston (1 id. 169); Williams *v.* Price (3 L. D., 486).

In the case at bar, the entryman, who was a non-resident, employed an agent to break, cultivate, and plant said tract as required by law. It is clear from the evidence that he failed to cultivate the trees at all, and that the amount broken was considerably less than ten acres. The fact that the entryman paid for the breaking, planting, and cultivating the land as required by law will not be a sufficient excuse for non-compliance with the statute. While the law and the rulings of the Department permit the work to be done by an agent, (Gahan *v.* Garrett, (1 L. D., 164); Flemington *v.* Eddy (3 L. D., 432); yet the entryman will be held to a strict accountability for the faithful performance of his agent's contract. If the agent fails to comply with the law, while he may not take advantage of his own wrong, a third party may initiate a contest, and the entryman cannot shield himself behind his contract with his agent.

The evidence shows a non-compliance with the requirements of the timber culture law, and fails to show good faith on the part of the entryman.

For the reasons set forth said decision is affirmed.

MINING CLAIM—KNOWN LODE.

OLATHE PLACER MINE.

The claimant for an alleged known lode should apply for patent in the usual way, notwithstanding the existence of a prior placer patent including it, in order that the controversy may be properly litigated in the courts.

Acting Secretary Muldrow to Commissioner Sparks, April 16, 1886.

I have before me the papers in the case of the Olathe Placer claim, Leadville, Colorado, which were transmitted September 29, 1882, on the direction of my predecessor, and in pursuance of the request of C.

S. Thomas, Esq., of Leadville, Colorado, by his letter dated September 12, 1882.

The accompanying report from your office shows that patent No. 4240 duly issued to John S. Sanderson for said placer; but that it appears to have issued by mistake, for the reason that there was a known lode within its limits, which the placer claimant had relinquished, prior thereto. Mr. Thomas's request was that, on due proof of the facts alleged, a patent should also issue to the lode claimants for said lode, known as the Buckeye Lode.

In the case of Robinson *v.* Royder (1 L. D., 577), it was held by the Department that the claimant for an alleged known lode must apply for patent in the usual way, notwithstanding the existence of a prior patent for the placer including it, that the patentee might file the usual adverse claim, and that the parties could then litigate the controversy in the courts. This ruling was followed in the case of the Shonbar Lode (L. and R., vol. 40, p. 293), and it seems to me to be a most efficient method of determining the facts and the rights of the parties. The record before me does not show that such an application has been made by the claimants for the Buckeye Lode. In the absence of such showing, and in view of the irregularity of this so-called appeal and of the lapse of time which has been suffered without further prosecution by the appellant, the appeal is dismissed, and the papers accompanying the letter of transmittal are returned herewith.

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*RULE OF PRACTICE AMENDED.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 27, 1886.

Rule No. 114 of Practice is amended as follows:

Motions for a review of decisions of the Secretary should be filed with the Secretary, who may, in his discretion, suspend action on the decision sought to be reviewed until such motion shall be decided.

WM. A. J. SPARKS,
Commissioner.

Approved:
L. Q. C. LAMAR,
Secretary.

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* For Rule of Practice 114, see page 49 of this volume.

PRE-EMPTION FILING—AMENDMENT.

THOMAS C. CHILCOTE.

The pre-emptor not having exercised diligence in ascertaining the status of the tract filed for, will not be allowed to amend his filing, in the event that he subsequently discovers that a portion of his claim is subject to the right of another.

Acting Secretary Muldrow to Commissioner Sparks, April 20, 1886.

I have considered the *ex parte* case of Thomas C. Chilcote, as presented by his appeal from the decision of your office, dated March 25, 1885, refusing to allow him to amend his pre-emption filing No. 12,871, for the E. ½ of SW. ¼ of Sec. 6, and NE. ¼ of NW. ¼ of Sec. 7, T. 29 S., R. 13 E., Independence, Kansas, so as to embrace in addition to tracts above described the NW. ¼ of NW. ¼ of Sec. 7, same township and range.

Chilcote filed his declaratory statement for the tracts first described together with the SW. ¼ of SE. ¼ of said Sec. 6, April 1, alleging settlement March 23, 1884. At that date the whole of the SE. ¼ of said Sec. 6 was covered by declaratory statement No. 12,457, of date December 15, settlement alleged December 10, 1883, in the name of E. W. Cantrell.

Some time after filing his said declaratory statement Chilcote learned of the prior claim of Cantrell, above mentioned, and believing said claim to be valid, he thereupon relinquished his claim to that part of land covered by his filing which conflicted with said claim of Cantrell, viz, the SW. ¼ of SE. ¼ of said Sec. 6, and his filing to that extent was canceled July 2, 1884. Under date of October 7, 1884, the local office transmitted Chilcote's application to amend, in which he set forth the facts above mentioned.

In said office decision of March 25, 1885, the application to amend was denied, on the ground that "by the exercise of due diligence, Chilcote could have ascertained the existence of the adverse claim of Cantrell, initiated three months before."

A careful examination of the case leads me to concur in the judgment of your office that the amendment should not be allowed. It seems that with reasonable diligence Chilcote might have informed himself of the existence of the prior claim of Cantrell to said SE. ¼ of Sec. 6, at the date he filed his declaratory statement. The declaratory statement of Cantrell was then upon the records of the local office, where it could have been observed by any one desirous of being informed of its existence, and so far as appears from the records in the case, he was then living upon his claim. It is not alleged that any fraud or imposition was practiced upon Chilcote at the time he filed his declaratory statement, or that he was misled in any manner by the local officers, further than that he alleges in his appeal that "the register of land office at Independence usually made a note on bottom of declaratory statement receipt of any adverse filing," and that in his case no such note was made upon the declaratory statement sent him. Thus leaving it to be

inferred that he did not even go to the local office to inform himself of any adverse claim to the land he desired to file upon. This was surely not due diligence.

The decision appealed from is affirmed.

SWAMP LAND—CONTESTANT.

RINGSDORF *v.* THE STATE OF IOWA

Though it is competent for the government, on its own motion, to inquire into the character of land, claimed as swamp, the diligence of an applicant therefor, in bringing contest, and paying the expenses thereof, may result in securing to him the right of entry, on the establishment of the non-swampy character of the land.

Secretary Lamar to Commissioner Sparks, April 22, 1886.

I am in receipt of your letter of May 11, 1885, transmitting the papers in the case of the swamp land contest instituted by William Ringsdorf, involving the character of the N. ½ of the N. E. ¼ of Sec. 1, T. 96, R. 28, Iowa.

The above tract was selected as swamp land by the State agents August 22, 1859; but has not yet been approved nor patented. Nevertheless, while such swamp land claim was pending and unadjudicated, the American Emigrant Company received a quit-claim deed thereto (*inter alia*), thus becoming a party in interest in the case.

The tract is a portion of an odd section lying within the primary (ten-mile) limits of the grant of May 12, 1864, (13 Stat., 72,) for the benefit of the McGregor Western (now Chicago, Milwaukee & St. Paul) Railway Company; but the company's interests are not affected whether the swampy character of the land be affirmed or denied.

On the 22d of September, 1883, William Ringsdorf, alleging under oath that said tract was not in fact swamp land, applied to the register of the land office at Des Moines to contest the swamp land claim, at the same time presenting his application to enter the above tract under the timber-culture act—tendering fees and commissions for entry.

October 10, 1883, the register of the land office at Des Moines transmitted to your office said application, with following request for instructions:

"Shall Mr. Ringsdorf be allowed to test the swamp-land claim on the above-described land? and if rejected shall he then be allowed to enter the tract in question under the timber-culture act?"

Upon instructions of your office, a hearing to determine the character of the land was held at the land office at Des Moines, beginning December 29, 1883. January 24, 1884, the local officers rendered their joint decision, finding from the evidence that the land was *not* swamp or overflowed September 23, 1850, and recommending that the swamp land claim be rejected.

February 2, 1884, the American Emigrant Company appealed to your office; which, July 9, 1884, affirmed the decision of the local officers, and therefore held for rejection the claim of the State of Iowa and those holding under it, under the swamp-land grant. From said decision the American Emigrant Company appeals to the Department—their appeal being based upon the following grounds:

1. The land is not subject to timber-culture entry, because not "public land."

2. Ringsdorf has no "interest" in the land and cannot contest its swampy character.

3. The land was and is swamp land ... as shown by the evidence in the case.

Referring first to the point last above mentioned: after a careful examination of the testimony, I concur in the opinion expressed in the decision of your office that the tract in question is not, and was not at the date of the swamp land act of September 28, 1850, "swamp land" within the meaning of said act.

It is competent for the government to contest the allegation of the swampy character of the land, regardless of Ringdorf's interests or application; so it is not necessary to decide whether or not it was competent for Ringsdorf to institute contest. But as it appears that Ringsdorf directed the attention of the government officers to the fact that the land in question was not swampy in character, and paid the expense of the contest, and as he has an application now on file, and not acted upon, said application will now properly come before you for action.

VOID PATENT NOT DELIVERED

WILLIAM H. MCLARTY.

A patent, issued in contravention of the record, is without authority and void, and will not be delivered by the Department.

Secretary Lamar to Commissioner Sparks, April 28, 1886.

I am in receipt of your letter of the 8th instant, transmitting the papers pertaining to the issuance of patent to William H. McLarty for the E. ½ of the SE. ¼ of Sec. 29, T. 1 N., R. 14 E., Stockton, California, requesting that proceedings be instituted to have said patent annulled, for the reason that it should have issued for only the NE. ¼ of SE. ¼ of said section.

Accompanying your letter is also the application of John Mullan, Esq., attorney for the widow of the late William H. McLarty, for the delivery of said patent, which has been returned to your office by the local office at Stockton.

It appears from the record in this case that on October 25, 1871, McLarty made cash entry for the E. ½ of the tract aforesaid. On Janu-

ary 23, 1873, said entry was suspended, for the reason that the township plat showed that the village of Montezuma was situated upon the land in question. McLarty was thereupon required to make publication of notice to all parties concerned to show cause why the entry aforesaid should not be patented. A hearing was the result, and it was thereupon decided by the Secretary of the Interior, October 24, 1884, that the entry of McLarty for the SE. ¼ of said SE. ¼ was illegal, and said entry for that part of said tract was thereupon canceled, and McLarty was permitted to enter for the remaining portion. On July 27, 1885, your office, in issuing patent under said decision, inadvertently issued to McLarty patent for the whole tract embraced in his entry, whereas it should only have issued for the NE. ¼ of the SE. ¼ of the section aforesaid, and forwarded the same to the register and receiver at Stockton, California, to be delivered to the widow of said McLarty, but it was recalled by your office before such delivery.

The widow of said W. H. McLarty now makes application for the delivery to her of said patent, basing her application on the principle decided in the case of United States *v.* Schurz (102 U. S., 378).

In the case of United States *v.* Schurz, McBride after the five years of residence and cultivation required by law, submitted final proof, which the Commissioner found to be in all respects in full compliance with the law, and as such entitled McBride to a patent; that in *accordance* with such finding a patent for the tract was issued and transmitted to the local officers for delivery to McBride, but subsequently returned to the Commissioner of the General Land Office. The land claimed by McBride was within the incorporated limits of the town of Grantville, and without this knowledge the local officers admitted McBride's entry. McBride made final proof in 1874. In February, 1877, the town authorities of Grantville applied to make townsite entry, which was refused, because the land was covered by McBride's entry. An application was then made to have McBride's entry canceled as illegally and improvidently allowed. This application was duly forwarded to the Commissioner of the General Land Office; but prior to action thereon a patent was issued, and transmitted for delivery to McBride. Subsequently, on taking up the matter of contest, the claim of McBride was rejected and the undelivered patent canceled; and McBride applied for a writ of mandamus to compel its delivery.

On this state of facts the court held that "when the officers whose action is rendered by the laws necessary to vest the title in the claimant have *decided in his favor*, and the patent to him has been duly signed, sealed, countersigned, and recorded, the title of the land passes to him, and the ministerial duty of delivering the instrument can be enforced by mandamus."

It will be seen that the principle upon which this decision rests is, that the authority of the Department to issue the patent was predicated upon a decision, judicial in its character, awarding the land so patented to McBride.

Again, the court says: "Here the question is, whether this land has been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to *consider and decide before* they issued McBride's patent. It was within their jurisdiction to do so. If they *decided* erroneously, the patent may be voidable, but not absolutely void."

Speaking in reply to the position assumed by the government, that the land claimed by McBride not being subject to homestead entry, that the patent therefore being void, and that the law will not compel the Secretary to do a vain thing by delivering the patent, the Court says: "We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one. But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend."

The Chief Justice, with whom concurred Mr. Justice Swayne in dissenting from this opinion, said: "There are very few, if any, of the general principles of law so well stated, in the opinion of the court, to which I do not give my assent.... I agree that when the *right* to a patent has become *complete*, the execution and delivery of the patent itself are mere ministerial acts of the officers charged with that duty; and I further agree that when the *right* to a patent has been determined, and the patent has actually been signed, sealed, countersigned, and recorded, no actual delivery is necessary to pass the title."

It is very evident that the majority of the court considered that the right of McBride to the land claimed had been adjudicated before the issuance of patent, while the Chief Justice regarded the question as pending before the Department when the patent was executed. The inference is therefore plain that the right of McBride to demand the delivery of the patent rested upon the decision of the officers of the Land Department awarding him the tract, and in effect deciding that it was subject to McBride's homestead entry.

When the record upon its face shows that a patent could lawfully issue for the tract claimed a patent issued thereon is not void, although it might for causes not apparent on the face of the record be voidable; but when the record does not show such authority a patent issued thereon is void.

In this case the record not only fails to show that McLarty was entitled to patent for the SE $\frac{1}{4}$ of this quarter-section, but the record of the proceeding upon which alone he can claim the right to patent, shows that the right to this tract was directly adjudicated against him, in a hearing ordered to determine his right to this part of the tract. A patent issued for the entire E. $\frac{1}{2}$ of said quarter-section was wholly without authority, and therefore void, and I see no reason why the patent now in possession of the Department should not be withheld, and that

patent issue in conformity to the decision of the Department canceling the entry of McLarty for the SE. ¼, and allowing his entry for the NE. ¼ of said quarter-section.

You will therefore inform Mr. John Mullan, attorney for the claimant, of this decision, and issue patent in accordance with this decision when called for.

DONATION CLAIM—ACT OF 1854.

JOHN WALLACE.

Under this act settlement and residence should be contemporaneous, and the settlement must have been commenced within the time specified in said act.

Secretary Lamar to Commissioner Sparks, April 29, 1886.

I have examined the appeal of John Wallace from the decision of your office, dated November 29, 1884, holding for cancellation his donation claim, notification No. 300, certificate No. 185, for the SE. ¼ of SE. ¼ of Sec. 29, N. ½ of the NE. ¼ and the SE. ¼ of the NE. ¼ of Sec. 32, T. 24 N., R. 32 E., Santa Fe land district, New Mexico Territory. Said claim was held to be invalid in its inception, because the proof submitted showed that settlement and cultivation were begun on said tracts on June 1, 1874, and not within the time required by law.

The second section of the act of Congress approved July 22, 1854 (10 Stat., 308), was carefully considered by my predecessor, Secretary Teller, on November 23, 1882, in the case of Juan Rafael Garcia (1 L. D., 287), and it was held therein that said act required that residence and settlement should be contemporaneous, and that settlement upon the tract claimed as a donation must have commenced within the time limited by said act, to wit, January 1, 1858. That ruling was adhered to in the case of the Atlantic and Pacific Railroad Company (2 L. D., 522), and again on November 18, 1884, in the departmental decision in the case of Florentino Padia, and no good reason is given for overruling the same.

The decision of your office is accordingly affirmed.

PRE-EMPTION—SETTLEMENT—ABANDONMENT.

HUDSON *v.* DOCKING. (ON REVIEW.)

Settlement made by entering through a fence partially enclosing the land, though with the permission of the owner of such fence, but with full knowledge of the prior existing possession, improvements and recorded claim of another, is in violation of the Atherton-Fowler doctrine.

Evidence showing that the claimant has persistently asserted his right in the local courts, is admissible as against the charge of abandonment.

Secretary Lamar to Commissioner Sparks, April 29, 1886.

I have before me a motion for review of my decision of January 20, 1886, in the case of Thornton Hudson *v.* Richard Docking (4 L. D., 333), awarding the land in controversy to Hudson.

Docking's contest allegation was, failure to reside and cultivate as required by the pre-emption law. My said decision held that, as the land was used for grazing purposes, for which it was best adapted, Hudson had cultivated all that the law required. And it held that, although Hudson's residence was not actually continuous from date of filing until the spring of 1883, it was legally sufficient, in view of the suspensions of the plats during this period, and that his proofs of continual residence thereafter were not overthrown by the contestant.

There are five assignments of error in this motion, which I will examine in their order.

The first is a general allegation of error in the award. The accompanying argument is substantially as follows: That in view of Docking's legal entry on the land, and his adverse claim, Hudson should have been held to a strict compliance with the law in the matter of residence. To this I reply: First, that I have grave doubts about the lawfulness of Docking's entry upon the land, which was through a fence partially enclosing it; and although this was with the permission of the owner of the fence, it was with the full knowledge of Hudson's possession and improvements, and of his recorded claim. I incline to the opinion that Docking's entry was in violation of the ruling in Atherton *v.* Fowler (96 U. S., 513), and of the several cases in the Supreme Court enforcing it.

Secondly, I remark that the so-called "liberal" ruling upon Hudson's showing of residence concerned a period anterior to Docking's said entry, and when he had no adverse claim to the land. Hence the first assignment of error is not well taken.

The second error assigned is that said decision is contrary to the law and the facts. In the accompanying argument, the law is stated to be that "continuous compliance with all the requirements of the pre-emption law is essential, and failure therein will not be overlooked except under urgent circumstances, and (for) controlling reasons." Admitting this to be the law, it is plain that said decision did not depart from it, for it found urgent circumstances and *a controlling reason* in the fact that the government had kept the plats suspended, and prevented Hudson from proving up, for some five years. The argument before me does not deny this to be the fact, or that it offers a satisfactory reason for my ruling upon the sufficiency of Hudson's compliance with the requirements of the statute during said period. No error of either fact or law is pointed out in the findings relating to the period after the restoration of the plat. Consequently there is no showing of error in either the facts or the law upon which the decision was based.

The third ground of error assigned is the admission of testimony in relation to several law suits in the local courts respecting title to this land. This testimony was admitted as evidence that Hudson had not abandoned the claim. The fact that there had been such suits was all that was used of the testimony, and it certainly was entirely competent evidence for the purpose indicated.

The fourth alleged error is that the decision is "against the law and the practice and rulings of the Land Department." There appears to be no argument in support of this allegation other than that above considered, and it therefore requires no further notice.

The fifth and last specification of error is the admission of "*ex parte* evidence" by the local officers, the Commissioner, or the Secretary of the Interior. The only explanation of this singular charge in the accompanying argument is a reference to the subjoined affidavit of one William Acuff, who therein denies that he made certain statements prejudicial to Docking's good faith in making his homestead claim, which purported to be signed and sworn to by him and were on file in the case. This alleged statement, if true, might have affected Docking's right to make final proof and entry; but it was entirely irrelevant to the issue raised by this contest, were not admitted as evidence by me, and had no weight whatever in influencing my judgment.

On careful consideration of this motion and the accompanying argument, I do not find any sufficient reason for changing my opinion upon the facts and law of this case, as expressed in my said decision. Said decision is therefore adhered to, and the motion dismissed.

PRACTICE—HEARINGS.

CIRCULAR.

Commissioner Sparks to registers and receivers, and special agents, July 31, 1885.

The practice of ordering hearings, as a matter of course and without application, in cases of entries held for cancellation on special agent's reports, is discontinued.

Hereafter when an entry is so held for cancellation, the claimant will be allowed sixty days after due notice in which to appeal to the Secretary of the Interior, or to show cause why the entry should be sustained.

Applications for hearings must be accompanied by the sworn statement of claimant, setting forth specifically the grounds of his defense and what he expects to prove at such hearing. He must also make oath that his application is made in good faith and not for the purpose of delay.

Notice to claimants will be sent by registered letter to their last known post-office address, and the return letter receipt (or returned letter) will be transmitted to this office with register and receiver's report.

Notice will also be served personally if claimant can be reached, and registers and receivers and special agents will take every precaution to

see that notice reaches the party or his attorney, and to preserve and transmit the evidence of service, or of attempt to procure service.

Attorneys appearing for alleged fraudulent entrymen will be required to file the written authority of the claimant for such appearance.

Approved.

G. A. JENKS,
Acting Secretary.

FRAUDULENT CONTEST—RELINQUISHMENT.

MELCHER *v.* CLARK.

Where a pending contest is attacked, on the ground of fraud, by one who also makes due application to contest the entry in question, notice will not issue on such application, but the case will be held for the final disposition of the prior contest.

It is however held that a relinquishment, executed before the first contest, but filed after said application, may inure to the benefit of the second contestant in the event that the allegation of fraud is established.

Secretary Lamar to Commissioner Sparks, April 30, 1886.

I have considered the case of Samuel H. Melcher *v.* Gideon E. Clark, as presented by the appeal of the latter from the decision of your office, dated March 25, 1885, rejecting his final proof and payment for the SE. ¼ of the SE. ¼ and Lot 4 of Sec. 27, and Lots 1, 2, 3 and 4 of Sec. 26, T. 106 N., R. 66 W., 5th P. M., Mitchell land district, Dakota Territory, and allowing Melcher a preference right of entry of said tracts.

The record shows that one Norris F. Jellison filed his soldier's homestead declaratory statement No. 3262 for said tracts on June 19, 1882, and on December 13, 1882, he made homestead entry No. 23641 of the same land. On May 26, 1883, one Elza J. Mentzer filed his affidavit of contest against said entry, alleging that the entryman had relinquished said entry to the United States and abandoned said land. In said affidavit it was also alleged that the affiant has made diligent inquiry in the vicinity of said land; that he believes the entryman is not a resident of said Territory; that personal service cannot be made upon him, and asked that service may be made by publication. Hearing was set for August 7, 1883.

On July 16, 1883, Melcher filed an affidavit of contest against said entry, alleging abandonment and change of residence for more than six months. At the same time Melcher also filed an additional affidavit, alleging that Mentzer has had the management of said land from June 19, 1882, up to the date of instituting his said contest; that Mentzer's contest was not issued for the purpose of having said entry canceled, and Melcher therefore asked "that his contest hereunto attached may be received and become of record in case of the dismissal, withdrawal or default of contest now pending."

On July 6, 1883, Jellison executed a relinquishment of said entry before a notary public in Linn county, Iowa, which appears to have been filed in the local office on July 30, 1883.

Additional testimony was filed in the local land office by Melcher and all the papers were transmitted to your office on September 11, 1883. On December 7, 1883, Clark applied to file his pre-emption declaratory statement for said land, which was rejected by the district land officers, because said contests had not been determined by your office. Upon appeal, your office, on March 24, 1884, held that said entry must be canceled as of the date when said relinquishment was presented to the local land office, to wit, July 30, 1883; that the relinquishment was filed subsequently to the commencement of said contests and must be held as evidence of abandonment; that the preference right of entry should be awarded to the first legal contestant; that Clark should be permitted, if he so desired, to have his filing placed of record, subject to the rights of the legal contestant, who would have the preference right of entry, and a hearing was ordered to determine the rights of the respective contestants. On March 31, 1884, Clark filed his pre-emption declaratory statement for said tracts and also filed an appeal from said decision to this Department.

On November 11, 1884, my predecessor decided that "your action in the premises is not derogatory to his (Clark's) interests; he has obtained all the benefits with relation to the contests of record, which were instituted prior to any action on his part that reasonably could be expected. If the whole case should come before me for my adjudication, his interests, if any, will be duly considered." L. &. R. (Vol. 47—234).

The hearing was duly held, commencing January 27, 1884, and, upon the testimony offered, the register and receiver rendered separate opinions, the former holding that Melcher was entitled to a preference right of entry, while the receiver, conceding the speculative character of Mentzer's contest, held that the relinquishment was an independent transaction and in no manner the result of Melcher's contest, and that the land should be awarded to Clark.

Your office, on appeal, held that the decision of the register was correct, and that the pre-emption proof which had been offered by Clark should be rejected.

The testimony taken at the hearing is conflicting as to the person from whom said relinquishment was purchased. It is clear that the relinquishment was not filed until after the filing of Melcher's affidavit of contest, and no rights acquired prior to the filing of the same could be lost in consequence thereof. Although the relinquishment was filed in the district land office on July 30, 1883, it appears to have been executed on July 6th same year, which was long subsequently to the date of the affidavit of contest filed by Mentzer, and was filed by an attorney who did not state at the time for whom he was acting, but who as the representative of Clark advised Mentzer on his cross-examination not

to answer numerous questions which were pertinent to the case. The testimony of Mentzer can have little, if any, weight. Mann *v.* Huk (3 L. D., 452).

It is fairly shown by a preponderance of the evidence that Mentzer's contest was fraudulent, and that Clark purchased Jellison's relinquishment, either directly or indirectly, from Mentzer. It is true that due notice to the entryman had not been issued upon Melcher's said affidavit, and, under the rulings of this Department, none could issue until the determination of Mentzer's contest. Woodward *v.* Percival (4 L. D., 234). As soon, however, as Mentzer's contest was disposed of, the rights of Melcher attached and his rights related back to the date when his contest affidavit was received, so as to cut off any intervening claimant.

Immediately upon the filing of the relinquishment, the district land officers should have canceled said entry. Thorpe *et al.* *v.* McWilliams (3 L. D., 341); Tilton *v.* Price (4 L. D., 123).

From a careful examination of the whole record, it appears that the filing of said relinquishment was the result of Melcher's contest and must be held to inure to his benefit. McCall *v.* Molnar (2 L. D., 265); Mitchell *v.* Robinson (3 L. D., 546).

Said decision is accordingly affirmed.

PRIVATE CLAIM—RAMON VIGIL GRANT.

E. P. SHELDON ET AL.

The decision of the Commissioner holding that the survey herein should not be disturbed became final for want of appeal, and the showing now made by the present alleged owners of said claim is too indefinite to warrant further investigation of the case.

Secretary Lamar to Commissioner Sparks, April 30, 1886.

I have considered the appeal of E. P. Sheldon, George N. Fletcher, and Winfield Smith, from the decision of your office dated April 25, 1885, refusing their application for an investigation by the United States surveyor-general, of the survey of the Ramon Vigil grant, being private land claim, No. 38, in Santa Fé land district, New Mexico Territory.

