24D.

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THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JANUARY 1, 1891, TO JUNE 30, 1891.

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3238 K

TABLE OF CASES REPORTED.

	Page.
Addis *v.* Blower	476
Alden *v.* Ryan	690
Allen *et al. v.* Merrill *et al.* (on review)	138
Ambers, Northern Pacific R. R. Co. *et al. v.*	395
Anderson *v.* Rey	620
Anderson *v.* Morrison	642
Arizona and Southeastern R. R. Co	72
Arnold *et al.*, McAllister *v*	520
Ary *v.* Iddings	252
Atkinson, Pike *v.* (on review)	226
Atlantic and Pacific R. R. Co	116
Atlantic and Pacific R. R. Co., Sullivan *v*	545
Avery *v.* Smith	550
Axford *v.* Shanks *et al*	250
Baca Float No. 3	676
Bailly, Alexis F	184
Baker, William D	127
Barbaronie, Matthews *v*	285
Barrett, Oregon and California R. R. Co. *v*	232
Barringer, Alpheus R	623
Bartlett, Friel *v*	502
Baxter *v.* Crilly	684
Bayfield Transfer Co	481
Beckman *v.* Colgrove	303
Bell, Dixon *v*	510
Bennett *v.* Cravens	647
Berreth *v.* Midgaard	203
Birtch *et al.*, Orvis *v.* (on review)	662
Black, John B	528
Blakely *v.* Kaiser	202
Blevins *et al.*, Spencer *v*	318
Blower, Addis *v*	476
Bond *v.* Watkins	56
Bourke, Walter	105
Bowman *v.* Davis	415
Boynton, Savage *et al. v.*	612
Bradlee, Carlson *v*	525
Brady *v.* Central Pacific R. R. Co. (on review)	653
Bregard *et al.*, Naphtaly *v.* (on review)	667
Brew, Gore *v*	239
Brotherton, Edward *et al*	305
Brown, Mather *v*	393
Brown, Underhill *v*	602
Bruce *v.* Riddle	488
Buckingham *v.* Northern Pacific R. R. Co	471
Buffington, Reed *v.* (on review)	220
Busch *v.* Devine	317
Bush, Newbaur *v*	533
Burrow, Johnson *v*	440
Butcher, James P	137
California and Oregon R. R. Co. *v.* Pickard	133
Campbell, Michael	244
Campbell, Samuel L	247
Canter, Oregon Central Military Wagon Road Co. *v*	362
Canty, Daniel J	58
Capelli *v.* Walsh	334
Carlson *v.* Bradlee	525
Casey, Willamette Valley Wagon Road Co. *v*	331
Catron *v.* Geister	195
Central Pacific R. R. Co., Brady *v.*	653
Central Pacific R. R. Co., North Star Mining Co. *v*	608
Central Pacific R. R. Co., Orr *v*	272
Central Pacific R. R. Co. *et al.*, Ryan *v*	11
Chicago, Milwaukee and St. Paul R. R. Co	541
Chicago, St. Paul, Minneapolis and Omaha Ry. Co	259
Chrisinger, R. M	610
Citizen Band of Pottawatomies	357
Clampett, John	110
Clapp, Cyrus F	281

	Page.
Clark, William H	201
Clark, Williams *v*	173
Cloessner *v.* Vicksburg, Shreveport and Pacific R. R. Co	280
Coder *v* Lotridge	643
Coffey *v.* Tracy *et al.*	492
Colburn *v.* Pittman	497
Colgrove, Beckman	303
Comar *v.* Wendling	25
Conlin *v.* Kelly	1
Copeland *et al.*, Ferguson *v*	93
Coon *v.* Simmons	429
Cotton, C. N	205
Cranson, Charles C., *et al*	279
Cravens, Bennett *v*	647
Craven, Swaim *v*	294
Crews, Nancy J	560
Crilly, Baxter *v*	684
Crose *v.* Fries	235
Dahlstrom *v.* St. Paul, Minneapolis and Manitoba Ry. Co	59
Dakota Central Ry. Co	264
Daly *et al.*, Ferguson *v*	230
Dano *v.* Lozier	568
Darland *v.* Northern Pacific R. R. Co	195
Davis, Henry L	632
Davis, Bowman *v*	415
De Good, McDonnell *v*	626
De Lendrecie, United States *v*	610
De Mars *v.* Donahue	113
De Shane, George *et al*	637
Devine, Busch *v*	317
Dickerson, Gay *v.*	531
Dixon *v.* Bell	510
Doherty *v.* Robertson	30
Dougherty, Patrick	183
Doyle, Kendrick *v.*	67
Drumm *v.* Tormey	109
Dubuque & Pacific R. R. Co	347
Dunbar, Jacob	73
Duncanson *v.* Southern Pacific R. R. Co. (on review)	664
Dusenberry *v.* Wall	12
Eaton *et al.*, Hyde *et al. v.* (on review)	157
Edgar *et al.*, Northern Pacific R. R. Co	540
Edmiston *et al. v.* Northern Pacific R. R. Co	465
Emde, Tyler *v*	94
Engler *v.* Molee	103
Epps *v.* Newcomb	370
Ewing *v.* Rourke	538
Fee *v.* Young	472
Ferguson *v.* Copeland *et al.*	93
Ferguson *v.* Daly *et al*	230
Finan *v.* Meeker (on review)	210
Finan *v.* Palmer *et al.* (on review)	208
Findley *v.* Ford (on review)	228
Fitzpatrick, Thomas	268
Flandreau Sioux	292
Fleetwood Lode	604
Flippen, Southern Pacific R. R. Co. *v*	18
Florida Ry. and Navigation Co.	553
Florida Ry. and Navigation Co. *v.* Roberts	547
Florida Ry. and Navigation Co., Wigg *v*	301
Ford, Henry	181
Foster, George G	316
Friel *v.* Bartlett	502
Fries, Crose *v*	235
Fuhrer, Hattie	556
Fuller *v.* Hill *et al*	600
Galloway, William	80
Gandell, Charles *et al*	478
Garlichs, Robert L	469
Garner *et al. v.* Mulvane *et al*	336
Gay *v.* Dickerson	531
Geister, Catron *v*	195
Gerlach *v.* Kindler	571
Gilland, George H	241
Gillette, Nichols *v*	388
Glass, Charles F	313
Goodale *v.* Olney	324
Gore *v.* Brew	239
Great Northern Rwy. Co	541
Griego, Ramey *v*	545
Gulf and Ship Island R. R. Co	269
Guthrie Townsite *v.* Paine *et al*	653
Haggin, United States *v*	34
Hall *v.* Levy (on review)	226
Hall, Kendall *v*	419
Hanchett, Ira O	437
Hanna, James	356
Harris, Isaac, Northern Pacific R. R. Co. *v*	351
Hartzell, Thomas B. (on review)	558
Hastings and Dakota Ry. Co	541
Hastings and Dakota Ry. Co., McFarlane *v*	228
Hatch, Yale T	607
Havel *v.* Havel	320
Haynes, Samuel J	645

	Page.
Hecla Consolidated Mining Co	75
Heenan, Stovall *v*	382
Henderson *v.* Moore	390
Hendsch, Parks *v*	100
Henley, Witt *v*	198
Henry *v.* Stanton *et al*	390
Hensley *v.* Missouri, Kansas & Texas Ry. Co	19
Hestetun *v.* St. Paul, Minneapolis and Manitoba Ry. Co	27
Hill *et al.*, Fuller *v*	600
Hinchman *et al. v.* McClain	49
Hobart, Joseph	431
Hobson, Johannes *v*	378
Hoffman *v.* Tomlinson *et al*	45
Hooper, Albert H	633
Hruby, Waclav	325
Hulbert, United States *v*	29
Hyde *et al. v.* Eaton *et al*	157
Iddings, Ary *v*	252
Imes, John W	288
Iowa Railroad Land Co	541
James, Southern Pacific R. R. Co. *v*	479
Janssen, Sven P	561
Jerome, Levi, *et al*	165
Jett *v.* Rogers	290
Johannes *v.* Hobson	378
Johnson, Turner *v*	263
Johnson *v.* Walton (on review)	205
Johnson *v.* Burrow	440
Jones, C. C	371
Jones, Lewis	361
Justice *v.* State of Alabama	635
Kaiser, Blakely *v*	202
Kane, James C	132
Kaweah Colony	83, 326
Keeler, Wydler *v*	194
Kelly, Conlin *v*	1
Kelly *v.* McWilliams	403
Kendall *v.* Hall	419
Kendrick, Doyle *v*	67
Kindler, Gerlach *v*	571
Kirby, Martin *v*	23
Knowles, Robinson *v*	462
Kranich *et al.* Northern Pacific R. R. Co. *v*	384
Krigbaum, James T	617
Lane, Morton *v*	74, 606
Larkin, Sarah A	213
Leary *v.* Manuel	345
Levy, Hall *v.* (on review)	226
Loew, Williams *v*	297
Logue *v.* O'Connor	32
Lotridge, Coder *v*	643
Lozier, Dano *v*	568
Lund, St. Paul, Minneapolis and Manitoba Ry. Co. *et al. v*	398
Lyon, Moore *v*	265
Madison, Luther K	397
Main, Mary J	102
Manuel, Leary *v*	345
Martin *v.* Kirby	23
Massey *v.* Malachi	214
Mather *v.* Brown	393
Matthews *v.* Barbaronie	285
McAllister *v.* Arnold *et al.*	520
McClain, Hinchman *et al. v*	49
McCoy, Mary	359
McCrimmon, Northern Pacific R. R. Co. *v*	554
McDonnell *v.* De Good	626
McDonogh *et al.*, State of Louisiana *v*	496
McFarlane *v.* Hastings and Dakota Ry. Co	228
McKenzie, Richards *v*	47
McLaughlin, James C	304, 681
McLaughlin *v.* Richards	98
McNickle, Ruth (on review)	44
McPherson, Sparks *v*	627
McWilliams, Kelly *v*	403
Meeker, Finan *v.* (on review)	210
Melvin, Noble *v*	311
Merrill *et al.*, Allen *et al. v.* (on review)	138
Metcalf, E. D	192
Michigan Land and Iron Co	214
Midgaard, Berreth *v*	203
Mille Lac Indian lands	52
Milwaukee, Lake Shore & Western Ry. Co	79
Minneapolis, St. Paul and Sault Ste. Marie Ry. Co	552
Mint Lode and Mill Site	624
Mission Indians *v.* Walsh	516
Missouri, Kansas & Texas Ry. Co	88
Missouri, Kansas & Texas Ry. Co., Hensley *v*	19
Mobile & Girard Railroad	117
Molee, Engler *v*	103
Montgomery *et al.*, United States *v.* (on review)	503
Moore, Henderson *v*	390

	Page.
Moore *v.* Lyon	265
Morgan, David J	78
Morgan *v.* Riley	44
Morrison, Anderson *v*	642
Morton *v.* Lane	74, 606
Moultrie, Emile	460
Mulvane *et al.*, Garner *et al. v*	336
Naphtaly *v.* Bregard *et al.* (on review)	667
Nelson, Tucker *v*	233
Newbaur *v.* Bush	533
Newcomb, Epps *v*	370
Nichols *v.* Gillette	388
Nil Desperandum Placer (on review)	364
Noble *v.* Melvin	311
Northern Pacific R. R. Co	572
Northern Pacific R. R. Co. *et al. v.* Ambers	395
Northern Pacific R. R. Co., Buckingham *v*	471
Northern Pacific R. R. Co., Darland *v*	195
Northern Pacific R. R. Co. *v.* Edgar *et al*	540
Northern Pacific R. R. Co., Edmiston *et al. v*	465
Northern Pacific R. R. Co. *v.* Isaac Harris	351
Northern Pacific R. R. Co. *v.* Kranich *et al*	384
Northern Pacific R. R. Co. *v.* McCrimmon	554
Northern Pacific R. R. Co. *v.* Pile	322
Northern Pacific R. R. Co. *v.* Potter *et al.* (on review)	212
Northern Pacific R. R. Co., Quinlan *v*	310
Northern Pacific R. R. Co., Sales *v*	299
Northern Pacific R. R. Co., Sawyer *v*	448
Northern Pacific R. R. Co. *v.* St. Paul, Minneapolis and Manitoba Ry. Co	512
Northern Pacific R. R. Co., St. Paul, Minneapolis and Manitoba Ry. Co. *v*	567
Northern Pacific R. R. Co., Stenoien *v*	495
Northern Pacific R. R. Co., Whitney *v*	238
North Star Mining Co. *v.* Central Pacific R. R. Co	608
O'Connor, Logue *v*	32
Olney, Goodale *v*	324
Olson *v.* Rogers	453
Oregon Central Military Wagon Road Co. *v.* Canter	362
Oregon & California R. R. Co. *v.* Barrett	232
Orr *v.* Central Pacific R. R	272
Orvis *v.* Birtch *et al.* (on review)	662
Pacific Slope Lode	686
Paine *et al.*, Guthrie Townsite *v*	653
Palmer *et al.*, Finan *v.* (on review)	208
Parker, Charles R	208
Parks *v.* Hendsch	100
Peorias and Miamies	168
Phillips, Joseph W	344
Pickard, California & Oregon R. R. Co. *v*	133
Pike *v.* Atkinson (on review)	226
Pile, Northern Pacific R. R. Co. *v.*	322
Pittman, Colburn *v*	497
Plumer, John	535
Plummer, heirs of, Reid *v*	562
Plymouth Lode	513
Pomeroy, Harmon	418
Popple, James, *et al*	433
Potter *et al.*, Northern Pacific R. R. *v.* (on review)	212
Price, George	162
Protector Lode	662
Pruitt *v.* Skeens	629
Pueblo of Monterey	364
Quarnberg, Lewis	199
Quinlan *v.* Northern Pacific R. R. Co	310
Ramey *v.* Griego	545
Rathbun, Thomas *v*	243
Rawson, Cyrus B	246
Rebel Lode	683
Reed *v.* Buffington (on review)	220
Rees *et al.*, Silva *v*	507
Reid *v.* Heirs of Plummer	562
Reimer *v.* Van Oene	47
Rey, Anderson *v*	620
Reynolds, Martin	130
Richards, McLaughlin *v*	98
Richards *v.* McKenzie	47
Riddle, Bruce *v*	488
Riley, Morgan *v*	44
Rio Grande Southern R. R. Co	92
Ritchey *v.* Stevens	519
Riverside Island	97

	Page.
Roberts, Florida Ry. and Navigation Co. *v*	547
Robertson, Doherty *v*	30
Robinson, Stella G	443
Robinson *v.* Knowles	462
Rogers, Jett *v*	290
Rogers, Olson *v*	453
Rogers, Taylor *v*	694
Ross, James	446
Rosson, Walker *v*	91
Rourke, Ewing *v*	538
Rowe *v.* Saint Paul, Minneapolis and Manitoba Ry. Co	354
Runyon, William C	377
Russell, Asahel	529
Ryan, Alden *v*	690
Ryan *v.* Central Pacific Co. *et al.*	11
Saint Paul, Minneapolis and Manitoba Ry. Co	373
Saint Paul, Minneapolis and Manitoba Ry. Co., Dahlstrom *v.*	59
Saint Paul, Minneapolis and Mantoba Ry. Co., Hestetun *v.*	27
Saint Paul, Minneapolis and Manitoba *et al. v.* Lund	398
Saint Paul, Minneapolis and Manitoba Ry. Co., Northern Pacific R. R. Co. *v.*	512
Saint Paul, Minneapolis and Manitoba Ry. Co. *v.* Northern Pacific R. R. Co	567
Saint Paul, Minneapolis and Manitoba Ry. Co. *v.* Rowe	354
Saint Paul, Minneapolis and Manitoba Ry. Co. *v.* Strobeck.	615
Saint Paul and Northern Pacific R. R. Co	541
Saint Paul and Sioux City R. R. Co. *et al*	541
Saint Paul, Stillwater and Taylor's Falls R. R. Co	541
Sales, Northern Pacific R. R. Co. *v.*	299
San Juan Placer	125
Savage *et al. v.* Boynton	612
Sawyer *v.* Northern Pacific R. R. Co	448
Schauer, Louis	313
Searle Placer (on review)	663
Searls, United States *v.*	20
Shanks *et al.*, Axford *v*	250
Sherry, Henry	176
Shirley *v.* Shropshine	57
Shultis, Thompson *v*	62
Silance *v.* Yeager	536
Silva *v.* Rees *et al.*	507
Simmons, Coon *v*	459
Simser *v.* Southern Minnesota Ry. Co	386
Sioux City and Saint Paul R. R. Co	541
Sioux lands	474
Skeens, Pruitt *v*	629
Smith, Avery *v*	550
Smith, Hulda M. (on review)	666
Smith *v.* Washburn	14
Sparks *v.* McPherson	627
Spence, Thomas *et al. v*	639
Spencer *v.* Blevins *et al*	318
Southern Minnesota Ry. Extension Co	518
Southern Pacific R. R. Co., Duncanson *v.* (on review)	664
Southern Pacific R. R. Co. *v.* Flippen	18
Southern Pacific R. R. Co. *v.* James	479
Stanton *et al.*, Henry *v*	390
State of Alabama, Justice *v*	635
State of Colorado	70
State of Florida	565
State of Iowa (Woodbury County)	276
State of Louisiana *v.* McDonogh *et al*	496
State of Minnesota	135
State of Oregon	64
State of South Dakota	89
Stebbins *v.* Sweetman *et al*	189
Stenoien *v.* Northern Pacific R. R. Co	495
Stephens, Ritchey *v*	519
Stewart, heirs of Emma F	197
Stovall *v.* Heenan	382
Strobeck *v.* Saint Paul, Minneapolis and Manitoba Ry. Co	615
Studer, Francis	455
Sullivan *v.* Atlantic and Pacific R. R. Co	545
Swaim *v.* Craven	294
ylor, Joseph S	444
Taylor *v.* Rogers	694
Tennessee and Coosa R. R. Co	254
Thomas *et al. v.* Spence	639
Thomas *v.* Rathbun	243
Thompson *v.* Shultis	62
Tighlman, Listor R	296
Tomlinson *et al.*, Hoffman *v*	45
Tormey, Drumm *v*	109
Tracy *et al.*, Coffey *v*	492

	Page.
Tucker *v.* Nelson	233
Turner *v.* Johnson	263
Tufts, Josiah	438
Tyler *v.* Emde	94
Uhlig, Edward	111
Underhill *v.* Brown	602
Union Pacific Ry. Co	210
Union River Logging Railroad Co	574
United Peorias & Miamies	168
United States *v.* De Lendrecie	610
United States *v.* Haggin	34
United States *v.* Hulbert	29
United States *v.* Montgomery *et al.* (on review)	503
United States *v.* Searls	20
Van Oene, Reimer *v*	47
Vicksburg, Shreveport & Pacific R. R. Co., Cloessner *v*	280
Wadena and Park Rapids R. R. Co	360
Walker *v.* Rosson	91
Wall, Dusenberry *v*	12
Walsh, Mission Indians	516
Walsh, Cappelli *v*	334
Walters, Amanda J. *et al*	52
Walton, Johnson *v.* (on review)	205
Warner, Evan T	389
Washburn, Smith *v*	14
Watkins, George	42
Watkins, Bond *v*	56
Weber, John W	563
Wendling, Comar *v*	25
Wheeler, L. F. (on review)	666
Whitney *v.* Northern Pacific R. R. Co	238
Wigg *v.* Florida Ry. and Navigation Co	301
Willamette Valley Wagon Road Co. *v.* Casey	331
Williams *v.* Clark	173
Williams *v.* Loew	297
Winona and St. Peter R. R. Co	541
Wisconsin Central Railroad	188
Witt *v.* Henley	198
Wolfley, Lewis	90
Wood, Levi (on review)	42
Woodbury County (State of Iowa)	276
Wydler *v.* Keeler	194
Yeager, Silance *v*	536
Young, Fee *v*	472

TABLE OF CASES CITED.