It appears from the record that said claim was confirmed by the act of Congress approved June 21, 1860, (12 Stat., 71) "as recommended for confirmation by the surveyor-general"; that the survey of said confirmed claim was made by two U. S. deputy surveyors in April, 1877, and approved by the U. S. surveyor-general on June 5, same year. On September 16, 1882, one Thomas A. Hayes, claiming to be the owner of the land, filed in the office of the U. S. surveyor-general his protest against the approval of said survey, and against the issue of a patent there-

under, claiming that, "Whereas the grant calls for the Sierra Madre Mountains as its west boundary (by universal custom and understanding meaning the whole mountain on its east side, or to its summit,) the said present survey makes the said west boundary the eastern foot-hills of the Sierra Madre Mountains, thereby attempting to materially reduce the quantity of land in fact granted." Mr. Hayes further alleged that, at the time said survey was made, he was absent "beyond the seas," and until his return, in 1881, had no opportunity of becoming acquainted with the facts and the manner of said survey or to protest against the same as improper and erroneous.

With his said protest was submitted the report of two surveyors, who state that they made a partial survey of said grant at his request, and, from their notes, which are embodied in their report, "The topography therein called for does not in any respect agree with the topography of the country described in the field notes of the grant."

Neither the protest, nor the report of said surveyors accompanying the same, was verified. Your office, however, on April 10, 1883, considered said protest and the survey of said claim, and held that the base and not the summit of the Sierra Madre Mountains constitutes the western boundary, and that said survey was correct and would be approved. Due notice of said decision was given to Hayes, but no appeal was taken therefrom.

The present application alleges that the petitioners became the owners of the land covered by said grant, by purchase in July, 1884; that about the time of said purchase they were informed that the official survey was erroneous; that the original owner had made application for the correction of said survey but as he failed to support his said application by proof, or to show wherein the error existed, by sworn affidavits, the said application was refused; that since the applicants have become the sole owners of said tract, they have retraced the boundaries of said survey and have found the same to be grossly erroneous in several respects; that the Rito de los Frijoles, which constitutes the southern boundary call of said grant, runs nearly east, instead of southeast, as represented on said survey; that at a point where two other streams empty into said Rito de los Frijoles, upwards toward the source of said streams, the line abandons the Rito de los Frijoles, thereby leaving out a considerable portion of several hundred acres of said grant; and that the west boundary does not extend to the main mountain, as called for in the original muniments of title. The applicants further allege that they are informed and believe that said U. S. deputy surveyors never actually run the said south and west boundary of said grant, but made field notes thereof from a partial survey of only the east and north boundary of the same; that, if said survey is allowed to stand without correction, great and irreparable injury will be inflicted upon the present owners; and they therefore ask that the U. S. surveyor-general of said Territory be directed to investigate said survey, and make a report thereof to your office.

With said application are filed the affidavits of said Sheldon and one Elder in support thereof. Mr. Sheldon avers that, since the said purchase and prior thereto, he went over the boundary lines of said survey and found the same to be incorrect.

In a letter filed in this Department, dated May 17, 1885,—since said appeal—Mr. Sheldon states that the south-west boundary lines, as given by said survey, are grossly inaccurate; that he is informed by most reliable authority, that there was no accurate or actual survey ever made, and that parties interested at the time in purchasing this grant, influenced the surveyors to return a fraudulent survey thereof; and that by the present survey he and his partners are defrauded of ten thousand or more acres of the most valuable part of their ranch.

It does not appear that the protest of Hayes, the prior owner, was dismissed because not supported by sworn affidavits as alleged by the applicants. On the contrary, it was duly considered, and both upon principle and upon the authority of the former adjudications of this Department, it was decided, in an elaborate opinion by your office, on April 10, 1883, that said survey was correct and should be approved. From this decision there was no appeal, and the same became final (R. S., Sec. 2273; Rule of Practice, 112).

It is clear that the present applicants can have no better claim than their grantor. They do not even furnish any evidence of title to said grant. Sheldon admits that he went over said boundaries as shown by said survey prior to said purchase, and does not show that the grantees will not get every acre of land they have purchased. The allegations of fraud are altogether too vague and indefinite, and not supported by sufficient affidavits to make out even a prima facie case calling upon your office to institute the investigation asked for.

For the foregoing reasons said decision is affirmed.

TIMBER CULTURE ENTRY—APPLICATION.

CROOKS *v.* GUYOT.

An entryman who has failed to comply with the law has forfeited all right to the land, and cannot set up his possession to defeat the application of a contestant.

Secretary Lamar to Commissioner Sparks, May 5, 1886.

I have before me the case of Alexander B. Crooks *v.* Henry Guyot, involving the NW. ¼ of Sec. 8, T. 24 S., R. 8 W., Wichita, Kansas, on appeal by Guyot from your predecessor's decision of December 13, 1884, holding his entry for cancellation.

It appears that Guyot made timber-culture entry No. 78 for said tract on October 14, 1873, and that Crooks filed affidavit of contest January 5, 1883, alleging non-compliance with the law. After hearing, the local officers recommended cancellation of the entry, and, on appeal, their

decision was sustained. The facts, as they are established by the testimony, are substantially as follows, to wit: that the entryman had complied with the law from date of entry until 1879, but that thereafter he failed to properly cultivate and protect the trees until the fall of 1881, when they were destroyed by a prairie fire, and that since then he has failed to replant. These facts sustain the allegations of the contestant, and justify your predecessor's action.

Crooks, it appears, filed with his contest affidavit an application to enter this land under the timber-culture law, and Guyot objects that it is invalid because contrary to the ruling in Bender *v.* Voss (2 L. D., 269), that such entries must be made on vacant land. In said case, as in that of Shadduck *v.* Horner (6 C. L. O., 113), which it followed, the land sought to be entered was in the possession of another under color of right; whereas in this instance all right of the entryman was forfeited immediately upon default, and the contestant had the right of immediate entry (Hoyt *v.* Sullivan, 2 L. D., 283).

I concur in the conclusion reached by your predecessor and affirm his decision.

REVIEW—NEWLY DISCOVERED EVIDENCE.

ST. PAUL M. & M. R'Y CO. *v.* MORRISON.

On motion for review there was tendered, as newly discovered evidence, a certificate from the commissioner of the State Land Office of Minnesota to the effect that said State had conveyed to plaintiff, by deed, the land in question. *Held*, that as the evidence offered was not the best of which the case was susceptible, and could not be considered newly discovered, because of record, the motion must be denied.

Secretary Lamar to Commissioner Sparks, May 5, 1886.

I am asked to review and revoke my decision of December 26th last in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* James A. Morrison (4 L. D., 300), wherein the claim of the railway company to the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 7, T. 128 N., R. 34 W., 5th P. M., St. Cloud, Minnesota, was rejected and the land awarded to Morrison.

In the original case as before me when said decision was rendered, the railway company was claiming said tract under the acts of Congress approved March 3, 1857 (11 Stat., 195), March 3, 1865 (13 Stat., 526), and some amendatory acts of later date, granting lands to the State of Minnesota to aid in the construction of certain railroads, including the road to which the present company is successor; and Mr. Morrison was claiming the tract under the general pre-emption law. The main question then at issue was, whether the United States had title to the tract in dispute, or whether that title had passed over to the railway company. It was conceded that the United States had by certification in 1874 and patent in 1875 passed the legal title to this tract over to the State of

Minnesota, for the benefit of the St. Vincent Extension of the St. Paul and Pacific Company, of which the present company is successor. The records further showed that the governor of the State of Minnesota, acting presumably under the authority of an act of the State legislature approved March 1, 1877, had, on the 23d of June, 1880, executed a deed and relinquishment of said tract to the United States in favor of Mr. Morrison, thus re-investing the United States with full and complete title to the same.

Upon this state of record facts it was properly ruled in said decision that the railway company, which claimed through the State by virtue of the grant, could not be heard to object to any disposition the United States chose to make of the land in question. In fact, the argument filed on behalf of the company in support of the motion before me does not attack the validity and correctness of said decision upon the state of facts presented when it was rendered. The motion is based upon what is alleged to be new and material evidence—evidence of which the company appears to have been unadvised until quite recently—viz: that the State of Minnesota had, by its deed bearing date February 22, 1877, (seven days prior to the passage of said act of the legislature,) conveyed said tract to the railway company; and that, therefore, said act cannot be held to apply to this case.

In support of this allegation is filed here a certificate under the hand and seal of the deputy auditor of the State of Minnesota, and *ex officio* Commissioner of the State Land Office, dated February 2, 1886, setting forth that said tract was "conveyed by said State of Minnesota to the St. Paul and Pacific Railroad Company by deed bearing date February 22, 1877, as appears by the records of this office." It is sought by the railway company to have this bare certificate admitted as evidence of a character sufficient to overturn and revoke said decision of December 26th last.

It is a general and well established rule governing in the production of evidence, that the best evidence of which the case in its nature is susceptible must be produced. Under this general rule it is held that "A title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence of which the case is susceptible; and its non-production would raise a presumption that it contained some matter of apparent defeasance." (1 Greenleaf's Evidence, Sec. 32.) This would also be termed *primary* evidence; the general rule in relation to which is that "Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is, in general, admitted," (ib., 34); Ord *v.* McKee (5 Cal., 515).

And in regard to certificates given by persons in official station, the general rule is: A certificate that a certain fact appears of record is not sufficient. The officer must certify a transcript of the entire record relating to the matter. That is, "if the person was bound to

record the fact, then the proper evidence is a copy of the record duly authenticated." (Greenleaf, Secs. 435–493–513.)

The statute of the State of Minnesota relative to this question of evidence provides that the State Auditor shall keep a record "of all lands owned or held by the State in trust for schools, public buildings, internal improvements and for all other purposes, and shall keep a true record of all patents, deeds and conveyances of such lands made by the State; *which record, or a transcript therefrom properly authenticated* shall be received as legal evidence in all courts and places within the State."

It is thus made manifest that the said certificate filed with the motion for review is not *legal evidence* to prove the fact which it was intended that it should prove; and cannot be considered sufficient to cause a revocation of said decision of December 26th last. It is merely a certificate that a certain fact appears of record in the land office of Minnesota; and is not, nor does it purport to be, a transcript of the record relating to the matter under consideration. It could not be received as evidence in Minnesota under the statute above quoted, neither could it be received as evidence under the general rules of evidence which obtain in courts wherever the common law is taken as the basis of jurisprudence; and I see no reason why an exception to these general and well established rules of evidence should be made in the administration of the law by this Department, especially where extensive property rights are involved and where the relaxation of the rule may work injustice to a settler. For although the company in the prosecution of this motion for review is quite ably represented, the settler is not heard at all; and under such circumstances it becomes necessary that more than ordinary care in the examination of the case should be exercised by the Department.

But, even if this certificate could be considered as legal evidence to prove the matter it was intended to prove, I am of opinion it should not be considered here for the first time upon a motion for review. It professes to be what in legal parlance is known as *newly discovered evidence* material to the issue. Now, it is assumed for the sake of the argument, that there may be cases in which newly discovered material evidence would be sufficient to authorize a review and revocation of a former departmental decision; but, as will be shown herein, this case is not one of that number.

Rule 76 of Practice provides that motions for review or reconsideration of the decision of the Secretary of the Interior will be allowed in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

It is a principle well settled in American jurisprudence that a new trial at law will not be granted on the ground of newly discovered evidence, when it appears that the evidence was or ought to have been known to the party before the trial, and no sufficient excuse is shown

for not producing it. (Hilliard on New Trials, p. 495, and authorities there cited.) And it must be shown affirmatively that the evidence could not have been discovered by due, ordinary, or reasonable diligence. Thus where the newly discovered evidence is all of record, as a deed recorded in a public office, and might have been found by reasonable search, it is universally held that it furnishes no grounds for a new trial (ib., 498 and cited cases). And it is no excuse that counsel were unadvised of the newly discovered evidence, unless the party were also unadvised of it.

In the case at bar, if there be a deed of record in the Minnesota land office of date February 22, 1877, conveying this land from the State to the railway company above named, I am unable to conceive that the company was ignorant of its existence or of its contents when the original case was heard. It was a matter of which it was bound to take cognizance; and a failure so to do renders it so culpably negligent that no indulgence should be shown it now. It had its day in court and a fair opportunity to present its case in a proper manner and furnish its best evidence; but, if its present allegations be true, it chose then to go to trial neglecting to produce as matter necessary to substantiate its claim, its best record or documentary evidence of which it must have been aware or could have ascertained by exercising the slightest degree of diligence. It gives no reasonable excuse for not producing this evidence at the proper time, and should now be bound by the former adjudication.

For the reasons above stated, the decision sought to be revoked is adhered to, and the motion for review and revocation is denied.

HOMESTEAD CONTEST—PRACTICE.

LITTEN *v.* ALTIMUS.

Though the informant may err in the method of his attack, the government will not be precluded thereby from taking advantage of information brought out in the progress of the trial.

Acting Secretary Muldrow to Commissioner Sparks, May 6, 1886.

The case of Michael L. Litten *v.* Lucy Altimus, as presented by the appeal of Miss Altimus from the decision of your office, rendered January 27, 1885, is before me for consideration.

October 4, 1880, Miss Altimus made homestead entry of the E. ½ of the SW. ¼ and E. ½ of NW. ¼ of Sec. 6, T. 11 N., R. 7 W., Lincoln, Nebraska, and the present contest against the same was begun October 12, 1883, on the charge "that the said Lucy Altimus has wholly abandoned said tract, and changed her residence therefrom for more than six months since making said entry, and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law."

The day fixed in the notice for hearing was November 19, 1883, but, in order that the evidence might be taken by deposition, the case was continued by stipulation until December 3, 1883, at which time it was submitted. The local office held that the evidence did not warrant cancellation of the entry and hence advised the dismissal of the contest. Your office, however, finding that Miss Altimus had "merely attempted to keep up a show of residence on the land, by going thereon once or twice in six months and remaining over night," reversed the decision of the local office, and held the entry for cancellation.

In 1880, Miss Altimus bought the possessory right to this land from one De Vore, paying therefor the sum of $400. The cultivation and improvements of the claimant are ample, and the only question at issue is with respect to her residence. It seems that after the sale to Miss Altimus and her entry, De Vore continued to reside upon the land until the following spring, the claimant placing in the house a few articles of household use.

In June, 1881, one Reed moved into said house and lived there until March, 1883, during which time the claimant kept therein a bed, trunk and a few chairs, and occasionally visited the premises, staying over night not to exceed five or six times. Prior to October 12, 1883, I am satisfied that she had not established a *bona fide* residence upon said tract, but was, in fact, living with a married sister, whose home was about a half mile distant.

In September, 1883, Litten began a contest against this entry on the same charge as herein, and the hearing was fixed for October 9, 1883, but was continued by stipulation for the purpose of taking depositions. Such evidence was duly taken, but on said day of October 9 the local office, holding the stipulation not specific enough to justify a continuance, and the parties not appearing, dismissed the suit; whereupon the contestant, on October 13th, asked a re-instatement of the case, which being refused, he brought the present suit. In the meantime, however, the claimant had gone upon the land, and at the hearing herein had been there continuously from October 12, 1883.

On this condition of facts, the contestee now urges that by the dismissal of the first suit, and failure to appeal therefrom, the matters therein involved were finally determined as between the parties hereto.

Granting that the better practice on the part of the contestant would have been to have followed up by appeal the refusal to reinstate the first contest, it does not follow that the government is precluded from taking advantage of information brought out in the progress of a trial, where the merits of the case are for the first time examined.

It being apparent that the claimant was endeavoring to secure title under the homestead law by keeping alive a fictitious residence on the land, while having her actual home elsewhere, and that such a condition of affairs had existed for three years following entry, the decision of your office is affirmed.

PRE-EMPTION—DECLARATORY STATEMENT.

ELLEN BARKER.

The filing of a declaratory statement is not made a condition precedent to the exercise of the pre-emptive right, but is merely a protection against the claims of subsequent settlers.

Secretary Lamar to Commissioner Sparks, May 7, 1886.

I have considered the case of Ellen Barker, on appeal from your office decision of October 30, 1884, rejecting her application to enter under her pre-emption proof the E. ½ of SE. ¼, Sec. 6, and E. ½ of NE. ¼, Sec. 7, T. 151, R. 53, Grand Forks, Dakota.

The facts in the case are as follows: On April 19, 1882, one Charles Barker, husband of appellant, filed declaratory statement for said tract, made settlement, and maintained his residence with his family thereon until November 26, 1882. About the middle of April, 1883, Barker deserted his wife and has not since returned to her. On the 26th of said April, Mrs. Barker, with her three minor children, resumed her residence on said land, occupying the house built by her husband, and so continued her residence for the space of six months. During that time she cultivated about six acres in oats and garden produce. At the end of said six months, Mrs. Barker offered final proof, and on a protest by one Thomas Mooney, a homestead entryman, a hearing was had December 10, 1883. Said hearing disclosed the facts above set forth. The local officers recommended the cancellation of Mooney's homestead entry and the acceptance of Mrs. Barker's proof. Mooney failed to appeal, and your office, by letter of July 28, 1884, after an examination of the testimony, canceled said entry of Mooney, and rejected the final proof of Mrs. Barker, because she had failed to file a declaratory statement, at the same time authorizing her to file for said tract. In pursuance thereof Mrs. Barker on August 22, 1884, filed a declaratory statement, alleging settlement June 1, 1882, for the land in question, and on October 6, 1884, offered her second proof, setting forth the facts alleged in the former. The local officers rejected the proof because, while "it shows a residence of more than six months on the land, does not show a residence since the date of filing her D. S." On her appeal, your office by letter of October 30, 1884, affirmed the action of the local officers. On application for review of said decision of October 30, Mrs. Barker alleges, in an affidavit, that she went to Grand Forks in the winter of 1883–4, for the purpose of sending her children to school, and to get work for herself; that about March, 1884, her house on said land was stolen, and that having no means to build another, she did not return to the tract; "that by reason of poverty she must live in town where she can earn a living, which she could not do upon the land;" that she was on the land several times during the summer and fall of 1884, attending to seeding, harvesting, and threshing the crop grown

thereon, and that when there she staid with the neighbors, as she had no house of her own. Her proof shows the total improvements to consist of two wells, twelve acres cultivated to crop and a garden, valued in all (including the house built by her husband) at $200.00. She further alleges in said affidavit that "unless she is allowed to make proof upon the time she already resided there she will lose the land and what she has put into it in improvements, as it will be impossible for her to *again reside upon the tract.*"

It is admitted that Mrs. Barker has complied with the provisions of the pre-emption law in all respects, except in the matter of filing her declaratory statement at date of her first offer to make final proof and payment. But the filing of a declaratory statement is not made a condition precedent to the exercise of the pre-emption right (Sec. 2259, R. S.); it is merely a protection against the claims of subsequent settlers Johnson *v.* Towsley, (13, Wall., 72). Wherefore she had then done all that the law required her to do to entitle her to entry as against the United States, and her entry should have been allowed; but that it was erroneously refused must not be permitted to prejudice her rights Lytle *v.* Arkansas, (9 Howard, 314); Wirth *v.* Brannon, (98 U. S., 118), and you will therefore please have her entry made of record to take effect as if made on November 1st, 1883.

The decision appealed from is reversed.

MINERAL APPLICATION—ABSTRACT.

DANIEL CAMERON ET AL.

The abstract of title required under the regulations, must be brought down to the date of filing the application, or as close thereto as is reasonably practicable.

Secretary Lamar to Commissioner Sparks, May 12, 1886.

I have before me the papers in the matter of mineral entry No. 1042, Helena, Montana, made December 8, 1883, by Daniel Cameron and others on the Dernier lode, on appeal from that part of your decision of July 27, 1885, requiring a completion of their abstract of title.

The record shows that the abstracts of title were made in the counties of Silver Bow and Deer Lodge, being dated June 16 and 18, 1883, respectively, and that they were filed with the application in the local office on July 2, 1883. They show that the claim was originally located by said Cameron and one Moffet, and that the interest of the latter passed through various mesne conveyances to James Thompson and Robert W. Nicholson, the present co-applicants with Cameron. Entry having been allowed, when the papers came before your office for revision, several amendments were required by said decision, one of them being "a duly verified continuation of the abstract of title down to and including July 2, 1883." To this the claimants except, on the ground

that it will cause additional expense, and that it is not in conformity with the practice existing at date of the application. That the requirement will entail additional expense upon them is not a sufficient reason for vacating it, if in fact it was in accordance with the established practice. The latter, therefore is the only point for consideration.

I find from Sections 32 and 34 of the mining regulations, approved by the Department on October 31, 1881, that, where possessory rights in a mining location have passed out of the original locator or locators, an abstract of title, tracing possession from the original locators to the applicant, is required to be filed with the application for patent. The propriety of this requirement, which has been in force since it was made, is not questioned by the appellants here, and does not require present consideration. Its purpose is obvious, to wit, that the government may be assured that the applicant for patent is in lawful possession of the claim. It is clear to my mind that the regulation contemplates an abstract of title brought down to substantially the date of the application; otherwise it would not furnish the desired evidence of possession. Complying with it in a rational manner, and endeavoring in good faith to furnish the information desired, an applicant should, and ordinarily does, file his application within the shortest reasonable period after date of the abstract. And where, through negligence or other cause, he fails to do this, I think it eminently proper that he should be required to supplement the showing by a continuation of the abstract to date of the application.

Such, I am informed, has been the practice of your office for some years, and it was recently brought to my attention in the circular instructions which I approved on December 15, 1885. Said circular contains the following regulation:

"The evidence specified in paragraph 32 of circular N. of October 31, 1881, will still be required. Where the abstract of title is dated prior to the date of filing the application for patent, a continuation of the abstract to and including such date must be filed before the applicant is allowed to make entry."

Transmitting this circular for my approval was a letter from your office, explanatory thereof, from which is made the following extract relating to the point now under consideration:

"These abstracts are brought down to various points, rarely to the date of application, and sometimes stopping several days or several months before such date. The present practice of this office is to require, where the entry has been made by the applicant, a continuation of the abstract to and including the date of filing the application, when it has not been brought down as nearly as practicable to that date. In determining what is 'practicable,' the facility of communication between the Recorder's office and the Land Office is taken into consideration."

This extract explains the manner in which your office has enforced the said requirement, now embodied in said circular, and it was ap-

proved by me with the intention of sanctioning its enforcement in the same manner thereafter. That is to say, the requirement is that the abstract of title must be brought down to the date of filing the application, or as close thereto as is reasonably practicable; and, when this has not been done, the applicant shall be required to furnish a supplementary abstract, brought down to and including the date of application, prior to allowance of entry. The regulation could not be enforced literally in the majority of cases, because the abstract is usually made at a distance from the local office and it must be filed with the application; and it should not be enforced in an illiberal manner, because it is designed to afford the government a reasonable assurance of the applicant's right of possession and not to vex him by unnecessary expense or delay.

In the case at bar, the period intervening between the date of the abstract and that of the application is some two weeks, while that between the execution of another paper and its filing on the latter date is but four days. I infer, therefore, that the abstract of title was not filed within a reasonably short period after it was made, and such appears to be the judgment of your office. This conclusion of fact is not controverted by the appellant, and it is therefore to be regarded as correct. In view of it, the requirement of a supplemental abstract was proper, and your decision is affirmed.

CONTESTANT—ACT OF MAY 14, 1880.

KRICHBAUM *v.* PERRY.

The preference right of entry, accorded under the second section of this act, is not defeated because the facts, showing the illegality of the contested entry, were of record in the General Land Office.

Secretary Lamar to Commissioner Sparks, May 12, 1886.

I have considered the case of Elizabeth Krichbaum *v.* George S. Perry, as presented by the appeal of the former from the decision of your office, dated March 7, 1885, dismissing her contest against Perry's homestead entry No. 6557, of the SW. ¼ of Sec. 34, T. 99 N., R. 64 W., made November 29, 1882, at the Yankton land office, Dakota Territory.

The record shows that an affidavit of contest was filed by Miss Krichbaum against said entry on August 21, 1883, and the hearing was set for November 8, 1883. Due service was made, and at the time and place set for the trial of the cause both parties appeared, and, by consent, the case was continued until December 1, 1883.

The contestant, on November 8, 1883, filed an amended affidavit, with the consent of the claimant, who waived any further notice, charging

that said entry was not made in good faith. The trial was had before the district land officers, who found upon the evidence submitted, both parties being present and represented by counsel, that the claimant had not acted in good faith, and that said entry should be held for cancellation. Upon appeal, your office found that said entry was illegal and should be canceled, because, at the date thereof, the claimant was living upon his pre-emption claim, embracing the NE. ¼ of Sec. 4, T. 98, same range, upon which he subsequently made final proof and payment. Said decision further held that, because the evidence showing the illegality of the entry appears of record in your office, it was not necessary to prove the facts and procure the cancellation of said entry, and, therefore, the contestant is not entitled to the preference right of entry given to successful contestants by the second section of the act of Congress approved May 14, 1880 (21 Stat., 140). This position can not be maintained. It by no means follows that, because the records of your office show that said entry was illegal, no contest was necessary or that without a contest the facts would ever be properly presented and the entry canceled. Besides, the second section of said act makes no exception to the general rule that "in all cases where any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead or timber culture entry he shall be notified by the register of the land office of 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."

There is no restriction or limitation as to the kind of evidence that the contestant may submit. The government may not say to the contestant your evidence and land office fees will be received, and upon that evidence the entry will be canceled, but you shall not receive the benefit secured by said section of said act. The claimant concedes that said entry was made while living upon his pre-emption claim, upon which he afterwards made proof and payment, but alleges that said entry was made by the advice and with the consent of the district land officers, with a full knowledge of all of the facts. This statement is denied by the district land officers.

It will be quite unnecessary to consider the testimony relative to the charge of abandonment and change of residence. It is clear that under the following decisions of this Department said entry must be canceled, and the contestant allowed the preference right of entry. Smith *v.* Brandes (2 L. D., 95); Condon *v.* Arnold (ibid, 96); Campbell *v.* Moore (3 id. 462); Bishop *v.* Porter (3 L. D., 103); Austin *v.* Norin (4 L. D., 461).

The decision of your office is modified in accordance with the principles herein announced.

PRE-EMPTION—JOINT ENTRY.

BENOIT *v.* NICHOLS.*

Both parties having in good faith continuously claimed the tract long prior to survey, a joint entry is directed.

Secretary Lamar to Commissioner Sparks, May 12, 1886.

This controversy involves the NE. ¼ of SW. ¼ of Sec. 9, T. 3 N., R. 7 E., Deadwood, Dakota Territory.