[The abbreviation "L.D." refers to this publication; "B. L. P." refers to Brainerd's Legal Precedents; "1. C. L. L." to Copp's Public Land Laws, Ed. 1875; "2 C. L. L." to Copp's Public Land Laws, Ed. 1882; "C. L. O." to Copp's Land Owner; "C. M. D." to Copp's Mining Decisions; "C. M. L." to Copp's Mineral Lands; "Lester," to Lester's Land Laws and Decisions; "Rep." to the Reporter; "S. M. D." to Sickles's Mining Laws and Decisions; and "C. Cls." to the Court of Claims.]

	Page.
Allen *et al. v.* Merrill *et al.*; 8 L. D., 207.	138
Allers *v.* Northern Pacific R. R. Co.; 9 L. D., 452	20
Andas *v.* Williams; 9 L. D., 311	395
Anderson *v.* Anderson; 5 L. D., 6	240
Anderson *v.* Hamilton; 5 L. D., 363	477
Asher *v.* Holmes; 8 L. D., 396	388
Anderson *v.* Northern Pacific R. R. Co. *et al.*; 7 L. D., 163	62, 644
Anderson *v.* The Amador & Sacramento Canal Co.; 10 L. D., 572	496
Arter, Maria C.; 7 L. D., 136, 8 L. D., 559.	48
Atlantic, Gulf and West India Transit Co.; 2 L. D., 561	548
Atlantic and Pacific R. R. Co.; 6 L. D., 84.	543
Atlantic and Pacific R. R. Co.; 5 L. D., 269	129
Atlantic and Pacific R. R. Co.; 8 L. D., 165.	349
Austin *v.* Thomas; 6 L. D., 330	19, 95, 653
Ayers *v.* Buell; 2 L. D., 257	267
Bailey, John W., *et al.*; 5 L. D., 216	166
Bailey *v.* Olson; 2 L. D., 40	496
Bailey *v.* Townsend; 5 L. D., 176	19, 641
Baker, W. D.; 12 L. D., 127	297
Ballew, Edward C.; 8 L. D., 508	22
Barnes, Julius A.; 6 L. D., 522	28
Barney *v.* Keokuk; 94 U. S., 324	435, 487
Barr *v.* Northern Pacific R. R. Co.; 7 L. D., 235	385
Barry, James; 10 L. D., 634	362
Bechtel *v.* United States; 101 U. S., 597	186
Beebe *v.* Callahan; 11 L. D., 182	494
Belk *v.* Meagher; 104 U. S., 279	688
Bell *v.* Hearne; 19 Howard, 262	328
Bennett, H. P., jr; 3 L. D., 116	2
Birtch *v.* Cüddigan; 11 L. D., 121	537
Bond *v.* Watkins; 12 L. D., 56	371
Boorman *v.* Sunnuchs; 42 Wis., 233	436
Boss *v.* Central Pacific R. R. Co.; 11 L. D., 571	481
Boulder and Buffalo Mining Co.; 7 L. D., 54	606
Bowker, Edward; 11 L. D., 361	560
Bowman *v.* Snipes; 11 L. D., 84	63, 496
Brady *v.* Central Pacific R. R. Co.; 11 L. D., 463	508
Brady *v.* Southern Pacific R. R. Co.; 5 L. D., 407	353
Brewster, Paul O.; id., 471	346
Bright, James F.; 6 L. D., 602	346
Bright *et al. v.* Elkhorn Mining Co.; 8 L. D., 122	346
Buchman, Henry; 3 L. D., 223	203
Buckley, John; 10 L. D., 297	57, 371
Bullen, Joseph A.; 8 L. D., 301	335
Bullock *et al. v.* Central Pacific R. R. Co. *et al.*; 11 L. D., 590	514
Bunger *v.* Dawes; 9 L. D., 329	342
Burns, George T.; 4 L. D., 62	41
Burns, J. B.; 7 L. D., 20	357
Buttz *v.* Northern Pacific R. R.; 119 U. S., 55–66	179
Buxton *v.* Traver; 130 U. S., 232	87, 439, 480
Caldwell, *v.* Smith; 3 L. D., 125	532
Campbell, Michael; 12 L. D., 244	456, 530
Campbell, Samuel L.; 8 L. D., 27	248
Campbell, Samuel L.; 12 L. D., 247	547
Canal Commissioners *v.* The People; 5 Wend., 423	436
Canty, Daniel J.; 12 L. D., 58	328
Capprise *v.* White; 4 L. D., 176	328
Carson, John; 9 L. D., 160	132
Caviness *v.* Harrah; 4 L. D., 174	477
Cayce *v.* St. Louis and Iron Mountain R. R. Co.; id., 356, and on review in 7 L. D., 205	353
Cedar Rapids and Missouri River R. R. Co. *v.* Herring; 110 U. S., 27	219
Central Pacific R. R. Co. *v.* Booth *et al.*; 11 L. D., 89	509
Central Pacific Rwy. *v.* Edward L. Taylor; 11 L. D., 445	273
Central Pacific R. R. Co. *v.* Orr; 2 L. D., 525	273
Central Pacific R. R. Co. *v.* Rees; 10 L. D., 281	212
Central Pacific R. R. Co. *et al. v.* Valentine; 11 L. D., 238	212, 609

	Page.
Chapman, Frank; 6 L. D., 583	435
Chapman *v.* Summerfield; 36 Kans., 610	246
Cherokee Nation *v.* Southern Kansas Railway Co.; 135 U. S., 641	486
Chicago, Milwaukee and St. Paul Ry. Co. *v.* Amundson; 8 L. D., 291	20
Chichester *v.* Allen; 9 L. D., 302	14, 95
Choate, E. L.; 8 L. D., 162	432
Christian *v.* Strentzel; 7 L. D., 68	491
Clark *v.* Blackwell; *ibid.*, 441	621
Clark *v.* Northern Pacific Railroad Company; 3 L. D., 158	129
Clark *v.* Timm; 4 L. D., 175	503
Clements *v.* Warner; 24 How., 394	349
Cliff, Henry; 3 L. D., 216	41
Collier *v.* Wyland; 10 L. D., 96	96
Colorado Coal and Iron Company *v.* United States; 123 U. S., 307-328	514
Conly *v.* Price; 9 L. D., 490	335
Cook, Thomas Co; 10 L. D., 324	388
Cornish, Arthur B; 9 L. D., 569	27
Cravens, Elisha B.; 5 L. D., 540	634
Creswell Mining Co. *v.* Johnson; 8 L. D., 440	614
Crœsus Co. *v.* Colorado; 19 Fed. Rep., 78	346
Crowston *v.* Seal; 5 L. D., 213	45
Cyprus Mill Site; 6 L. D., 706	77, 625
Dahlstrom *v.* St. Paul, Minneapolis and Manitoba Ry. Co.; 12 L. D., 59	644
Dallas *v.* Lyttle; 11 L. D., 208	537
Darland *v.* Northern Pacific R. R. Co; 12 L. D., 195	450
Darragh *v.* Holdman; 11 L. D., 409	496
Davies *v.* Kilgore; 11 L. D., 161	477
Dayton *v.* Hause *et al.*; 9 L. D., 193	27
Dean, John J.; 10 L. D., 446	461
Deffeback *v.* Hawke; 115 U. S., 392-407	261
Dement, Helen E.; 8 L. D., 639	70
Devereux *et al. v.* Hunter *et al.*; 11 L. D., 214	30
Dickson *v.* Bennett; 10 L. D., 451	539
Dinwiddie *v.* Florida Ry. and Navigation Co; 9 L. D., 74	29
Donovan, Michael; 8 L. D., 382	274
Doolan *v.* Carr; 125 U. S., 613	665
Dotson *v.* Arnold; 8 L. D., 439	346
Downey *v.* Briggs; 5 L. D.	45
Driscoll *v.* Johnson; 11 L. D., 604	313, 621
Drury *v.* Shetterly; 9 L. D., 211	27, 335
Dughi *v.* Harkins; 2 L. D., 721	614
Dusenberry *v.* Wall; 12 L. D., 12	292
Edens, Jacob H.; 7 L. D., 229	346
Elwell *v.* Northern Pacific Railroad Company; *ib.*, 566	397
Epley *v.* Trick; 8 L. D., 110	195
Esler *v.* Townsite of Cooke; 4 L. D., 212	334
Etnier *v.* Zook; 11 L. D., 452	417
Eureka Mill Site (Charles Lenning); 5 L. D., 190	76
Farson, John; 2 L. D., 338	389
Filkins, Charles W.; 5 L. D., 49	289
Finan *v.* Meeker; 11 L. D., 319	14, 292
Findley, W. H. H.; 6 L. D., 777	191
Florida Railway and Navigation Company *v.* Dick; 7 L. D., 481	549
Florida Railway and Navigation Co. *v.* Miller; 3 L. D., 324	496
Forward, James A.; *id.*, 528	346
Fonts *v.* Thompson; 6 L. D., 332, and 10 L. D., 649	651
Franklin *v.* Murch; 10 L. D., 582	416
Frazer *v.* Ringgold; 3 L. D., 69	342
Frederick, Henry A.; 8 L. D., 412	328
Frisbie *v.* Whitney; 9 Wall., 187	86, 207
Gage *v.* Lemieux (on review); 9 L. D., 66	335
Garner, John O. & Minerva C.; 11 L. D., 207	443
Gauger, Henry; 10 L. D., 221	244
Genesee Chief; 12 How., 443	455
Gibson *v.* Choteau: 13 Wall., 92	86
Gilbert *v.* Thompson; 14 Minn., 544	152
Gilford, Jacob A.; 8 L. D., 583	127, 317
Going *v.* Orns; 8 Kans., 87	246
Goodale *v.* Olney; 12 L. D., 324	644
Graham *v.* Carpenter; 9 L. D., 365	298
Gray *v.* Nye; 6 L. D., 232	537
Griffin, Richard; 11 L. D., 231	640
Grimes, Ambrose W.; 8 L. D., 462	317
Grisar *v.* McDowell; 6 Wall., 381	207
Hardin, James A.; 10 L. D., 313	242
Harkness *v.* Hyde; 98 U. S., 476	622
Harris, Ariel C.; 6 L. D., 122	388
Hartzell, Thomas B.; 10 L. D., 681	559
Hastie, Addison W.; 8 L. D., 618	624
Hastings and Dakota Rwy Co. *v.* Whitney; 132 U. S., 357	86, 476
Hausen *v.* Ueland; 10 L. D., 273	603
Hawes, W. F., *et al.*; 5 L. D., 224	496
Heaston, B. F.; 6 L. D., 577	474
Hegranes *v.* Londen; 5 L. D., 385	335
Heitkamp *v.* Halverson, id., 530	496
Helleckson, Christopher; 10 L. D., 229	538
Henderson, Thomas E.; 10 L. D., 366	443
Hessong *v.* Burgan; 9 L. D., 353	155, 194
Heydenfeldt *v.* Daney, etc.; 93 U. S., 634-8	180
Hoagland *v.* Fairfield; 11 L. D., 543	474
Hoffman, John W.; 5 L. D., 2	41
Holland, G. W.; 6 L. D., 20	434
Hollants *v.* Sullivan; 5 L. D., 118	346
Holmes *v.* Northern Pacific Railroad Company; 5 L. D., 333	397
Hone, John C.; 10 L. D., 493	353
Hooper, W. H.; 1 L. D., 560	101
Hooper *v.* Ferguson; 2 L. D., 712	614
Horder *et al. v.* Horder *et al.*; 23 Kans., 391	246
Horn *v.* Burnett; 9 L. D., 252	63
Horton *v.* Westbrook; 9 L. D., 455	384
Horton *v.* Wilson. 9 L. D., 560	30
Hudson *v.* Docking (on review); 4 L. D., 501	490
Hulbert, Lucy W.; 12 L. D., 29	202
Huling, Lewis C.; 10 L. D., 83	69
Hull, Frank W.; 9 L. D., 60	532
Hunt *v.* Lavin; 3 L. D., 499	537
Hunter *v.* Orr; 5 L. D., 8	477
Iron King and Mine Site; 9 L. D., 201	625

	Page.
James *et al. v.* Nolan; 526	685
Jamie Lee Lode *v.* Little Forepaugh Lode; 11 L. D., 391	296
Johnson, John W.; 11 L. D., 527	183
Johnson *v.* Johnson; 4 L. D., 158	535
Johnson *v.* Townsley; 13 Wall., 89	538
Johnson *v.* Walton; 11 L. D., 278	341
Joline, A. A.; 5 L. D., 589	447
Jolly Cobbler Lode; 3 L. D., 321	648
Jones *v.* Campbell *et al.*; 7 L. D, 404	496
Jones *v.* Soulard; 24 How., 41	682
Kane *et al. v.* Devine; 7 L. D., 532	240, 317
Kansas Pacific Railway Company *v.* Dunmeyer; 113 U. S., 629	233
Kansas Indians, 5 Wall., 737	486
Kearney, Thomas; 7 L. D., 29	127
Kellem *v.* Ludlow; 10 L. D., 560	267
Keller *v.* Bullington; 11 L. D., 140	496
Kelley, Patrick; 11 L. D., 326	176
Kelly *v.* Halvorson; 6 L. D., 225	653
King *v.* Leitensdorfer; 3 L. D., 110	496
Kingfisher *v.* Wood *et al.*; 11 L. D., 330	655
Kings County *v.* Alexander *et al.*; 5 L. D., 126	614
Kirkpatrick *v.* Brinkman; 11 L. D., 71	346
Knaggs, Annie; 9 L. D., 49	299, 632
Krogstad, Ole O.; 4 L. D., 564	346
Krohn, John F.; 10 C. L. O., 342	2
Kurtz *v.* Summers; 7 L. D., 46	627
Laffoon *v.* Artis; 9 L. D., 279	19, 225
Lake Warner; 5 L. D., 369	391
Lamb *v.* Ullery; 10 L. D., 528	563
Lambert *v.* Fairchild; 5 L. D., 675	696
Laney, Thomas J.; 9 L. D., 83	515
Leavenworth R. R. Co. *v.* United States; 92 U. S., 733–745	86, 476
Le Cocq cases; 2 L. D., 784	41
Lee, David; 8 L. D., 502	245, 456, 530
Lee *v.* Johnson; 116 U. S., 48	40, 496
Lehman *v.* Snow; 11 L. D., 539	19
Le Neve Mill Site; 9 L. D., 460	77
Lindsey *v.* Hawes; 2 Black, 554	69
Little Rock and Memphis R. R. Co. 11 L. D., 595	89
Lombardi, Daniel; 7 L. D., 57	201
Louisiana *v.* John McDonogh *et al.*; 6 L. D., 473	496
Lowe, Robert; 5 L. D., 541	54
Lucy B. Hussey Lode; 5 L. D., 93	346
Ludwig *v.* Faulkner; 11 L. D., 315	313
Lutz, George F.; 9 L. D., 266	103
Lyman *v.* Elling; 10 L. D., 474	346
Lytle *v.* Arkansas; 9 Howard, 333	176, 330
Magalia Gold Mining Co., *v.* Ferguson; 6 L. D., 218	43
Malone *v.* Union Pacific Ry. Co.; 7 L. D., 13	233, 385
Manderfield and O'Connor *v.* McKinsey; 2 L. D., 580	496
Manning, Patrick; 7 L. D., 144	498
Manuel *v.* Miller; 7 L. D., 433	68
Martel, Israel; 6 L. D., 566	200
Masterson, C. P.; 7 L. D., 172 and 577	422
Maxwell *v.* Brierly; 10 C. L. O., 50	2, 101
McCabe *v.* Nichols; 4 L. D., 94	496
McClure *v.* Northern Pacific R. R. Co.; 9 L. D., 155	29
McGovern *v.* Bartels; 2 C. L. L., 241	496
McKallor, Charles W.; 9 L. D., 580	447
McKenzie *v.* Killgore; 10 L. D., 322	92
Mead *v.* Cushman; 10 L. D., 253	318
Meyer, Lewis F. J.; 10 L. D., 492	103
Meyer, Peter; 6 L. D., 639	434
Meyers *v.* Smith; 3 L. D., 526	640
Miller *v.* Knutsen; *ibid.*, 536	622
Milne *v.* Dowling; 4 L. D., 378	45, 312, 622
Mining Company *v.* Rose *et al.*; 114 U. S., 576	296
Missouri, Kansas and Texas Ry. Co. *v.* Beal; 10 L. D., 504	20
Mitchell, Joseph W.; 7 L. D., 455	43, 494
Mitchell, Joseph W.; 8 L. D., 268	43
Monax *v.* Wilkinson; 2 Montana Rep., 42	3
Montgomery *v.* Curl; 9 L. D., 57	200
Moore *v.* Robbins; 96 U. S., 530	688
Moore *v.* Lyon; 4 L. D., 393	267
Morfey *v.* Barrows; 4 L. D., 135	95
Moss Rose Lode; 11 L. D., 120	346
Myers *v.* Croft; 13 Wall., 291	487
Mudgett *v.* Dubuque and Sioux City R. R. Co.; 8 L. D., 243	346
Murray, James H.; 6 L. D., 124	496
Naphtaly *v.* Bregard *et al.*; 8 L. D., 144	667
Neff *v.* Cowhick; 8 L. D., 111	446
Neilson *v.* Northern Pacific R. R. Co.; 9 L. D., 402	353
Newbaur *v.* Bush; 12 L. D., 533	631
Newhall *v.* Sanger; 92 U. S., 761	664
New York Indians; 5 Wall., 764	485
Nix *v.* Allen; 112 U. S., 129	353
Norcross *v.* Griffiths; 65 Wis., 599–614	487
North Noonday Mining Co. *v.* Orient Mining Co.; 1 Fed. Rep, 524	346
Northern Pacific Railroad Company *v.* Beck; 11 L. D., 584	385
Northern Pacific Railroad Company *v.* Bowman; 7 L. D., 238	397, 555
Northern Pacific Railroad Company *v.* Burt; 3 L. D., 490	310
Northern Pacific R. R. Co. *v.* Fugelli; 10 L. D., 288	233
Northern Pacific Railroad Company *v.* Halvorson; 10 L. D., 15	19, 640
Northern Pacific Railway Co. *v.* Kerry; *ibid.*, 290	233
Northern Pacific Railroad Company *v.* Killian; 11 L. D., 596	311
Northern Pacific Railroad Company *v.* McLean; 5 L. D., 529	310
Northern Pacific R. R. Co. *v.* Miller; 11 L. D., pp. 1, 428	197, 519
Northern Pacific Railroad Company *v.* Potter; 11 L. D., 531	353, 397, 481, 509, 555
Northern Pacific R. R. Co. *v.* Stovenour; 10 L. D., 645	233, 352, 385, 568
Northern Pacific Railroad Company *v.* Stuart; 11 L. D., 143	301
Northern Pac. R. R. Co. *v.* Wilder; 11 L. D., 444	385