The township plat was filed in the local office September 27, 1881. September 30, 1881, Stephen Nichols filed pre-emption declaratory statement No. 1330 for the NE. ¼ of SW. ¼ and W. ½ of SE. ¼ of Sec. 9, and the NW. ¼ of NE. ¼ of Sec. 16, township and range aforesaid, alleging settlement July 7, 1877. October 1, 1881, Pierre Benoit filed pre-emption declaratory statement No. 1346 for the entire SW. ¼ of said section 9, alleging settlement April 1, 1877.

It appears from the decision of your office that Nichols gave notice of his intention to make final proof, and that Benoit thereupon, on February 26, 1884, filed affidavit of contest, charging bad faith in Nichols and a prior occupation of, and residence upon, the tract in dispute by contestant. This affidavit recites that the said proof of Nichols was to be made March 24, 1884; no further mention is made in reference to it, however, and it does not appear to have been made at that time. The hearing was had commencing April 7, 1884, and on June 12, 1884, the local office rendered a decision in favor of Benoit. Upon appeal your office, on February 24, 1885, affirmed the action of the local office, and held that as Benoit made the prior settlement upon the tract in dispute, he should be allowed the right to enter the land embraced in his pre-emption filing; and thereupon held the said pre-emption declaratory statement of Nichols as to the tract in dispute for cancellation.

From said decision the appeal under consideration was taken, and I am of opinion well taken. A careful examination of the record transmitted convinces me that your office erred, both as to the facts and as to the law in the case.

The evidence shows that in July, 1877, Nichols came into the Elk creek valley and located a tract of one hundred and sixty acres or thereabouts. The township not being then surveyed, he staked off his land, locating the lines thereof as near as he was able to do, where the subdivisional lines of the township were expected to run. His land as thus located and staked off included nearly all of the forty acres in dis-

* The Department, January 21, 1884, dismissed a former contest between these parties, for this land, holding the same premature, because final proof had not been offered by either party. (2 L. D. 583.)

pute, and included the land upon which Benoit in March following built his cabin and afterward other outbuildings. The south line of Nichols' claim was south of Benoit's house. Near the north line of this forty acre tract is Elk creek. Nichols' first house built in 1877 was north of the creek, and, as it transpired upon the completion of the government survey, not on this forty acre tract, in fact not upon any of the land now claimed by him. It is in evidence, however, that Nichols in the fall of 1877 had cut hay upon this land, and had cleared off some brush, rubbish, etc., from the place where Benoit afterwards built his house. In the fall of 1878 Nichols built a new house south of the creek upon this forty acre tract, and has continued to reside there ever since. His improvements on this land are estimated as worth from $600 to $700.

It is further in evidence that Nichols notified Benoit when the foundation of his (Benoit's) house was laid in March, 1878, that it was upon land claimed and settled upon by him (Nichols); and that Benoit then declared that it made no difference to him, he would build there anyhow.

Both parties continued to live upon the same subdivision until some time in the early part of 1883, when Benoit removed his house and main improvements to another subdivision of his claim. He has continued to assert claim to the tract, however, and cultivated a part of it every year since his settlement. Nichols has also cultivated a part of the tract every year since his settlement, and has constructed an irrigating ditch, running through the central part of the tract.

From the above recitation of facts, which are all that are necessary in the decision of this case, it will be seen that both parties have been continuously claiming the tract in dispute for a long time prior to survey; that Nichols made the first settlement, but that Benoit built the first cabin upon this particular tract; and that there are no evidences of bad faith on the part of either party herein, for although Benoit was notified while building his house that he was upon land claimed by Nichols, it does not appear that he was aware of that fact when he chose his location and commenced to build.

I am of opinion, therefore, that this case comes within the intent and spirit of section 2274 of the U. S. Revised Statutes, relating to joint entries.

You are therefore directed to notify the parties that they will be allowed to make joint entry of the tract in controversy. And if either party shall refuse to consent to this award in a reasonable time, say ninety days, the other party may be allowed to make entry of the tract.

The decision appealed from is modified accordingly.

TIMBER CUTTING ON THE PUBLIC DOMAIN.

CIRCULAR.

Commissioner Sparks to registers and receivers, and special agents, May 7, 1886.

By virtue of the power vested in the Secretary of the Interior by the 1st section of the act of June 3, 1878, entitled, "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations are hereby prescribed:

1st. The act applies only to the States of Colorado and Nevada, and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana, and other mineral districts of the United States not specially provided for, and does not apply to the States of California or Oregon, nor to the Territory of Washington.

2d. The land from which timber is felled or removed, under the provisions of the act, must be known to be strictly and distinctly mineral in character and more valuable for mining than for timber or for any other purpose or use.

3d. No person who is not a resident citizen or bona fide resident of the State, Territory or mineral district, shall be permitted to fell or remove timber from lands therein.

4th. Timber felled or removed shall be strictly limited to building, agricultural, mining and other domestic purposes.

All cutting of such timber for sale or commerce is forbidden. But for building, agricultural, mining and other domestic purposes each person authorized by the act may cut or remove for his or her own use, by himself or herself, or by his, her or their own personal agent or agents only.

5th. No person will be permitted to fell or remove any growing trees of any kind whatsoever less than 8 inches in diameter.

6th. Persons felling or removing timber from public mineral lands of the United States must utilize all of each tree cut that can be profitably used, and must cut up and remove the tops and brush—or dispose of the same in such a manner as to prevent the spread of forest fires.

7th. These rules and regulations shall take effect June 1, 1886, and all existing rules and regulations heretofore prescribed under said act, inconsistent herewith, are hereby revoked.

Approved:

L. Q. C. LAMAR,
Secretary.

TIMBER CULTURE CONTEST—RELINQUISHMENT.

PICKETT *v.* ENGLE.

The sale of relinquishment, if proven, warrants the cancellation of the entry, and where the relinquishment is filed pending contest on said charge it is held in aid of such suit.

Secretary Lamar to Commissioner Sparks, May 10, 1886.

I have considered the case of Ira Pickett *v.* Joshua D. Engle, on appeal by the latter from your office decision of November 13, 1884, holding for cancellation his timber culture entry for the NW. ¼ of Sec. 30., T. 17 S., R. 19 W., Wa-Keeney, Kansas, and allowing that of Pickett to go to record.

On July 30, 1881, one Annetta Pickett made timber culture entry for said tract, and on May 3, 1884, executed a relinquishment therefor, and sold the same to said Engle.

On July 10, 1884, Ira Pickett, a son of Annetta Pickett, instituted contest against the entry of the latter, alleging that she "has sold and relinquished all her right, title and interest in said land." Hearing was set for August 19 ensuing. On August 7th Engle filed said relinquishment and was thereupon allowed to enter said tract under the timber culture law. On August 19, 1884, Pickett applied to enter the tract under the same law, and the local officers refused his application, because of the prior entry of Engle. Pickett appealed. It is alleged that Pickett knew of all the circumstances attending the sale of said relinquishment, and that he endeavored to purchase said relinquishment from Engle prior to the initiation of the contest, and these allegations are not denied. However this may be, Pickett had a perfect right to bring the contest, and the allegation, if proven, was a sufficient reason for cancellation. Green *v.* Graham (7 C. L. O., 105). Engle held the relinquishment for more than two months before contest. Shortly after the initiation of the contest he filed it. He states that a death in his family and pressure of business prevented him from filing the relinquishment at an earlier date.

After an examination of all the facts it the case, I am of opinion that Engle filed said relinquishment as a result of the contest of Pickett. Said decision is therefore affirmed.

RAILROAD RIGHT OF WAY—ACT OF MARCH 3, 1875.

PLEASANTS *v.* DAKOTA CENT. RY. CO.

The approved plat, showing the right of way and location of station grounds, being filed in the local office, entries thereafter made of land crossed by said line of road, are subject to the right of the company under said act, and due reservation will accordingly be made in patents that issue on such entries.

Commissioner McFarland to register and receiver, Aberdeen, Dakota, September 23, 1884.

On January 16, 1880, the Hon. Secretary of the Interior approved a map filed by the Dakota Central Railway Company under the provisions of the Act of March 3, 1875, (18 Stat., 482,) granting to railroads the right of way through the public lands of the United States, showing the line of route of said company's road from a point in township 111 N., range 62 W., to a point in township 124 N., range 63 W., passing through the NW. ¼ of Sec. 27, T. 122, R. 64 W.

A copy of said map was transmitted to the local officers at Springfield and Fargo, Dakota, January 22, 1880, (the lands, through which the line shown thereon passes, being then in their districts), with instructions to mark the line of the road, upon the proper township plats and records, and thereafter in disposing of any tract cut by said line the claim to which was initiated subsequent to the receipt by them of the copy of the approved map, to note upon the entry papers the fact that such entry is allowed, subject to the right of way of said road. The copy of said map was received at the Springfield and Fargo offices, February 4, 1880.

On May 13, 1880, the Hon. Secretary also approved a plat showing a tract of twenty acres in the SW. ¼ NW. ¼ and NW. ¼ SW. ¼, Sec. 27, T. 122 N., R. 64 W., selected by said Dakota Central Railway Company for station purposes, under the act of 1875. A copy of said plat was transmitted to the local officers at Watertown, Dakota, May 22, 1880, (said township being then in that district,) with instructions to mark the location of said station upon the proper plat and thereafter in disposing of the land covered by the station, if the claim thereto was initiated subsequent to the receipt by them of the copy of the approved station plat to note upon the entry papers the fact that such entry is allowed subject to the right of said company to use and occupy twenty acres for station purposes. The copy of the approved station plat was acknowledged by the local office June 8, 1880.

June 1, 1883, Charles H. Pleasants filed homestead entry No. 1481 for said NW. ¼ of Sec. 27, T. 122 N., R. 64 W., alleging settlement on the same date and on January 8, 1884, made proof and payment, certicate No. 2936, issuing thereon.

I am now in receipt of a letter from W. K. Mendenhall, of this city, attorney for the railway company, in which he asks that the proper

notes be endorsed upon Mr. Pleasants' entry papers, which were issued with reference to the right of way in order that patent may issue with a reservation of such right of way, and right of occupancy for station purposes.

As Mr. Pleasants did not settle until more than three years after the map showing the line of the road was received at the local office and the receipt of the station plats also acknowledged, the land was clearly subject to the right of way and right of occupation for station purposes, his entry papers should have been issued with an endorsement to that effect. As this was not done, the proper notes will be made upon the papers and patent will issue with a reservation of the company's rights.

NOTE.—The above decision was affirmed by Secretary Lamar, May 12, 1886.

SWAMP LAND—FIELD NOTES OF SURVEY.

THE STATE OF LOUISIANA.

The field notes of survey constituting the basis of adjustment, the State is not entitled to lands described therein as "low prairie, not arable," "not fit for cultivation," "bottom lands," "low ground," or "low wet lands."

Commissioner Sparks to Hon. Van H. Manning, November 21, 1885.

I am in receipt of your letter of the 17th ultimo, referring to the claim of the State of Louisiana for certain lands under the swamp land grant, and asking that a rule be established in this office that whenever it is found that lands are described in the field notes of survey as "low prairie not arable;" "not fit for cultivation;" "bottom lands;" "low wet lands," such tracts be regarded as swamp or overflowed within the meaning of the grant. I have also heard Hon. R. G. Ingersoll, atty., etc., for Louisiana, orally, in relation to the matter.

The act of September 28, 1850, under which this request presumably arises, grants to the respective States lands that were at that date "swamp and overflowed lands, *made unfit thereby for cultivation.*"

The State made field selections at an early date of the swamp lands claimed under its grant. Recently upon representation that there were still remaining unselected, lands that were of the character granted, the application of the State to have the adjustment of the grant proceeded with and completed by an examination of the field notes of township surveys was acceded to. The rule adopted by this office in making such adjustment is, that where the field notes show the lands to be "swamp and overflowed," and "made unfit thereby for cultivation," such tracts are to be listed to the State. But the swampy character as defined by the statute, must be clearly shown. If not so shown, the tracts cannot be so classed. In judging by field notes of the character of land that would determine the title of the State, that character must be unmistakably shown. It cannot be guessed at. The

phrases found in field notes and referred to in your letter do not necessarily, nor even presumptively, indicate or imply, "swamp and overflowed lands made unfit *thereby* for cultivation."

Lands may be "low prairie," without being swampy; they may be "not arable," for other causes than being swamp and overflowed; they may be "not fit for cultivation," for many reasons. "Bottom lands" are liable to be agricultural lands of the best quality needing no reclamation to make them cultivable; "low grounds" can not be presumed to be swampy, and "low wet grounds," even, are not necessarily "swamp and overflowed and made unfit thereby for cultivation," but on the contrary it often occurs that the surveyor describes land as "low wet grounds" and then proceeding further with the same survey, comes to lands which he designates as "swamp," thus showing that he discriminates between "low wet lands" and "swamp lands." The reason for this may be found in the fact that in Louisiana the surveys were generally made in the fall and winter when owing to the rains of that period lands would be found "wet" and so described, that were not in any sense swampy.

Your request to have all lands listed to the State that are described in the field notes by any of the above named phrases, must be denied.

The rule in force from the beginning has been that "a State having elected to take swamp land by field notes and plats of survey is bound by them, as is also the government." (See Secretary's decision, 1 Lester, 553; id., 571; C. L. O., 149, and September 19, 1879.)

The State of Louisiana elected under her own motion to have the swamp grant finally adjudicated in this manner. The State is bound and also the government, by what the field notes disclose. If they show swamp lands, such lands will be listed.

NOTE.—The foregoing decision was affirmed by Secretary Lamar, May 12, 1886.

RAILROAD STATION GROUNDS—ACT OF MARCH 3, 1875.

NEW MEXICO & SOU. PAC. R. R. CO.

Though the power of approval rests with the Secretary of the Interior, it is proper that the plats showing selections under said act should be submitted through the General Land Office, accompanied with its recommendation thereon.

By the terms of said act each station taken thereunder must represent its particular section of ten miles, and cannot be selected in any other section. But selections thus made may be disapproved by the Department, where it appears that the true intent of the act has not been observed.

Secretary Lamar to Commissioner Sparks, May 13, 1886.

The New Mexico and Southern Pacific Railroad Company filed in your office five plats showing selections by said road of station grounds on the line of its road, under act of March 3, 1875, which you refused to

submit for my approval, upon the ground that they were not selected in conformity with the act which provides that not more than twenty acres for station purposes shall be selected for each ten miles of road.

The road, by its counsel, have now filed in the Department said plats for my approval, together with a copy of your letter assigning your reason for refusing to submit them.

While the act of March 3, 1875, confers upon the Secretary of the Interior alone the power of approval, it is proper that such plats should be submitted for my approval through your office, with your recommendation thereon.

The act of March 3, 1875 (18 Stat., 482), grants to railroads the right of way through the public lands, and "Also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

It is contended by counsel for the road that a proper construction of this act is to give twenty acres for station purposes for such number of stations as will not exceed in the aggregate one station for each section of ten miles of road, the distance being a mere basis of computation. They further insist that such has been the construction of that act by the Department heretofore, citing the opinion of Commissioner McFarland in submitting certain station plats of the Denver and Rio Grande Railroad, in a like case, in which he says: "It might be contended that this would require the stations to be located ten miles or more apart. In my opinion, however, the intention of the act was to grant one station for each and every ten miles of road, irrespective of the distance between the same." The Secretary concurred in this view by approving the plats.

I do not agree with counsel that the opinion cited supports the construction contended for.

The act of March 3, 1875, is not a grant of land by quantity, but simply a grant of the use of twenty acres of land for station purposes for each ten miles of road. The words "to the *extent* of one station for each ten miles of road" clearly means that there cannot be more than one station within each section of ten miles of road allowed under the act.

This road has three hundred and seventy-two miles constructed, and is therefore entitled to thirty-seven stations. The necessary effect of the construction contended for by counsel for the road is, that these thirty-seven stations may all be located within any section of ten miles of said road.

While I concur in the opinion of Commissioner McFarland, cited by counsel, that the intention of the act was to grant one station for each and every ten miles of road, *irrespective of the distance between them*, I am also clearly of the opinion that each station granted under the act must represent its particular section of ten miles, and can not be se-

lected in any other section of ten miles. That is, within the first ten miles a station ground may be selected at any point within said section, and for the next ten miles another station may be given to be located within the limits of said section, in the same manner as the first; and other stations may in like manner be made for each additional section of ten miles to represent said section in its particular locality. But such selections are still subject to approval by the Secretary of the Interior, who may refuse to approve a selection although made within the limits of a ten-mile section, if such selection in his judgment is not made according to the true intent and spirit of the act, which contemplates that the convenience of the public should be considered, as well as the interest of the road.

The fact that said stations are located upon the rejected Nolan grant does not affect the right of the road.

You will therefore advise Messrs. Britton & Gray, attorneys for said road, that their right to selections for station purposes under said act will be adjusted in conformity to the above ruling, and if selections of one station within each ten miles of road have been made they will be affirmed, although ten miles may not intervene between said stations, unless there is some good reason why such selections should not be approved; all of which you will report to the Department.

ATTORNEYS—CIRCULAR OF JULY 31, 1885.

WILLIAM E. MCINTYRE.

The requirement of written authority on the part of attorneys appearing for alleged fraudulent entrymen, as provided in said circular, is within the authority of the Department.

Said rule however is not retroactive, and where an appearance in the usual form was noted prior to the promulgation of said rule the attorney was duly entitled to recognition.

Secretary Lamar to Commissioner Sparks, May 18, 1886.

I have before me the application of J. E. Robinson, attorney of the above entryman, of June B. Noyes, grantee, and Hazen & Clements, mortgagees, to have the papers relating to the cancellation of said entry certified to me for such action as I may deem proper.

It appears that on July 5, 1882, William E. McIntyre made homestead entry No. 10,992, for the NW. ¼ of Sec. 30, T. 135 N., R. 63 W., Fargo, Dakota Territory, and on June 5, 1883, made final proof and cash entry thereon, receiving final certificate No. 6362. On August 14, 1883, on report of Special Agent McIlvain, said entry was canceled for fraud by your predecessor. On October 22, 1883, June B. Noyes made application, through the local office, for re-instatement of said entry, alleging that McIntyre, on June 5, 1883,—the date of cash entry certificate—sold and

conveyed said tract to him. Noyes, for the sum of $600; and further that McIntyre thereafter left the Territory, and his residence was unknown, although diligent search has been made to ascertain the same. Noyes, alleging that he was an innocent purchaser, asked that a hearing be ordered; which was done by letter of April 4, 1884. It was stated in said letter that the right of Mr. Noyes to appear at the hearing in his own behalf, as purchaser, would not be recognized, but that "he may appear in behalf of the entryman and submit whatever proof he may have, showing McIntyre's good faith in entering the land and his compliance with the law."

Hearing was had on April 30, 1885, at which appeared "F. B. Morrill, for J. E. Robinson, attorney for William E. McIntyre, June B. Noyes, Hazen & Clements" and also Special Agent McIlvain. Morrill, the attorney, stated that he had no testimony to offer, and declined to cross-examine. Testimony was then taken, and further proceedings had and transmitted to you; and on September 25, 1885, you informed the register and receiver that no reason had been shown why the entry should be re-instated and the former action in the case would be adhered to.

On November 2, 1885, an appeal from your said action was filed in the local office by James E. Robinson, attorney for "Wm. E. McIntyre, entryman, June B. Noyes, grantee, Hazen & Clements, mortgagees, appellants." This appeal, and the accompanying specification of errors, were duly forwarded to your office on November 9, 1885, and on April 13, 1886, you returned the same to the local officers, stating that they were "irrelevant;" directing that the local officers "will in future in all cases of entries held for cancellation, on special agents' reports, observe the rules laid down in circular of July 31, 1885, strictly, and call the attention of the attorneys to the last paragraph thereof."

The last paragraph to said circular is: "Attorneys appearing for alleged fraudulent entrymen will be required to file the written authority of the claimant for such appearance."

There can be no doubt about the right of this Department "to prescribe rules and regulations governing the recognition of . . . . attorneys representing claimants," as will be seen by the act of July 4, 1884 (23 Stat., 101).

The requirement that, in this class of cases, attorneys appearing on the side of the entrymen should produce written evidence of their authority to do so, is clearly within the power conferred by the statute, if not theretofore possessed by the Department.

But this case is not within the requirement of said rule.

It appears from your letter of April 13, 1886, to the register and receiver at Fargo, that at the hearing held before them, by your direction, on April 30, 1885, "appeared F. B. Morrill for J. E. Robinson, atty. for Wm. E. McIntyre, June B. Noyes, and Hazen and Clements." It thus seems that before the approval of the circular of July 31, 1885, the appearance of Mr. Robinson as attorney for the parties named, including

Noyes, the purchaser, had been entered in the case and was of record, through the action of his associate, Mr. Morrill. It is not shown that this appearance has in any way been withdrawn and is now sought to be entered anew.

Said rule of July 31 was not intended to be and is not retroactive, and the appearance of Mr. Robinson being already in the case prior to that date, he had a right to prosecute the appeal without producing written evidence of his authority to act in the premises.

I therefore hold that you erred in refusing to entertain and forward the appeal filed by him. It follows that his present application has been properly made, and on receipt hereof you will certify the papers in said case to me for further action, notifying proper parties hereof.

PRACTICE—SECOND CONTEST.

BROWN *v.* ZEAKE.

An affidavit of contest may be received, but no action should be taken thereon, pending final disposition of a prior suit involving the same land.

Acting Secretary Muldrow to Commissioner Sparks, May 19, 1886.

I have considered the case of Ralph L. Brown *v.* Henry Zeake, on appeal by the former from your office decision of February 25, 1885, dismissing his contest against the homestead entry of Zeake for the S. ½ of NE. ¼ and NE. ¼ of SE. ¼ and lots 2 and 3 of Sec. 17, T. 118, R. 73, Huron, Dakota.

At the initiation of said contest the tract was involved in a contest between two pre-emptors, both alleging settlement prior to the date of Zeake's entry. Both parties had offered final proof and the case was pending before your office.

Under such circumstances, the contest affidavit ot Brown should have been received, and held to await the final disposition of the pending case. That case was decided by this Department February 5, 1885, (Zinkand *v.* Brown, 3 L. D., 380). The decision appealed from is modified in accordance with the opinion herein expressed.

HOMESTEAD—SETTLEMENT—ENTRY.

PELERIN *v.* CUTGERS.

Two settlers having gone upon a quarter section in pursuance of a contract that one should make entry for the whole tract and convey one half thereof to the other upon securing patent, the entry thus made is canceled, and each allowed to enter the land embraced within his settlement.

Acting Secretary Muldrow to Commissioner Sparks, May 20, 1886.

I have considered the case of Percelin Pelerin *v.* Celestine Cutgers, widow of Julien Cutgers, as presented by the appeal of the latter from the decision of your office, dated February 25, 1885, holding for cancel-

lation homestead entry No. 5,849, made January 14, 1881, of the NE. ¼ of Sec. 27, T. 10 S., R. 3 E., by said Julien Cutgers, at the New Orleans land office, in the State of Louisiana.

The record shows that contest was initiated on Feb. 4, 1884, upon a charge of illegality, personal service of notice of the hearing was made upon the defendant, testimony was taken by deposition, in accordance with the rules of practice, and, upon the testimony submitted, the register and receiver dismissed the contest, upon the ground that said entryman, "as far as the rights of the government are concerned has fully complied with the law in all of its requirements up to the day of his death, and since his widow has continued to live on said tract and cultivate the same, and that the testimony tending to show that the said Cutgers (now deceased) swore falsely in making his application is based solely upon an accomplice, who now seeks to be benefited by her own turpitude."

Upon appeal your office found that the deceased entryman had said tract surveyed in the spring of 1880, and divided the same by a line east and west; that it was agreed by the parties that the expenses of said survey and of making a homestead entry of the whole tract should be divided equally between the two parties; that said entryman, in consideration of the money so paid, agreed, upon obtaining the patent for the whole quarter-section, to convey to the contestant said north half of said tract; that pursuant to such agreement the contestant and the entryman moved on to the land, the contestant moving on to the N. ½ of said quarter-section one day prior to the occupation of the S. ½ of the same quarter-section by said entryman; that the contestant paid her part of the cost of said survey and expenses of entry, amounting to sixty dollars, and has continued to live upon said tract up to the time of said hearing, and that the improvements made by the contestant upon said N. ½ of said tract are worth from $900 to $1,000.

Upon the foregoing state of facts, your office held that the said agreement was proven; that under the act of Congress approved May 14, 1880 (21 Stat., 140), the contestant, being a *bona fide* settler on said N. ½ of the NE. ¼ at date of said entry, was entitled to the preference right of entering the same; that she entered into said agreement in perfect good faith and through ignorance of her rights; that the defendant should not be permitted to appropriate the fruits of the toil and labor of the contestant on the N. ½ of said tract, which is her only home, and that said entry so far as the same covers the N. ½ of said tract must be held for cancellation, and the contestant allowed to enter the same.

It is clear that the widow of the deceased entryman can claim nothing by virtue of said entry, if the same was illegal in its inception, nor can the contestant claim any right by virtue of her own illegal contract with said entryman.

It appears that both parties to said agreement were ignorant—the entryman not being able to write his name—and if ignorance can be

pleaded in the one case, as an excuse for making an illegal contract. can the same excuse be denied to the other party to said contract which rendered said entry illegal?

It is clear that the entry having been made in violation of Section 2290 of the Revised Statutes, must be canceled for illegality, and, while the contestant can not set up her own illegal contract to acquire the whole quarter-section, she should be permitted to enter the N. ½ of said tract, if she makes application for the same within the time required by law. And likewise the defendant should be allowed to make entry of the S. ½ of said tract, upon making the proper application within the time required by law. Such disposition of the case will preserve the equities of both parties, and not permit either to acquire the fruits of the toil and labor of the other contrary to law. Johnson *v.* Johnson (4 L. D., 158); Geer *v.* Farrington (ibid., 410).

Said decision of your office is modified accordingly.

MINERAL APPLICATIONS FOR SCHOOL LANDS.

H. S. BACK.

Order of March 24, 1885, suspending action on mineral applications for school lands in the Territories, vacated.

Secretary Lamar to Commissioner Sparks, May 20, 1886.

April 21st ultimo, this Department referred to you "for consideration and speedy report," a motion, made by Charles and William B. King, of this city, on behalf of certain of their clients claiming an interest in the land hereinafter mentioned, for an order upon you "to take up and consider the claim of H. S. Back, for the NW. ¼ of Sec. 36, T. 16 N., R. 55 E., Miles City district, Montana, as coal land, notwithstanding Department order of March 24, 1885."

Your report, dated 29th ultimo, is now before me, in which you state that the case referred to is in the mineral division of your office, and arose upon an appeal by Back from the action of the local office refusing his coal declaratory statement for the W. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of said section; and that the reason why proceedings were suspended in the matter was that you considered the case as falling within said Department order of March 24, 1885.