	Page.
Northern Pacific Railroad Company *v.* Yantis; 8 L. D., 58	127
Norton *v.* Westbrook; 9 L. D., 455	490
Noyes *v.* Mantle; 127 U. S., 348	687
O'Brien *v.* Richtarik; 8 L. D., 192	75
Ogden *v.* Walters; 12 Kans., 290	246
Olney *v.* Shryock; *id.*, 633	496
Olson *v.* Warford; 11 L. D., 289	477
Omaha Lands; 9 L. D., 326	112
O'Neal, Patrick; *id.*, 137	210
Orr *v.* Breach; 7 L. D., 292	43
Overton *v.* Hoskins; 7 L. D., 394	335
Packer *v.* Bird; 137 U. S., 661	487, 682
Parker *v.* Castle; 4 L. D., 84	99
Parker *v.* Gamble; 3 L. D., 390	318
Parsons *v.* Hughes; 8 L. D., 593	200
Pearce *v.* Woolscheid; 10 L. D., 678	421, 678
Pederson *v.* Johannessen; 4 L. D., 343	30, 99, 496
Peninsular R. R. Co. *v.* Carlton and Steele; 2 L. D., 531	302, 549
Percival *v.* Doheney; 4 L. D., 134	641
Perkins *v.* Robson; 6 L. D., 828	341
Peru Lode and Mill Site; 10 L. D., 196	625
Peterson, Adolph, *et al.*; 6 L. D., 371	338
Peterson *v.* Ward; 9 L. D., 92	641
Pettigrew *v.* Griffin; 10 L. D., 510	48
Pfaff *v.* Williams *et al.*; 4 L. D., 455	48, 325
Plummer *et al. v.* Jackman; 10 C. L. O., 71	659
Pike's Peak Lode; 10 L. D., 200	515, 663, 684, 687, 689
Pollard *v.* Rethke; 8 L. D., 294	236
Pollitz, Edward; 4 L. D., 326	24
Prindeville *v.* Dubuque and Pacific R. R. Co.; 10 L. D., 575	134, 212, 348
Pueblo of San Francisco; 5 L. D., 483	688
Querbach, Eberhard; 7 L. D., 292	43
Quinn, Frank; 9 L. D., 530	696
Railroad Company *v.* Schurmeir; 7 Wall., 272	435
Ramage *v.* Maloney; 1 L. D., 461	224
Randall *v.* St. Paul and Sioux City R. R. Co.; 10 L. D. 54	233
Randolph *v.* Northern Pacific R. Co.; 9 L. D., 416	354
Rashaw, Orrin C.; 6 L. D., 570	353
Reed, John H.; 6 L. D., 563	61, 244
Rees *v.* Central Pacific R. R. Co.; 5 L. D., 62	507
Reeves *v.* Emblen; 8 L. D., 444	318, 496
Reeves *v.* Emblen; 11 L. D., 480	447
Rice, J. B.; 11 L. D., 213	325
Rice *v.* Bissell; 8 L. D., 606	395
Richardson *v.* Moore; 10 L. D., 415	133
Riggan *v.* Riley; 5 L. D., 595	41
Riggs, Rosa E.; 10 L. D., 526	103
Rinehart *v.* Willamette Valley Wagon Road Co.; 3 L. D., 650	333
Ringsdorf *v.* The State of Iowa; 4 L. D., 497	342
Roberts, Oscar T.; 8 L. D., 423	389
Robbins, David H.; 10 L. D., 3	52
Ross, James; 11 L. D., 623	464
Ross, James; 12 L. D., 446	610
Russell *v.* Gerrold; 10 L. D., 18	287, 640
Ryan *v.* Central Pacific R. R. Co.; 12 L. D., 11	378
Saben *v.* Amundson; 9 L. D., 578	48
St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Chadwick; 6 L. D., 128	399, 616
St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Forseth; 3 L. D., 446	346
St. Paul, Minneapolis and Manitoba Ry. Co. *et al. v.* Vannest, id., 205	496
St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Leech; id., 506	346
St. Paul and Pacific R. R. Co. *v.* Northern Pacific R. R. Co; 139 U. S., 1	396, 399
St. Paul and Sioux City R. R. Co.; 10 L. D., 50	212
St. Paul and Pacific R. R. Co *v.* Northern Pacific R. R. Co.; 139 U. S., 1	568
St. Louis *v.* Rutz; 138 U. S., 226	305, 487, 682
St. Paul and Pacific R. R. Co. *et al. v.* Northern Pacific R. R. Co.; 139 U. S., 1	513
Sandford, George E.; 5 L. D., 535	394
Sanford *v.* Sanford; 139 U. S., 642	537
Sapp *v.* Anderson; 9 L. D., 165	81, 496, 648
Saunders *v.* Baldwin; 9 L. D., 391	161
Sayles, Henry P.; 2 L. D., 88	357
Schools, The *v.* Risley; 10 Wall., 91	682
Schweitzer *v.* Wolfe; 5 L. D., 158	30, 99
Schrotberger *v.* Arnold; 6 L. D., 425	640
Schulenberg *v.* Harriman; 21 Wall., 44	120, 230, 269
Scott *v.* King; 9 L. D., 299	14, 653
Searle Placer; id., 441	609
Serrin *et al. v.* Grefe; 67 Iowa, 197	436
Simmons *v.* Wagner; 101 U. S., 260	87
Sioux City and St. Paul R. R. Co.; 6 L. D., 47	257
Shelton *v.* Reynolds; 6 L. D., 617	130
Sheldon *v.* Warren; 9 L. D., 668	648
Shire *et al. v.* Chicago, St. Paul, Minneapolis and Omaha Ry. Co.; 10 L. D., 85-88	260
Smith, Charles E.; id., 150	538
Smith, Hulda M.; 11 L. D., 382	167
Smith, George H., *et al.*; 10 L. D., 184	296
Smith, R. H.; 11 L. D., 268	14, 292
Smith *v.* Brearly; 9 L. D., 175	69
Smith *v.* Custer *et al.*; 8 L. D., 269	161, 491
Smalley *v.* Hawblits; 8 L. D., 372	496
Smith *v.* Martin; 2 L. D., 333	328
Snody, Duthan B.; 1 L. D., 532	127
Sorenson *v.* Becker; 8 L. D., 357	27
Southern Pacific R. R. Co. *v.* Reed; 4 L. D., 256	19
Southern Pacific R. R. Co. *v.* Saunders; 6 L. D., 98	509
Southern Minnesota Railway Extension Co. *v.* Gallipean; 3 L. D., 166	249
Sparks *v.* Pierce; 115 U. S., 408-413	260
Spicer *v.* Northern Pacific R. R. Co.; 11 L. D., 349	447
Sprague *v.* Robinson; 1 L. D., 469	641
Sproul *et al. v.* The Atchison National Bank; 22 Kans., 336-9	246

	Page.
Staltz *v.* White Spirit *et al.*; 10 L. D., 144.	289
State of California; 7 L. D., 270	392
State of Colorado; 6 L. D., 412	180
State *v.* Dent; 18 Mo., 313	392
State of Florida; 11 Stat., 15	547
State of Indiana *v.* Milk; 11th Fed. Rep., page 595	435
State of Louisiana (on review); 9 L. D., 157	71
State of Oregon; 5 L. D., 31	66
State of Oregon (on review); 9 L. D., 360.	496
Stearns, George F.; 8 L. D., 573	242, 335
Stebbins, Homer C.; 11 L. D., 45	268
Steele *v.* Engelman; 3 L. D., 92	225
Steinhart, Falk; 7 L. D., 10	431
Stevens *v.* Robinson; 4 L. D., 551, 5 id., 111	99
Stoddard *v.* Neigel; 7 L. D., 340	384, 490
Strange *v.* Ryan; 45 Cal. Rep., 33	3
Stroud *v.* de Wolf; 4 L. D., 394	19, 334
Supervisors *v.* United States; 4 Wall., 435–446	171
Swanson *v.* Wisely's heirs; 9 L. D., 31	563
Swift *v.* California and Oregon R. R. Co.; 2 C. L. L., 733	134
Talbot, Thomas F.; idem, 495	183, 392
Tavener, Lydia A.; 9 L. D., 426	198, 443
Taylor, Ida M.; id., 107	496
Taylor, Mary A.; 7 L. D., 200	70
Taylor *v.* Huffman; 5 L. D., 40	335
Taylor *v.* Yates; 10 L. D., 242	672
Texas Pacific Grant; 8 L. D., 530	317
Thompson, J. H.; 10 L. D., 34	432
Thompson, Sydney F.; 8 L. D., 285	23
Thompson *v.* Myrick; 20 Minn., 205	152
Titamore *v.* Southern Pacific R. R.; 10 L. D., 463	509
Tomay *et al. v.* Stewart; 1 L. D., 570	388
Toombs, Arthur P.; 10 L. D., 192	48, 559
Tootle *v.* Coldwell; 30 Kans., 125	246
Townsite of Deadwood; Sickles Mining Laws and Decisions, 356	3
Travelers' Insurance Co.; 9 L. D., 316	111
Turner *v.* Bumgardner; 5 L. D., 377	237, 685
Two Sisters Lode and Mill Site; 7 L. D., 557	77
Ulmer *et al. v.* Hiatt *et al.*; 4 Greene, Iowa, 439	621
United States *et al. v.* Atterbery *et al.*; 8 L. D., 173	13
United States *et al.*; 11 L. D., 484	503
United States *v.* Bank of Metropolis; 15 Pet., 377, 401	581
United State *v.* Burlington and Missouri R. R. Co.; 98 U. S., 334–339	271
United States *v.* Cook; 19 Wall., 591	179
United States *v.* Curry; 6 How., 106	421
United States *v.* McLaughlin; 127 U. S., 428	508, 665
United States *v.* Montgomery *et al.*; 11 L. D., 484	315
United States *v.* Raymond; 4 L. D., 439	622
United State *v.* Schurz; 102 U. S., 378	514, 688
United States *v.* Trinidad Coal and Coking Co.; 137 U. S., 160	340
United States *v.* Woodbury *et al.*; 5 L. D., 303	14
Valentine *v.* City of Chicago; 2 C. L. L., 1024	389
Van Wyck *v.* Knevals; 106 U. S., 360	134, 218, 348
Victorine *v.* New Orleans and Pacific R. R. Co.; 8 L. D., 377	480
Voght, John P. S.; 9 L. D., 114	162, 688
Wagner, Jesse H.; 9 L. D., 450	201
Walker, John M.; 5 L. D., 504	81, 334, 496
Warden *v.* Shumate; 8 L. D., 330	395
Watson, Thomas E.; 6 L. D., 71	167, 392
Watts *v.* Williams; 6 L. D., 94	395
Waterhouse, William W.; 9 L. D., 131	622
Webb *v.* Loughrey (on review); 10 L. D., 302	115
Webb *v.* Loughrey; 9 L. D., 440	267
Weber, Peter; 10 L. D., 392	394
Weed, Thurlow; 8 L. D., 100	210
Welch *v.* Duncan *et al.*; 7 L. D., 186	267
West *v.* Owen; 4 L. D., 412	58
Wheeler, Cyrus; 9 L. D., 271	299
Wheeler *v.* Spinola; 54 N. Y., 377	436
Whitnall *v.* Hastings and Dakota Ry. Co.; 4 L. D., 249	609
Wigg *v.* Florida Ry. and Navigation Co.; 12 L. D., 301	549
Wilcox *v.* Jackson; 13 Peters, 498–513	86, 476, 564
Wilds, Henry; 8 L. D., 394	392
Willamette Valley Wagon Road Company *v.* Morton; 10 L. D., 456	333, 363
Wilson, Benjamin C.; 10 L. D., 524	357
Winona and St. Peter R. R. Co. *et al.*; 6 L. D., 544	212
Winona and St. Peter R. R. Co.; 9 L. D. 649	211, 350
Wirth *v.* Branson; 8 Otto, 118–121	490
Witherspoon *v.* Duncan; 4 Wall., 218	40, 207
Witter *v.* Ostroski; 11 L. D., 260	696
Walcott *v.* Des Moines Co.; 5 Wall., 681–688	564
Wright *v.* Maher; ib., 758	640
Wurlitzer, Rudolph; 6 L. D., 315	81, 99, 496
Yosemite Valley case; 15 Wall., 77	87, 207, 439
Younge *v.* Guilbeau; 3 Wallace, 636	105

TABLE OF OVERRULED AND MODIFIED CASES.

[From 1 to 12 L. D., inclusive.]

Bailey, John W., *et al.* (3 L. D., 386); modified, 5 L. D., 513.

*Baker *v.* Hurst (7 L. D., 457); overruled, 8 L. D., 110.

Barlow, S. L. M. (5 L. D., 695); modified, 6 L. D., 648.

Bartch *v.* Kennedy (3 L. D., 437); modified, 6 L. D., 217.

Bivins *v.* Shelley (2 L. D., 282); modified, 4 L. D., 583.

Blenkner *v.* Sloggy (2 L. D., 267); modified, 6 L. D., 217.

Box *v.* Ulstein (3 L. D., 143); modified, 6 L. D., 217.

Bundy *v.* Livingston (1 L. D., 152); overruled, 6 L. D., 284.

Burkholder *v.* Skagen (4 L. D., 166); overruled, 9 L. D., 153.

Buttery *v.* Sprout (2 L. D., 293); overruled, 5 L. D., 591.

Central Pacific R. R. Co. and Orr (2 L. D., 525); overruled, 11 L. D., 445.

Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284, 624.

Colorado, State of (7 L. D., 490); overruled, 9 L. D., 408.

Cornell *v.* Chilton (1 L. D., 153); overruled, 6 L. D., 483.

Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429.

Dudymott *v.* Kansas Pacific R. R. Co. (5 C. L. O., 69); overruled, 1 L. D., 345.

*Elliott *v.* Ryan (7 L. D., 322); overruled, 8 L. D., 110.

Epley *v.* Trick (8 L. D., 110); overruled, 9 L. D., 353.

Ewing *v.* Rickard (1 L. D., 146); overruled, 6 L. D., 483.

Florida Rwy. and Navigation Co. *v.* Miller (3 L. D., 324); modified (6 L. D., 716); overruled, 9 L. D., 237

Forgeot, Margaret (7 L. D., 280); overruled, 10 L. D., 629.

Freeman *v.* Texas Pacific R. R. Co. (2 L. D., 559); overruled, 7 L. D., 18.

Galliher, Maria (8 C. L. O., 57); overruled, 1 L. D., 57.

Garrett, Joshua (2 C. L. L., 1005); overruled, 5 L. D., 158.

Gates *v.* California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336.

Gohrman *v.* Ford (8 C. L. O., 6); overruled, 4 L. D., 580.

Hickey, M. A. and Edward (3 L. D., 83); modified, 5 L. D., 256.

Holland, G. W. (6 L. D., 20); overruled, 6 L. D., 639, and 12 L. D., 436.

Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284.

Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448.

Kniskern *v.* Hastings and Dakota Rwy. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.

Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.

Louisiana, State of (8 L. D., 126); modified, on review, 9 L. D., 157.

Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.

Meyer, Peter (6 L. D., 639); modified, 12 L. D., 436.

Morgan *v.* Craig (10 C. L. O., 234); overruled, 5 L. D., 303.

Northern Pacific R. R. Co. *v.* Yantis (8 L. D., 58); overruled, 12 L. D., 127.

Nyman *v.* St. Paul, Minneapolis and Manitoba Rwy. Co. (5 L. D., 396); overruled, 6 L. D., 750.

Papina *v.* Alderson (1 B. L. P., 91); modified, 5 L. D., 256.

Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624.

Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854.

Rancho Alisal (1 L. D., 173); overruled, 5 L. D. 320.

*Reed *v.* Buffington (7 L. D., 154); overruled, 8 L. D., 110.

Rico Townsite (1 L. D., 556); modified, 5 L. D., 256.

Rogers *v.* Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D., 165.

*Rogers *v.* Lukens (6 L. D., 111); overruled, 8 L. D., 110.

Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797.

Serrano *v.* Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380.

Shineberger, Joseph (8 L. D., 231); overruled, 9 L. D., 202.

Sipchen *v.* Ross (1 L. D., 634); modified, 4 L. D., 152.

Spencer, James (6 L. D., 217); modified, 6 L. D., 772, and 8 L. D., 467.

State of California *v.* Pierce (3 C. L. O., 118); modified, 2 L. D., 854.

Sweeten *v.* Stevenson (3 L. D., 249); overruled, 3 L. D., 248.

Taylor *v.* Yates *et al.* (8 L. D., 279); reversed on review, 10 L. D., 242.

Traugh *v.* Ernst (2 L. D., 212); overruled, 3 L. D., 248.

Tripp *v.* Stewart (7 C. L. O., 39); modified, 6 L. D., 795.

Tupper *v.* Schwarz (2 L. D., 623); overruled, 6 L. D., 623.

Turner *v.* Lang (1 C. L. O., 51); modified, 5, L. D., 256.

Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71.

Weber, Peter (7 L. D., 476); overruled on review, 9 L. D., 150.

Wilkins, Benjamin C. (2 L. D., 129); modified, 6 L. D., 797.

Willingbeck, Christian P. (3 L. D., 383); modified, 5 L. D., 408.

* The cases marked with a star are now authority. See Hessong *v.* Burgan, 9 L. D., 153.

TABLE OF CIRCULARS AND INSTRUCTIONS.

	Page.
January 3, 1888.—Right of way act	423
August 18, 1890.—Oklahoma townsites	186
August 21, 1890.—Oklahoma townsites	187
December 29, 1890.—Entry; instructions under the act of August 30, 1890	81
January 3, 1891.—Forfeiture of railroad lands; act of September 29, 1890	3
January 12, 1891.—Forest reservations	83
January 17, 1891.—Departmental order establishing a motion day	64
January 24, 1891.—Disposition of final proof	188
March 31, 1891.—Forfeited railroad lands	308
April 8, 1891.—Rule advancing cases, on motion, under section 7, act of March 3, 1891	308
April 17, 1891.—Right of way for canals, etc., under the act of March 3, 1891	429
April 20, 1891.—Desert land entry prior to survey	376
April 22, 1891.—Instructions under the school indemnity act of February 28, 1891	400
April 25, 1891.—Instructions under section 7, act of March 3, 1891	522
April 27, 1891.—First six sections of the act of March 3, 1891, with copy of the act	405
May 5, 1891.—Timber cutting	456
May 8, 1891.—Oklahoma townsites	612
May 8, 1891.—Instructions to chiefs of divisions under the act of March 3, 1891, section 7	450
May 15, 1891.—Timber reservations; instructions to special agents	499
June 3, 1891.—Non-mineral entries in Alaska	583

TABLE OF CIRCULARS AND INSTRUCTIONS CITED AND CONSTRUED.

March 21, 1857.—Sioux half-breed scrip; 1 Lester, 627	146
February 22, 1864.—Sioux half-breed scrip; 1 C. L. L., 721	146
February 29, 1872.—Sioux half-breed scrip; 1 C. L. L., 723	146
July 13, 1874.—Meandered shallow lakes; 1 C. L. O., 69	434
November 12, 1874.—Sioux half-breed scrip; 1 C. L. L., 725	147
May 28, 1878.—Sioux half-breed scrip; 2 C. L. L., 1355	147
April 9, 1883.—Alabama lands; 1 L. D., 655	551
May 31, 1884.—Indian occupancy; 3 L. D., 371	517
June 24, 1885.—Certificates of deposit; 3 L. D., 599	24
August 4, 1885.—Indemnity selections; 4 L. D., 90	196, 450
April 26, 1887.—Osage land; 5 L. D., 580	13
June 27, 1887.—Desert land; 5 L. D., 708	41, 299
October 26, 1887.—Indian occupancy; 6 L. D., 341	517
April 1, 1889.—Oklahoma lands; 8 L. D., 336	618
May 8, 1891.—Confirmation of entry under act of March 3, 1891; 12 L. D., 450	611
January 1, 1889.—Certificate of deposit; gen. cir., par. 21, page 59	23
January 1, 1889.—Repayment; general circular, p. 68	432

ACTS OF CONGRESS CITED AND CONSTRUED.

May 18, 1796 (1 Stat., 464), sec. 9, navigable streams	435
August 19, 1825 (7 Stat., 272), Menomonee treaty	177
September 4, 1841 (5 Stat., 453), sec. 8, grant for internal improvements	166
September 4, 1841 (5 Stat., 453), sec. 14, pre-emption act	272
August 4, 1842 (5 Stat., 502), "armed occupation act"	553
June 15, 1844 (5 Stat., 671), "armed occupation act"	553
August 6, 1846 (9 Stat., 56), Wisconsin enabling act	177
May 29, 1848 (9 Stat., 233), Wisconsin admitted	177
July 1, 1848 (9 Stat., 243), "armed occupation act"	553
October 18, 1848 (9 Stat., 952), Menomonee treaty	177
September 27, 1850 (9 Stat., 496), donation act	239
September 28, 1850 (9 Stat., 519), swamp grant	166
March 2, 1853 (10 Stat., 172), Washington Territory	166
June 10, 1852 (10 Stat., 8), R. R. grant to Missouri	116
January 25, 1853 (10 Stat., 745), McKee scrip	389
March 3, 1853 (10 Stat., 244), sec. 6, pre-emption in Cal	272
March 3, 1853)10 Stat., 244) price of land	632
May 12, 1854 (10 Stat., 1064), Menomonee treaty	177

Page.

July 17, 1854 (10 Stat., 304) Sioux half-breed scrip....105, 138
February 22, 1855 (10 Stat., 1165), Indian treaty.... 53
February 11, 1856 (11 Stat., 679), Menomonee treaty.... 177
June 3, 1856 (11 Stat., 17), R. R. grant to Ala....117, 254
June 3, 1856 (11 Stat., 21), railroad grant to Mich.... 215
August 11, 1856 (11 Stat., 30), railroad grant to Mississippi.... 269
March 3, 1857 (11 Stat., 195), Minnesota railroad grant....373, 375, 541
February 26, 1859 (11 Stat., 385), school indemnity.... 165
June 21, 1860 (12 Stat., 72), private claim.. 676
July 1, 1862 (12 Stat., 489), Union Pacific grant.... 608
March 3, 1863 (12 Stat., 808), sec. 14, Idaho school land.... 183
May 7, 1864 (13 Stat., 695), Indian treaty.. 53
May 12, 1864 (13 Stat., 72), sec. 7, railroad grant.... 542
June 2, 1864 (13 Stat., 95), sec. 4, Iowa railroad grant.... 543
June 18, 1864 (13 Stat., 137), railroad grant to Mich.... 215
June 18, 1864 (13 Stat., 409), joint resolution.... 215
July 1, 1864 (13 Stat., 332), private claims.. 666
July 2, 1864 (13 Stat., 355), wagon-road grant.... 362
July 2, 1864 (13 Stat., 356), Union Pacific grant.... 608
July 2, 1864 (13 Stat., 365) secs. 3 and 6, Northern Pacific grant.... 128
July 11, 1864 (13 Stat., 125), private claim.. 681
March 3, 1865 (13 Stat., 526), Minnesota railroad grant.... 373
sec. 7.... 541
March 3, 1865 (13 Stat., 520), railroad grant to Mich.... 215
July 4, 1866 (14 Stat., 87), Hastings and Dakota grant.... 228
July 5, 1866 (14 Stat., 89), wagon-road grant 332
July 23, 1866 (14 Stat., 218), sec. 7, private claims in California.... 667
July 25, 1866 (14 Stat., 239), California and Oregon R. R. grant.... 133
sec. 2.... 232
July 27, 1866 (14 Stat., 292), Atlantic and Pacific grant.... 116
December 26, 1866 (14 Stat., 374), wagon-road grant.... 363
July 14, 1870 (16 Stat., 279), pre-emption final proof.... 233
February 6, 1871 (16 Stat., 404), Wisconsin Indian lands.... 178
March 3, 1871 (16 Stat., 588), Minnesota railroad grant.... 375, 513
April 20, 1871 (17 Stat., 643), railroad grant to Michigan.... 216
May 23, 1872 (17 Stat., 159), Shawnee, etc., allotment.... 182, 357

Page.

June 5, 1872 (17 Stat., 226), Flathead Indians.... 49
March 3, 1875 (18 Stat., 474), sec. 7, Colorado school land.... 71
March 3, 1875 (18 Stat., 482), right of way.. 72, 79, 92 264, 360, 423, 457, 481, 574
March 3, 1877 (19 Stat., 377), desert land.. 376, 405, 632
June 3, 1878 (20 Stat., 88), timber cutting.. 457
June 3, 1878 (20 Stat., 89), timber and stone act.... 3, 58, 100, 314, 326, 503, 561
sec. 4.... 246
March 3, 1879 (20 Stat., 352), certificate of deposit.... 23
March 3, 1879 (20 Stat., 472), additional homestead.... 351, 395, 550
May 14, 1880 (21 Stat., 140), sec. 1, relinquishment.... 163
sec. 2, contestant's right.... 26, 41, 228, 267, 319, 464, 493
sec. 3, homestead settlement.... 629
May 28, 1880 (21 Stat., 143), Osage land.... 13
June 15, 1880 (21 Stat., 237), sec. 2, homestead.... 310, 320, 393, 469
June 16, 1880 (21 Stat., 287), repayment.... 79, 297, 316, 432, 528, 607
February 18, 1881 (21 Stat., 326), university lands.... 89
August 7, 1882 (22 Stat., 327), certificate of deposit.... 24
August 7, 1882 (22 Stat., 341), Omaha lands. 372
March 3, 1883 (22 Stat., 487), Alabama lands 550, 635
July 4, 1884 (23 Stat., 89), Mille Lac Indian lands.... 52
July 5, 1884 (23 Stat., 103), abandoned military reservations.... 193, 288
January 31, 1885 (23 Stat., 296), forfeiture of railroad grant.... 378
February 25, 1885 (23 Stat., 321), inclosure of public land.... 383, 490
February 28, 1885 (23 Stat., 337), forfeiture of Texas Pacific grant.... 298
May 6, 1886 (24 Stat., 22), additional homestead.... 550
August 4, 1886 (24 Stat., 239) salary of local officers.... 372, 479
February 8, 1887 (24 Stat., 388), Indian allotments.... 169, 181, 185, 205, 358
sec. 4.... 162
March 3, 1887 (24 Stat., 526), salary of local officers.... 372
March 3, 1887 (24 Stat., 556), adjustment of railroad grants.... 210, 280, 347, 543
sec. 3.... 272
sec. 5.... 261, 247
May 15, 1888 (25 Stat., 150), Omaha lands. 112, 372
October 2, 1888 (25 Stat., 526), arid land act. 439
October 19, 1888 (25 Stat., 611), patent for Indian land.... 184
January 14, 1889 (25 Stat., 642), Mille Lac Indian lands.... 52
February 22, 1889 (25 Stat., 676), secs. 10 and 11, school lands.... 400
secs. 10 and 17.... 165
sec. 14.... 89

	Page.
March 1, 1889 (25 Stat., 1307), McKee scrip.	389
March 2. 1889 (25 Stat., 854), sec. 1, private entry, etc	201
sec. 2	268, 361
sec. 4	316
secs. 5 and 6.	558
March 2, 1889 (25 Stat., 1008), forfeiture act	214
March 2, 1889 (25 Stat., 888), Sioux allotments	164
sec. 7	292
March 2, 1889 (25 Stat.. 998), allotment of Indian lands	475
March 2, 1889 (25 Stat., 1013), allotment of Indian lands	168
March 2, 1889 (25 Stat., 1004), Oklahoma lands	617, 653
March 2, 1889 (25 Stat., 850), forfeiture of wagon-road grants	333
May 26, 1890 (26 Stat , 391), entry and final proof	560
August 19, 1890 (26 Stat., 336), Santee Sioux Indian appropriation	293
August 19, 1890 (26 Stat., 329), Omaha Indian land	326
August 30, 1890 (26 Stat., 389). appropriation for public surveys	506
August 30, 1890 (26 Stat., 391), arid lands, entry	81, 439
September 25, 1890 (26 Stat., 478), forest reservation	83
September 29 1890 (26 Stat., 496), forfeiture of railroad lands	3, 188, 254, 308, 316, 374
September 29, 1890 (26 Stat., 496), sec. 4, forfeiture act	541
sec. 7.	269
sec. 8.	117
October 1, 1890 (26 Stat., 650), forest reservation	58, 83, 326
February 13, 1891 (26 Stat., 747), Fort Ellis Reservation	288
February 13, 1891 (26 Stat., 749), Sac and Fox Indian lands	359
February 28, 1891 (26 Stat., 796), school land	400
March 3, 1891 (26 Stat., 1021), Pottawatomie Indian allotments	357
March 3, 1891 (26 Stat., 1093), timber trespass	246
March 3, 1891 (26 Stat., 1095), repeal of timber-culture act, etc., secs. 1 to 6	405
sec. 2	376
sec. 7 .250, 279, 305, 313, 322, 334, 344. 440, 443, 414, 446, 450, 459, 497, 522, 540, 600.	610, 637
sec. 8	456
secs. 11 to 15	583
sec. 16	513, 662, 686
sec. 17	440
secs. 18 to 21	429
sec. 24	499

REVISED STATUTES CITED AND CONSTRUED.

Section 441	691
Section 453	328
Section 2238	478, 532
Section 2258	261, 438, 564
Section 2260	244, 455, 529
Section 2261	111
Section 2262	22
Section 2275	71, 400
Section 2276	71, 391, 400
Section 2288	406
Section 2289	261, 407
Section 2290	407
Section 2291	132, 623, 645
Section 2301	407, 618, 623, 645
Section 2326	295
Section 2329	2
Section 2337	75, 624
Section 2362	623
Section 2380	282
Section 2381	282
Section 2387	592
Section 2403	24
Section 2449	391
Section 2455	397
Section 2461	457

RULES OF PRACTICE CITED AND CONSTRUED.

Rule 8	462
Rule 9	45, 454, 621
Rule 11	621
Rule 17	192
Rule 35	30
Rule 41	109
Rule 42	186
Rule 43	63
Rule 48	421
Rule 53	11, 19
Rule 54	109
Rule 56	109
Rule 66	235, 684
Rule 70	93
Rule 76	222
Rule 77	46, 648
Rule 78	447, 648
Rule 79	62, 648
Rule 87	62
Rule 88	27, 30, 99
Rule 93	61
Rule 94	61
Rule 96	61
Rule 114	423

DECISIONS

RELATING TO

THE PUBLIC LANDS.

PRE-EMPTION—MINERAL LAND—BUILDING STONE.

CONLIN *v.* KELLY.

Stone that is useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, or except it from pre-emption entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 2, 1891.

I have considered the case of B. M. J. Conlin *v.* Wm. Kelly on appeal by the former from your decision of May 25, 1889, dismissing his contest against the pre-emption cash entry of the latter for the NW. ¼ Sec. 14, T. 102 N., R. 58 W., Mitchell, South Dakota land district.

On November 19, 1879, Kelly filed pre-emption declaratory statement for this land and on July 29, 1880, made cash entry for the same.

On January 20, 1887, Conlin filed an affidavit of contest against the same alleging that the filing and entry were fraudulent and made for the purpose of speculation and to secure title to the land because of valuable mineral deposits thereon, and that the entry was made for the benefit of another party. Upon due notice a hearing was had and the local officers recommended the dismissal of the contest, from which Conlin appealed.

Your office on May 25, 1889, dismissed the contest, but upon different grounds from that upon which the local officers based their decision. An appeal was taken by Conlin from your decision, and thus the case is before this Department.

The testimony shows that there is upon this land a ledge of unstratified, extremely hard, flesh colored rock, a species of granite, which contains no trace of any valuable metal. It is a common stone in South Dakota, is of some value as a building stone, being used for foundations of buildings, cellar walls, bridge abutments and other places where strong, rough, work is required; but owing to its extreme hard-

ness and the fact that it is unstratified and breaks with an irregular fracture, its commercial value is not very great, as yet, although it is claimed that this will soon be greatly increased.

On the charge that the entry was made for another party, there was but little testimony taken, the greater part of over four hundred pages being directed to the stone on the land.

You say in your decision that:

> There is no doubt that this quarry or rock is mineral within the provisions of the law, and the decisions thereunder (H. P. Bennett, jr., 3 L. D., 116); and as such, subject to entry as a placer claim, there being no veins of quartz or rock in place containing any of the precious metals.

I cannot concur in this statement in your opinion. The case you cite is not a decision of this Department, but a letter from Commissioner McFarland to the local officers at Leadville, Colorado.

Section 2329 (Revised Statutes), which uses the words "claims usually called 'placers' including all forms of deposits, except veins of quartz and other rock in place, shall be subject to entry" etc., is a part of the mining laws and should be considered in connection therewith. It is apparent that the deposit therein spoken of means a deposit having some especial value, other than that of a mere "stone quarry" for general purposes.

Counsel for appellant have furnished an extensive and interesting brief in the case, and they attempt to show that this stone in question is "jasper" and of peculiar value as a mineral. It is sufficient to say, upon this point, that the evidence shows that its use is such that any good free stone, lime stone, or granite could supply its place.

I have examined the authories cited, but am unable to find anything in them, or in any other authority, that supports the proposition that a common stone quarry is subject to mineral entry as a "placer mine." In the "Dells Mining Company" mineral entry, the papers in which case are in evidence herein, it appears that a mineral entry was allowed on a tract of land similar to, and in the vicinity of, the tract in controversy, but it is not pretended that the case was ever considered by this Department.

In the case of Maxwell *v.* Brierly (10 C. L. O., 50) cited by counsel, it was shown upon the hearing that the land was of little value for agricultural purposes, and it had been returned as mineral. It lay upon a precipitous mountain side, only about thirty acres of it could be tilled or irrigated, and this was in parcels of a few acres each. Its chief value consisted in a lime stone ledge, stone of which was used as a flux in neighboring smelting furnaces and for manufacturing into lime. This Department held that the tract was subject to entry under the mineral laws. The land was in a mineral belt, no other stone would serve as a flux in a furnace or for making lime.