Said order reads as follows: "You are hereby directed to suspend all action relative to mineral applications for school land in the Territories until further instructions." Afterwards, to wit, on July 30, 1885, in reply to your inquiry of June 10th of that year, respecting the scope of said order, you were advised "that the same was not intended to refer to claims initiated upon unsurveyed lands, which may possibly by subsequent survey be found to be in a school section, but was directed to a possible question as to whether or not mineral lands as such are exempt from the reservation of 16th and 36th sections for the support of schools."

The plat of this township was filed June 12, 1882.

You state that upon the paper presented as a coal declaratory statement, the register and receiver made the following indorsement:

"May 7, 1883. Presented this day with a tender of the fees of $3.00, but refused, for the reason that by section 1946, R. S. U. S., there appears to be no exceptions in reserving sections 16 and 36 in Montana for school purposes in each township, except in cases where, after the passage of the act of March 3, 1873, the parties are found in actual occupancy of the lands at the date of survey. Second, All of the tract applied for, excepting the NE. ¼ of SW. ¼ said section 36, is embraced by S. H. B. S. locations, R. & R., Nos. 1, 2 and 4."

From the foregoing recitation of facts, it is seen that under said departmental orders you were properly justified in suspending action on Back's declaratory statement. It was a mineral application for school lands in one of the Territories, made nearly a year after the filing of the township plat, and was therefore clearly within the said order of suspension. Consequently, were I of opinion that the best interests of the government and of the public generally would be advanced by a further suspension of cases of this kind, I should at once dismiss the motion before me.

But, believing that the circumstances and probable necessities which caused the promulgation of said order of March 24, 1885, do not now exist, and that the public good will not be advanced by a further continuance of the same, I have concluded that it will be unwise administration to delay longer action upon the cases embraced within its terms.

Said order is therefore revoked, and you will proceed in the regular order to consider and dispose of the cases suspended by it.

The vacation of the order aforesaid is not intended as an expression of opinion by the Department on the questions involved in these cases.

CONTEST—RELINQUISHMENT—APPEAL.

BINEGAR *v.* BARNSBACK.

Rights lost through the refusal of the local office to act upon a relinquishment and failure to appeal therefrom, may not be set up to defeat an intervening adverse claim.

Acting Secretary Muldrow to Commissioner Sparks, May 20, 1886.

I have considered the case of Andrew J. Binegar *v.* Julius A. Barnsback, Jr., involving the SE. ¼ of Sec. 11, T. 100 N., R. 68 W., Yankton, Dakota, on appeal by Binegar from your office decision of November 24, 1884, dismissing his contest against homestead entry, No. 7332, made by said Barnsback.

The record shows that said homestead entry was made April 19, 1883, and that it covered the tract described. The decision appealed from

recites that about July 13, 1883, a relinquishment was presented at the local office, and application made by one Dallas Wamsley to make homestead entry for said tract. The register and receiver declined to receive said relinquishment and consequently refused to cancel Barnsback's entry and allow Wamsley to make entry.

The next step taken by Wamsley was to transmit to your office the relinquishment mentioned, at the same time presenting his statement of the case. This it appears, as stated by him in his argument on appeal, he did on March 20, 1884. April 16, 1884, your office transmitted said relinquishment to the local office with instruction to cancel Barnsback's entry thereon, unless satisfied that it was fraudulent. Pursuant to this instruction, the register and receiver, by letter of July 12, 1884, informed your office that they had canceled said entry and notified Wamsley that he would be allowed thirty days within which to make entry.

July 22, 1884, said cancellation was duly noted on the records of your office.

It further appears that Binegar, the appellant, on the 11th of January, 1884, filed affidavit of contest in the local office against Barnsback's homestead entry, charging abandonment.

After notice by publication, hearing was had in said contest March 20, 1884, and the register and receiver found in favor of the contestant and recommended the cancellation of Barnsback's entry. The record with the finding in said contest was transmitted to your office, under date of June 23, 1884.

In January, 1885, the local office transmitted also application filed in behalf of Binegar, asking a reconsideration of instruction of your office contained in its letter of April 16, 1884, under which Barnsback's entry was canceled on relinquishment and the preference right of entry awarded to Wamsley.

Prior to this, however, your office had by letter of November 24, 1884, to the register and receiver, decided that as Barnsback's entry "had been relinquished some time prior to the commencement of said contest, and presented to you, upon which said entry has been canceled, with right of entry to said Wamsley, as above stated, which right relates back to the time when application was first made, therefore said contest is dismissed."

In other words, that decision in effect is that the relinquishment of Barnsback should be held to take effect as of the date (July 13, 1883,) when it was presented at the local office by Wamsley, who had purchased it, although it was not then accepted, and was not in fact accepted and the entry canceled thereon until after your office letter of April 16, 1884, transmitting it and directing cancellation. From that decision Binegar's appeal is before me for consideration.

On the facts as found in this case, I am unable to concur in the decision appealed from. Wamsley having presented the relinquishment of Barnsback, together with his application to enter, and the local

office having declined to receive or act upon the relinquishment, he had his remedy in appeal from that refusal, and had he appealed, his rights would have related back to the date of tender of relinquishment and application to enter. He did not appeal, but held said relinquishment until March 20, 1884, more than eight months after his tender of the same to the register and receiver, and their refusal to accept it, when he transmitted it to your office directly and asked its intervention in his behalf.

In the meantime, appellant had filed his contest against Barnsback's entry, and before the receipt of the relinquishment at your office, hearing had been had on the contest and a finding had been made by the local office in favor of appellant. This, in my judgment, completely barred Wamsley. Whatever rights might have been accorded him, notwithstanding his dilatory and irregular action, had no other right intervened, were lost through his laches by the intervention of Binegar's contest. That contest was prosecuted to a successful issue by Binegar after due proceedings had, and a judgment was rendered in his favor by the local office. All this was done before Wamsley moved in the matter of the refusal to receive from his hands the relinquishment of Barnsback. On the facts as they appear of record, Binegar is undoubtedly entitled to the benefit which the law gives a successful contestant, and, as against him, Wamsley has gained no right under the law to the land in question.

Your predecessor's decision is accordingly reversed.

CONTESTANT—RIGHT OF ENTRY.

CLEVELAND *v.* BANES.

On the cancellation of an entry after contest the land is open to settlement or entry, subject only to the preference right of the successful contestant.

Secretary Lamar to Commissioner Sparks, May 21, 1886.

The land involved in this case is the S. ½ of SE. ¼ of Sec. 7, and N. ½ of NE. ¼ of Sec. 18, T. 19 S., R. 28 E., Gainesville, Florida, and was embraced in homestead entry No. 2901, made by Nathan H. Banes January 25, 1876.

Said entry was canceled by letter "C", of your office, dated April 21, 1883, as the result of a contest by one A. S. Matlock, and the cancellation was noted on the books of the local office May 16, 1883. On the following day Oliver C. Cleveland (the appellant herein) appeared at the local office and offered to file soldier's homestead declaratory statement for this land, but was refused because of the preference right of entry existing in Matlock by virtue of the contest aforesaid; but no endorsement was made upon this rejected application as required by Rule 66 of Practice. Some time thereafter, within the thirty days allowed Matlock to exercise his preference right of entry, Cleveland's

attorney again offered to file the soldier's declaratory statement, together with Matlock's waiver of his preference right of entry, but it was refused as before with no endorsement thereon.

Said thirty days expired Saturday evening, June 16, 1883. On the morning of the 18th, as soon as the office was opened for business, Cleveland's attorney again appeared and filed the homestead declaratory statement for said land, and at the same time the attorney for Banes filed the application of Banes to purchase the land under the act of June 15, 1880 (21 Stat., 237). The local office allowed Banes to purchase per cash entry No. 5323, and rejected Cleveland's said application. Cleveland thereupon appealed from the action of the local office in rejecting his several applications before mentioned. The record does not show the date of filing said appeal, but it having been allowed by your office, and no objection having been made as to its not having been filed in time, it is presumed that it was regular in all respects.

Your office on February 7, 1885, affirmed the action of the local office allowing Banes to purchase as aforesaid, and rejecting Cleveland's said application. Cleveland's appeal from said decision of your office is now before me for consideration.

I am of opinion the appeal under consideration was well taken. Upon the cancellation of the entry of Banes, and the notation of the same upon the records of the local office May 16, 1883, the land embraced therein was open to entry and settlement, subject only to the superior rights of Matlock, the successful contestant. It follows, therefore, that the application of Cleveland presented May 17, should have been received. Further, the local office in rejecting it should have endorsed upon it the reason of its rejection in accordance with Rule 66. But if there were any question as to receiving the application of Cleveland May 17, surely there could have been none when it was presented the second time, together with Matlock's waiver of his preference right of entry.

The several refusals of the local office to receive Cleveland's said application were error, and he should not be prejudiced thereby.

The decision of your office is therefore reversed, the application of Banes to purchase under the act of June 15, 1880, is refused, and Cleveland's application to file his soldier's homestead declaratory statement will be received.

CHEROKEE NATION—COURTS OF RECORD.

Courts of the Cherokee Nation recognized as courts of record under the same rule as applied to courts in the States and Territories.

Secretary Lamar to the Commissioner of Indian Affairs, May 22, 1886.

I have considered your report of the 19th instant on the subject of recognition of courts of the Cherokee Nation in the Indian Territory as courts of record in the matter of execution of contracts under the provisions of Section 2103 of the Revised Statutes of the United States.

This Department will recognize as courts of record such courts of the Cherokee Nation in the Indian Territory as possess the powers which entitle courts of the States and Territories to be recognized as courts of record.

The former ruling of this Department on this subject contained in letter of October 27, 1883, to your office, is so far modified as to conform hereto.

PRACTICE—SERVICE OF NOTICE.

MILLER *v.* KNUTSEN.

Service of notice by publication set aside where by ordinary diligence personal service could have been obtained.

Acting Secretary Muldrow to Commissioner Sparks, May 24, 1886.

This controversy relates to the E. ½ of NE. ¼ and N. ½ of SE. ¼ of Sec. 32, T. 115 N., R. 45 W., 5th P. M., Redwood Falls, Minnesota; and arose upon contest initiated by William Miller April 24, 1884, against a timber culture entry of this land, made June 5, 1877, in the name of Knut Knutsen.

The affidavit of contest charged that the entryman "has not complied with the timber culture law in the matter of planting five acres of trees, seeds, nuts, or cuttings, the third year after said entry, or planting five acres of trees, seeds, nuts, or cuttings, the fourth year after said entry, and has not cultivated said tract." It was further alleged in the affidavit of contest that "After using due diligence, it has been found impossible to make personal service upon the claimant." Thereupon, notice was given by publication and a hearing ordered for, and had, June 20, 1884, upon which day claimant's attorney appeared specially and moved the dismissal of the contest, for the reason that claimant has been a resident of township 114, range 37, Minnesota (about forty eight miles from the land in contest), for eighteen years, and was well known to the persons who reside in the immediate vicinity of the land in controversy, which fact could have been ascertained, had the contestant used due and proper diligence. An inspection of the registry return receipt shows the letter containing the notice of trial to have been received by claimant June 12, 1884, (eight days before trial).

The local office overruled the motion to dismiss, to which claimant excepted, and the case then went to trial. Upon the testimony taken, the local office recommended the cancellation of the entry, and an appeal was taken.

Your office, on February 14, 1885, reversed the action of the local office, on the ground that the evidence did not show a failure to comply with the law. Your office refused to pass upon the points raised as to the sufficiency of notice.

In my opinion the first point necessary to be decided is, as to the character and sufficiency of the notice, inasmuch as this goes to the question of jurisdiction. Houston *v.* Coyle (2 L. D., 58). If claimant was not notified properly, objection to the jurisdiction was not waived by his proceeding to trial after his motion to dismiss had been overruled. United States *v.* Raymond (4 L. D., 439), and cited cases.

Rule 10 of Practice (old) requires that personal service of notice shall be given in all cases when possible, if the party be resident, and shall consist in a delivery of a copy of notice to such person. And Rule 12 provides that "Notice may be given by publication alone, only when it is shown by affidavit of the contestant, and by such other evidence, as the register and receiver may require, that personal service can not be made."

In construing these rules, this Department, in the case of Parker *v.* Castle—on review—(4 L. D., 84), following the established departmental rulings and practice, held:

"It has been uniformly held that it must affirmatively appear that proper efforts had been made to obtain personal service before publication could be resorted to, and that the acts relied upon must be stated that thereon it might be determined whether they showed the exercise of due diligence in that behalf, upon which showing alone, publication could be made."

This doctrine has been cited with approval in numerous cases, and is not now an open question. In the case at bar the notice was clearly insufficient. Under the existent state of facts, the notice of contest should have been served personally, as required by Rule 10, as it is evident that the contestant by using ordinary, reasonable diligence could have ascertained the whereabouts of the entryman. In fact, it would seem that he did not care to inform himself further than to ascertain that the entryman at one time received his mail at Sacred Heart, Renville county, Minnesota, when by ordinary diligence he could have easily ascertained that to have been his post-office address for at least eighteen years.

For the above reasons, the objection to the service is, in my opinion, well taken. The decision of your office is modified accordingly, and the service is hereby set aside, with leave to contestant to proceed with his contest by a new notice, provided he applies to do so within a reasonable time, say thirty days, from receipt of notice of this decision. In the event of his refusal or failure to so proceed, the contest will be dismissed.

This conclusion is reached without reference to the testimony taken at the hearing, because such testimony was illegally taken and should not be given any effect. Milne *v.* Dowling (4 L. D., 378).

PRACTICE—RIGHT OF AMENDMENT.

FISHER ET AL. *v.* SALMONSON.

Where, in ignorance of the death of the entryman, suit was brought against him to cancel the timber culture entry standing in his name, and a motion to dismiss said contest, for the want of the proper party defendant, was filed by the sole heir of said entryman, the contestant was allowed to amend and proceed against said heir.

Secretary Lamar to Commissioner Sparks, May 25, 1886.

I have before me the case presented by the appeal of Ernest B. Fisher from the decision of your office, dated January 27, 1885, wherein his contest against the timber-culture entry of Anton Salmonson for the NW. ¼ of Sec. 22, T. 144 N., R. 55 W., Fargo, Dakota, was dismissed.

Salmonson made this entry December 6, 1880, and one Daniel O'Hara began a contest against the same April 12, 1883, charging that said entryman "has failed to cultivate, or cause to be cultivated on said land five acres on or before December 7, 1882, or within the second year of said entry, contrary to the act of June 14, 1878." With the affidavit of contest O'Hara filed his application to enter said tract under the timber culture law.

Among the papers transmitted there is nothing to show that notice was ever issued under the charge thus laid, and it is stated in the decision now on appeal that "The record does not show that any citation was ever issued by you, or that any notice of the contest was ever served or attempted to be served."

June 6, 1883, Fisher appears to have filed contest papers with a view to the procurement of the cancellation of said entry, filing application to enter, and charging non-compliance with the law; also alleging that said Anton Salmonson, the entrymen, was dead, and accordingly making Peter Salmonson, the sole heir of the deceased, the defendant in such proceedings. On the same day Peter Salmonson by his attorneys, who made special appearance for that purpose, filed a motion to dismiss the contest of O'Hara *v.* Salmonson, alleging as grounds therefor: "That this contest is brought against Anton Salmonson instead of his heirs," and setting forth that said motion was "based upon the affidavit of Ernest B. Fisher, hereto annexed, who asked to be allowed to contest, and tenders his application to enter and his fees."

In response to this motion O'Hara filed affidavits, showing that said Anton Salmonson, being a non-resident, he (O'Hara) had no knowledge of his (Salmonson's) death until after bringing said suit; that the said Peter Salmonson was acting in bad faith and endeavoring to sell the relinquishment of said contested entry, and was only prevented therefrom by the pendency of his (O'Hara's) contest; for which reasons O'Hara asked that the "Heirs of Salmonson" be substituted as defend-

ants and his rights under said contest recognized from the date of filing the same.

July 6, 1883, the local office, acting on the said motion to dismiss, sustained the same and dismissed the contest, on the ground that the suit should have been against the heirs of said deceased entryman. July 26, 1883, your office on the examination of the record, as sent up by the district office, found that said O'Hara had not filed an application to enter with his affidavit of contest, and for that reason dismissed his contest and at the same time directed the local office to proceed with Fisher's contest. August 1, 1883, the local office advised your office that O'Hara did file an application to enter with his contest, which it seems was not transmitted with the papers in the case.

Subsequently, and after considerable correspondence in order to ascertain the facts as to notice given of the decision of July 26, the local office was directed to give formal notice of said decision. Such notice was given October 2, 1884, and O'Hara filed his appeal from said decision December 3, 1884.

Inasmuch as the decision of July 26, 1883, had been rendered upon an imperfect record, your predecessor held that it was not necessary to submit O'Hara's appeal, and on January 27, 1885, decided that as O'Hara had, through ignorance of Anton Salmonson's death, named said entryman as the defendant, but had in fact applied to enter the land at the time of bringing such contest, he should be allowed to file an amended affidavit of contest, dating his right back to the time of making said application. In support of this ruling, the cases of Fergus *v.* Gray (2 L. D., 296,) and Adair *v.* Neal (3 Id., 95,) were cited; and Fisher's contest was dismissed on the ground that as a stranger to the record he had no right to be heard herein.

The right of amendment was properly allowed, but it rests upon a broader principle than that laid down in your predecessor's decision.

The general rule in the courts is that where the rights of the parties are not prejudiced by allowing amendment, or where there is a substantial subject matter, or remedy sought, the case will not be dismissed, but due time and terms given for such amendment. Kirstein *v.* Madden (38 Cal., 163); Seevers, admr., *v.* Hamilton *et ux.* (11 Iowa, 71); Hiram T. Hunter (2 L. D., 39).

In the case of Randolph *v.* Barrett (16 Peters, 141), wherein the defendent, being sued as administrator, plead that he was in fact executor, the court said: "The power of the court to authorize amendments, where there is anything on the record to amend by, is undoubted. In this case the defendant admitted by his plea, that he was the person liable to the suit of the plaintiff, but averred that he was executor and not administrator. Whether he acted in one character or the other, he held the assets of the testator, or intestate, in trust for the creditors; and when his plea was filed it became part of the record, and furnished matter by which the pleadings might be amended."

As in that case, so in the case now at bar, the motion to dismiss supplied information upon which the amendment could be properly founded, for while said motion pointed out that the suit was not directed against the proper party, it at the same time disclosed the true defendant.

Again, contests like this to clear the record partake largely of the nature of actions *in rem*. So where the land is properly described in the affidavit of contest, and application to enter, certainty as to the subject matter of the contest is secured and the foundation laid for subsequent action. Under this view of the case the application to enter may be properly considered in aid of the right claimed by the contestant to show that the land was in fact subject to such application. McCall *v.* Molnar (2 L. D., 265).

The entryman was a non-resident and information concerning him does not appear to have been readily obtainable in the vicinity of the land; hence want of diligence can not be alleged as against the application of O'Hara to amend.

The decision of your office is therefore affirmed.

PRACTICE—SUFFICIENCY OF NOTICE.

McTIGHE *v.* BLANCHARD.

Under Rule 35 of Practice thirty days notice of the hearing before the local office is sufficient, though an earlier date may be named in said notice for taking testimony elsewhere.

Secretary Lamar to Commissioner Sparks, May 25, 1886.

I have before me the case of Martin McTighe *v.* Chester H. Blanchard, involving homestead entry No. 22063 upon the SE. ¼ of Sec. 3, T. 11, R. 58, Watertown, Dakota, on appeal by McTighe from your predecessor's decision of January 5, 1885, dismissing his contest.

The record shows that Blanchard made said entry on September 19, 1882, and that at said date he was residing on a pre-emption claim, where he continued to reside until April 30, 1883, when he made final proof and entry. On April 18, 1883, McTighe filed affidavit of contest alleging abandonment and change of residence for six months next prior thereto. Notice was issued on April 24 following, fixing June 25 as the date of hearing, and ordering that testimony should be taken before a certain clerk of court on June 18, 1883. Service of notice was made upon Blanchard in person on May 22, 1883. At the appointed date the contestant took testimony before the clerk of court, but the contestee failed to appear; and on said testimony the local officers held that the contest charges were sustained and that the entry should be canceled. When the case reached your office, it was held that "due notice" had not been given the entryman; and thereupon the contest was dismissed as aforesaid.

Rule of Practice 7 (formerly Rule 8) provides that "at least thirty-days' notice shall be given of all hearings before the register and re-

ceiver." Rule 42 provides that the testimony shall be taken before the register and receiver "Upon the day originally set for hearing, or upon any day to which the trial may be continued." Rule 35 empowers the local officers to direct that testimony shall be taken before some other officer "at a time and place to be fixed by them and stated in the notice of hearing"; and that, "on the day set for hearing at the local office, the register and receiver will examine the testimony . . . . . and render a decision." I am of opinion that under these rules the day of the "hearing," of which the thirty days' notice must be given, is the day set for the appearance of the parties before the local officers and for examining the testimony taken elsewhere than at the local office, and not the day on which said testimony is to be taken. Under Rule 35 of Practice of December, 1880, oral testimony could be taken only before the register and receiver, and not earlier than on the day set for hearing, except by consent of the parties. In December, 1882, the rule was amended to substantially its present form, so as to authorize the testimony to be taken on an earlier day in the discretion of the local officers; requiring that the date and place thereof should be indicated in the "notice of hearing," but not providing any limitation as to time or changing the terms of Rule 7, and therefore leaving said rule applicable only to the day of appearance before the local officers.

In the case now before me, it appears that more than thirty days' notice of the "hearing before the register and receiver" was given, though there was but twenty-seven days' notice of the day of taking testimony before the clerk of court. Your office ruled that this was not due notice, but for the reasons above stated said ruling must be held to be erroneous. Having received proper notice of the date of trial, it was incumbent on the contestee, under existing rules, if he felt himself aggrieved by the shortness of the period prior to the day set for taking testimony, to move the designated officer for an extension of time, which on a proper showing should have been granted. Having failed to do this, he may not now be heard to allege that any injury resulted to him from this cause.

Blanchard has stated in an affidavit accompanying his appeal that he made application for a new entry on this tract prior to the initiation of McTighe's contest; but it seems, from your predecessor's said decision, that such an application is not on file, and as it is not otherwise satisfactorily proved, the effect of such an application need not now be considered.

The evidence in this case shows the abandonment alleged. The excuse offered by Blanchard for continuing to reside on his pre-emption claim after making the homestead entry, to wit, that the local officers misled him by an erroneous opinion of the law, upon a hypothetical case stated to them, is, as against a contestant, manifestly insufficient. His entry should therefore be canceled.

The said decision is reversed.

TIMBER CULTURE—BREAKING BY FORMER CLAIMANT.

DONLY *v.* SPRING.

In case of special defense the burden of proof shifts to the defendant.

If credit is allowed on account of breaking and planting done by a previous entryman it must appear that such work has been properly utilized and followed up by the subsequent claimant.

Acts done toward curing default, after the initiation of contest, will not be considered as affecting the case made out by contestant.

Secretary Lamar to Commissioner Sparks, May 25, 1886.

I have considered the case of Bernard Donly against Charles G. Spring, involving the latter's timber culture entry of April 6, 1882, for N. ½ of NW. ¼, SE. ¼ of NW. ¼, and NE. ¼ of SW. ¼ of Sec. 8, T. 96, R. 55, Yankton, Dakota Territory.

On June 16, 1883, contest was initiated by Donly, against said entry, alleging that the entryman "has failed and neglected to break or plow any land on said tract during the first year after making said entry." September 10, 1883, hearing was had, at which both parties submitted testimony; on the consideration of which the register and receiver, on March 25, 1884, dismissed said contest; this judgment, on appeal, was affirmed by your office; and on Donly's appeal from that affirmance the case is now before me.

The testimony shows, and it is conceded by the attorney for Spring, that from the time of his entry, on April 6, 1882, until after the initiation of the present contest, no work whatever was done by him upon said tract. By way of avoidance, it is claimed in behalf of Spring, that prior to the time of his entry more than five acres had been broken on the tract and planted to trees by the former entryman, whose improvements and possessory right had been bought; and that the reason Spring did not plow or cultivate said tract the first year after entry was because there were trees there, which he did not wish to plow up. The register and receiver thought this defense fully made out, and in that view you concurred. In behalf of the appellant, it is insisted that in so doing error was committed as to both the law and facts of the case.

In considering the case it is to be observed that in setting up this special defense, Spring takes upon himself the burden of proof in relation thereto; and it becomes necessary to first examine the testimony submitted by him in support thereof.

That testimony utterly fails to sustain the defense set up, further than to show that Patrick Smith, the father-in-law of Spring, made timber culture entry of the tract in 1878, and broke during the two years thereafter five or six acres; Smith and his wife testify to the cultivating and planting of the whole of said breaking in trees during the second year, and the replanting of the dead trees the third year.

But the greatly preponderating weight of the testimony on the other side shows that nothing had been done on the land beyond the mere breaking of the five or six acres during the existence of Smith's entry, which terminated in April, 1882, when the same was relinquished and Spring, the son-in-law, made entry. This testimony is given by parties, who, living very close to the land, some adjoining it, some passing over it every week for years back, all with abundant opportunities of observation, speak positively from knowledge thus obtained, and who are, so far as the record discloses, impartial and without bias or interest. These witnesses—some five or six in number—assert most positively that no cultivation or planting whatever was done after said breaking, except that some corn was planted on the sod the first year. And they testify that during the four or five years between the time of the breaking and date of initiating contest, the land had grown up in weeds and grass, and was really in a worse condition for cultivation than if it had been left unbroken. No trees were on the place, unless two switches, about three feet high, may be considered as such.

On this state of facts said judgment must be reversed. In the class of cases in which this Department has held that a timber culture entryman might avail himself of breaking or planting upon the land at the time of his entry, for the purpose of showing compliance with the law, it was never intended that the mere naked fact that at some anterior date there had been five acres broken upon the tract would excuse the entryman from his obligation under the law to break five acres the first year.

In the case of Gahan *v.* Garrett, (1 L. D., 154),—considered the leading case on this subject—a prior entryman had broken about forty acres on the tract and planted seven acres to trees. Garrett replanted the missing trees, broke other land, and planted more trees, so that at the date of contest he had, counting the planting of the prior entryman, ten acres of trees planted, cultivated and in a thrifty condition. Secretary Kirkwood held that Garrett could avail himself of the land "plowed and planted by his vendor, provided he replowed, cultivated and replanted the same land.