In the case of John F. Krohn (10 C. L. O., 342) cited by counsel, the land had been returned as agricultural, but it was in the vicinity of

valuable placer mines, and upon the hearing it was shown to contain valuable deposits of gold in the form of nuggets, and that it could be mined to advantage, and upon this being proven the tract was held to be subject to entry as a "placer" mine.

"Placers are superficial deposits which occupy the beds of ancient rivers or valleys." Monax *v.* Wilkinson (2 Montana Rep., 42). They are, "held and worked in accordance with the local mining laws adopted and in force in the mining district where they are located." Strange *v.* Ryan (45 Cal. Rep., 33).

Valuable mineral, as gold, silver, copper, etc., intermingled with, or imbedded in "rock in place" is called a "lode," and the rock is quarried, not for the stone but the valuable mineral it contains. "In placer mining land no fact is better established than that the surface is essential to its developement as mining ground." Case of Townsite of Deadwood, Sickles Mining Laws and Decisions, 356.

Congress seems to have recognized the fact that a stone quarry is not a "placer mine" and it passed an act June 3, 1878 (20 Stat., 89) providing for timber and stone entries. The stone in the tract in controversy has no peculiar property or characteristic that gives it especial value, such as attaches to gypsum, lime stone, mica, marble, slate, asphaltum, borax, auriferous cement, fire clay, kaolin or petroleum. Its characteristic appears to be its hardness, and its value, in this particular mine, appears to be its proximity to the town of Alexandria, which has come into some prominence, having been chosen as a county seat since the entry in question was made.

It is simply a quarry of stone for general building purposes and as such not subject to entry as a "placer" under the mineral law.

For this reason and there being no satisfactory proof that the entry was made for another than the entryman, your decision dismissing the contest is affirmed.

FORFEITURE OF RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

[Circular.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 3, 1891.

Registers and Receivers of United States Land Offices:

SIRS: Your attention is called to the provisions of an act of Congress entitled: "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September 29, 1890, (26 Stat., 496) a copy of which is hereto attached, containing eight sections.

The first section provides for the forfeiture of all lands heretofore granted to any State, or to any corporation, to aid in the construction of a railroad, opposite to and coterminous with the portion of any such

railroad not now constructed and in operation, and declares the lands forfeited to be a part of the public domain, excepting, however, from the forfeiture the right of way and station grounds heretofore granted.

The second section provides that all persons, who, at the date of the passage of this act, are actual settlers in good faith on any of the lands forfeited, and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as actual settlers from the date of actual settlement or occupation.

It is clear that this clause of the section allows the actual settler, if qualified, to make a homestead entry of the tract upon which he had made settlement, and this as a preference right to be exercised within six months after the passage of the act.

It is further provided by said section that any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act.

The language of this clause of the section authorizing "a second homestead entry" refers only to those persons who have heretofore made a homestead entry, but failed from any cause to perfect the same.

In other words, the object of this clause is to allow any one qualified, who had not theretofore secured a piece of land under the homestead law, to obtain a tract of these forfeited lands under that law, and at the same time to take these lands out of the operation of the pre-emption laws.

No pre-emption entry will, therefore, be permitted for these lands, and applicants under the homestead laws will be required to make oath that they have not heretofore secured a piece of land under the homestead law, and if an entry has been made under said law that was not for any reason perfected, the facts in relation thereto should be fully set forth.

The third section provides: That in all cases where persons, being citizens of the United States, or who have declared their intention to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant, and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with *bona-fide* intent to secure title thereto by purchase from the State or corporation, when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person,

at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor; and where any such person in actual possession of any such lands, and having improved the same, prior to the first day of January, eighteen hundred and ninety, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said railroad company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has been paid, and not more, credited to him on account of and as part of the purchase price herein provided to be paid the United States for said lands, or such persons may elect to abandon their purchases and make claim on said lands under the homestead law, and as provided in the preceding section of this act.

Where parties, persons and corporations, with the permission of such States or corporations, or their assigns, are in possession of, and have made improvements upon, any of the lands resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations, shall have six months in which to remove any growing crops, buildings and other movable improvements from said lands.

It is provided that the right of purchase granted by this section shall not apply to any lands situated in the State of Iowa, on which any person in good faith has made, or asserted the right to make, a pre-emption or homestead settlement.

All the roads situated within said State have been constructed, except the portion of the Sioux City and St. Paul Railroad between Le Mars and Sioux City.

The grant for this company was made the subject of departmental decision of July 26, 1887 (6 L. D., 47), and a portion of the lands south of Le Mars was by said decision directed to be restored; but, as far as the same are opposite unconstructed road, they will come under the provisions of this act.

An applicant for purchase, under this section, of lands in Iowa, will, therefore, be required to show that no person has in good faith asserted the right to make a pre-emption or homestead settlement upon the land sought to be purchased.

Further provision is made that nothing in this act shall be construed as limiting the rights granted to purchasers or settlers by the act of March 3, 1887, providing for the adjustment of land grants made by Congress to aid in the construction of railroads, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

The fourth section merely repeals certain sections in acts making grants to aid in the construction of certain railroads, in so far as said sections require the Secretary of the Interior to reserve lands within

the indemnity limits of such grants. This section does not restore the indemnity lands, but removes any obstacle to the restoration by the Department, and steps will be taken at once to secure a speedy restoration of any such lands now withdrawn and not included in pending selections.

The fifth section provides: That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company, and so resumed by the United States and restored to the public domain, lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity.

Having determined that the terminal originally established upon the Northern Pacific Railroad as constructed to Wallula, Washington, properly separates the lands earned by the construction of the road to that point, from those forfeited by the first section of this act, this section will have immediate application upon the promulgation of these instructions.

This section also confirms to the city of Portland, in the State of Oregon, the right of way and riparian rights heretofore attempted to be conveyed to the city of Portland by the Northern Pacific Railroad Company, to a strip of land fifty feet in width, through certain described sections.

The sixth section provides that no lands forfeited by this act shall inure to the benefit of any State or corporation, to which lands may have been granted by Congress, except as provided by this act, nor shall the act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or persons, to lands which were excepted from such grant.

Provision is also made against the moiety, in conflicting limits of grants for a main and branch line, appertaining to unconstructed road and forfeited by this act, inuring to the benefit of the completed line.

Section seven relates specially to the grant to the State of Mississippi, to aid in the construction of the road known as the Gulf and Ship Island Railroad, and, upon the condition that said company, within ninety days from the passage of this act, shall accept the provisions of this act, and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title, and claim, in and to all such lands as have been sold by the officers of the United States for cash, or with the allowance or approval of such officers, have entered in good faith under the pre-emption or homestead laws, or upon which there were *bona fide* pre emption or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States, then the forfeiture declared in the first section shall not, until one year after the passage of this act, apply to or in anywise affect so much and such parts of said grant as lie south of a line drawn east and west through the point where the Gulf and Ship Island Railroad may cross the New Orleans and Northeastern Railroad in said State.

Other lands, in lieu of those relinquished south of said point, may be selected within the indemnity limits of the original grant, nearest to and opposite such part of the line as may be constructed at the date of selection.

Special instructions under this section will be given to the proper officers, when the point of crossing provided for shall have been determined and those lands upon which the act has immediate application are formally restored.

Section eight makes special provision in relation to the grant for the Mobile and Girard Railroad Company of Alabama, and as the questions involved are peculiar and will require some consideration, instructions thereunder will not be issued at present.

Very respectfully,

LEWIS A. GROFF,
Commissioner.

Approved:
JOHN W. NOBLE,
Secretary.

AN ACT to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: *Provided,* That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

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 are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior shall make such rules as will secure to such actual settlers these rights.

SEC. 3. That in all cases where persons being citizens of the United States, or who have declared their intentions to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor, and where any such person in actual possession of any such lands and having improved the same prior to the first day of January, eighteen hundred and ninety, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said railroad company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has been paid, and not more, credited to him on account of and as part of the purchase price herein provided to be paid the United States for said lands, or such persons may elect to abandon their purchases and make claim on said lands under the homestead law and as provided in the preceding section of this act: *Provided*, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: *Provided further*, That the provisions of this section shall not apply to any lands situate in the State of Iowa on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: *And provided further*, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

SEC. 4. That section five of an act entitled "An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State," approved May seventeenth, eighteen hundred and sixty-four, and section seven of an act entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March third, eighteen hundred and sixty-five, and also section five of an act entitled "An act mak-

ing an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State," approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of section four of an act approved June second, eighteen hundred and sixty-four, and entitled "An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State,'" approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act of which the same is amendatory.

SEC. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: *Provided*, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one in township one south, of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five in township one south, of range four east, of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore-described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid.

SEC. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such

main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line.

SEC. 7. That in all cases where lands included in a grant of land to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf and Ship Island Railroad, have heretofore been sold by the officers of the United States for cash, or with the allowance or approval of such officers have entered in good faith under the preëmption or homestead laws, or upon which there were bona fide preëmption or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by occupation of the land under color of the laws of the United States, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed, and persons claiming the right to enter as aforesaid may perfect their entry under the law. And on condition that the Gulf and Ship Island Railroad Company within ninety days from the passage of this act shall, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title, and claim in and to all such lands as have been sold, entered, or claimed, as aforesaid, then the forfeiture declared in the first section of this act shall not apply to or in anywise affect so much and such parts of said grant of lands to the State of Mississippi as lie south of a line drawn east and west through the point where the Gulf and Ship Island Railroad may cross the New Orleans and Northeastern Railroad in said State, until one year after the passage of this act. And there may be selected and certified to or in behalf of said company lands in lieu of those hereinbefore required to be surrendered to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

SEC. 8. That the Mobile and Girard Railroad Company, of Alabama, shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles. And the Secretary of the Interior in making settlement and certifying to or for the benefit of the said company the lands earned thereby shall include therein all the lands sold, conveyed or otherwise disposed of by said company not to exceed the total amount earned by said company as aforesaid. And the title of the purchasers to all such lands are hereby confirmed so far as the United States are concerned.

But such settlement and certification shall not include any lands upon which there were bona fide preëmptors or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States.

The right hereby given to the said railroad company is on condition that it shall within ninety days from the passage of this act, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title, and claim in and to all such lands within the limits of its grant, as have heretofore been sold by the officers of the United States for cash, where the government still retains the purchase money, or with the allowance or approval of such officers have been entered in good faith under the preëmption or homestead laws, or as are claimed under the homestead or preëmption laws as aforesaid, and the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed, and all such claims under the preëmption or homestead laws may be perfected as provided by law. Said company to have the right to select other lands, as near as practicable to constructed road, and within indemnity limits in lieu of the lands so relinquished. And the title of the United States is hereby relinquished in favor of all persons holding under any sales by the local land officers, of the lands in the granted limits of the Alabama and Florida Railroad grant, where the United States still retains the purchase money but without liability on the part of the United States.

Approved, September 29, 1890.

HOMESTEAD APPLICATION—PENDING CONTEST.

RYAN *v.* CENTRAL PACIFIC R. R. CO. ET AL.

An application to make homestead entry cannot be allowed for land embraced in a pending contest.

Secretary Noble to the Commissioner of the General Land Office, January 5, 1891.

I have considered the appeal of Patrick R. Ryan from your office decision, dated April 11, 1889, rejecting his application to enter, under the homestead law, lots 1 and 2, Sec. 7, T. 2 S., R. 2 W., San Francisco, California.

His application was made February 25, 1889, and was "rejected because the land embraced is in the twenty-mile limit of reservation for the Central Pacific R. R. Co."

An appeal having been taken your office on April 11, 1889, affirmed the action of the local office, because the land described in Ryan's application is embraced in the case of Manuel G. Fie *v.* Central Pacific R. R. Co., now pending before your office.

Applicant appealed to this Department.

The record shows that there was filed in your office a number of affidavits showing that the lands embraced in this homestead application have been occupied, claimed and cultivated by parties claiming the same, under the pre-emption or homestead laws, and that the same was so occupied and claimed by settlers, at the date of the definite location of said road and at the date of the withdrawal for the benefit of said road. These affidavits make a *prima facie* showing at least that said tracts were exempted from the operation of said withdrawal.

Your office decision, however, is correct. Rule 53, of the Rules of Practice, provides that after a contest has been had and the papers forwarded to your office "The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner."

It follows that the land embraced in Ryan's application being in controversy in the case of Fie *v.* Central Pacific Railroad Company, the local officers did right in rejecting his application.

Your said office decision is accordingly affirmed.

OSAGE LAND—RESIDENCE—ACTUAL SETTLEMENT.

DUSENBERRY *v.* WALL.

Six months continuous residence preceding final proof is not required of the purchaser of Osage land, but he must show actual settlement by acts that indicate an intent to take the land for a home to the exclusion of one elsewhere.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 5, 1891.

I have considered the case of George W. Dusenberry *v.* Drewery S. Wall, on appeal by the former from your office decision of May 17, 1889, on which you hold for cancellation Osage declaratory statement No. 9078, made by him May 27, 1885, for the NW. ¼ of Sec. 35, T. 28 S., R. 20 W., Larned, Kansas. His alleged settlement was on May 5, of that year.

Wall filed Osage declaratory statement No. 6207, for the same land, November 6, 1884, alleging settlement October 30, 1884; on March 23, 1885, he gave notice of his intention to make final proof before the register and receiver on May 25, 1885.

On May 1, 1885, Dusenberry filed a corroborated affidavit, protesting against the acceptance of Wall's final proof, and charged that defendant "never did reside upon or cultivate any portion of said tract . . . . . and does not reside upon or cultivate the same at the present time."

Wall made his final proof on the day advertised.

On June 18, 1885, a hearing was ordered on plaintiff's protest. Due notice was given, and, on April 1, 1886, the register and receiver found in favor of the defendant. April 17, thereafter, plaintiff made a motion for a new trial, which was overruled. Thereupon, he appealed.

On August 14, 1886, your office ordered a rehearing. Notice was given to all parties; depositions were taken, and case again closed, and on July 22, 1887, the register and receiver again found in favor of defendant, and on appeal you affirm that judgment.

There is no question raised as to defendant's settlement and improvements. The evidence discloses that he is an actual settler on the land, and has made valuable improvements.

Wall went on the land in 1884; he was unable to find the corners of the land, and he joined with others to have a survey made of that and the adjoining tracts. The survey was completed, and about October 20, 1884, he settled upon the tract, building a sod-house. This house was twelve by fourteen feet, with double board roof, one door and one window. He also broke about three acres of ground and sowed the same to rye during that fall. He slept a part of the time in that house, during the months of October, November, and December of 1884, taking his meals at some of the neighbors. He was a single man. While sleeping in his house he contracted a severe cold, resulting in hemorrhage, and he went to Batte county, Kansas, for treatment. In Feb-

ruary, 1885, he returned to the land and erected a frame house, twelve by fourteen feet, shingle roof, door, two windows, and board floor. He broke and cultivated more ground and planted a few trees. He slept in his house a part of the time; his health continued very poor. He took his meals as before with the neighbors and at a hotel in the town of Mulinville, near the land. The winter of 1884 and '85 was very severe, and he spent considerable time at the hotel, keeping warm. His health becoming precarious again, he went to his brother's in Butler county, Kansas, and returned again to the land May 5. He did no cooking on his land; his reason for not doing so was because his health required delicacies which he could not prepare himself. He swears that he had no other home.

These improvements were made long before plaintiff filed or settled on the land. Wall's occupancy of the land was not continuous, and the protest was doubtless made because he did not eat and cook and sleep on the place continuously.

His qualifications as a pre-emptor are not denied. The act relating to the Osage trust and diminished reserve lands, approved May 28, 1880 (21 Stat., 143), provides in its second section that said lands, "remaining unsold," "shall be subject to disposal to actual settlers only having the qualifications of pre-emptors on the public lands."

"An actual settler is one who goes upon the public lands with the intention of making it his home under the settlement laws, and does some act in execution of such intention." United States *et al. v.* Atterbery *et al.*, 8 L. D., 173. While six months continuous residence next preceding date of proof would be corroborative, if not positive proof of actual settlement on Osage lands, yet such continuous residence is not an essential requirement. Circular, April 26, 1887, 5 L. D., 580.

So that, while the settler on Osage lands must have all the qualifications of a pre-emptor, neither the statute, nor the rules of this Department require "in evidence of the genuineness of settlement, that six months of actual residence shall be passed before proof and payment." But it is essential that the settlement be shown to be actual and *bona fide.*

The settler must go upon the land with the the intention of making it his home. The mere verbal expression of that intention is not sufficient. "He must do some act in execution of that intention" "sufficient to give notice thereof to the public." United States *et al. v.* Atterbery *et al.*, 8 L. D., 173.

The number of days he has actually spent on the land, the quality, value, and extent of his furniture and cooking apparatus; the extent of his cultivation; the number or days he has been absent, the causes therefor—may all be shown, but only in proof of one fact and in answer to one question: "Is he an actual settler?"

Claimants for Osage lands are required to file a declaratory statement within three months from date of settlement, and to make proof

and payment within six months from date of filing. They may, however, make proof and payment in less than six months after filing, on showing the necessary qualifications as a pre-emptor, and that they have made an actual *bona fide* settlement on the land. It must also appear that the land is taken for the home of the entryman. R. H. Smith, 11 L. D., 268; Finan *v.* Meeker, idem., 319. It follows also that it must be his home to the exclusion of a home elsewhere.

The hearing in this case was largely directed to the issue as to whether the entryman had maintained a continuous residence, after settlement. Had the filing been on lands subject to the general preemption laws, it is doubtful whether the residence would have been sufficient in point of duration. But, since the only question involved is, whether the entryman is "an actual settler" (United States *v.* Woodbury *et al.*, 5 L. D., 303), and since the evidence on that point is conflicting, and since the register and receiver twice found that issue in favor of the entryman, and that finding was sustained in your said office decision, I do not, on the record before me, feel justified in disturbing the judgment appealed from, which is accordingly affirmed. Chichester *v.* Allen, 9 L. D., 302; Scott *v.* King, idem., 299.

PRACTICE—DEATH OF DEFENDANT—APPEARANCE—EVIDENCE.

SMITH *v.* WASHBURN.

On the death of the entryman and substitution of his widow as defendant she is entitled to notice, and must be brought into court either through process of law, or voluntary appearance.

An appearance entered in general terms, and without words of limitation, or expression of intention to dispute the jurisdiction of the local office, cannot be qualified in its effect by the subsequent allegation that it was for a special purpose.

It is within the discretionary authority of the local office to allow the introduction of additional testimony by the contestant, after the evidence for the claimant has been submitted.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 5, 1891.

On March 24, 1883, John E. Washburn made homestead entry No. 5140 for the NE. ¼ SE. ¼ and W. ½ SE. ¼, Sec. 28, and the NW. ¼ NE. ¼, Sec. 33, T. 5 N., R. 70 W., Denver Colorado. July 24, 1886, John R. Smith filed an affidavit of contest against said entry, charging abandonment.

Notice issued the same day, summoning the defendant to appear and answer to said charge at the office of the register and receiver in Denver, on the 28th day of August, 1886. The return on the said notice is as follows:

John R. Smith, being duly sworn, upon his oath says that he served the notice of which the within is a true copy on the 25th day of July A. D. 1886, by delivering to

Mrs. Washburn, a member of the family of the within named John E. Washburn, over the age of fourteen years, a true copy of said notice at the usual place of abode of said John E. Washburn in Boulder county, Colorado, and that the said Mrs. Washburn at the time of the delivering of said notice represented that the said John E. Washburn was ill and requested that said notice should be delivered to her.

JOHN R. SMITH.

Sworn to and subscribed before me this 28th day of August A. D. 1886.

J. M. ELLIS.
Receiver.

On the 15th of August, before the day set for the hearing, Washburn, the defendant, died. On the 28th, the day of hearing, the record shows the following proceedings:

Proof of service of notice of hearing made and filed. And thereupon contestant by his attorney suggests the death of claimant after service of notice, and asks that the action proceed against Albina Washburn, his widow.

And thereupon come B. L. Carr, F. P. Secor and Daniel Witter, attorneys at law, and enter their written appearance as attorneys in this cause for Albina Washburn, widow of John E. Washburn.

And thereupon comes the said Albina Washburn by her attorneys and files her written motion to dismiss said contest for the reasons stated therein.

And thereupon the said motion coming on to be heard before the register and receiver and argument of counsel being heard and it appearing to the register and receiver that the said Albina Washburn had prior to the filing of said motion to dismiss entered her general appearance in said cause by her attorneys, and it being within the personal knowledge of the receiver that F. P. Secor, one of the attorneys of said claimant, had in her presence and in the presence of the receiver and of the attorneys for contestant, stated that there was no doubt that John E. Washburn had in his lifetime and on the day mentioned, and in the manner mentioned by contestant in his affidavit to the service of such notice, received said notice, and the said attorney having then in the presence of the receiver, and prior to the filing of said motion to dismiss, verbally waved the rights of his client on account of any defect in the proof of service by contestant, and having stated that no objection would be taken on account thereof, and the said Albina Washburn having at the same time admitted that she had received the notice from the contestant on the date and in the manner stated by him, and having further stated that she had immediately on receiving it handed it to her husband, John E. Washburn, the said motion is overruled, with leave nevertheless to claimant to apply for a continuance. To which action of the register and receiver in refusing to dismiss said contest claimant by her attorneys objects and excepts.

And thereupon the claimant declining to apply for a continuance of this cause, the parties respectively announce themselves ready for the hearing thereof, and contestant to support the issues in his own behalf is sworn, etc.

The written appearance of the attorneys referred to in the foregoing is in this language:

John R. Smith *vs.* John E. Washburn. } Before the Register and Receiver of the U. S. Land Office at Denver, Colorado.

Involving title to H. 5140 of said Washburn for (here follows description of land).

We hereby enter our appearance as attorneys in the above entitled cause for Albina Washburn, widow of J. E. Washburn.

B. L CARR & F. P. SECOR,
and DANIEL WITTER.

The reasons stated in the motion to dismiss are—

1st. Because the notice was not served in accordance with Practice Rule No. nine.

2d. Because John E. Washburn, the claimant, died between the date of the affidavit of contest and the day of trial.

The examination of the witnesses was proceeded with until and including the 1st day of September, when by agreement of all parties the hearing was continued until the 9th day of the same month. On said day contestant filed a motion, supported by his affidavit and that of his attorney, to be allowed to "offer further testimony by 10 o'clock on the 10th September, 1886, as to the residence of claimant, three quarters of a mile south of Loveland."

The contestant's affidavit in support of this motion was to the effect that at the commencement of the hearing he had been informed that he ought to have brought witnesses, showing that claimant had maintained his residence at a place other than on the homestead; that before the trial he had supposed that he had only to bring witnesses residing in the neighborhood of the land in dispute to show lack of residence thereon by claimant.

The affidavit of the attorney was corroborative of that of contestant. The motion was allowed, and after the conclusion of the testimony on the part of claimant the contestant introduced one Seaman, whose evidence tended to show the residence of claimant on his farm south of Loveland ten miles from the land in dispute.

After the hearing the register and receiver rendered their decision recommending that the entry be canceled.

Mrs. Washburn appealed, and on November 20, 1888, your office reversed the decision of the local officers, upon the ground of the illegality of the service of notice on Washburn in his lifetime, and remanded the case for a rehearing, with notice to the widow.

Contestant filed a motion for a review of this decision of your office, and upon a further and more careful inspection of the record of your office sustained said motion, recalled the order for a rehearing, and on the evidence submitted affirmed the decision of the register and receiver, and held the entry for cancellation. This decision of your office was rendered May 2, 1889, and it is from this decision that Mrs. Washburn, widow of claimant, now appeals, claiming that the register and receiver obtained no jurisdiction of the person of defendant Washburn in his lifetime by reason of the alleged defective service of notice, and that there was no service of notice on the widow, nor appearance by her to the action, and also that it was error to allow the contestant's motion for the additional testimony of Seaman; also that the evidence did not justify the cancellation of the entry.

On the death of the claimant, the widow, at the suggestion of the entryman being substituted as defendant, was entitled to notice. She is the party in interest, and to obtain jurisdiction, must be brought into court, either through process of law or by her voluntary appearance.

And this must be done whether her husband in his lifetime was properly served with notice or not. It is, therefore, in my opinion, unnecessary to discuss the legality of the service on him.

Then the only jurisdictional question is, was the widow of claimant properly before the register and receiver? The record shows that on the day fixed for the hearing (28th of August), the contestant suggested the death of John E. Washburn and asked that the action be revived in the name of his widow.

Thereupon she, by her attorneys, enters a general appearance in the case, as heretofore noted, and immediately files a motion to dismiss the action for want of legal service upon Washburn. This motion comes too late.

It will be observed that their appearance for Albina Washburn contains no words of limitation, nor discloses any design to dispute the jurisdiction of the register and receiver. There is no claim upon her part that these attorneys had no authority to represent her, and they will not, after having entered a general appearance of this character, be heard to qualify the same on this showing. To hold that this was an appearance of her attorneys for some ulterior purpose, and not a general appearance by her, would be to stultify the record.

The only remaining question is, was it reversible error for the local officers, after the defendant had rested her case, to allow the contestant to introduce the witness, Seaman, to prove the residence of the claimant elsewhere than on the homestead in dispute? I do not think so. In the interest of substantial justice, as much discretion should be allowed the local officers in the introduction of testimony on trials before them, as is given nisi prius courts, and no one will contend that such tribunals can not exercise the discretion that was used in this case. Besides no showing is attempted to be made that Mrs. Washburn was prejudiced by such action. To my mind, this objection is more technical than substantial, and will not warrant a reversal of the judgment.

The evidence abundantly shows that the defendant in his lifetime never established a bona fide residence on the land, but used it as headquarters for a dairy and stock ranch while his actual residence was ten miles distant. The widow, though present at the trial, refused to testify in the case, though called upon by the plaintiff in his own behalf.

From a careful examination of the record, I find no reason for disturbing your judgment, and it is therefore affirmed.

RAILROAD INDEMNITY SELECTION PRE-EMPTION CLAIM.

SOUTHERN PACIFIC R. R. CO. *v.* FLIPPEN.

A pre-emption filing should not be received for land involved in a rejected railroad selection pending on appeal; nor should any action be taken with reference to land in such status without special notice to the company.

Where a filing has been allowed for land thus reserved, and final proof submitted thereon, the filing and proof should be suspended until final disposition of the pending appeal, and the pre-emptor allowed to intervene under the rules of practice.

Secretary Noble to the Commissioner of the General Land Office, January 5, 1891.

I have considered the case of the Southern Pacific Railroad Company *v.* Nancy A. Flippen, as presented by the appeal of the former from the decision of your office dated May 27, 1889, rejecting its claim for the S. ½ of the SW. ¼ of Sec. 15, T. 25 S., R. 30 E., M. D. M., Visalia, California, and allowing Nancy A. Flippen to pre-empt said tract, with others in the even sections, upon which, in her declaratory statement, she alleged settlement January 1, 1886.

Said decision states that "the tract in the odd-numbered section is within the restored indemnity limits of the Southern Pacific Railroad Company's grant under the act of July 27, 1866" (14 Stat., 292); that said company, on December 9, 1885, filed list No. 23 of indemnity selections embracing the tract in controversy, which was rejected by the local officers "for non-compliance with the rules relating thereto," and an appeal taken from their action to your office; that Mrs. Flippen, after notice by publication, made final proof, which shows that she settled on her claim in January, 1885, and resided thereon continuously up to October 4, 1886, cultivating and improving the same; and that upon the decision of the local officers that she should be allowed to perfect her claim, the company duly appealed.

Your office decided that Mrs. Flippen was an actual settler residing upon the land when the company applied to select the same; that her improvements were such an appropriation of the land as would defeat the company's right of selection, and accordingly affirmed the action of the local office.

The company insists in its appeal that, at the date when Mrs. Flippen alleged settlement on said tract, and long prior thereto, the land was reserved from settlement and entry by the withdrawal of October 27, 1874; that the company's said application to select said tract had the effect of an entry, and, while the appeal was pending, said land was not subject to pre-emption settlement and entry; that the company having a selection of record was entitled to special notice when the pre-emptor proposed to offer her final proof.

It is quite evident, under the rulings of the Department, that the pre-

emption filing of Mrs. Flippen should not have been allowed while the company's appeal from the action of the local office rejecting its selection was pending in your office undecided. (Rule of Practice 53, 4 L. D., 43; Stroud *v.* de Wolf, 4 L. D., 394; Bailey *v.* Townsend, 5 L. D., 176; Austin *v.* Thomas, 6 L. D., 330; Laffoon *v.* Artis, 9 L. D., 279; Northern Pacific R. R. Co. *v.* Halverson, 10 L. D., 15; Lehman *v.* Snow, 11 L. D., 539.

The lands within the indemnity limits having been restored, the right to file for said tract depends upon the validity of the selection of the company. If that is invalid for any reason, then Mrs. Flippen can be permitted to make pre-emption entry of the land. The company having an appeal pending involving its right to said tract, no action could be taken without special notice to it. Southern Pacific R. R. Co. *v.* Reed, 4 L. D., 256. Indeed, the proper practice is to suspend the filing and proof until the final disposition of the appeal of said company now pending before your office. Mrs. Flippen, however, may be allowed to intervene under the rules of practice.

The decision of your office is accordingly modified and the pre-emption claim of Mrs. Flippen will be suspended until final action upon the appeal of the company.

RAILROAD INDEMNITY SELECTION—PRE-EMPTION CLAIM.

HENSLEY *v.* MISSOURI, KANSAS AND TEXAS RY. CO.

The right to take a tract of land as indemnity is determined by its status at the date of selection and not at date of withdrawal.

Land excepted from withdrawal by the existence of a pre-emption claim is not excluded thereby from subsequent selection, if at the date thereof, such claim has expired and is abandoned.

Secretary Noble to the Commissioner of the General Land Office, January 5, 1891.

I have considered the case of W. F. Hensley *v.* Missouri, Kansas and Texas Railway Company, on appeal by the former from your decision of July 12, 1889, rejecting his application to make homestead entry for the S. ½ of the SE. ¼ of Sec. 10 and the N. ½ of the NE. ¼ of Sec. 15, T. 26 S., R. 14 E., Topeka, Kansas land district.

The statement of facts made in said decision is supported by the record and is not denied or criticised by the appellant. It is simply insisted on appeal that because the land was at the date of the order of withdrawal covered by the filing of a qualified pre-emptor who had made actual settlement thereon, it was excepted from the operation of the grant and the withdrawal therefor.

It is clear that the land covered by such settlement was excepted from the operation of the withdrawal and that it was until selection by the company subject to appropriation as public land. The right to

take a tract of land as indemnity is determined by its status at the date of selection and not at date of withdrawal.

Missouri, Kansas and Texas Ry. Co. *v.* Beal (10 L. D., 504).

The claims which served to work the exception from the withdrawal had, however, expired and, as shown by the evidence been abandoned long prior to the application of the company to select the tracts as indemnity, and were not therefore sufficient to prevent such selection thereof by the company. Chicago, Milwaukee, and St. Paul Ry. Co. *v.* Amundson (8 L. D., 291); Allers *v.* Northern Pacific R. R. Co. (9 L. D., 452).

The decision appealed from is affirmed.

PRE-EMPTION—ALIENATION AFTER ENTRY.

UNITED STATES *v.* SEARLS.

One who settles on land in good faith, and subsequently complies with the requirements of law, intending to make the land his home, is not disqualified as a preemptor by the fact that through a change of circumstances he had formed an intention to sell prior to the submission of final proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 6, 1891.

On May 5, 1882, Alvin T. Searls filed his declaratory statement for the S. ½ SW. ¼ Sec. 7, and N. ½ NW. ¼ Sec. 18, T. 97 N., R. 61 W., Yankton, Dakota.

He offered his final proof before the register and receiver on April 26, 1883, and the same was accepted, and final certificates duly issued.

The improvements consisting of a house, stable, and five acres broken, were valued at $150. No crops (except hay) were raised, and the residence was shown to be continuous.

Special Agent Thomas M. James examined the premises October 25, and 26, 1885, and reported the land in possession of Isaac W. Seaman, to whom it was conveyed the day after said entry; that the land was enclosed by Seaman for a stock-range in the spring of 1884; that the improvements consisted of a sod shanty twelve by fourteen feet, built in 1881 by said Seaman, less than three acres broken—the breaking being done for a fire guard for protection of Seaman's stock-range; no crops; no residence ever established; was employed by Seaman in Tyndall, Dakota, and lived twenty-five miles away from the land; had agreement to convey the land after proof should be made to Seaman, receiving fifty dollars for his right. The evidence on which he made his report was the declarations of one John Musser, of Denmark, Iowa; that he was present and heard the contract between claimant and Seaman; that claimant had no furniture, and that the fraud was wilful.

The entry was accordingly held for cancellation, March 11, 1886, and

on the application of said Seaman a hearing was ordered January 12, 1887, and the same was had and concluded July 13, 1888, the government being represented by Special Agent Braly and the claimant and transferee appearing in person.

The register and receiver, while finding that the charges of the special agent were not fully sustained, yet recommended the cancellation of the entry, saying:

> Although the improvements were meager, such fact in itself does not indicate an attempt to obtain title to land without making the same his actual home, we are constrained to believe however that his action in selling the land immediately after proof, coupled with his own statement that he had prior to proof concluded to sell the tract and return to Iowa, and the further facs that he was in the employment of the subsequent transferee or grantee during a great part of the time of his alleged residence thereon, fails to establish the entryman's good faith in the premises, and that his entry is not of such a character as contemplated by law. While the inception of the entry may have been in good faith, the claimant's admission that when he learned that his brother would not leave Iowa and remove to Dakota, he determined to sell as soon as proof was made, and the fact he did sell the day after proof was made leaves no doubt that the consummation of the entry was speculative and not for the purpose of procuring a home.

In your decision you find that the original filing was in Seaman's interest, and because the claimant "was in search of a purchaser before he made final proof," he thereby became disqualified for making such final proof.

I have carefully reviewed the testimony. The evidence taken at the hearing fails to sustain the agent's charges in several important particulars. The house was a stone house, built two or three years before the filing was made by one Coats, it was never occupied until claimant moved into it. When he made his filing the house was badly out of repair, the stones had fallen from the sides and corners, the roof needed fixing and the floor leveled. He made the necessary repairs, discovered a spring of water and fixed it for use, and built a stable. The improvements are shown to be fully worth $150—the amount estimated in final proof. His residence was practically continuous; he had the necessary furniture in his house, and the evidence fails to show that he agreed to convey the land before he made final proof. In all this the report of the special agent was not sustained. Claimant swears he made the entry in his own interest, and there is no evidence whatever to sustain your finding that the original filing was in Seaman's interest. It can only be inferred from the fact that Seaman, who had known him from boyhood, showed him the land, that claimant was employed by Seaman for about half the time from the filing to date of final proof, and that the land was deeded to Seaman the day after proof was made.

Claimant was a poor man, and was compelled to work for others for his support and for means to improve his land; and his temporary absence for such purposes did not break the continuity of his residence.

He swears he made the filing in his own interest, and had no agreement

that the title he might acquire should inure to the benefit of any one else; that he resided on the land continuously and had no other home. He further says:

I filed on my land in the spring of 1882, and then went back to Iowa, thinking my brother would come, and I was to bring my sister so I could get ready to take up my residence; my brother changed his mind and would not come, and I brought out my sister and she got homesick, and I got tired of the country and concluded to sell and go back to Iowa. This was in the spring of 1883. I made the agreement with Sea man the next day after the entry. I had been talking to different parties about selling my place before I had proved up. I had talked to Mr. Seaman about selling him the place before I made my proof. When I made my proof I intended to make the land my home, if I could not sell it. I talked to Mr. Seaman about selling my land before final proof and the day following I made the trade, but not in terms we had talked about. I know I had the land for sale when I proved up.

Sec. 2262 of the Revised Statutes, among other things, provides as follows:

Before any person . . . . . is allowed to enter lands he shall make oath . . . . . that he has not settled upon and improved such lands to sell the same on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatever by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself.