So in the case of Clark *v.* Timm, (4 L. D., 175), it was shown at the time the latter made his entry ten acres had been broken on the tract. He did nothing on the land the first year after entry; but in the second year he replowed and planted to crop said ten acres, finishing the same prior to the initiation of contest. Here the default was cured prior to contest, and Acting Secretary Muldrow held that contest would not lie.

In the case under consideration, the contest was initiated some fourteen months after entry by Spring, and up to that time he had confessedly done nothing, and the breaking of the former entryman, done some four or five years before, was from neglect in such condition that the land had gone back to its former wild condition. It seems to me it would be a plain defiance of the letter and spirit of the timber culture

law to allow Spring under the circumstances any credit for the so-called breaking of the former entryman, which Spring had in no way sought to utilize, save for the purpose of evading the requirements of the law. There is other testimony to show that one month after initiation of contest Spring caused to be replowed some of the old breaking, and also new breaking to be made, so that at the time of the hearing in September, 1883, there were ten acres broken upon the land. This testimony I have not considered, because, if default existed at the time Donly filed his contest, accompanied by his application to enter the land under the homestead law, he is entitled to make entry of the tract; and the subsequent action of Spring, seeking after contest to cure his own default, cannot deprive the contestant of the statutory right of entry given to him.

Having found that such default existed at the initiation of the contest, I reverse said judgment, sustain Donly's contest, and direct the cancellation of Spring's entry.

PRACTICE—PARTIES IN INTEREST.

R. M. SHERMAN ET AL.

A mortgagee, after final entry, is entitled to be heard on appeal, in case the entry is subsequently held for cancellation.

The case of R. M. Chrisinger cited and distinguished.

Secretary Lamar to Commissioner Sparks, May 25, 1886.

I am in receipt of your letter of the 16th ultimo, transmitting application of William J. Johnston, attorney for R. M. Sherman *et al.*, for an order of certification under Rules 83 and 84 of Practice, of the papers in the case of James O. Payne's pre-emption cash entry No. 10,897, made November 15, 1884, for the NW. ¼ of Sec. 7, T. 150 N., R. 55 W., Grand Forks District, Dakota Territory.

Payne, subsequently to said cash entry, executed mortgage on the tract described to R. M. Sherman *et al.* Your office, by decision of November 16th last, held said entry for cancellation, on the ground that the entryman had acted in bad faith and had not complied with the law. Sherman appealed. The right of appeal being denied by your office, he then made application for certification of the case under Rules 83 and 84 of Practice. No appearance has been entered in the case in behalf of Payne; and Sherman, in his affidavit accompanying his application for certification of the case states that, although diligent search has been made, he is unable to ascertain the whereabouts of said Payne.

Your office letter to the register and receiver, dated March 15th last, denying Sherman's right to appeal, said:

Your attention is invited to the case of R. M. Chrisinger (4 L. D., 347); and the appeal is returned herewith, that you may advise Mr.

Sherman that "parties in interest" have no standing in the case, unless the entryman appears, either in his own behalf or by attorney. "Parties in interest" may assist the entryman to sustain the validity of his entry; but they will not be allowed to intervene independently in such cases as the one at bar.

If the above extract is to be understood as indicating that your holding as set forth in the concluding portion thereof is based upon the decision of the Department in the Chrisinger case, I have to state that said case was not intended to involve the inference thus drawn therefrom. On the contrary, in discussing the portion of the Chrisinger case bearing upon this point, I referred specifically to the case of C. P. Cogswell (3 L. D., 23); and in the Cogswell case it was explicitly asserted (see p. 29): "This Department has recognized the right of purchasers to appear and be heard upon the question whether the entryman has complied with the law (Whitaker *ex rel.* Garrison *v.* Railroad). Such a purchaser would be *a proper if not a necessary party in appeal* to cancel a patent alleged to have been procured by fraud."

True, your office decision intimates that the applicant might have a standing in the case at bar if the entryman appeared also. But in the Whitaker case the entryman did *not* appear; on the contrary, when notified to do so, he peremptorily "declined to assume the cost and trouble of a rehearing, stating in a letter to the register and receiver that he had long since sold the land, and refused to appear at the trial." And in that (Whitaker) case, the very point now under consideration being directly in issue, it was decided that the purchaser from an entryman "may be heard *ex rel.* to maintain the validity of the entries embracing the lands purchased" (2 C. L. L., 919).

For the reasons herein set forth, I am of the opinion that in the present case Sherman is a party in interest, having such a standing in the case that he may and should be heard *ex rel.* to maintain the validity of the entry in question. You are therefore directed to certify the proceedings in the case to the Department under Rules 83 and 84 of Practice.

CIRCULAR OF JULY 31, 1885, *AMENDED.*

Commissioner Sparks to registers and receivers, and special agents, May 24, 1886.

Paragraph 2 of circular of July 31, 1885, relative to hearings in cases of entries held for cancellation on special agents' reports, is amended so as to read as follows:

"Hereafter when an entry is so held for cancellation the claimant will be allowed sixty days after due notice in which to apply for a hearing to show cause why the entry should be sustained."

Approved:

L. Q. C. LAMAR,
Secretary.

PRIVATE CLAIM—RESURVEY DENIED.

THE DEWEES GRANT.

The boundaries of the grant as established being well known to the claimants thereunder at the time of the survey, and when subsequent settlement was made by others upon lands excluded therefrom, the grant claimants are estopped from asserting that the grant in fact embraced the lands so excluded and disposed of under the settlement laws.

Secretary Lamar to Commissioner Sparks, May 29, 1886.

On May 4, 1804, Enrique White, military governor of the Spanish province of Florida, in pursuance of an application and survey previously made, granted to the heirs of Andrew Dewees a certain tract of land in said province lying on the St. John's River and San Pablo Creek, containing 2300 acres. The survey, made by the Spanish authorities, which is known as the Eastlake survey, described said tract as follows

"The first line runs south 195 chains, beginning on the bank of a marsh of the river St. John's, and ends at a stake marked with a cross on the edge of the sea beach. The second line runs west 130 chains, begins at said stake and ends at a pine tree with the same mark on the bank of a marsh of San Pablo Creek, bounding the lands of Don Juan McQueen. The third and fourth lines, which form the front, run, the one along the edge of a marsh of San Pablo Creek, and the other along the edge of a marsh of the St. John's River."

After the acquisition of Florida by the United States, the heirs of Andrew Dewees filed their petition to the board of commissioners, under the act of Congress of May 8, 1822, praying for confirmation of a grant of 2633 acres, which was subsequently amended, asking for confirmation of a tract containing 2290 acres, described and bounded according to the certificate of survey heretofore mentioned, known as the Eastlake survey. Upon the amended application was rendered this decree—

"The board having ascertained the above to be a valid Spanish grant (i. e., of the tract of land lying *on* the St. John's river, and *bounded by said river*, as stated in said petition), and that the heirs of Andrew Dewees are now and have been previous to the concession of the province in actual occupancy and cultivation of the same, do confirm it accordingly."

This decree of confirmation was rendered September 26, 1825, and was confirmed by Congress February 8, 1827.

Townships 1 and 2 south, Range 29 east, in which this claim is situated, were surveyed by Henry Washington, U. S. deputy surveyor, under a contract entered into November 20, 1833, which survey was approved by the surveyor general of Florida. In the survey of said township the boundaries of the private claim of Andrew Dewees were also established, this being the first United States survey of that grant. By this survey the southern bank of the St. John's river was made the

northern boundary of the grant, which includes the present site of the town of Mayport. The San Pablo creek was made the western boundary; the sea beach was made the eastern boundary, and the southern boundary running west by north embraced a small strip of section 9, and excluded small strips of sections 5 and 6 on the southern boundary of said sections. In 1850, A. M. Randolph, United States deputy surveyor, made a re-survey of township 2, and his survey conformed substantially to that of Washington.

On June 20, 1857, (as appears of record in Vol. 2, Public Land Records, page 143,) John Westcott, surveyor general of Florida, referring to these surveys, makes the following certificate: "The foregoing record of the plat and description of survey, its connection with the public lands and history of the private claim of the heirs of Andrew Dewees, is this day approved."

The lands south of said grant were surveyed by Washington in 1834 and 1835 as public lands and disposed of by the government. The lands embraced within the grant, including all south of the St. John's river and north of the southern boundary as established by the Washington survey, have from time to time been conveyed by the grant claimants and those holding under them, including the site of the town of Mayport and the light-house site purchased by the government. For more than fifty years the boundary lines enclosing said grant, as established by the survey of Washington, have been notorious, and accepted by the original grantees as correct, and until within the past few years it seems not to have been questioned.

In July, 1882, Eli Haworth, in behalf of Alphonso and Ann Haworth, owners of part of the Dewees grant, deriving title through others from the original grantees, made application to your office for a re-survey of the Dewees grant. The application was granted, and pursuant to instructions issued from your office of September 8, 1882, a re-survey of said claim was made by Deputy Surveyor Duval, which was approved by the surveyor general of Florida, and transmitted to your office. By this survey the northern boundary of the grant is fixed along the edge of the marsh on the St. John's river, which excludes the town of Mayport and the land sold to the government for a light-house. The eastern and western boundaries are about the same as defined in the Washington survey, but the southern boundary is removed further south so as to include sections and fractional sections 5, 6, 7, 8, 9, 16, 17 and 18, as shown by the plat of survey, nearly all of which have been disposed of as public lands.

On the return of this survey, Eli Haworth filed objections to the approval of the same, alleging that the surveyor failed to comply with the instructions of your office in not confining his boundaries to the original boundaries of the grant. Subsequently, Fleming and Daniel, attorneys for the heirs of David Palmer and for Joseph H. Durkee, who derive title through others from the original grantees, also filed objections to the approval of said survey. Your office, by letter of November 7, 1884,

approved said survey, from which objectors appealed. It is now admitted that all parties, holding interest in and claiming title to the lands embraced in both the Washington and Duval surveys, are parties to this appeal and object to the approval of said re-survey.

As all parties in interest, who have any right to complain, are now seeking to have the survey made by Duval set aside, and the interest of the government being better protected by disapproval than approval of said survey, inasmuch as it covers lands that have been disposed of by the government, this alone would seem to be a sufficient reason for setting aside said survey.

But independent of this, a careful review of a large mass of testimony, giving a full and complete history of this case, fails to show any good reason why the application for this re-survey should have been granted.

A prior application by Charles D. Taylor had been made for a re-survey of this grant, which was refused by Commissioner Williamson, by letter of December 5, 1877, in which he says:

"Said claim was originally surveyed in 1792 by the Spanish surveyor, and was surveyed by U. S. Deputy Henry Washington in 1834 and 1835, and the land now claimed by the heirs of Dewees on the south of the grant was surveyed as public land, and has been nearly all disposed of by the government, and no objection to the survey of 1834 and 1835 appears to have been made for over forty years.

Although Washington's survey of the grant does not appear to conform exactly with the description contained in the grant, or with the survey of Don Eastlake in 1792, it may be impossible to determine at this time exactly what was granted, owing to the lapse of time and consequent changes in the soil and the marsh on St. John's river, which bounds the claim on the north."

The boundaries defined by the survey of Washington should therefore be definitely settled as the boundaries of said grant. Such boundaries must have been well known to the grant claimants at the time of such survey, and the survey of the land south of the grant limits, as defined by Washington as public land, and settlement thereon by others, would estop the claimants and those holding under them from now asserting title thereto.

The land lying on the St. John's river, which forms the northern boundary of this grant and includes the site of the town of Mayport, was by the survey of Washington conceded by the government to form a part of the Dewees grant, and from that day until the recent survey of Duval, the title of the grantees and those holding under them to all the land lying on the St. John's river, within the boundaries as surveyed by Washington, seems never to have been questioned.

The decision of your office is therefore reversed, and the re-survey of Deputy Surveyor Duval is disapproved and will be set aside.

As there appears no reason why the boundaries of this grant, as fixed by the Washington survey, should be disturbed, especially at this late day, you will direct that no further re-survey of the grant be made under the application of Eli Haworth.

SWAMP LAND—ADVERSE CLAIM.

THE STATE OF OREGON.

Suit to vacate patent, issued for a pre-emption claim on land now claimed by the State as swamp, will not be advised, as it appears that the State has by act of legislature waived its claim thereto.

Acting Secretary Muldrow to Commissioner Sparks, May 29, 1886.

I am in receipt of a letter from John Mullan, Esq., agent for the State of Oregon, requesting that this Department recommend to the Attorney General that suit be instituted in the proper court to vacate the patent to a certain tract of land, therein referred to.

His letter is accompanied by a letter from the governor of Oregon, with which he transmits, for my consideration, a statement from the register of the Lakeview land office, with accompanying affidavits, showing that patent for the SW. ¼ of SW. ¼ and lot 7, section 9, lots 1 and 3, section 17, and lots 11, 12, and 13 of section 16, township 40 S., range 8 E., Willamette Meridian, Oregon, was issued January 7, 1875, to Dennis Small. It is alleged in this application that said lands belong to the State of Oregon, and that patent was obtained by fraud and perjury.

The affidavits submitted with said application show that all of said land, except fourteen acres, is subject to overflow from March to July, caused by excess of water from rains and melting snow on the surrounding mountains; the level nature of the country, and the absence of natural drainage, which renders it unfit for the cultivation of the staple crops without reclamation by drainage. That the season for planting in this locality is from March 15 to May 15, and that Small has never appropriated said swamp land to agricultural purposes, but has used the same for the wild or swamp grass it yields in a state of nature, said grass being available for hay and grazing purposes after the subsidence of the annual overflow in the fall of the year.

There is no allegation or proof offered that Small does not reside on the land, or that the pre-emption law was not in every other way complied with at date of entry, the only question being the character of the land entered.

Whatever claim or right the State may have to such lands as were swamp and overflowed at the date of the act, an entry upon such land by a pre-emptor is not of itself evidence of fraud.

It is purely a question of title, and if the land was of the character contemplated by the act at the date of the grant, the State can recover in the courts, without the aid of the United States, provided the character of the land had not been determined by the Secretary of the Interior not to be swamp. R. R. Co. *v.* Smith, 9 Wall., 95; French *v.* Fyan *et al.*, 3 Otto, 169.

Independent of this view, this application should be rejected upon the authority of the act of the Legislative Assembly of Oregon, approved February 25, 1885, which reciting that—

"Whereas many persons have completed settlement under the pre-emption and homestead laws of the United States, along the tide waters of the State, which lands may belong to the State of Oregon, under the provisions of the act of Congress approved March 12, 1860,"

Enacts:

"That all the rights and title of the State of Oregon to the swamp and overflowed lands of this State, and claimed by persons who have completed settlement thereon under the provisions of the pre-emption or homestead laws of the United States, or claimed by their heirs or assigns, be and is hereby granted and conferred to such claimants respectively."

Said application is therefore refused.

ACCOUNTS—AUTHORITY OF THE COMMISSIONER.

McCLELLAN & BRIDGES.

The discretion of the Commissioner of the General Land Office to adopt such means, in the examination of accounts, as may seem to him best calculated to ascertain the justness and accuracy of the same, will not be controlled by the Department unless there is a clear showing that such power has been improperly exercised.

The case of G. W. Baker *et al.* cited and distinguished.

Secretary Lamar to Commissioner Sparks, June 4, 1886.

I have before me the appeal of McClellan and Bridges, filed by their attorney, Phil. B. Thompson, Jr., from the decision of your office of May 8, 1886, in the matter of the surveying account of McClellan and Bridges, U. S. deputy surveyors, in Nevada, which is now pending in your office, for work performed under their contract No. 174, dated November 14, 1884.

Mr. Thompson made application for the adjustment of said account and certification for payment. You declined to certify said account pending an examination in the field to satisfy yourself that the work had been performed according to contract, from which decision McClellan and Bridges, by their attorney, appealed, insisting that the account having been returned with the approval of the surveyor-general, the Commissioner of the General Land Office has only the power to audit and certify the balance to the Comptroller for his decision thereon. The substance of the appeal is that, if the account has been approved by the surveyor-general, and there is no suggestion of fraud upon the face of the surveyor-general's return, it is the duty of the Commissioner to audit and certify the account without further investigation.

While in the case of G. W. Baker *et al.* (4 L. D., 451), it was held that, "Where the evidence required by the regular practice is furnished,

with no evidence to rebut it, an arbitrary rejection should not be exercised," it was not intended by that expression to limit the power or discretion of the Commissioner to adopt such methods in the examination of accounts as may seem to him best calculated to ascertain the justness and accuracy of the same. This was distinctly ruled in the case of George K. Bradford (4 L. D., 269); and again in the case of G. W. Baker *et al.*, in which case it was further held that, "if you have just reason to believe that the work for which the accounts are rendered has not been fully and faithfully performed, it is not only your right, but your duty to satisfy yourself of this fact by such means as you may adopt before finally adjusting them."

If these accounts have been approved and returned according to the general rule governing such cases, these contractors are entitled to have their accounts audited and certified, unless you have reason to believe that the work has not been faithfully performed; in which event you may satisfy yourself by an examination in the field, as you have directed in this case; and your discretion in such matters will not be controlled, unless there is a clear and satisfactory showing of an abuse of it.

Your decision is affirmed.

PRACTICE—APPEAL.

STEVENS *v.* ROBINSON.

Failure to file specification of errors within the time required by the rules of practice held a waiver of the right of appeal.

Acting Secretary Muldrow to Commissioner Sparks, June 5, 1886.

I have before me the case of Frank L. Stevens *v.* Alfred B. Robinson, involving the SE. ¼ of Sec. 22, T. 93, R. 60, Yankton, Dakota, on appeal by Stevens from your office decision of December 1, 1884, dismissing his contest.

It appears from the record that contestant's attorneys in this city were notified of the decision on December 1, 1884. Under rules 86 and 97, appeal therefrom should have been filed on or before February 1, 1885; but in fact notice of appeal was not filed until February 5, in the local office. Under rule 88, a specification of errors is required to be filed "within the time allowed for giving notice of appeal;" but in this case the specification of errors was not filed until on or after May 16. This was about a hundred days after the time at which, as appears by the record, contestant's local attorney had actual notice of said decision.

Counsel for contestee has filed a motion for the dismissal of the appeal on the ground that the specification of errors was not filed as required by Rule 88.

The aforesaid appeal is expressed to be "from the decision of the Hon. Commissioner of the General Land Office of date December 1, 1884, letter C, affirming the decision of the local office and dismissing said contest, and from the whole thereof." Supposing the appeal itself to have been filed in time, manifestly it contained no such specification of errors as required, namely, which "shall clearly and concisely designate the errors" complained of. For this reason, under the ruling in Pederson *v.* Johannessen (4 L. D., 343), the appeal was fatally defective. An assignment of errors was filed about May 22, 1885, but under Rule 90 these cannot be considered in the face of appellee's motion; the right of appeal must be treated as waived, and the case considered closed by the Commissioner's decision.

Counsel for appellant urge that Rule 90 is to be read in connection with Rule 82 (Series of December 1880), and that an appeal without assignment of errors is good unless the Commissioner notifies the party that it is defective. This position, I think, is untenable. Rule 82 was designed to prevent the transmittal to the Secretary of an appeal which the Commissioner considered defective; but Rule 90 binds both the Commissioner and the Secretary, and, if overlooked by the former, is none the less imperative upon the latter, at least in the presence of a motion to dismiss by the adverse party.

For the foregoing reasons said appeal is dismissed.

HOMESTEAD CONTEST—CHANGE OF RESIDENCE.

JAMES *v.* HALL ET AL.

On the last day of the six months following entry, affidavit of contest was filed, and the hearing set for a day two months later. No objection thereto being made, or appeal taken, the entry is canceled, the evidence showing a change of residence for more than six months.

Acting Secretary Muldrow to Commissioner Sparks, June 3, 1886.

I have considered the case of Joseph H. James *v.* Andrew H. Hall, Mathias A. Becker and Christopher Mizener, as presented by the appeal of Hall from the decision of your office, dated December 13, 1884, allowing James the preference right of entry of Lots 1 and 2 and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 22, and Lot 2 of Sec. 27, T. 104, R. 66, Mitchell land district, Dakota Territory.

The record shows that said Becker made homestead entry No. 24,897 of said tracts on April 13, 1883, and on October 13, same year, Mizener initiated a contest against the same, alleging abandonment and "also that said claimant has relinquished his right and title to the same," and at the same time made application to enter said tracts.

Due notice was given and December 17, 1883, was set for the hearing, on which day the contestant appeared and offered testimony the defendant not appearing.

On Oc ober 15, 1883, said James made affidavit of contest against said entry, charging abandonment and change of residence, and on December 17, 1883, moved the district land officers to dismiss the contest of Mizener, because the same was fraudulent and speculative, and entered of record for delay and speculation, and offered another affidavit, alleging the same ground as contained in the affidavit dated October 15, 1883. By stipulation of parties hearing was had upon said motion to dismiss, on December 27, 1883, before the register and receiver, upon which day both parties appeared and offered testimony. From the testimony submitted the local land officers found that, after a careful examination of the evidence submitted by James as to the fraudulent and speculative character of said contest, there was no evidence to sustain said allegations. From said decision an appeal was filed by James, who, on July 17, 1884, applied to enter said tracts under the homestead laws, which was refused, because said entry of Becker was still of record. From said decision refusing to allow said homestead application James duly appealed. On July 24, 1884, said Hall filed the relinquishment of Becker, and made homestead entry No. 26,907 for said tracts and also lot 1 of Sec. 27, same township and range. Due notice was given to said parties, and on July 30, 1884, the register transmitted all of the papers to your office for consideration.

No other appeal was filed by James than those above referred to, and said decision of your office held that the action of the local land officers was correct in overruling said motion to dismiss, because James was a stranger to the record and had no right to move therein; that Mizener's contest was illegal, because it was initiated before the expiration of six months after entry, and that upon the authority of Bailey *v.* Olson (2 L. D., 40,) a contest, based upon "the allegation of the execution and sale of a relinquishment," cannot be maintained.

It will be observed that in the case of Bailey *v.* Olson (supra) it was stated that "the charge made was to the effect that said Olson had relinquished said tract to the United States, and *offered to dispose* of the privilege of filing said relinquishment for a consideration," and it was held that the offering to sell a relinquishment is not a sufficient ground to order a hearing.

In the case at bar, although the affidavit of contest was filed on the last day of the six months subsequently to the date of said entry, since the hearing was set for December 17, more than two months thereafter, and the testimony shows a change of residence for more than six months, in the absence of any objection or appeal by the claimant, said entry should be canceled upon the testimony submitted. When said relinquishment was filed in the local land office the land covered thereby became public lands and subject to entry by the first legal applicant. The first contestant having furnished the testimony showing the illegality of said entry, should be entitled to enter said tract under the

act of Congress approved May 14, 1880 (21 Stat., 140). Hall's entry, in so far as it is legal, will remain subject to the right of Mizener.

Your attention is called to the excess of Hall's entry, concerning which no mention is made in said decision.

The decision of your office is modified accordingly.

LOCAL OFFICE—ENTRY OF RECORD.

WITZEL *v.* BRUSH.

The local office has no authority, on the motion of an adverse claimant, to expunge from the record a duly recorded entry.

Acting Secretary Muldrow to Commissioner Sparks, June 3, 1886.

Statement of facts from Acting Commissioner Harrison's letter of December 11, 1884, to the register and receiver at Mitchell, Dakota.

I have considered the appeal of Christ C. Witzel, transmitted with your letter of June 12, 1884, from the action of your office, rejecting his application to enter the NE. $\frac{1}{4}$ of Sec. 3 T. 105 R. 59, under the homestead law.

This tract was originally covered by H. J. Baxter's homestead entry No. 1343, made March 17, 1882. On October 5, 1883, Witzel filed in your office a relinquishment of the entry, asking that it be canceled and he allowed to enter the tract. You refused to cancel said entry and transmitted the relinquishment to this office for consideration. By my letter "P" of March 28, 1884, Baxter's entry was canceled on the relinquishment and the tract held open to entry by the first legal applicant. After filing the relinquishment, Witzel went immediately upon the land, on October 6, and made setttlement and began his improvements.

On January 18, 1884, one Jesse Brush filed an application to enter the tract, which the register states was rejected as shown by annotations on his records, though no such endorsement appears on the papers. On April 5, 1884, Witzel again appeared at your office and presented his application to enter the tract to the register, which was accepted, given the current number homestead 26605, noted on the plats of the office, and the papers passed over to the receiver, together with the fee and commissions therefor. On April 7, 1884, before receipt was issued to Witzel, Alfred Joubert, attorney for Brush, filed a motion to set aside the Witzel entry as having been erroneously allowed. Whereupon you ordered that the homestead entry of Christ C. Witzel, made April 5, 1884, and erroneously allowed be canceled and stricken from the records; and that the application of Brush filed January 18, 1884, be placed of record as the first legal application for said land. Brush's papers were accordingly substituted for those of Witzel and given the same number 26605. From this rejection of his entry Witzel appeals. With the entry of Brush is filed a special affidavit, stating that he made settlement on the tract September 1, 1883, by taking possession of a house previously built thereon.

* * * * * * *

DEPARTMENTAL DECISION.

I concur in the opinion that the local officers had no authority to expunge from their records an entry duly recorded upon the mere motion of Brush. The entry of Witzel will therefore be reinstated.

I do not think the settlement rights of the parties are properly involved in this case, and therefore no opinion is expressed as to them. If Mr. Brush has an adverse claim to this tract he may assert the same by proper proceedings under the Rules of Practice.

MINING CLAIM—SUIT TO VACATE PATENT.

SMOKE HOUSE LODE.

Application for a mineral patent being made for land embraced within a prior townsite patent, adverse claim should be filed, or protest entered, on behalf of said townsite; and, in the absence of such action, suit to set aside the mineral patent thus issued, will not be advised.

Secretary Lamar to Attorney-General Garland, June 5, 1886.

I have the honor to inclose herewith copies of two reports from the Commissioner of the General Land Office, to wit, of February 24 and May 13, 1886, relative to the application of certain residents of Butte City, Montana, for the institution by the United States of a suit to set aside the patent issued March 15, 1881, to David N. Upton and others for the Smoke House Lode mining claim, which was referred to this Department by your letter of November 25, 1885. Transmitted with said report are the papers accompanying your said letter, and also certain affidavits, etc., filed in this Department since its reception here.

The application is based on the charge that the said patent was procured wrongfully, in that the proofs, upon which it issued, falsely and fraudulently represented that the land was valuable for minerals, that the requisite five-hundred dollars worth of work had been done upon it, and that the claim had been staked off as required by the statute. The allegation of the want of the necessary marking, work, and discovery of valuable minerals are more or less amply supported by the affidavits of a number of reputable residents of Butte City, who have been familiar with the Smoke House Lode for many years. But, in the view I take of the case, it is unnecessary for me to determine whether the *prima-facie* case thus made is sufficiently strong, and this for the following reason.