There is no evidence that claimant settled upon this land for speculative purposes. He swears to the contrary. Nor is there any evidence that he made any contract to sell the land before he made final proof; he swears to the contrary. But he had talked about selling the land before he made final proof to Mr. Seaman and "different persons," and he swears that when he made his proof he intended to reside on the land, "if he could not sell it."

The incident of his going after his brother, and of his bringing his sister from Iowa to Dakota (after his filing) "so I could get ready to take up my residence," strongly indicates his good faith in filing on the land. The failure of his brother's coming and the homesickness of his sister "caused him in March 1883 to conclude to sell and go back to Iowa."

The sole inquiry therefore is, whether one can in good faith make final proof in a pre-emption claim, who before and at the time he submits such proof "has concluded to sell" if he can find a purchaser, but who intends to make the land his home "if he can not sell."

There is nothing in the record which impeaches the entryman's statements made in his final affidavit, as required by Sec. 2262 of the Revised Statutes.

In the case of Edward C. Ballew (8 L. D., 508), I find this statement: "But a change of circumstances after settlement and before proof may be such as to render the making of final proof at a particular time in order to go away from the land entirely compatible with good faith."

The change of the circumstances which induced the intention to sell

took place just before the proof was made, and could not be foreseen at date of filing and during the time of residence and improvements. He did not sell or agree to sell before he made proof. After he made proof he had a legal right to sell, and the fact that he had formed the intention of selling before proof is not inconsistent with good faith or contrary to the spirit of the law. Had he gone on the land with the intention of discontinuing his residence and selling the same when proof should be made, although his subsequent residence and improvements might fulfill the letter of the law, his good faith would be wanting and the entry should be canceled. (Sydney F. Thompson, 8 L. D., 285). But he did not do this; on the contrary, his good faith at date of filing and up to the time of the final proof is manifest.

For the reasons above given, I reverse your decision and direct that the final proof be received and patent issued.

CERTIFICATE OF DEPOSIT—ACT OF MARCH 3, 1879.

MARTIN KIRBY.

A certificate issued on a deposit made to secure a survey, is assignable under the provisions of the act of March 3, 1879, whether issued before or after the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 6, 1891.

I have considered the appeal of Martin Kirby from your office decision dated October 22, 1889, refusing to accept a certificate of deposit issued October 12, 1872, as part payment for lot 20, Sec. 5, SE ¼ of SE ¼ Sec 6, and N ½ of NE ¼ Sec. 7, T. 5 S., R. 20 E., Stockton, California.

The record shows that the certificate in question was a triplicate certificate of deposit, No. 243, dated October 12, 1871, for $100, deposited with the United States Assistant Treasurer at San Francisco, California, by J. P. Thompson. It was deposited by Thompson on account of field and office work for the survey of township No. 5, the same in which this land is located, and was tendered by Martin Kirby September 30, 1889; Kirby is a settler under the pre-emption law in that township. The local officers refused to accept the certificate, but, in accordance with paragraph 21, page 59, of the general circular from the Land Office, issued January 1, 1889, enclosed the certificate to your office for examination. Said paragraph reads as follows:

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.

Your office, upon examination of said certificate, on October 22, 1889, informed the local office that it had been compared with the records of your office and found to be genuine and receivable in the sum of one hundred dollars in payment for public lands, in accordance with paragraph 22 of the circular issued from your office June 24, 1885, 3 L. D., 599, which is as follows:

> Certificates issued before 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.

You, however, refused to accept the certificate because it was issued before March 3, 1879, and is not assignable. The claimant has appealed from your judgment to this Department, averring that "your office decision is contrary to law."

This certificate was issued under the provisions of sections 2401, 2402 and 2403 of the Revised Statutes of the United States. Section 2403 provides that:

> Where settlers make deposits in accordance with the provisions of section twenty-four hundred and seven (one), the amount so deposited shall go in part payment for their lands situated in the townships, the surveying of which is paid for out of such deposits.

Paragraph 22 aforesaid, and paragraphs 21 and 17 on page 59 of your general circular issued January 1, 1889 (*supra*), would seem to be in harmony with section 2403, which only limits the use of the certificates to the township the survey of which was paid for out of such deposits made by the homestead and pre-emption settlers thereof. The act of March 3, 1879, (20 Stats. 352), enlarged the use that might be made of these certificates by providing that they may be assigned by endorsement and be accepted as payment for any public land of the United States entered by settlers under the pre-emption and homestead laws.

The act of August 7, 1882 (22 Stats., 327), provided that certificates issued after the date of the passage of the act should not be received as payment for public land except in the land district where the surveying is done.

The record in this case does not show the date of the assignment of the certificate to Kirby. However, that is not important, since it is not tendered as payment outside of the township for the surveying of which the deposits were paid.

The amendments to section 2403 have not attempted to restrict the use to which the certificates might be applied, but have enlarged their sphere by providing that they may be received as payment, etc., outside of the township for the surveying of which the deposits were made. (Edward Pollitz, 4 L. D., 326.)

The transaction between the government and the pre-emption and homestead settlers of township 5 S., of R. 20 E., Stockton, California, was in the nature of a contract, and in consideration of a speedy survey being made of said township by the government the settlers agreed to

advance the money, the government agreeing to credit them with the amount of their deposit when they should purchase the land.

The act of March 3, 1879 (20 Stats., 352), makes certificates issued for deposits assignable by indorsement. This act is remedial in character, and it seems clear that Congress meant by its passage to make certificates then in existence as well as to make those thereafter to be issued assignable. The act says: "Certificates issued for such deposits may be assigned by indorsement." It makes no class of certificates assignable, but makes them all so. To hold that this certificate could only be received as payment for public land in township 5 when presented by Thompson, would be establishing a very harsh rule which in some instances would allow the government immunity from the payment of the debt to the settler, and this too after having received the benefit of the survey.

It is not necessary to decide whether the certificate would be received for land outside of the township or not, for it is presented as payment for land in the township for the surveying of which it was deposited; neither is it necessary to decide whether or not the certificate would have been assignable before the passage of the act of March 3, 1879, for the passage of that act makes existing certificates assignable whether they were before or not.

The certificate in question should be received as part payment for the land Kirby seeks to purchase.

Your office decision is accordingly reversed.

CONTEST—PREFERENCE RIGHT—PROCEEDINGS BY THE GOVERNMENT.

COMAR *v.* WENDLING.

A contestant is not entitled to a preference right unless the cancellation, or relinquishment, of the entry is the result of his contest.

No preference right is acquired by a contest filed during the pendency of proceedings against the entry by the government, if such proceedings result in the cancellation of the entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 7, 1891.

I have considered the case of Sylvin Comar *v.* Michael Wendling upon the appeal of the former from your office decision of July 5, 1889, dismissing his contest against the timber culture entry of Wendling, No. 19, for the NE. ¼ of section 22, T. 9 S., R. 2 W., New Orleans, Louisiana.

The record shows that on the 1st day of April, 1881, Wendling made timber culture entry for said tract. On the 26th day of December, 1887, Comar filed his affidavit of a contest against said entry, alleging failure "to comply with the timber culture laws in that he failed to plow or

break five acres the first year, and to plow or break five additional acres, to plant in seeds, trees or cuttings the required amount."

Notice was issued the same day and served, fixing the hearing before the local officers on the 19th day of March, 1888, at which time the parties appeared and upon the motion of contestant, the hearing was continued until the 26th day of May, 1888, at which time the parties appeared and Wendling filed with the local officers a motion for an indefinite postponement of further proceedings in the contest, which motion was granted by the local officers.

Contestant appealed.

On the 5th of July, 1889, your office affirmed the decision of the local officers and dismissed the contest.

Comar appeals.

The grounds of the motion to postpone indefinitely further proceedings are set out in your office decision, and are substantially as follows:

It appears that on October 8, 1887, your office held the entry of Wendling for cancellation, upon the report of a special agent. The local officers based their action in sustaining the motion upon the fact that the case was under investigation by the government and that the filing of the application of Wendling to be allowed to comply with the timber culture law thereafter, was, at that time, pending in your office. On the 28th day June, 1888, your office passed upon said application of Wendling as follows: "The records show that T. C. entry No. 17, was made March 21, 1881, for lots 2 and 3, or NW. ¼ of Sec. 22, T. 9 S., R. 2 W., La. Mer. by Michael Connolly and canceled February 8, 1888, upon relinquishment. T. C. entry No. 19 is this day canceled for illegality, and Wendling hereby allowed to make new entry of the tract in question, of date of presentation of his affidavit, February 13, 1888." Under the authority of your said decision, the local officers allowed Wendling's entry on the 26th day of July, 1888, numbering it 673.

Appellant assigns error:

1. Wendling's relinquishment of the above entry having been filed during the pendency of contest, said relinquishment was *prima facie* the result of said contest, and it was error not to have awarded the preference right to enter the land to the contestant in pursuance of the words and intent of the statute in such cases, made and provided,

citing the act of May 14, 1880 (21 Stat., 140), as authority in support of appellant's position.

Section 2 of said act provides:

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 the date of such notice to enter said lands.

Manifestly, these provisions are not applicable to the case at bar. In the first place Wendling filed no relinquishment of his entry, but inas-

much as the government was proceeding against the same (and that before the affidavit of contest was filed), he simply filed a showing why he had not complied with the law which was properly adjudged to be sufficient and under which he was permitted to make a legal entry. His first one was improperly allowed and was illegal in its inception, as there was already one timber culture entry on the same section. But if his application should be treated as a relinquishment, the contestant would not acquire a preference right under the statute, because it is only accorded to such contestants as procure the cancellation or relinquishment—such as is brought about as the result of the filing of the contest—"of any pre-emption, homestead, or timber culture entry." The relinquishment must, in some way, be the result of, or produced by, the filing of the affidavit of contest in order to entitle the contestant to a preference right. Sorenson *v.* Becker (8. L. D., 357); Dayton *v.* Hause *et al.* (9 L. D., 193).

There is another reason why this appeal should not be sustained, which is, that no preferred rights are secured under a contest filed during the pendency of government proceedings against the entry of record, if it is canceled as the result of said proceedings. Drury *v.* Shetterly (9 L. D., 211); Arthur B. Cornish (9 L. D., 569). The government was proceeding against the entry of Wendling before and at the time Comar filed his affidavit of contest, and your office had held the entry for cancellation on the 8th day of October, 1887, more than two months before the affidavit of contest was filed, and the entry is conclusively shown to have been canceled upon the government proceedings and the second entry allowed by your office in pursuance thereof.

The remaining error assigned is too general to present any question for determination. See Rule of Practice 88.

I discover no error in the decision appealed from and it is accordingly, affirmed.

INDEMNITY WITHDRAWAL—APPLICATION TO ENTER.

HESTETUN ET AL. *v.* ST PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An application to enter can not be allowed for land embraced within an existing indemnity withdrawal.

Secretary Noble to the Commissioner of the General Land Office, December 24, 1890.

I have considered the appeal of Anders A. Hestetun, and forty-three other persons from your office decision of February 15, 1889, affirming the judgment of the local officers at Benson, now Marshall, Minnesota, rejecting the applications of the respective parties to enter certain lands.

It appears that at various dates during the years 1885, 1886, 1887 and 1888, the appellants herein applied at the local office to enter the

lands described in their respective applications, some of them under the pre-emption, some of them under the homestead, and some of them under the timber culture laws. Each of their respective applications was rejected by the local officers because it conflicted with the rights of the St. Paul, Minneapolis and Manitoba Railway company (main line) under the grant to aid in its construction. From the decision of the local officers each of the parties appealed to your office, which on the 15th day of February, 1889, affirmed the ruling of the local officers.

From your decision each of the parties appeals.

The judgment appealed from includes each of the forty-four cases, and in it I find fully and clearly set out, the names of the several parties, and a particular description of the land applied for by each person, to which reference is hereby made. I have carefully examined the record in each particular case, so far as the same is before me, and as they can all be properly disposed of in one decision I deem it best so to do.

While the errors assigned are numerous, and cover almost every question pertaining to the rights of entrymen in the public lands so far as the pre-emption, homestead and timber culture laws are concerned, I am of the opinion that they can all be properly disposed of in a general way, without specifically referring to each of them and that they are substantially met by the conclusion I reach in the case.

October 22, 1877, and October 16, 1883, the St. Paul and Pacific Railway company selected all of the tracts in controversy on account of the grants to aid in the construction of said road. These selections were not approved by the Secretary of the Interior. The lists of lost lands filed by the company in lieu of which these selections were made, exceeded in quantity by a few acres, the lands embraced in said selections and all but seven of the tracts in controversy are covered by the lists of specified lost lands in lieu of them, as shown by the records of your office. All of the lands in controversy are within the twenty mile (indemnity) limits of the grant,—act of March 3, 1857 (11 Stat., 195), and act of March 3, 1865 (13 Stat., 526),—in aid of the St. Paul and Pacific (now the St. Paul, Minneapolis and Manitoba) railway company; the withdrawal for which became effective on the 20th day of July, 1865, and still remains in force. None of the claimants make any claim that they have any right or rights to the land antedating the time when the withdrawal became effective or that his claim was excepted from the withdrawal.

The legal effect of the withdrawal is to preclude the disposal of the land covered thereby, under any of the land laws. In other words, so long as the withdrawal remains in force the land covered thereby is simply held for the purpose for which the withdrawal was made.

In Julius A. Barnes (6 L. D., 522), it is said, in speaking of the effect of withdrawals of lands within indemnity limits for the benefit of a road (see page 524),

I am satisfied that in the absence of any statutory denial of the right to withdraw lands within indemnity limits, for the benefit of a road, the exercise of such right by the land department, would have the effect to reserve such lands for that purpose, even although it might not have been contemplated by the grant, and that such right is now too well established to be called in question.

Again on page 528, it is said,—

These lands were not subject to private cash entry while they were in a state of reservation, and hence the applicant can acquire no right under an application made when the lands were not in a condition to be purchased.

In the case of McClure *v.* Northern Pacific R. R. Co., (9 L. D., 155) it is held in effect that when the withdrawal became effective, it reserved the land embraced therein from general disposal, and that a cash entry of such land after the map of general route was filed, but before notice of withdrawal, is illegal and does not except the land from the grant.

In Dinwiddie *v.* Florida Ry. and Navigation Co. (9 L. D., 74), it is held that lands included within pending selections were not restored to the public domain by the revocation of the indemnity withdrawal.

In view of the withdrawal of all the lands involved in these cases, your office correctly rejected the respective applications. The decision appealed from is accordingly affirmed.

PRACTICE -APPEAL- SPECIFICATION OF ERROR.

UNITED STATES *v.* HULBERT.

An assignment of error that sets forth that the decision is "contrary to law and the facts, and is unjust, unreasonable, illogical and biased" is not sufficient to warrant consideration of the case on appeal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 24, 1890.

In the case of the United States *v.* Levi W. Hulbert involving the latter's pre-emption cash entry for the SE. ¼ Sec. 18, T. 111 N., R. 66 W., Huron land district, South Dakota, Hulbert appeals from the decision of your office of November 12, 1888, holding said cash entry for cancellation.

Hulbert's assignments of error are as follows:

1st. Said decision is contrary to law.

2nd. Said decision is contrary to the facts.

3rd. Said decision is unjust, unreasonable, illogical, biased,—

and he asks that the same be set aside.

Rule 88 of the Rules of Practice requires that the appellant shall file "a specification of errors, which specification shall clearly and concisely designate the errors of which he complains."

In the case of Pederson *v.* Johannessen (4 L. D., 343), it was held that the allegation that a decision "is contrary to the evidence" was insufficient, as a specification of error and the appeal was dismissed.

In Schweitzer *v.* Wolfe (5 L. D., 158), the appeal, which asked the reversal of a decision "for the reason that said decision was contrary to law, and the practice of the Land Department" was dismissed as defective "in that it does not set forth any specification of error as required by Rule of Practice No. 88."

In Horton *v.* Wilson (9 L. D., 560), the specifications—"1. The Commissioner erred in dismissing the contest. 2. The Commissioner erred in sustaining the decision of the local office" were held insufficient.

In Devereux *et al. v.* Hunter *et al.* (11 L. D., 214), a specification asking the reversal of a decision "Because of the manifest errors in the conclusions of law and fact arrived at by the Commissioner in making the decision appealed from" was held "too indefinite to present any question."

The specifications of error here are, under the rulings in the decisions cited, insufficient, and said appeal is, therefore, because of the failure to comply with the requirements of said Rule of Practice, hereby dismissed.

PRACTICE—EVIDENCE—RULE 35.

DOHERTY *v.* ROBERTSON.

Failure to appear and submit testimony in accordance with an order made under rule 35 of practice, can not be excused on the mere allegation that the party in default was apprehensive that his testimony would not be fairly taken by the officer designated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1891.

I have considered the appeal of James Robertson from your office decision dated May 10, 1889, holding for cancellation his timber culture entry for the NE ¼ of Sec. 14, T. 161 N., R. 60 W., Grand Forks, Dakota.

He made this entry October 2, 1884. March 17, 1887, Charles B. C. Doherty initiated a contest against the same and alleged in his affidavit "that the said James Robertson did not break or cause to be broken five acres during the year 1886, the second year after entry, as required by law, and that there was not now ten acres broken on said tract."

Upon this affidavit and corroborative affidavits being filed, and upon due notice, the local office ordered testimony to be taken before the clerk of the court of Cavalier county at Langdon on May 6, 1887, and that final hearing be had before the register and receiver May 11, following. Claimant, in answer to service, sent a written protest to the

local office objecting to the testimony being taken at Langdon, for the alleged reason that "the clerk before whom testimony was to be taken and contestant are on the most intimate terms of friendship, and that Langdon is the home of both contestant and the clerk of the court." This protest was filed three days before the date set for taking testimony before the clerk. Testimony was taken at Langdon on the day set for that purpose, and a hearing was duly had before the local office upon the day set for said hearing, to wit: May 11, 1887. Claimant made default at both places.

On May 12, 1887, the next day after final hearing, he filed in the local office a number of affidavits, giving as a reason why he had not ploughed his land as required by law that the season of 1886 was so dry that it was impossible to have broken the ground.

July 7, 1887, the local office recommended claimant's entry for cancellation, and, upon appeal being taken to your office, by decision of May 10, 1887, you affirmed the judgment appealed from, and held the entry for cancellation.

Thereupon Robertson appealed to this Department, and assigned a number of errors, the principal one of which is, in substance, that he had had no opportunity to be heard where he could have a fair and impartial trial.