The papers before me show that the Smoke House Lode is situated entirely within the limits of the townsite of Butte, for which patent issued on September 26, 1877. The lode location was made in 1875, but the application was not made until January 1880, and patent did not issue thereon until 1881, as aforesaid. While the application was pending, to-

wit, in April 1880, protests were filed by the mayor of Butte City, and others, alleging various causes (and among others the worthlessness of the land for minerals) why patent should not issue. The protestants, however, abandoned the charge that the land was non-mineral, and as the final proofs were complete, and no adverse claim had been filed, the patent was in due time issued.

Subsequently actions in the nature of ejectment were brought by the owners of the Smoke House Lode patent against various persons in possession of parts of said lode under the townsite patent, and the Supreme Court of Montana, at their January 1886 term, affirmed the judgments rendered below for the plaintiffs. In respect to the required location, discovery, work, etc., they ruled, as will more fully appear in a certified copy of their opinion forwarded herewith, that "the issuance of the (mineral) patent conclusively proves all these precedent acts and facts, which the Land Department must find to exist before patent can rightfully issue;" and they therefore held that evidence to prove the non-existence of these acts and facts was incompetent in the actions then under consideration. In my judgment, this ruling is a correct exposition of the law. It was because of it, as it appears, that the parties claiming under the townsite patent have asked the intervention of the government to have the mineral patent set aside.

If the land covered by the Smoke House location was known to be valuable for minerals, then no title to it passed under the townsite patent Deffeback *v.* Hawke, (115 U. S. 392). Hence, when it was alleged to be valuable mineral land by the lode locators, and the required evidence thereof had been filed with their application for patent before the local land office, it was incumbent upon the townsite claimants, if they proposed to assert title under their patent, to file the adverse claim provided for by the statute, and in the ensuing judicial proceedings to show the superiority of their right to it. Having had serious doubts, at least, of the mineral character of the land at the time of the application for patent, as shown by the papers before me, and having failed to file the adverse claim authorized by law, they certainly were neglectful of their own interests.

Furthermore, they had it in their power to enter protest against the issue of the patent for any of the causes now set up as grounds for asking its cancellation, and in fact they did protest on several grounds. As to the alleged defects in staking and amount of work done, a pro test by them would have had the effect merely of delaying the issue of patent until such defects were cured. As to the non-mineral character of the land, proof of it would have barred the issue of patent; but they withdrew or failed to prosecute the charge that no discovery of mineral had been made, because, as the papers before indicate, they hoped that a discovery would be made; and herein again they were negligent in protecting their interest in the land.

Since the tract in controversy is covered by the townsite patent, if the mineral patent were set aside for the causes alleged, title would revest in the holders under the townsite patent, and not in the United States. In the case of the United States *v.* Minor (114 U. S., 233), the Court said that it might become a grave question whether the government could be permitted to use its name to set aside its own patent for the benefit of a rival claimant, when it had no interest in the subject matter of the suit. In the case of the United States *v.* Hughes (11 How., 552, 668), where it was urged that the United States had no interest in the land in controversy, it was held that such a suit might be instituted when, by reason of the inadvertence of the Land Department and the fraud of the claimant, the government was unable to fulfill its engagements with and give title to the prior and rightful claimant. But in this case there is no indication that the prior claimant had been negligent in acquiring or maintaining his rights; whereas, in the case before me, such negligence is manifest; and I think that, for that reason, the claimants under the townsite patent are in no position to ask the government to interpose in their behalf. Having neglected to avail themselves of the two methods of preventing isssue of the mineral patent authorized by the statute, they ought not now, I think, to be heard when they ask the use of the name of the government to avoid the effect of such negligence.

For the foregoing reasons, it is my judgment that the petition should be denied, and I so recommend.

COMMUTATION PROOF—RESIDENCE.

HENRY B. MAY.

The proof submitted does not show satisfactory compliance with the law in the matter of residence, but as bad faith does not appear, further time is accorded, within the lifetime of the entry in which to perfect residence.

Acting Secretary Muldrow to Commissioner Sparks, June 5, 1886.

I have considered the case arising from the appeal of Henry B. May from your office decision of March 30, 1885, rejecting his commutation homestead proof for the N. W. ¼ of Sec. 9, T. 109 N., R. 64 W., Huron, Dakota.

May's homestead entry was made August 18, 1882. In his commutation proof claimant states that he is unmarried; that he established residence on the tract June 15, 1883; that his improvements consist of a house, eight by ten feet, with door and window, and shingle roof; a stable ten by ten feet; and nine acres of breaking, on which a crop has been raised one season—total value $100. His proof was made July 1, 1884—after a lapse of more than a year from the date when he alleges he established his residence upon the tract.

In answer to question 5, upon the blank forms for final proof furnished by the Department, "Has claimant resided continuously on the homestead since first establishing residence thereon?" claimant replies: "Yes, except as shown by special affidavit."

The special affidavit, bearing the same date, states:

I have resided continuously on said claim since making settlement thereon, June 15, 1883, except when necessarily absent to earn a living and to get means to improve and cultivate said claim; that I have no property or means to support myself with while on the claim, and so have had to work away from said claim much of the time since making said entry; that I have been to said claim on an average of once in two weeks since making said entry, and remained there from one day to one week at a time; that my absence has been *only* such as has been rendered necessary by my lack of means to support myself on the claim continuously.

In view of the preceding statement, I concur in your decision rejecting said commutation proof. I do not find any evidence, however, of any want of good faith on the part of the claimant, to warrant a declaration of forfeiture of the money which he has paid, and which the government has accepted for the land. He will therefore be allowed further time and opportunity, within the lifetime of said entry, within which to comply with the law. Your decision is modified accordingly.

PRACTICE—RES JUDICATA.

HENRY J. REDMOND.

A ruling by the Commissioner of the General Land Office on a question of priority as between two applicants is not such a final decision as to preclude his successor from considering the final proof subsequently submitted by the successful party in the former suit.

Acting Secretary Muldrow to Commissioner Sparks, June 8, 1886.

I have before me the petition of Henry J. Redmond, filed on the 12th ultimo, for a certification of the papers in the matter of his commutation homestead entry for the SW. ¼ of NW. ¼ and Lot 3 of Sec. 18, T. 152 N., R. 62 W., and the SE. ¼ of NE. ¼ and Lots 2 and 3 of Sec. 13, T. 152, R. 63 W., Grand Forks, Dakota.

Said petition is not "under oath," as required by Rule 84; but, being otherwise in proper form, the informality is waived, because your letter reporting upon it substantially admits the correctness of its recital of facts.

The material facts set out in the petition are as follows, namely: that said Redmond's homestead claim originally conflicted with the claim of certain Valentine scrip locators, and that your predecessor's decision of the controversy, dated October 14, 1884, was in his favor; that said

decision found that "the prior settlement, continuous occupation thereafter, and improvements of the land, and the good faith" of Redmond "are fully established by the proof submitted," and directed the local officers to allow the entry; that thereupon final entry was allowed December 9, 1884; but that on June 10, 1885, you rejected said proof for the reasons, first, that it improperly described the tract—second, that it was not made on the day advertised—and, third, that it was indefinite and indicative of lack of good faith—at the same time, however, allowing Redmond the right to appeal or to submit new proof; that, on reconsideration on January 13, 1886, you adhered to said action, but afterwards, to wit, on the 16th of said month, revoked said decision, and suspended your first action pending examination of the case by a special agent; and that Redmond thereupon filed an appeal from your said decision of June, 10, 1885, which appeal you refused to recognize, for the reason that said decision was suspended to await the result of the special investigation.

Counsel for Redmond urges that the substantial question here is "whether in this case the Commissioner had authority to review and revoke the action of his predecessor, or order the case to a special agent, or take any action other than the issue of patent;" he denies that any such authority exists, and he insists that he was entitled to bring the question before the Department by appeal.

I am of opinion that there was no right of appeal in this case at the time when appeal was sought to be taken. Your action was in substance merely a temporary suspension of the issue of patent, pending the special examination; it was interlocutory, and therefore under Rule 81 no appeal from it could lie. If injury to the applicant resulted, petition under Rule 83 was the appropriate means of redressing it.

Such a petition, asking a review of the decision or action complained of, should contain a showing of the injury resulting from it, as a ground of relief (R. R. Co. *v.* Schœbe, 3 L. D., 183). This petition makes no such showing, except in the matter of your denial of applicant's alleged right of appeal, which has already been disposed of. I will therefore not enter into any extended discussion of the primary question raised by the petition, namely, as to the authority of your office to inquire into the validity of Redmond's entry; but will merely state it to be my judgment that, as your predecessor's finding of October 14, 1884, was made in a controversy between two applicants on the question of priority, it was not such a final disposition of the question of Redmond's right against the United States as would preclude your office from examining his final proofs, as in any other *ex parte* case, before approving the entry for patent.

For the above reasons the petition is dismissed.

PRE-EMPTION—SOLDIERS' ADDITIONAL HOMESTEAD.

BROOKS *v.* TOBIEN.

The filing, settlement and improvement, of one who has exhausted his pre-emptive right form no foundation for a lawful claim, and possession thereunder will not defeat the location of a soldier's additional homestead by another.

Secretary Lamar to Commissioner Sparks, June 11, 1886.

In the case of Matthew Brooks *v.* John Tobien, decided by the Department January 2, 1884, a motion for review was duly filed.

The records show that Brooks filed declaratory statement December 7, 1878, alleging settlement November 18, 1878, for the W. ½ of the NW. ¼ Sec. 26 and E. ½ of NE. ¼ of Sec. 27, T. 5 S., R. 7 E., H. M., Humboldt, California, and transmuted said filing to a homestead entry November 11, 1880.

Soldier's additional homestead entry, in the name of John Tobien, was made March 31, 1880, for the SE. ¼ of the NE. ¼ Sec. 27, and the SE. ¼ of the SW. ¼ of Sec. 35, T. 5 S., R. 7 E., H. M., in said district.

The aforesaid claims, as thus of record, were therefore in conflict as to the SE. ¼ of the NE. ¼ of Sec. 27.

When the matter came before your office, Brooks was directed to show cause why his filing, and the homestead entry based thereon, should not be canceled, and a hearing was accordingly had June 20, 1882.

It appears from the evidence that Brooks in 1877 filed a declaratory statement for a tract of land in the San Francisco district, and abandoned the same subsequently by sale of his improvements, and formal relinquishment, believing as he states that he could legally make a second filing. He settled on the tract in dispute November 18, 1878, and has since maintained a continuous residence thereon. His improvements consist of a one story house, sixteen by twenty feet, a barn, eighteen by twenty-six feet, a store house, twelve by fifteen feet, a garden of three acres under fence, eighty acres enclosed with fence for a pasture, a small orchard and seven acres cultivated to crop. These improvements are valued at about $600, and were all made, with the exception of the store house, prior to March 31, 1880, the date when the additional homestead entry of Tobien was allowed. It also appears that the greater part of said improvements are located upon the forty acres in controversy.

February 21, 1883, your office held that "the second filing of Brooks was illegal and his homestead entry based thereon could not prevail in the face of a valid adverse claim," but, "as the law does not contemplate the appropriation of such character of land by additional homesteads, the entry of Tobien is held for cancellation to that extent; and the homestead entry of Brooks will remain intact upon the records." January 2, 1884, this Department affirmed said decision, whereupon the motion now under consideration was filed.

The claim under which Brooks held possession at the time the soldier's additional homestead entry was made, was not only without authority of law, but was in open defiance thereof. Section 2261 of the Revised Statutes provides that "no person shall be entitled to more than one pre-emptive right by virtue of the provisions of Section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract." But notwithstanding such inhibition, Brooks attempted to secure title under the pre-emption law. His filing however was an absolute nullity. Such a filing could not be transmuted into a valid homestead entry, for the right of transmutation only attends a legal claim under the pre-emption law. But, while this is true, Brooks might have been allowed to make homestead entry of the land, independently of his illegal claim as a pre-emptor, had it not been for the intervening adverse claim of Tobien. Thereafter there remained in the Department no authority under the law by which it could protect Brooks from the full legal consequences of his own unlawful acts. His possession being clearly illegal, he can not be allowed to plead it as against the lawful appropriation of another. Powers *v.* Forbes (7 C. L. O., 149); Palmer *v.* Clevinger (2 L. D., 56); Banks *v.* Smith (Ibid., 44). As was said in Deffeback *v.* Hawke (115 U. S., 392): "There can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation."

The motion for review is therefore granted, and the departmental decision of January 2, 1884, is hereby vacated, and that of your office reversed. The entry of Brooks so far as it conflicts with Tobien's will be canceled.

HOMESTEAD—SOLDIER'S DECLARATORY STATEMENT.

ROBERTS *v.* HOWARD.

The right to file a soldier's declaratory statement and make homestead entry of land not covered thereby, within the life of such filing, was not conferred by the homestead law, nor has it been recognized by the regulations of the Land Department.

Acting Secretary Muldrow to Commissioner Sparks, June 14, 1886.

I have considered the case of Joseph S. Roberts *v.* John M. Howard, as presented by the appeal of the former from the decision of your office, dated December 30, 1884, dismissing his contest against Howard's homestead entry, No. 24,162 of the W. ½ of the NE. ¼ and the E. ½ of NW. ¼, Sec. 19, T. 108, N., R. 66 W., 5th P. M., made March 13, 1883, at the Mitchell land office, Dakota Territory.

It appears that Roberts filed his affidavit of contest Sept. 19, 1883, charging that Howard "has abandoned said entry for more than six months since making the same and next prior hereto," meaning next prior to the date of the affidavit of contest.

Hearing was set for November 30, 1883, on which date both parties appeared and instead of proceeding under the charge as above recited, they prepared and submitted to the register and receiver for their decision an agreed statement of facts, as follows:

"That John M. Howard by his agent filed his soldier's declaratory statement on the NE. ¼ of Sec. 14, T. 107, R. 68; that afterwards on the 13th day of March, 1883, he filed his homestead entry No. 24,162 for the W. ½ NE. ¼ and E. ½ NW. ¼, Sec. 19, T. 108, R. 66; that before he made his said homestead entry he was advised by the local land office at Mitchell, D. T., and also by his attorney . . . that he could legally make such homestead entry notwithstanding his declaratory statement made as above; that said homestead entry was made in good faith," etc.

Upon the issue thus presented the local office held Howard's homestead entry for cancellation for the reason that it was not made upon the land described in his soldier's declaratory statement.

It does not appear that Howard appealed from that action. Your office, however, when the case came up for consideration and action in the regular course of business, reversed the findings of the register and receiver and dismissed the contest, giving as a reason for its action, that Howard had under the practice existing at that time a perfect right to make his homestead entry upon other land than that described in his soldier's filing, and that although he failed to appeal from the action of the local office, yet his rights should not be jeopardized or forfeited on account of his failure to file a specification of errors on a decision unauthorized by the rules. I am unable to find anything reported in any publication in the form of decision, circular, rule or regulation, which shows the existence at any time of the practice above indicated, and cannot concur in the statement that the decision of the register and receiver was one unauthorized by the rules.

What are the facts as disclosed and made the issue in the statement agreed upon? Howard filed a soldier's declaratory statement for a particular tract of land. This gave him a preference right to that land for a period of six months. Before the expiration of the six months, however, he made homestead entry of another and different tract located in a different township and range. By this procedure he had of record at one and the same time certain claims under color of the homestead law to two different tracts, aggregating 320 acres, a thing clearly not contemplated by the law. His homestead entry was made March 13, 1883. December 15, 1882, your office, with the approval of the Department, promulgated a circular (1 L. D., 36), which enunciated, among other things, that, "A soldier will be held to have exhausted his homestead right by the filing of his declaratory statement."

It will be observed that Howard made his homestead entry two days less than three months after the promulgation of the circular from which the above quotation is made, so that although his filing was made prior to the date of said circular, it is to my mind very doubtful whether such fact would relieve him from the operation of the circular.

But, conceding, for the purpose of further inquiry, that it did, I fail to find any authority in any rules or regulations in existence at any time which would authorize such a procedure as that had in this case. May 17, 1873, your office issued circular instructions to registers and receivers providing that where a person having filed a homestead declaratory statement—

"Fails by reason of sickness, misfortune, or any insurmountable cause, to make a homestead entry thereof within six months from the date of said filing, such party will be held to have exhausted his right to file a declaratory statement, * * * but will be allowed to make a direct homestead entry of the tract so filed upon, if no valid adverse right thereto shall have intervened, or in case such right has intervened, to enter any other tract of public lands subject to such entry," etc. (3 C. L. O., 115).

The same rule was re-announced in slightly different language, in the General Circular issued from your office October 1, 1880; on this point it was as follows:

"Where the party has failed to make entry within six months from the date of filing he is not thereby debarred from making entry of the tract filed for, unless some adverse right has intervened; and if so he may enter some other tract that is still vacant."

This was the rule in force at the date (October 25, 1882) when Howard filed his soldier's declaratory statement, and it would therefore seem that he is bound by it.

In case of failure to make entry, within six months after filing homestead declaratory statement, it permitted (1) entry of the tract filed for, provided no adverse right had intervened, and (2) if such adverse right had intervened, then it permitted entry of some other tract. The necessary implication, it seems to me, is that under such circumstances the party must, if he make entry at all, enter the land for which he filed, provided no adverse right has intervened.

In this case no adverse right could have intervened at the date when Howard made entry of a tract entirely different from that filed upon, as the six months from date of filing had not yet elapsed, and his preference right was up to that date complete. It follows that his homestead entry was without legal authority, and that it must be canceled.

Your predecessor's decision is accordingly reversed.

HOMESTEAD ENTRY—CITIZENSHIP.

OLE O. KROGSTAD.

An alien having made homestead entry and subsequently filed his intention to become a citizen, it is held that in the absence of an adverse claim, the alienage at time of entry will not defeat the right of purchase under the act of June 15, 1880.

Secretary Lamar to Commissioner Sparks, June 14, 1886.

On April 16, 1878, Ole O. Krogstad, an alien, made homestead entry for the NE. ¼ of Sec. 8, T. 111, R. 50 W., Watertown, Dakota.

On November 19, 1878, he claims to have filed his declaration of intention to become a citizen of the United States. On March 22, 1883, he applied to purchase said tract under Sec. 2 of the act of June 15, 1880, and was thereupon allowed to make cash entry No. 3729. By your office letter of August 9, 1883, Krogstad was advised that unless he could show that he had declared his intention to become a citizen prior to the date of making said homestead entry, said entry was illegal, and together with said cash entry must be canceled. In response thereto, on June 25, 1884, claimant forwarded his affidavit setting forth that at the time he made said homestead entry he believed himself entitled to the rights of citizenship, owing to the fact that his father in 1871 had filed his declaration to become a citizen, while he (claimant) was still a minor. But it is not shown that said claimant's father was ever naturalized, and the belief of claimant in respect to his rights as a citizen was clearly erroneous, however honest.

Your office by letter of December 10, 1884, held that claimant, being an alien at the date of making said homestead entry, was therefore totally unqualified to make the same, and held said cash entry for cancellation, "for non-compliance with the naturalization laws of the United States." Section 2289 of the Revised Statutes provides that, "Every person, who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration to become such, as required by the naturalization laws, shall be entitled to enter one quarter section," etc. In his original homestead affidavit, claimant alleges that he is a citizen of the United States, and the papers are in all other respects regular and the entry *prima facie* valid. There is no other claim for the land, and the right of Krogstad to the land was not questioned until cash certificate was presented to your office as a basis for patent. The question arises as to the effect of the declaration to become a citizen upon the claim of Krogstad to the land, and for the purposes of this inquiry such declaration serves all the purposes of a full naturalization.

In the case of Jackson *v.* Beach (1 Johnson's Cases, 399), A. conveyed land to B. in trust for C., who was an alien. C. afterwards, and before any office found, became duly naturalized, and B. released the estate held in trust by him. It was held the conveyance to C. was valid; that

no title in case of alienism vests in the people of the State until after office found, and that naturalization has a retroactive effect so as to be deemed a waiver of all liability to forfeiture, and a confirmation of his former title. This case arose in the State of New York, the laws of which barred an alien from holding real estate therein.

In the case of Governeur's Heirs *v.* Robertson, arising in the Circuit Court of Kentucky and reported in 11 Wheaton, 332, it was held that, "An alien may take real property by grant, whether from the State, or a private citizen, and may hold the same until his title is divested by an inquest of office or some equivalent proceeding."

In the case of Osterman *v.* Baldwin (6 Wallace, 116), Baldwin, a citizen of New York, purchased and paid for three lots in Galveston, in the then Republic of Texas, receiving certificates of purchase for the same. The constitution of Texas however prohibiting aliens from holding lands there, he transferred said certificates to one Holman, a Texan, as trustee. Texas was admitted into the Union in 1845. In an action thereafter brought by Baldwin to try the title to said lands, the defendants set up Baldwin's alienage and consequent incapacity to hold. The court ruled that, "Even if the defendants could have made this objection while the Republic of Texas existed, they cannot make it *now*, because when Texas was admitted into the Union the alienage of Baldwin was determined. His present status is that of a person naturalized and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of his former title."

Section 2319 of the Revised Statutes provides that, "All valuable mineral deposits in lands belonging to the United States . . . . . 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," etc. The court in construing said section holds that "Upon declaring his intention to become a citizen an alien may have advantage of work previously done and of a record previously made by him in locating a mining claim on the public mineral lands. Crœsus Co. *v.* Colorado Co. (19, Fed. Rep., 78.)

After an examination of the above cases and the authorities therein referred to, I am of opinion that the homestead entry of claimant was not void, and there being no adverse claim, that his alienage cannot now be pleaded against him. Said decision holding his cash entry for cancellation, "for non-compliance with the naturalization laws of the United States," is therefore reversed. The copy of the "declaration of intention" is certified to by a notary public. This Department requires that such certificate must be made by the clerk of the property court, or by the local officers. (C. R. Glover, 4 L. D., 211.) You will cause claimant to be notified that he must furnish a new copy properly certified, pending the receipt of which said cash entry will be suspended.

PRIVATE CLAIM—PATENT ATTACKED.

RANCHO LAGUNA DE TACHE.

Suit to set aside the patent issued herein will not be advised on allegations that the grant was of fraudulent character and its confirmation procured through fraud as the validity of the grant was the main question in issue in the court that rendered such decree of confirmation.

Secretary Lamar to Commissioner Sparks, June 14, 1886.

B. B. Newman, Esq., as attorney for certain citizens of California, files a motion for review and reconsideration of my decision of February 3, 1886,* in the matter of the Rancho Laguna de Tache, California.

Said motion for review is made upon the following grounds:

1. Because the decision alleges that the patent for Laguna de Tache only embraces nine square leagues, whereas in fact it was surveyed and patented for eleven square leagues, as appears on the face of the survey and patent;

2. Because the decision holds that the plat was duly approved after due notice by publication under the act of June 14, 1860, and July 1, 1864, and no objections filed thereto, whereas the certificate of the surveyor-general shows that it was only advertised twenty-one days, instead of four weeks.

3. Because all the facts are not fully reported in the decision which would clearly show beyond all question that the claim of Manuel de Castro to Laguna de Tache is fraudulent and unfounded.

In the decision it was inadvertently written that the patent was for nine square leagues, whereas it should have stated that it was for eleven square leagues. This error, however, cannot affect the decision, as the survey and patent calls for eleven square leagues, which was the amount confirmed by the district court.

As to the second ground urged in support of this motion, even if publication for the time required by law had not been made prior to the approval of the plat, it would be a mere irregularity that would not invalidate the patent, without showing how the parties seeking to set aside a patent were affected by want of such notice. The surveyor general is required to make such publication, and a failure on his part to publish such notice for the full time required by law, in the absence of fraud does not affect the validity of the patent. But this ground is not sustained by the facts set forth in the motion.

Applicant alleges that the certificate of the surveyor general shows that the first publication was made May 29, 1865, and the last publication on the 19th of June following, thus officially certifying that it was only advertised twenty-one days, or three weeks, instead of four weeks.

*By this decision the Department refused to advise suit to vacate the patent issued March 6, 1866, for said Rancho.

The law provides that whenever the surveyor general shall have caused any private claim to be surveyed he shall give notice thereof by publication in two newspapers, once a week for four consecutive weeks, and shall retain in his office for public inspection the survey and plat until ninety days from the date of first publication, and if no objections are made to said survey, it shall be approved.

According to the facts stated in this application, the first publication appeared May 29th and the last June 19th. The inference is that the intermediate publications appeared June 5th and June 12th. This is once a week for four consecutive weeks, and it not being alleged that any objection was filed, or that the plat was approved before the expiration of the ninety days, "due notice by publication was therefore made according to law."

The principal and only remaining ground urged in this motion is, that the facts which show that the claim of De Castro was fraudulent in its inception was not fully considered in preparing the opinion.

The facts relied upon to show that the claim of De Castro was fraudulent and unfounded refer solely to alleged fraudulent acts of De Castro prior to confirmation by the district court. In substance it is mainly this: That the grant to Limantour of Laguna de Tache being declared by the district court, on appeal, to be a fabricated grant, and therefore false and fraudulent, that the grant to De Castro being the surplus of the grant to Limantour must therefore as a necessary consequence be also fraudulent. While it is true that the court, in deciding upon the claims of Limantour, held that those claims were fraudulent and antedated and were not valid existing grants at the date of the Guadalupe Hidalgo treaty, and in said decision expressed doubts as to the genuineness of the De Castro grant, yet the same court subsequently confirmed the De Castro grant notwithstanding this fact.

It is further alleged that the grant to De Castro was not in existence at the date of the treaty of Guadalupe Hidalgo, February 2, 1848, and therefore the district court had no jurisdiction to confirm such grant, although it purported to have been issued by the Mexican authorities at a date prior thereto.

I have carefully re-examined the testimony on this point, and viewed in the strongest light presented by applicant, I can see no reason for a change of my opinion. It tends to but one point, and that is, that the confirmation of the grant of De Castro was procured by fraud on the part of the claimant in presenting a fraudulent grant for such confirmation. The sole purpose of this testimony would be to impeach the validity of the grant. The validity of a Mexican grant depends mainly upon the genuineness of the title papers, and as the district court have decided this grant to be a valid grant, it of necessity determined the genuineness of the title papers.

The act of 1851 declares that the final decrees of the board and district and supreme courts shall be conclusive as between the claimant

and the United States. As there was no appeal from the decree of the district court, the decree of that court was as conclusive against the government as a decree of the supreme court on appeal.

It is not alleged in this application that there are any other facts or evidence that was not before the court at the time of confirmation, or accessible to it. Besides additional testimony would not furnish a ground to set aside the decree of confirmation, if it merely tends to disprove the direct issue which the court necessarily determined.

The allegation is that the grant presented was a fraud; that it had been fabricated in Mexico, after the transfer of California to the United States; that the fraud was concealed from the government officers and the board of land commissioners; and that the confirmation was obtained upon false and perjured testimony. These are precisely the grounds alleged in the cases of the United States *v.* Throckmorton, United States *v.* Flint, and other cases, in which the court decided that the confirmation could not be vacated on the ground that it was obtained wholly upon false and perjured testimony, or for the palpable frauds alleged. See U. S. *v.* Throckmorton, (4 Sawyer, 42); U. S. *v.* White, (9 Sawyer, 125, 17 Fed. Rep., 561).

In the case of Throckmorton, the U. S. Supreme Court, citing and commenting on these authorities, said:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." (98 U. S. 68).

Another ground urged by applicant is, that the grant was improperly located by the surveyor general. It appears that the question of the improper location of this grant was directly considered by the Commissioner of the General Land Office in approving the survey. The Commissioner was of the opinion that the grant was improperly located, and called the attention of the surveyor-general to this matter, but finally became satisfied with the explanation of the surveyor-general and approved the survey. There was no fraud or deception practiced upon the Commissioner in making his investigation, nor is there any evidence now produced to show fraud or imposition. The mere fact that the Commissioner may have erred in judgment in the location of this grant is not sufficient to warrant the vacating of his judgment.

I therefore reaffirm my decision of February 3, 1886, holding that the question of the validity of this grant has been conclusively determined by the tribunal specially clothed by Congress to ascertain and determine such claims, and that the principle announced in the case of United States *v.* Throckmorton, (98 U. S. 68), controls this case. See also the case of Flint *et al.*, 4 Sawyer, 42.

PRACTICE—DEFECTIVE APPEAL.

WILLIAM CLARK ET AL.

An appeal filed by an attorney who has not complied with the circular requirement of July 31, 1885, should not be dismissed without notice under Rule 82 of Practice.

Acting Secretary Muldrow to Commissioner Sparks, June 15, 1886.

I have considered the applications of James E. Robinson, as attorney for William Clark and Josephine Olson, that I cause to be certified before me for proper action the papers in relation to the cancellation of the above entries.

It appears that said Clark made homestead entry June 21, 1882, and cash entry January 24, 1883, for the SW. ¼ of Sec. 14, T. 133 N., R. 61 W., Fargo, Dakota Territory; and that Olson made homestead entry June 21, 1882, and cash entry January 24, 1883, for the south-east quarter of same section.

On report of a special agent of your office both entries were held for cancellation, "for fraud," on August 14, 1883. On appeal from said action my predecessor, Secretary Teller, on June 3, 1884, reversed the same, and directed that a hearing be had to ascertain the facts, and that upon report thereof said cases be re-examined and disposed of as the law requires. In pursuance of this direction, hearings were had in both cases—in that of Clark, September 23, 1885, and in that of Olson, August 10, 1885—at which, the register and receiver report, the parties were represented by their attorney J. E. Robinson, who declined to submit testimony, or cross-examine the witnesses of the government. On December 16, 1885, said entries were declared canceled by you. On December 29, 1885, appeals were filed in both cases by J. E. Robinson, as attorney for said parties, and also for Sarah Loring, mortgagee of Clark's land. On same day said appeals were transmitted to your office. On April 21, 1886, you declined to entertain them, because there had been no compliance on the part of Robinson with the Departmental circular of July 31, 1885, (4 L. D., 503), which requires attorneys appearing for "alleged fraudulent entrymen" to file written evidence of their authority to do so. Robinson was notified of your action April 27, 1886, and next day transmitted to this Department the application under consideration, which was referred to you May 4, 1886, and returned to me May 17, 1886, with report.

Your action in canceling said entries was one from which an appeal would properly lie to this Department. That appeal was taken in time, and specification of errors filed. But the attorney claiming to represent the appellants failed to produce proper evidence of his authority in that behalf, as required by circular of July 31, 1885. This was an irregularity which you properly took notice of, but in relation to which you should have proceeded in accordance with rule 82 of the Rules of Practice.

I therefore rescind your order dismissing said appeals, and direct that on receipt hereof you will proceed to give notice in said cases in accordance with said rule, and certify the papers therein to this Department, for such action as may be right and proper.

PURCHASE BEFORE PATENT—NOTICE.

JOHN C. FEATHERSPIL.

Questions arising on inquiry into the validity of an entry will not be affected by a sale or mortgage after the issuance of final certificate, though the right of such purchaser or mortgagee to appear and show that the entry-man complied with the law will be duly recognized.

The legal presumption in favor of the regularity of the notice given, as shown by the record, will not be disturbed by the mere allegation that such notice was not served.

Acting Secretary Muldrow to Commissioner Sparks, June 15, 1886.

On May 14, 1886, was filed in this Department an application by Mr. Jas. E. Robinson, as attorney, in behalf of John C. Featherspil, asking that I cause to be certified before me the papers relating to the cancellation, by your office, of the cash entry, No. 2910, Sept. 22, 1882, of said Featherspil, for the NW. of Sec. 9, T. 129 N., R. 50 W., Watertown, Dakota. Said application was sent to your office and has been returned to me with copy of a letter from you to the register and receiver, dated March 22, 1886, and copy of letter from Robinson to you, dated April 21, 1886, both relating to the subject matter under consideration.

From these letters and the sworn application of Robinson I gather the following in relation to the case:

Said Fetherspil filed declaratory statement for said tract September 8, alleging settlement August 20, 1881; and on Sept. 22, 1882, made final proof and received cash entry certificate No. 2910 therefor.

It also appears that on June 13, 1882, declaratory statement No. 8510 for same tract was filed by Patrick Sweeney, claiming settlement on the 5th of said month.

In April, 1884, Special Agent E. G. Fahnestock reported that said entry had been obtained through fraud and should be canceled; and in

August following Patrick Sweeney made application to be allowed to contest the same. On this application a hearing was ordered, of which notice was given by publication, but defendant failed to appear, and judgment was rendered in favor of the contestant. No appeal was taken, though, it is said, in your letter of March 22, 1886, that defendant was notified of said judgment. In that letter you further state that on "Aug. 7, 1885, . . . I reviewed the case, and referring to Special Agent Fahnestock's reports of his personal examination of the land in controversy, of the fact that Featherspil's whereabouts could not be ascertained, and of the testimony taken at the hearing, I canceled said cash entry No. 2910, and directed you to note the same on your records and advise Patrick Sweeney of his right to enter the tract." On Dec. 22, 1885, the latter relinquished his declaratory statement for said tract, and the same was canceled; thereupon he made timber-culture entry for the same.

It is claimed by Robinson that he, representing the entryman and one F. A. Rising, to whom the tract had been mortgaged by the former, properly filed an appeal, with specification of errors, from your said decision of Aug. 7, 1885, and which appeal you refused to entertain and transmit because of alleged irregularities therein; and that being otherwise remediless, all the papers in said cause should be certified to this Department for such action as may be proper in the premises.

There having been in this case no appeal from the action of the register and receiver, of March 19, 1885, holding said entry for cancellation, under Rule of Practice 47 (now 48) then in force, their decision became final as to the facts of the case and could only be disturbed by the Commissioner—(1) where fraud or gross irregularity is suggested on the face of the papers; (2) where the decision is contrary to existing laws or regulations; (3) in event of disagreeing decisions by the local officers; (4) where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal."

The Commissioner did not find the existence of any of said causes for disturbing the decision of the register and receiver, and affirmed the same. And the representative of the entryman cannot now be heard to disturb said decision, except for jurisdictional cause: So that it is not necessary to pass upon the questions of alleged irregularity in connection with the presentation of said appeal to your office.

Robinson specifies three errors in said decision:

First, that the complaint did not state facts sufficient to constitute cause for cancellation. This objection is immaterial now, inasmuch as the register and receiver and Commissioner found that the facts were sufficient to cause cancellation of the entry, and it matters not whether said facts were originally alleged or not.

The second error alleged is that the Commissioner "had not original jurisdiction and that he could only act if at all in such cases on appeal

from the local land office." This question is not in the case, for the facts shown in the application do not substantiate the assertion that the Commissioner took original jurisdiction, but on the contrary make it clear that his action was based upon that of the local officers had in the regular way.

The third error alleged is "that notice of the hearing ordered . . . was never served on said entryman or said mortgagee." No showing to sustain this allegation or rebut the legal presumption which exists in favor of the regularity of judicial proceedings is made. The assertion may be literally true as stated, but substantially untrue, and therefore no ground for disturbing said case. In this case it is shown by your letter before referred to, and which I have a right to act upon, inasmuch as the application presents no statement in this respect, that notice was given by publication to the absent defendant, which was sufficient in law, to bind him and those claiming through him whether mortgagees or vendees, if said notice was properly given, which is to be presumed, in the absence of any showing to the contrary. It may thus be that the entryman "was never served" personally yet was served legally.

To summarize: Contest was regularly brought by Patrick Sweeney against said entry, notice given to the absent entryman by publication, who failed to appear and on the evidence submitted the entry was held for cancellation by the local officers; of which notice was regularly given to defendant, who failed to appeal, and the judgment was in due course affirmed by the Commissioner of the General Land Office, from which latter decision an appeal was sought to be taken, but denied; and because of said denial certiorari is now asked, in order that the supervisory power of this Department may be interposed to prevent the execution of said judgment.

I see no proper ground for such interposition and must deny the application.

In determining this case the fact that there is a mortgagee now interested in maintaining the validity of the entry brings no new element into the consideration thereof, inasmuch as he can have no better right than the entryman would have if present, and with whose rights the government deals only, regardless of any sale, assignment or lien made by him to third parties, recognizing, however, the right of said third parties, where their interests have been acquired subsequent to the issue of final certificate, to appear and protect the same by showing proper compliance with the requirements of the law on the part of the entryman.

RAILROAD GRANT—SUIT TO VACATE PATENT.

MISSOURI, KANSAS & TEXAS RY. CO.

Suit is advised to vacate the patents issued to said company for the even sections in Allen county, Kansas, (1) in the indemnity limits of its road where overlapped by the primary limits of the Leavenworth, Lawrence & Galveston road, and (2) in the common indemnity limits of the two roads, on the ground that as these sections were reserved to the United States from the grant to the Leavenworth, Lawrence & Galveston Company in 1863, they were also excepted from the grant to the Missouri, Kansas & Texas Company in 1866 by the following proviso in said grant: "That any and all lands heretofore reserved to the United States by any act of Congress . . . . for the purpose of aiding in any object of internal improvement . . . . be and the same are hereby reserved to the United States from the operations of this act," etc.

This decision leaves to the determination of the Department of Justice all questions arising on the alleged rights of parties claiming as innocent purchasers from said company.

Secretary Lamar to Attorney General Garland, June 16, 1886.

I have the honor to transmit herewith the recommendation of the Commissioner of the General Land Office, and papers accompanying the same, that suit be brought to set aside the patents issued to the Missouri, Kansas and Texas Railway Company for certain even numbered sections of land lying in Allen county in the State of Kansas.

The first section of an act of Congress of March 3, 1863 (12 Stat., 772), provided—

"That there be and is hereby granted to the State of Kansas for the purpose of aiding in the construction: First, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence and *via* the Ohio City crossing of the Osage river, to the southern line of the State in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa river to the point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho river.

"Second, of a railroad from the city of Atchison *via* Topeka, the capital of said State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where this last named road crosses the Neosho, down said Neosho valley to the point where the first named road enters the said Neosho valley, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, ... 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 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," etc. "Provided that the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches."

Under this act the Leavenworth, Lawrence and Galveston Railroad was constructed through Allen county, but its Wakarusa branch has never been constructed. The Atchison, Topeka and Santa Fé Railroad Company constructed its main line, but assigned its land contract, so far as it concerned its Neosho Valley Branch, to the Union Pacific Railroad, Southern Branch (now Missouri, Kansas and Texas Railway).

An act of Congress, approved July 1, 1864 (13 Stat., 339), provided:

"That there be and hereby is granted to the State of Kansas to aid in the construction of a railroad and telegraph line from Emporia *via* Council Grove to a point near Fort Riley on the Branch Union Pacific Railroad, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: Provided, That this grant shall be subject to all the provisions, restrictions, limitations, and conditions, in regard to selections and locations of land and otherwise, of an act of Congress approved March 3, 1863," etc.

This simply extended the grant to the Neosho Branch from Emporia northward to Fort Riley.

By the act of July 26, 1866 (14 Stat., 289), Congress made a grant to the State of Kansas for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, to construct a railroad from Fort Riley, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, for the use and benefit of said railroad company, of every alternate section of land designated by odd numbers to the extent of five alternate sections per mile on each side of said road; and provided further that indemnity lands should be selected—not beyond twenty miles from the line of said road—"from the *public lands of the United States nearest to the sections above specified.*" The act further provided, "*That any and all lands heretofore reserved to the United States by any act of Congress*, or in any other manner by competent authority, *for the purpose of aiding in any object of internal improvement*, or other purpose whatever, be, and the same are hereby, *reserved* and *excepted* from the operation of this act, except so far as it may be necessary to locate the route of said road through such reserved lands," etc.

Under this act the Missouri, Kansas and Texas road was constructed. In Allen county it approaches the Leavenworth, Lawrence and Galveston road and consequently the limits of the two roads overlap. The question here presented relates solely to the even sections in the indemnity limits of the Missouri, Kansas and Texas road in Allen county, first, as to those overlapped by the *granted* limits of the Leavenworth, Lawrence and Galveston, and, secondly, those overlapped by the *indemnity* limits of that road.

I.

The act of 1863 granted for the Leavenworth, Lawrence and Galveston road the *odd* sections within its granted limits, and raised the alternate *even* sections within said limits to the double minimum price, designating them as "sections and parts of sections of land which shall *remain* to the United States."

These sections, in as far as they fell within the indemnity limits of the Missouri, Kansas and Texas, were selected by that road and patented to it. To determine the validity of the title thereby acquired, it is necessary to examine the history of railroad grants made prior thereto.

The act of 1866 contains the following—

"And provided further, That any and all lands heretofore *reserved* to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved land; in which case the right of way only shall be granted," etc.

The first act granting land to aid in the construction of a railroad was that in aid of the Illinois Central road, made in 1850, (9 Stat., 466).

In that act the *original* of the above proviso was used for the first time by Congress. It did not appear in the bill as first formulated and introduced, but was added subsequently, for the following reason: Prior thereto, on March 2, 1827, Congress had granted to the State of Illinois, for the purpose of aiding in the construction of the Illinois canal, "a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States," etc. During the debate in the Senate on the bill in aid of the Illinois Central, it was noticed that at a certain point the grant for said canal would be overlapped by the proposed grant for the railroad. Thereupon the proviso was added to the second section of the bill, as follows: "And provided further, That any and all lands reserved to the United States by the act entitled, 'An act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan,' approved March 2, 1827, be, and the same are, hereby reserved to the United States from the operations of this act."

Senator Whitcomb, in proposing the amendment, said:

"To enable the amendment to which I now refer to be understood, I will premise that the branch of this railroad, which leads from its northern terminus to Chicago, must be alongside of the canal connecting these points, and for the construction of which Congress made to Illinois, on the 2d of March, 1827, a similar grant of lands along its entire length, every alternate section being at the same time reserved to the United States. These reserved lands will necessarily lie within the scope or limits of the proposed grant now under consideration, and will consequently be subject to further selection, notwithstanding their previous reservation. The language of the bill is substantially that all the lands belonging to the United States not heretofore disposed of, or to which a right of pre-emption has not attached, shall be divided equally between Illinois and the United States. I shall propose, therefore, at a suitable time, an amendment that will *save the lands reserved under the former grant from the operation of this one.*" (Cong. Globe, Vol. 21, p. 900.)

The proviso was accordingly introduced and adopted.

During the next Congress only one land grant was made, and that to the State of Missouri in aid of the Hannibal and St. Joseph road. Another to the State of Iowa passed the Senate but failed in the House. These two bills were framed in exactly the same words, except the names of the States, termini, etc. The Iowa bill was reported by the Senate Committee on Public Lands as a "*model bill*," and that they had "shaped all the others which are to follow it for grants of land for like purposes in other States after this model."

This bill, as well as the grant to Missouri, contained the proviso in question, but *changed only so as to make its terms general*, as follows: "And provided further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are, hereby reserved to the United States from the operation of this act." The language of this proviso was preserved by Congress in all subsequent grants of a similar character. By comparing this proviso with that in the original railroad grant—to Illinois—it will be seen that they were enacted to serve the same purpose. They bear the same relation to the section—they commence and end with the same words. One relates to a particular reservation, the other is made applicable to all reservations. In the first grant the only conflict was with the canal, and therefore the reserved sections within its grant were *alone* excepted. Railroad grants afterwards multiplied and extended, and consequently the proviso was generalized so as to apply to all cases of conflict between such grants. Adopting this view, I am of opinion that the even sections in question within the granted limits of the Leavenworth, Lawrence and Galveston road were reserved from the operation of the act in aid of the Missouri, Kansas and Texas, and that the patents for the same were issued without authority of law.

II.

As to the even sections in the common indemnity limits. The act of 1863 provided:

"But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, 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 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; Provided that the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches."

By this act, selection of indemnity lands by the Secretary was restricted to *odd* sections. Under no circumstances could *even* sections in these limits pass under the act of 1863. I am of opinion therefore that the even sections within the limits in question were so *reserved* to the United States as to fall within the exception created by said proviso, in the act of 1866, to wit: "That any and all lands heretofore *reserved* to the United States by any act of Congress . . . for the purpose of aiding in any object of internal improvement . . . be and the same are hereby *reserved* to the United States from the operations of this act," etc. Hence, I concur in the conclusion of the Commissioner in regard to the even sections in the common indemnity limits.

The Commissioner says: "The records of this office show that even numbered sections of lands have been patented to the Missouri, Kansas and Texas Company, to which pre-emption and homestead rights had attached prior to indemnity selections, and it is claimed to be just that relief should be afforded by a suit to cancel such patents." No such case has been presented to me, and this opinion is not intended to pass on the rights of any individual as against the railroad company. If injustice has been done in the issuance of patents, this Department will lend its full power to redress the wrong upon a presentation of the facts in the case.

The Commissioner further says: "It is alleged that even sections have been patented to the Missouri, Kansas and Texas Company outside of its indemnity limits. An accurate adjustment of limits is being made in this office which renders it probable that this is the case."

In the examination of this matter I have proceeded upon the supposed accuracy of the original limits, and a diagram of which is herewith transmitted. What the new adjustment of limits will disclose I am now unable to state.

It is contended by the railroad, that the question here involved is *res adjudicata*. In a letter dated December 30, 1882, my predecessor, concurring in the views expressed by the United States District Attorney for Kansas, declined to recommend that suit be instituted touching the title to the lands in the common indemnity limits in question. While due weight is given to the action of the former Secretary in that matter, I do not think it bars the present incumbent from examining the facts and law *de novo*. Indeed, such examination shows that the views expressed herein were never submitted to my predecessor. I am therefore of opinion that it is my duty to make such recommendation as the law warrants, independently of the former action.

The railroad company furnishes an abstract of its records showing that it has sold all the lands in question to purchasers; that the sales were made at various times, running from 1871 to 1875, at sums ranging from two dollars to seven dollars per acre; that to one purchaser it sold 10,000 acres, to another 2,200, to another 1,400, and so on; and tracts of 80 and 160 acres to many different purchasers. As to the right of

those claiming to be innocent purchasers, or of purchasers without notice, no opinion is here expressed. Such questions are deemed within the exclusive jurisdiction of your department. Treating this question solely in the light of the public land laws of the United States, I am of opinion that the even sections within the indemnity limits of the two roads above named, were not subject to selection under the act of July 26, 1866; that the even sections within the indemnity limits of the Missouri, Kansas and Texas road and the granted limits of the Leavenworth, Lawrence and Galveston road were reserved from the operation of the act of 1866, and that the patents for the same were issued without any authority of law.

I therefore respectfully recommend that suit be instituted to set aside the patents for the even sections above indicated, so illegally issued to the Missouri, Kansas and Texas Railway Company, if in your judgment, upon further examination such suit be deemed advisable.

HOMESTEAD—ACT OF JUNE 15, 1880.

SIEVERS *v.* HALLOWELL.

A cash entry under the second section of this act being attacked, on the ground of fraud in the original entry, a hearing is ordered.

Acting Secretary Muldrow to Commissioner Sparks, June 17, 1886.

On September 19, 1879, Chalkley Hallowell made homestead entry for the S. ½ of NE. ¼, N. ½ of SE. ¼ of Sec. 10, T. 5 S., R. 22 W., Kirwin, Kansas. On June 20, 1884, he made cash entry for the tract under the second section of the act of June 15, 1880. On June 24, 1884, Henry Sievers filed protest against the issuance of patent on said entry, alleging that the homestead entry "was made in fraud and in violation of law, the said Hallowell having had two homestead entries previous to this one," and stated that he had filed his affidavit to that effect in the local office. On January 24, 1885, your office denied the protest of Sievers, and said: "No such affidavit appears to have been received at this office as yet, but even if filed it would avail nothing as it was held by the Department in the case of George W. Maughn (9 C. L. O., 56), that cash entry may be under the second section of the act of June 15, 1880, although the homestead entry was void at inception." Sievers appealed. With the appeal are forwarded several affidavits, substantially corroborating the statements of protestant. The register states that these affidavits were on file December 10, 1884, but were overlooked. Without passing, at this time, on the correctness of the ruling in the Maughn case, *supra*, I am of opinion that Sievers should have an opportunity of proving the truth of his allegations. You will therefore direct the local officers to fix a day for hearing the parties to this controversy, giving them due notice of the time set for such hearing. Said decision is accordingly modified.

RAILROAD GRANT—STATE SELECTION.

SOUTHERN PAC. R. R. CO. *v.* THE STATE OF CALIFORNIA. (ON REVIEW.)

At the date of the grant, and also when it took effect, the tract in question was covered by a *prima facie* valid school selection, which is held to have excepted said tract from the railroad grant though the selection was subsequently disallowed.

The case of Aurrecoechea *v.* Bangs cited and distinguished.

Secretary Lamar to Commissioner Sparks, June 21, 1886.

With your letter of the 23d ultimo was forwarded the application of counsel for the Southern Pacific Railroad Company for a review of departmental decision, dated March 13, 1886 (4 L. D. 437), in the case of said company *v.* the State of California, rejecting the claim of the company to the NW. ¼ of Sec. 17, T. 5 S., R. 2 W., S. B. M., Los Angeles land district, in said State.

The claim of the company was rejected, because it was held that, at the date when its right attached to its granted lands, under the act of Congress approved March 3, 1871 (16 Stat., 573), said tract was embraced in a prima facie valid school selection, which served to except the land from the grant, and also that the subsequent discovery that the basis of said selection was erroneous, can not validate the company's claim.

Counsel for the company insists that said selection was a nullity, and that, upon the authority of the decision of the United States Supreme Court, in the case of Aurrecoechea *v.* Bangs (114 U. S., 381), the land should be awarded to the company. The case cited (supra) can not be considered an authority in the case. In that case the court held that, "lands covered by a claim under Mexican or Spanish grants, but not found within the limits of the final survey of the grant when made are within the excepting clause of the act of July 23, 1866 (14 Stat., 218), and are restored to the public domain by the survey," and the selection of land embraced within the claimed limits of a Mexican grant was a nullity, because the land was not subject to selection. But no such condition exists in the present case.

The land was public land at the date of selection, and hence subject to settlement, entry or selection by the first legal applicant. The State made the selection which was allowed by the proper officers and the same remained of record long after the date when the right of the company attached.

It will be unnecessary to cite authority to show that until said selection had been canceled, the land covered thereby was not subject to entry under the laws of the United States, and it is difficult to understand how the company can maintain under its grant a claim for land covered by such a selection.

Prior to the date of the grant to said company, and also at the date when the right of said company is held to have attached to its granted lands, said tract was covered by a claim that excepted it from the operation of said grant, and the fact that long afterwards said claim is disallowed, can not affect the right of the company. Newhall *v.* Sanger (92 U. S. 761).

A careful re-examination of said decision and of the application of the petitioner discloses no reason why said decision should be disturbed, and the application is therefore denied.

CONTEST—ACT OF JUNE 15, 1880.

FREISE *v.* HOBSON.

An application to purchase under the second section of this act, made after the initiation of a contest against the original entry, should be suspended until the final disposition of said contest.

The case of Gohrman *v.* Ford over-ruled.

Assistant Secretary Hawkins, to Commissioner Sparks, June 21, 1886.

I have considered the case of Freise *v.* Leonard Hobson, on appeal by the latter from your office decision of August 16, 1884, holding for cancellation his homestead entry on the S. ½ of SE. ¼ and NE. ¼ of SE. ¼ of Sec. 17, and NE. ¼ of NE. ¼ of Sec. 20, T. 45 N., R. 63, Del Norte, California.

Hobson made entry July 15, 1879. On July 16, 1883, Freise initiated contest for abandonment, and by agreement hearing was set for November 26, 1883. At that date claimant failed to appear and contestant offered testimony. The testimony showed that Freise moved upon the tract in June, 1883, and that there were then no improvements, except a fence claimed by one Hoagland, and a dilapidated shanty with no roof; that Hobson lived at least part of the time in Saguache, a neighboring town, and that he had not resided upon, or in any way improved, said tract "since a year last spring." The local officers decided that said entry should be canceled, and your office, by said decision, held the same for cancellation. On September 24, 1884, Hobson was notified of said decision, and on November 22 following filed appeal therefrom. On the same day he made application to purchase said tract under section two of the act of June 15, 1880, and was thereupon allowed to make cash entry No. 673 therefor.

On December 30, 1884, Freise filed protest against the action of the register and receiver in allowing Hobson to enter under the act of June 15, 1880, and the whole case is now before me.

I concur in said decision holding for cancellation the homestead entry of Hobson, and the same is hereby affirmed.

The only further point to be determined is the validity of said cash entry. The question presented is, whether Hobson under all the cir-

cumstances of the case was in position to avail himself of the provisions of the act of June 15, 1880, as against the contestant Freise, and involves the construction of the act of May 14, 1880, and of the act of June 15, 1880.

The question was first presented to this Department in the case of Gohrman *v.* Ford (8 C. L. O., 6), and it was there decided on March 12, 1881, that the entryman might purchase under the act of June 15, during the pendency of a contest against his entry for abandonment. That case, however, proceeded upon two false suppositions: first, that the two acts above noted should not be construed *in pari materia*, and, secondly, that the entrymen and the government were the only parties in interest.

"As one part of a statute is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect if possible to the whole; so is the comparison of one law with other laws, made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage. In applying the maxims of interpretation the object is throughout, first to ascertain by legitimate means, and next to carry into effect the intentions of the framer. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and harmonious in its several parts and provisions. It is therefore an established rule of law that all acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system and having one object in view." (Potter's Dwarris, 189.)

Section two of the act of May 14, 1880 (21 Stat., 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 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 land."

Section two of the act of June 15, (21 Stat., 236,) provides:

"That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor . . . . Provided, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

Adopting the views above quoted, these acts are *in pari materia*, and must be construed as one law. The act of May 14, conferred a special power upon the successful contestant, namely the right, as against all others, to enter the tract in dispute upon the successful termination of the contest, thereby securing to him a reward for the time and money spent in such contest. Prior to its passage any stranger, being the first legal applicant after cancellation upon contest, might enter and appro-

priate the land, and thus secure to himself the result of the contestant's labor. It was to remedy this evil that the second section of the act of May 14, was passed.

Will it be said that a right thereby conferred in one month was in the next taken away, and by implication? If so, then the act of June 15, converts the act of May 14, 1880, into a mere device to lead a *bona fide* contestant on to spend his time and money only to find that the entryman or his assignee has deprived him of the advantages contemplated by law. Such intention will not be imputed to Congress if the acts will admit of any other reasonable construction.

"Enactments which confer powers are so construed as to meet all attempts to abuse them by exercising them in cases not intended by the statute. Though the act done was ostensibly in execution of the statutory power and within its letter, it would nevertheless be held not to come within its power, if done otherwise than honestly, and in the spirit of the enactment." (Max. Int. Stat., 134.)

The spirit of the act of June 15, was to afford relief to those who had violated the law, or failed to comply with it, but certainly did not contemplate that an entryman should invoke its aid to the detriment of one who had faithfully followed the law. Construing the two acts as if they were one law, a case is presented analogous in many respects to that of Shepley *v.* Cowan (91 U. S., 330), upon which the case at bar may be ruled.

In that case two patents had been issued under the act of September 4, 1841, one in 1850 on a State selection, made in 1849, and the other to a pre-emptor in 1866, settlement having been made in 1835. The Court said:

"The party who takes the initiatory step, in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. . . . . But it was not intended by the 8th section of the act of 1841, in authorizing the State to make selections of land, to interfere with the operation of the other provisions of that act regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had."

Following this ruling, it is held that the initiatory step was taken by Freise when he initiated contest, and that the right of purchase under the act of June 15, 1880, was thereby suspended until the final disposition of said contest. That contest having procured the cancellation of the homestead entry, contestant is entitled to the preference right of entry, and the cash entry of Hobson will be canceled.

The case of Gohrman *v.* Ford, *supra*, and cases following it, in as far as they conflict herewith, are hereby overruled. This decision will not affect in any manner cases that have been finally adjudicated.

PRACTICE—SECOND CONTEST.

BABCOCK *v.* GARRETT.

An application to contest rejected for illegality, but pending on appeal, will not bar the initiation of a second contest, though no proceedings should be had thereunder until the final disposition of the pending appeal.

The ruling in Bivins *v.* Shelly cited and modified.

Assistant Secretary Hawkins to Commissioner Sparks, June 23, 1886.

I have considered the appeal of Martin C. Babcock from the decision of your office, dated March 10, 1885, holding his timber culture entry for the NE. ¼ of Sec. 21, T. 11 N., R. 74, Huron, Dakota, subject to the preference right of entry of Richard Garrett.

On March 20, 1883, Alonzo P. Robertson made a timber culture entry for the tract. January 31, 1884, one Thomas Lewis made application to contest the same for illegality, which application was forwarded to your office. April 19, 1884, Stephen Pauley applied also to contest, and his application was rejected, because offered pending Lewis's application. He appealed. Your office letter of June 18, 1884, allowed Lewis to contest, and dismissed Pauley's appeal. Pauley failed to appeal therefrom. Prior to that decision, to wit, on May 6, 1884, Lewis filed a withdrawal of his contest, and the local officers allowed Richard Garrett to file contest, alleging non-compliance with law. On July 2, 1884, the local officers concluded that that contest had been improperly allowed pending Pauley's appeal, dismissed it, and allowed one Davis to contest. Garrett appealed. Your office re-instated his contest, and the entry having been canceled upon relinquishment on September 4, 1884, and an entry by one Martin C. Babcock allowed, held said entry to be subject to the preference right of Garrett. From that decision Babcock appealed, alleging that Garrett's contest was invalid, because allowed pending Pauley's appeal.

I am of the opinion that the action of your office was correct. It was held in the case of Bivins *v.* Shelly (2 L. D., 282), that an illegal contest cannot defeat a legal application to contest (though in said case the second contest was improperly allowed to proceed to hearing before the pending suit was finally determined). Now the very question at issue in the appeal of Pauley was the *legality* of his contest. His appeal, therefore, would not operate to bar the initiation of Garrett's contest. The latter should have been received and allowed to remain of record pending the disposition of the question in Pauley's appeal. The decision appealed from is affirmed, for the reasons herein stated.

LOCATION OF TOWNSITE ON PUBLIC LAND.

MILTON TOWNSITE *v.* GANN.

A townsite plat filed by a railroad company upon lands withdrawn for its benefit, confers no rights upon townsite settlers claiming under the public land laws.

Assistant Secretary Hawkins to Commissioner Sparks June 23, 1886.

On September 29, 1884, your office decided the case of the townsite of Milton *v.* W. H. Gann and Edward Bunds, involving the NE. ¼ of Sec. 15, T. 2 N., R. 10 E., Stockton land district, California, and held pre-emption cash entry No. 7836, made by Bunds, covering the NW. ¼ of the NE. ¼, for cancellation, because of conflict with the claim of said townsite.

The homestead entry of Gann, No. 2606, covering the S. ½ of said quarter, was allowed to remain intact, upon the supposition that it did not conflict with said townsite claim. Subsequently, on December 3, 1884, your office revoked said decision of September 29, and substituted therefor another decision, in which both entries were held for cancellation. From said decision only Gann appealed. The record shows the following state of facts.

Said land was originally surveyed in 1855, and the township plat of survey was filed in the local land office at San Francisco on December 5, 1855. Subsequently, on July 29, 1858, said plat was filed in the district land office at Stockton, in said State. Said decision states that "all the lands in said township were proclaimed June 30, 1858, but at the subsequent sale, to wit, February 17, 1859, the tracts in sections 11 and 15 were reserved and not offered." The local land officers state, "that the land surveyed in said township was offered at public sale on February 17, 1859." An inspection of the records of your office shows that all of Sec. 15, and the SW. ¼ of Sec. 11, were offered at said sale. On November 30, 1867, said sections 11 and 15, among others, were withdrawn for the benefit of the Stockton and Copperopolis Railroad Co., under the act of Congress approved March 2, 1867, (14 Stat., 548). Said grant was forfeited by act of Congress approved June 15, 1874 (18 Stat., 72), and lands not patented to said company were restored on September 4, 1874. Said company having acquired from the State sections 10 and 14, laid off the town of Milton, embracing portions of said sections and also part of sections 11 and 15, and filed a map thereof with the clerk of the county wherein the land is situated.

On September 16, 1876, Gann made homestead entry No. 2606 of the S. ½ of the NW. ¼ of Sec. 14, and S. ½ of the NE. ¼ of said Sec. 15. Upon the day set for making final proof, affidavits were filed by the residents of said town objecting to the allowance of the final proof offered by Gann, because—

1st. The entryman has entered into a contract for the sale of the land applied for.

2d. That all of the land applied for is within the limits of the townsite of Milton.

3d. That a part of the land applied for is under enclosure and has been for more than a year in the possession of the citizens of said town.

4th. That one of the affiants has improvements and an enclosure on said land.

5th. That an application has been made to the courts for a segregation of the lands claimed.

Besides the final proof offered by Gann, additional testimony was taken by the register, disproving said allegations, and thereupon the final proof was accepted and final certificate No. 1138 was issued on November 15, 1881. From this action of the register and receiver, no appeal was taken. On February 14, 1884, the superior judge of said county offered to file a declaratory statement in trust for the inhabitants of said Milton, an unincorporated town, claiming the NE. ¼ of said Sec. 15, and the SW. ¼ of the SW. ¼ of Sec. 11, in said township and range. Said judge alleges in said statement that said town was located, settled and improved in the year 1870; that it has ever since "actually occupied, settled and improved" the tracts claimed; and that the number of inhabitants of said town exceeds one hundred.

The district land officers declined to receive said declaratory statement, because of conflict with the prior homestead entry of Gann, and the pre-emption entry of Bunds. On appeal by said judge, your office, on April 8, 1884, ordered a hearing to ascertain the number of inhabitants at date of said entries, the date of first selection, and use for townsite purposes, and also at date of hearing. The hearing was duly held on June 12, 1884, said judge appearing in behalf of the townsite claimants, and the entrymen appearing in person and represented by counsel.

It does not appear that the register and receiver rendered any opinion upon the testimony taken, but your office, upon the evidence submitted, held that the filing of said map in connection with the population of said town in 1876 operated as a selection, and created a reservation of the land in controversy, and that said entries were therefore illegal and should be canceled.

It is insisted by the appellant that said decision erred in holding—

1st. That the land in controversy was selected as a townsite, or was occupied for purposes of trade or business at the date when said homestead entry was made.

2d. That it was error to refer to the copy of the map filed on May 26, 1871, and transmitted to your office as evidence in another case.

The testimony shows that the town of Milton was laid out by the railroad company in 1870, upon land purchased from the State, and also land in said odd numbered sections, withdrawn for its benefit under said grant; that after the restoration of said odd numbered sections, no action was taken by the inhabitants of the town to secure the townsite, except to settle upon and use portions thereof for purposes of trade;

and that the tract in controversy was not used for trade or business. It is clear that the town-site laws have reference solely to the establishment of towns upon public lands. The filing of said map on May 21, 1870, by said company could not give the townsite claimants any right to lands in a state of reservation. The map was filed by said company for its own benefit, and for lands appropriated at that time to its own use. It is not intended to decide that the inhabitants of said town could not have made a selection of public land after a restoration of said sections, but that as a matter of fact they did not make any selection under the town-site laws, and that they could acquire no right by virtue of the platting of said town by said company for its own private use and benefit. Such was substantially the ruling of this Department in the case of Keith *v.* Townsite of Grand Junction (3 L. D., 356,) adhered to on review (ibid. 431), citing, among other cases, Carson *v.* Smith (12 Minn., 546,) and matter of Selby (6 Mich., 193). In the case of Keith *v.* Townsite the townsite declaratory statement was filed within three months from the date of restoration; while in the case at bar no filing was offered until nearly ten years after the restoration of said land, and more than two years after the issuance of the final certificate to Gann.

It is urged by the appellee that said homestead application ought not to have been allowed, for the reason that at its date there was a pending contest for a portion of the land between two settlement claimants, which was decided adversely to both on December 14, 1876, and the rights of the townsite recognized. But said decision, from which no appeal was taken, found that the town contained something less than one hundred inhabitants. While it is true that said contest was decided after the allowance of said homestead application, yet said contest did not under the rules of practice then in force reserve the land from homestead entry, the entryman's rights were subject to the rights of the alleged prior settlers. Again, Gann made his final proof after due notice, and after testimony had been taken upon the allegations of parties in behalf of the townsite claimant, and his final certificate was issued. from which action no appeal was taken. When said entry was made there was nothing upon the record of the local land office to show that said tract was not public land, and the entry segregated the land covered thereby so long as it remains of record. Until the entry is canceled, the land covered thereby is not subject to settlement and entry. Wilcox *v.* Jackson (13 Peters, 498); Henry Cliff, and cases cited (3 L. D., 216).

It will be unnecessary to notice the objection insisted upon by the resident counsel for appellant, relative to the consideration of the copy of said map, filed in the case of said town *v.* McClellan. The error alleged was not assigned in the appeal filed in your office.

After a careful consideration of the testimony and record of the case, I am of the opinion that said entry of Gann should be allowed to remain intact and that the decision of the district land officers rejecting

the townsite declaratory statement, so far as the same covers the S. ½ of the NE. ¼ of said Sec. 15, should be affirmed. Said decision of your office is modified accordingly.

The attention of your office is called to the request of the district land officers, asking a ruling as to the payment of fees, concerning which no opinion was expressed in said decision, and hence no mention is made herein as to the correctness of the ruling of said officers.

TIMBER CULTURE CONTEST—RELINQUISHMENT.

EBBOTT *v.* SCHAETZEL ET AL.

All rights of an entryman to be heard in a contest cease on relinquishment.

As the contestant had complied with the law as then construed in the initiation and prosecution of his contest, and had filed his application to enter before the promulgation of the circular of dismissal under the Bundy decision, it is held that a subsequent relinquishment will inure to his benefit.

Secretary Lamar to Commissioner Sparks, June 23, 1886.

January 25, 1879, Jacob Schaetzel, Jr., made timber-culture entry No. 970 (Springfield series), of the NE. ¼ of Sec. 17, T. 102 N., R. 59 W., Mitchell, Dakota Territory. January 5, 1882, John Ebbott initiated contest against this entry, but withdrew it January 26, ensuing, and on the same day initiated a new contest charging failure to cultivate, etc. Hearing was finally had after several continuances May 2, 1882, at which both parties were present and both submitted evidence.

No further action appears to have been taken in reference to this contest until December 2, 1882, when Ebbott filed an unsigned timber culture application to enter the tract. This application was dropped and on December 20, same year, he filed a homestead application for the land. In the meantime, November 14, 1882, the decision in the Bundy case (1 L. D. 179) had been rendered, in which it was held that the filing of an application to enter was a condition precedent to the right to contest an abandoned or forfeited timber-culture entry, and on December 20, ensuing, by circular instructions of that date (1 L. D. 38), the registers and receivers of all the land offices were directed to dismiss all contests then pending in their respective offices against timber-culture entries coming within the purview of said decision.

Under these instructions, January 2, 1883, the local office dismissed Ebbott's contest, because no application to enter accompanied his affidavit of contest. Notice of this dismissal, however, was not given him until September 25, 1884. In due time thereafter, he appealed to your office, and his appeal was transmitted by register and receiver's letter of September 29, 1884.

January 26, 1882, the day Ebbott filed his second contest, Solon D. Norton applied to contest this same entry; but his application was rejected because of the prior contest of Ebbott and he appealed. July 1,

1884, he filed a second contest against the same entry, and hearing was set for September 2, following. July 2, 1884, Schaetzel relinquished his entry, and sold his improvements thereon to one August Deicher, who thereupon filed pre-emption declaratory statement No. 22,997 for the same land. At the instance of Schaetzel, Norton's second contest was dismissed by the local office on the day set for the hearing thereof, because his application to enter, filed with his affidavit of contest, was unsigned. He appealed, and his several appeals, together with other papers in the case, were transmitted by register and receiver's letter of September 19, 1884.

December 13, 1884, your office considered the whole case as then presented, and held: First, That neither Ebbott nor Norton gained anything by attempting to contest Schaetzel's entry prior to the time they filed applications to enter, under the Bundy decision; Second, That as Ebbott filed the first application to enter, he was first entitled to contest the entry, under the doctrine in Fergus *v.* Gray (2 L. D., 296); and, Third, That as Ebbott was not informed of the dismissal of his contest till after Schaetzel's entry was canceled, he had no opportunity to contest it, and consequently he was entitled to enter the tract in controversy under his said homestead application and affidavit of December 20, 1882. Norton's appeal was dismissed summarily, because of his claims being subsequent to those of Ebbott.

From this decision Norton and Schaetzel appealed to this Department, and it is upon their appeals that the case is now before me.

In so far as the appeal of Schaetzel is concerned, it is sufficient to say that he can not be heard here. Having relinquished his claim to the United States, he can have no interest in a decision affecting this land. His appeal is therefore dismissed.

It is strongly urged by Norton that Ebbott was notified of the dismissal of his contest at the date thereof, to wit, January 2, 1883; but this is explicitly denied under oath by Ebbott, and the record shows no notice until September 25, 1884, as aforesaid. I therefore find as a fact in accordance with the record upon that point, and Ebbott's appeal to your office was thus in time. It is also urged that Ebbott's contest was properly dismissed under the Bundy doctrine. But I think otherwise. The contest was initiated and the hearing had under the rules and the practice, which had been in existence for at least eight years. He did all that the law as then interpreted required of him, and should not suffer because of the change of ruling subsequently adopted. Lytle *v.* Arkansas (9 Howard, 314); Kent Com., 476; Brown *v.* U. S. (113 U. S., 568), and cases therein cited; Ryan *v.* Conly (4 L. D., 246); and numerous other departmental decisions. Further, his application to enter was pending at the time of the dismissal of his contest, it having been filed on the day of the signing of said Circular Instructions of December 20, 1882, and before their promulgation at the Mitchell office.

It having been thus ascertained that Norton's claims are subsequent to those of Ebbott, the conclusion in the decision appealed from that Ebbott is entitled to make homestead entry of the tract applied for under his said application of December 20, 1882, will not be disturbed. Whatever claim the pre-emptor Deicher can have to this land is subject to the claim of Ebbott; and it already having been ascertained that Ebbott's entry should be allowed, it is necessary that Deicher's claim be rejected, and his said pre-emption declaratory statement canceled.

The decision appealed from is modified in accordance with the views above expressed.

PRACTICE—SECOND CONTEST.

CHURCHILL *v.* SEELEY ET AL.

An application to contest, filed pending appeal by another from the rejection of his contest for illegality, should be received and held subject to the result of such appeal.

Assistant Secretary Hawkins to Commissioner Sparks, June 23, 1886.

June 7, 1880, Edmund Hodges made timber culture entry No. 3027 of the NW. $\frac{1}{4}$ of Sec. 29, T. 120 N., R. 62 W., Watertown, Dakota Territory. March 6, 1882, Henry Churchill began contest against this entry charging failure to break five acres of said tract the first year of the entry. Hearing was set for May 13, 1882, at which contestant appeared and submitted ex parte testimony (the defendant failing to appear) and judgment was that day rendered in his favor by the local office. No appeal was taken and the case came up under the rules. March 13, 1883, your office dismissed this contest, under the rule in the Bundy case (1 L. D., 179).

This tract now came within the jurisdiction of the Huron office, and on March 15, 1883, before the local office had received formal notice of the dismissal of Churchill's contest, Charles H. Seeley attempted to initiate contest against this same entry, but his application was dismissed for the reason "Prior contest on same tract." He appealed, and his appeal was transmitted by register's letter of May 15, 1883.

In the meantime, April 6, 1883, the local office rejected a second contest by Churchill, for the reason "Appeal pending on same tract." He appealed, and his appeal was transmitted May 7, 1883. Upon consideration of the case as then presented, your office, June 20, 1883, affirmed the action of the local office in dismissing the respective applications of Seeley and Churchill to contest, and held further that Churchill by attempting to initiate a second contest had waived his right of appeal from said office decision of March 13, 1883, dismissing his first contest. His first contest was, therefore, closed.

Seeley took no appeal from said decision, but immediately upon receiving notice of the same, on June 27, 1883, began a second contest

which proceeded regularly to a hearing on February 4, 1884, and judgment of the local office in his favor. The proceedings of this contest were forwarded to your office on March 5, 1884.

Under date of September 17, 1883, Churchill addressed a letter to your office, stating that great injustice had been done him by the dismissal of his contest: that he was not notified of the said decision of your office of June 20, 1883, until July 25, following, after the second contest of Seeley had been commenced; and he therefore asked what course to pursue in order to save his rights. September 29, 1883, your office replied to Churchill, telling him that any grievance of his relative to his case, when embodied in proper form and transmitted through the local office would be duly considered.

After waiting about four months, Churchill, on February 5, 1884, filed in the local office his petition, setting forth all the proceedings in his contests, and asked that his second contest (which was dismissed June 20, 1883, as aforesaid) be re-instated. In this petition he evidently forgets what he had stated in his letter of a previous date relative to notice of said decision of June 20, 1883. For in his petition he says, after reciting the fact of the dismissal of his second contest by the local office, "Thereupon my attorneys, Messrs. Melville & Kelly, of Huron, appealed from the register's decision to the Honorable Commissioner, claiming that my contest should not be rejected. And I have never had [heard] any further regarding it."

In the meantime, to wit: January 5, 1884, your office made the said decision of June 20, 1883, final, and closed the cases.

Upon this allegation of Churchill, that he had heard nothing from his appeal from the action of the district officers in rejecting his second contest, your office made four several calls upon the local office to ascertain when and in what manner they had given Churchill notice of said decision of June 20, 1883, if, indeed, they had ever given him any. Finally, on December 30, 1884, the local office reported that Churchill was notified by mail June 27, 1883, said letter having been addressed to Henry Churchill, Armadale, Dakota Territory, the post-office nearest the land in controversy; and that no attorneys appear of record for Churchill.

January 20, 1885, your office held that proper notice had not been given Churchill of said decision of June 20, 1883; and accordingly gave him sixty days from notice of that decision within which to appeal to this Department.

April 14, 1885, your office overruled a motion for review, filed on behalf of Seeley, of said decision of January 20, 1885; and Seeley thereupon appealed from such action.

In the meantime, Churchill filed his appeal from said decision of June 20, 1883.

Both appeals were transmitted to this Department by your office letter of May 27, 1885, and the whole case is now before me for consideration.

Whatever rights Churchill had under his first contest were lost by his failure to appeal from your office decision of March 13, 1883, dismissing said contest. And whatever rights he acquired under his second contest were lost if he failed to appeal from your office decision of June 20, 1883, within sixty days from the time he received legal notice of such decision. That he did receive notice of some kind on the 25th of July, 1883, is evidenced by his own statement made in his said letter of September 17, 1883, upon which your office has acted in its subsequent proceedings. It may be true, as he alleges, that he never received the letter of the local office advising him of the dismissal of his second contest; in fact it is not claimed by the opposing party that he did receive said letter. It is, however, insisted on behalf of Seeley that Churchill was notified personally by the register, and that such notice is sufficient under the rules. I do not so consider it. Rule 17 of Practice (old) provides that notice of decisions *shall be in writing*, and may be served personally or by registered letter through the mail. See also Elliot *v.* Noel (4 L. D., 73). It is not even claimed by any one that the said letter of the register to Churchill at Armadale was a registered letter; and it is not claimed that the notice which Churchill received July 25, 1883, was notice in writing. Hence, it not being shown affirmatively that Churchill was properly notified of said decision of June 20, 1883, but, on the other hand, being specially denied by him that he did receive proper legal notice, I am of opinion that your office was properly justified in holding that he had not been notified in a proper manner, and that therefore he would have the right of appeal from said decision. See Parker *v.* Castle, on review (4 L. D., 84); and Milne *v.* Dowling (ib., 378). This brings me, therefore, to the consideration of the correctness of the ruling of your office in said decision of June 20, 1883, dismissing Churchill's second application to contest. As before stated, this application to contest was received at the local office and by it rejected, pending an appeal by Seeley involving the same tract.

I am of opinion your office was in error in its ruling.

The second application of Churchill to contest was merely subject to the rights of Seeley under his first application, (which had been rejected by the local office for illegality,) and should have been held to await the final result thereof. Seeley's first application having been disposed of by final judgment June 20, 1883, from which there was no appeal, the rights of Churchill under his second application thereupon attached. His rights having been kept alive by appeal, he should now be given the right to contest under his said application rejected April 6, 1883.

The decision of your office refusing him this right is reversed. The subsequent proceedings of Seeley in the case are hereby set aside and vacated, and you will proceed as hereinbefore directed.

PRIVATE CLAIM—JURISDICTION OF THE LAND DEPARTMENT.

NEW ORLEANS CANAL & BANKING CO. *v.* STATE OF LOUISIANA.

The departmental decision herein of April 3, 1886, settled but two questions, one of practice, and the other as to whether the State was concluded by the decision of the Department rendered January 18, 1884.

Acting Secretary Hawkins, to Commissioner Sparks, June 29, 1886.

I transmit herewith a communication from J. L. Bradford, Esq., and C. W. Holcomb, Esq., attorneys for the New Orleans Canal and Banking Company, calling my attention to an alleged error of fact in my decision of April 3d last (4 L. D. 473) in the above stated case.

The following paragraph from my decision of April 3, 1886, is the error complained of, which is alleged to be an erroneous view of the decision of Secretary Teller of January 18, 1884:

"This decision relied upon by your office as disposing of the question of title to this claim was therefore made upon an appeal from a decision of the Commissioner on application for confirmation of a private claim under the act of June 22, 1860; and while the Secretary assumed jurisdiction to pass upon the validity of these grants, and in effect to confirm the same, upon the ground that the State selections were in conflict with the grants, yet the subject of the appeal before him was a decision of the Commissioner disapproving the report of the register and receiver upon an application for confirmation of a private claim under the act of June 22, 1860."

Counsel for the bank assert that their application, upon which the decision of Secretary Teller was made, was not under the act of June 22, 1860, but was made pursuant to the decision of the Department in the Malines case (2 C. L. O., 23,) praying that they be allowed to prove their title and place it on record, as they claimed under complete French grants, requiring no confirmation or other relief under the act of 1860.

My decision of April 3d last was made upon an appeal from a decision of your office dismissing the case made by the record of a hearing had before the register and receiver, without considering the merits of the case, upon the ground that the matters in controversy had been compassed by the decision of the Secretary of January 18, 1884. The record accompanying the appeal then before me, and the decision therein referred to, appeared to be a sufficient record for the purpose of adjudicating the question raised by the appeal, without an examination of the record in your office, as the controlling issue made by the appeal was whether the State was concluded by the decision aforesaid. That is the only question decided by my decision of April 3d, except the question of practice.

In considering the decision of Secretary Teller, I presumed that it was made upon an application under the act of 1860; because it recites that application was filed before the register and receiver, who could only assume jurisdiction of private claims under the act of 1860.

Another view presented in this case is, whether there is any jurisdiction vested in either the Land Office or the Department to consider or in any manner pass upon the validity of private claims in Louisiana, except under the acts of Congress providing for the confirmation of such claims.

If it appears from an examination of the record that the hearing before the register and receiver was not had upon an application filed under the act of 1860, you will not be controlled by the statement complained of, but if such is the fact, you will then consider and determine the question whether there is any authority or jurisdiction vested in the Land Office to hear and determine or in any manner pass upon the validity of private claims in the State of Louisiana, except such as may be conferred upon it by the acts of Congress providing for the confirmation of such claims.

I herewith transmit the application of Messrs. Bradford and Holcomb for file with the papers in the case, and direct that you notify the counsel for both parties of this decision.

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