The record shows that the land in question is near Langdon, which is about ninety miles from the land office. Also that claimant lived about thirty miles from Langdon and about sixty-five miles from the land office. When contestant filed his affidavit, March 17, 1887, he requested that testimony be taken before some officer at Langdon. A notice was served on claimant of the contest and the time and place of taking testimony, March 17, 1887, yet he made no objection to the place of taking the same until May 3, three days before the testimony was taken. It was too late then to have changed the place of taking the testimony, even if there existed any real reason why claimant could not have a fair trial. The only excuse he alleges for his failure to appear is "that contestant and said officers are on the most intimate terms of friendship; that we fear to have our case heard and testimony taken at the home of the contestant, before his friend, and among his friends, and so far from where we reside or have any acquaintance."

There are no facts stated in this protest, and it does not show any just or legal grounds upon which to base his apprehension that he could not have a fair hearing before the clerk designated by the local office to take the testimony. At no time has the entryman shown that the clerk before whom the evidence was taken was prejudiced against him. The clerk had no power to prejudice his case. His duties were purely manual in reducing the testimony to writing as given by the witnesses, and it was the duty of Mr. Robertson to appear, if he desired to protect his rights, before the clerk and cross-examine contestant's witnesses and submit his proof in defense of his entry, and if he saw any evidence

of unfairness, take his exceptions thereto. He can not remain away and shield himself behind any imaginary fear which does not exist in fact. The presumption, in the absence of any showing by facts or circumstances to the contrary, is that he received justice and fair dealing, and I am inclined to the belief that he got it.

Under Rule 35 of the Rules of Practice of your office, the local officers are given discretionary authority to have testimony taken near the land in controversy before any officer authorized to administer oaths. It seems in this case that this discretion was wisely used. The testimony given before the clerk of the court at Langdon shows that the allegations made in contestant's affidavit are substantially true.

Your decision is accordingly affirmed.

PRACTICE—JURISDICTION—PREFERENCE RIGHT.

LOGUE *v.* O'CONNOR.

Where an entry is canceled on an issue raised by a contest, in which the entryman appears and invokes the judgment of the Department, he will not subsequently be heard to allege that he had no notice of the case and is not bound by the decision.

After an entry is regularly canceled on contest, the defendant therein has no interest in the case that entitles him to be heard in the matter of the contestant's preference right of entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 8, 1891.

I have examined the case of Lent H. Logue *v.* Daniel O'Connor on appeal by the latter from your decision of May 1, 1889, holding that his homestead entry had been properly canceled and that Logue had acquired a preference right of entry for the SE. ¼ Sec. 35, T. 27 S., R. 31 W., Garden City, Kansas.

It appears that on September 14, 1885, O'Connor filed Osage declaratory statement for the NE. ¼ Sec. 26, T. 28 S., R. 25 W., Garden City, Kansas land district, alleging settlement September 7, 1885. On October 14, of same year he made homestead entry for the tract in controversy, and on May 10, 1886, made cash entry for the NE. ¼ of Sec. 26, T. 28 S., R. 25 W., on which he had filed the Osage declaratory statement.

On August 9, 1887, one Frank Davis applied to contest the said cash entry, and on October 1, 1887, your office held that while it was unlawful for O'Connor to hold two different tracts of land at the same time under pre-emption and homestead laws, yet you could not deny his right to make the cash entry, and therefore denied the application of Davis to contest the same, but the records of your office showing the homestead entry to be illegal, the same was held for cancellation.

From this ruling and decision O'Connor appealed to this Department,

and on November 20, 1888, the Department affirmed your said decision. (Vol. 86 Lands and Railroads, 109).

In the meantime, on July 26, 1887, Logue filed affidavit of contest against the homestead entry, charging that the same was illegal from its inception for the reason that at the date of making said entry the entryman was claiming the NE. ¼ Sec. 26, T. 28 S., R. 25 W., as a pre-emption right, etc. Notice was duly given of this contest, and on January 13, 1888, the parties appeared and the counsel prepared and submitted an agreed statement of facts, upon which the local officers on May 25, 1888, held that O'Connor was not a qualified entryman when he made the homestead entry, and recommended its cancellation. He appealed from this decision and on May 1st 1889, your office affirmed their findings of law, there being no dispute as to the facts, and you add,—

> But said homestead entry having been properly canceled as the result of the investigation brought about by Davis' application to contest, there remains nothing to do but approve your action and close the case, which I have done this day.

Thereupon you held that Logue having initiated this contest prior to the action of your office, canceling the entry, and having prosecuted the same, etc., he has acquired a preference right to make entry for the land.

From this decision O'Connor appeals to this Department and alleges error—

> 1st. In holding that defendant's entry was void *ab initio*.
>
> 2d. In not holding that the entry was validated when defendant procured his final certificate on his pre-emption claim, no adverse right having attached at that time.
>
> 3d. In canceling said entry in a case to which defendant was not a party and of which he had no notice. (See case of Frank Davis *v.* Daniel O'Connor).
>
> 4th. In granting Logue a preference right of entry on the tract . . . . he not having paid the expenses of contest or procured the cancellation of said entry in any suit between the parties. Act of May 14, 1880 Sec. 2.

It appears that the decision of the Department canceling the homestead entry was promulgated December 17, 1888, and that on the 29th of same month Logue applied to make homestead entry for the land, asserting his preference right of entry and on the 31st of same month leave was granted and he thereupon made homestead entry for the tract in controversy.

It further appears, however, that on July 27, 1889, he filed in the local office at Garden City a relinquishment of said entry, thereupon cancellation of the entry was entered on the records.

In the matter of the appeal, the questions raised by the 1st and 2d assignments of error, are *res judicata*. This is so because the third assignment is not well taken. O'Connor *was in court* in the case of Davis *v.* O'Connor and appealed from your decision to this Department. It is true the Davis contest sought the cancellation of the pre-emption cash entry, and your office held adversely to him, but his contest raised the question of the validity of the homestead entry, and O'Connor being in court he was there for all purposes of that case, and having ap-

pealed from your decision, and invoked the judgment of the Department, he can not now be heard to say he had no notice of the case and is not bound by the decision.

As to the fourth error, it is sufficient to say that the appellant's homestead entry having been regularly and properly canceled, he can have no interest in the matter of Logue's preference right of entry. I see no reason for disturbing your decision. It is therefore affirmed.

VISALIA DESERT ENTRY—JURISDICTION—CHARACTER OF LAND.

UNITED STATES *v.* HAGGIN.

The allowance of initial desert entry by the local office, does not deprive it of jurisdiction in subsequent proceedings directed by the Department to ascertain the validity of such entry, and the character of the land embraced therein.

Land that contains a natural growth of timber trees is not subject to entry under the desert land act.

The departmental order of September 12, 1877, suspending Visalia desert entries, revoked, and directions given for the disposition of pending contests against said entries, and the reception of final proofs that may be offered thereon.

Secretary Noble to the Commissioner of the General Land Office, January 12, 1891.

On September 12, 1877 (see Vol. 22, Lands and Railroads, p. 225), your office was directed by my predecessor, Mr. Secretary Schurz, to suspend all the entries made in the Visalia, California, land district, under the act of Congress approved March 3, 1877 (19 Stats., 377), and cause an investigation to be made before the local land officers as to the character of each of the tracts entered. On September 28, 1877, your office suspended said entries, and directed the local land officers to give public notice in some newspaper published nearest to the lands to all parties in interest, of such suspension, also of the time and place when they would hear the testimony in regard to the character of the lands entered under said law.

The local officers were directed to make a full and thorough investigation, with a view of ascertaining whether any of the land entered under said act would produce an agricultural crop without irrigation, whether any of the tracts had been previously cultivated by parties residing thereon, or by non-residents; whether any tract has to be protected from overflow by levees, and whether entries have been made by parties other than the real applicants.

On November 2, 1877, your office further advised the local land officers that the Secretary of the Interior directed that the following additional instructions be given them, namely:

When the residence of the persons, in whose names said entries were made, is known, or can readily be ascertained, notice in writing of the suspension, and of the time when the hearing will take place, may be served through the mail. In cases, where

the residences or whereabouts of the applicants is unknown and unascertainable, notice of said hearing should be given in a newspaper published in the county where the land is situate, for four successive weeks, notifying said applicants that their entries have been suspended, and requiring them to show cause, on a day named, why the same should not be canceled. At the hearing you will inquire particularly of the applicant, who must appear in person, where his present residence is, and how long he has resided where he now resides; whether he knew from personal observation anything about the character of the tract entered, before making the entry; if so, over how long a period his knowledge extended; whether he paid the first instalment required by law to be made, at the time of making said entry, or whether the money so paid was advanced by other parties, if so, by whom; whether he has assigned or mortgaged his interest, present or future, in the tract or tracts so entered, if so, to whom, when and upon what consideration. If conveyances, assignments, or mortgages, or agreements to convey, assign or mortgage the tracts entered have been made by the applicant, you will require the original instrument, or a certified copy of the same, to be furnished and made a part of the testimony in each case. The testimony of each witness must be taken by question and answer, and the witness required to give a direct answer to all questions propounded to him pertaining to the particular case. After the testimony is reduced to writing, the same must be read to the witness, and by him signed. If you shall have good reason to think that the statements made under oath by any witness are not in accordance with the truth in that case, you will at the close of the testimony in said case report the same specially to this office, with a full statement of the points upon which you think the witness testified untruthfully. In addition to the testimony presented by the applicant, you will obtain such other testimony as may be obtainable in relation to the character of the soil of each of the tracts so entered, whether any portion of the same is covered with timber, if so, how much, and of what kinds, and whether the same will produce any agricultural crop without irrigation. At the conclusion of said investigation, you will transmit the testimony taken in each case to this office, with your joint opinion thereon.

In addition to the foregoing, your office further directed the local land officers that, before resorting to advertisement, in cases where the applicant can not be found, they should hear those cases where proper service can be had, either personal, or by mail; that care should be taken not to fix the dates of hearing so as to conflict in separate cases; that the case on trial should be concluded before the day set for another case; and that at least thirty days notice of the day of hearing should be given to the party in interest.

The hearing in the case of the United States *v.* James B. Haggin, involving his desert land declaration, No. 184, dated April 19, 1877, for the S.½ of the SE.¼ and the S.½ of the SW.¼ of Sec. 6, T. 30 S., R. 26 E., was had pursuant to said instructions, commencing on December 3, 1877, and ending on January 29, 1878.

The record shows that said Haggin appeared at said hearing in person and was represented by counsel, and the United States was represented by O. P. G. Clarke, special agent, and Theodore Wagner, Esq. Before commencing to take testimony in the case, said Haggin, by his attorney, objected to any investigation on the ground that the question of the desert character of the land and the qualifications of the applicant, and the sufficiency of the testimony, were adjudicated by the local officers, when said declaration was filed and the payment of

twenty-five cents per acre paid for said land. Counsel for Haggin further objected to proceeding to show cause why his entry should not be canceled, until the ojections to said entry were made known. Said objections were overruled by the local land officers, and the testimony in the case was taken as aforesaid.

On March 5, 1878, the local land officers rendered their joint opinion against the validity of said entry. The local officers report that the claimant offered in evidence in said case one hundred and eighty-six affidavits of residents of Kern county, with a certified copy of the tax assessments of said affiants, a certificate of the officers of Kern county and the judge of the 16th judicial district, as to their character; and also a printed copy of the report of Messrs. Alexander, Mendell and Davidson; that said affidavits are not competent evidence under ordinary rules, but were received and transmitted to your office for consideration; that twenty-seven of said affiants testified in the case, but the ex parte affidavits were not considered by the local officers in forming their opinion.

The local officers find from the evidence:—

(1) That said Haggin is a native born citizen of the United States, that he filed said declaration for his own benefit, and personally paid the twenty-five cents required by law; that he has known said land for several years prior to filing said declaration; that he has not in any way sold, mortgaged or assigned his interest in said land; that the twenty-five cents per acre required to be paid upon the filing of said declaration was not paid at the date thereof, to wit, April 19, 1877, but on May 8, 1877, when said Haggin paid to the receiver, in bulk, $8,744.45, upon one hundred and fifty-one desert land declarations (including No. 184), filed during the month of April, 1877; that the receiver made out the receipts and induced the register to believe that the money due thereon was duly paid; that at the end of the month, the receiver took the receipts to San Francisco, received the money and deposited the same in "the U. S. Treasury."

(2) That the land covered by Haggin's said declaration was embraced in the pre-emption filing No. 4742 of Leonard Fetterman, dated May 3, 1875; that Fetterman built a small house on said land, cultivated a few acres by means of irrigation from the old Pioneer Canal; that Fetterman subsequently made additional homestead entries No. 1704 and No. 1705 of said tracts, and sold the land to said Haggin for $1600; that Haggin took possession of said land, and during the last year cultivated about forty acres thereof; that the McClung ranch, including the land in Haggin's said entry, is fenced with redwood posts and boards, costing $930 per mile; that the fencing on the south side of said land was completed about October 1877; that said additional homestead entries were canceled as fraudulent on March 31, 1877.

(3) That the land under investigation is a part of the McClung ranch, which includes sections 3, 4, 5 and 6 of township 30 south, range 26

east, and E. ½ of section 1, township 30 south, range 25 east, and a large portion of said ranch has been cultivated by means of irrigation from the Pioneer Canal, and the system of canals connected therewith, namely, the old Pioneer canal, the James and Dixon canal and the Pottenger canal; that the Pioneer canal is forty feet wide at the bottom, and runs nearly through the centre of said Sec. 6, a little more than a quarter of a mile from the land under consideration; that the James and Dixon canal, smaller than the Pioneer, crosses a part of said ranch, ending at the northeast corner of the SE. ¼ of the SE. ¼ of said Sec. 6, and runs for one-fourth of a mile along the north boundary of the land in controversy; that all of said land, excepting some high places, can be irrigated from the Pioneer and the James and Dixon canals, by making more lateral ditches from said canals; that a few acres were cultivated by the former occupant, Fetterman, and about forty acres were cropped in barley by said Haggin in 1877, by means of irrigation from the Pioneer and the James and Dixon Canals; that said barley was sowed in February or March, the ground having been previously plowed and the irrigating ditches having been made about the middle of April, or the first of May; that the land in question is divided lengthwise nearly equally by an irregular branching slough, averaging about five feet deep; that said slough has been full of water from the Pioneer canal, thoroughly saturating the most of the land on the north side, causing to grow thereon a large amount of vegetation; that on the south side of said slough and near its edge there is rank vegetation, but some distance from the slough the land is dry; that surveys have been made for other lateral ditches sufficient to irrigate all of said land, except some high places; that said Pioneer canal was completed in the winter of 1875 and 1876, the James and Dixon canal in 1874 and 1875; that there was expended on the Pioneer canal from March 3, 1877, to December 15, 1877, $890.56 in clearing out ditches, making surveys and constructing weirs; that the James and Dixon canal cost originally from $3000 to $4000, the Pioneer cost, prior to March 3, 1877, $37,207.30, and the lateral ditches on the McClung ranch have cost up to the time of said hearing about $4000; that the land in its present condition is worth about $20 per acre.

(4) That there is growing upon the land in question a considerable number of cottonwood and willow trees; that one witness, Horace Hawes, who made a special examination with a view of ascertaining the number, counted 1036 trees, over five inches in diameter, at about five feet from the ground; that in the opinion of said witness forty or fifty of said trees are nearly two feet in diameter, about two hundred and fifty of them are one foot in diameter, and the trees are generally from twenty-five to thirty feet high, while a few of them are from forty to fifty feet high; that said trees grow generally on each side of said slough, although there are some scattering trees throughout the tract; that said trees are, for the most part, scrubby and crooked, branching out a few

feet from the ground, but some of them are thrifty; that besides said 1036 trees, there are on the land a considerable number of smaller trees; that said trees have little value for timber or manufacturing purposes, but they may be used for fire-wood, charcoal and fences; that some of the witnesses consider said trees an injury to the land, while in the opinion of others they enhance its value.

(5) That Kern Island is a low tract of land of sedimentary deposit, and was formerly partially overflowed by Kern river, which cut many channels that are now dry and are called gulches and sloughs; that a dense growth of vegetation springs up in many places on account of the moisture caused by said overflows, and retains upon the land for a time the water of the succeeding overflow; that since the Kern river has become confined to a few channels, lands formerly wet from overflows have become dry; that the soil of Kern Island is generally fertile, but some portions of it are sandy and other parts covered with alkali; that the land in controversy is a sandy sediment, some of it containing considerable alkali, requiring a good deal of moisture to produce vegetation; that the testimony of twenty-five witnesses has been taken relative to the capacity of said land to produce a crop without irrigation; that eighteen of said witnesses testify that said land will not produce any agricultural crop without irrigation, while four say they do not know whether it will or not, one says he would not care to put his labor on the land without irrigation, and two think the land would produce in any ordinary year a crop of wheat or barley that could be cut for hay before maturity.

(6) That said land without irrigation produces salt grass, alfileria, wire grass, and wheat grass, but not in sufficient quantities in an ordinary year to be cut for hay.

The local land officers, upon their findings of fact as above set forth, held—

1st. That desert land declaration, No. 184, was filed April 19, 1877, but the money was not actually paid thereon until the 8th proximo; that the evidence does not show any collusion on the part of the receiver and the entryman, and in the absence of any intervening claim prior to the receipt of the money by the receiver, said entry should not for that reason be canceled.

2d. That although Mr. Haggin purchased the land from said Fetterman, supposing his title to be good, and has expended considerable money in improving it, yet he should not be permitted to acquire title to the land, if it is not desert land within the meaning of said act.

3d. That said land was substantially reclaimed prior to April 19, 1877, for the reason that the main canals by which a portion thereof had been irrigated and by which all, or nearly all, could be irrigated, were built prior to the passage of the desert land act.

4th. That said land, if not timber land, is wooded land, and therefore not subject to entry under said act.

5th. That the evidence shows that the ordinary rainfall is not sufficient to mature an agricultural crop on said land, and that without moisture from Kern river no agricultural crop can be produced, excepting in a year of excessive rains.

The local officers duly transmitted the record in said case, and on October 26, 1878, your office considered the same, and reported that the printed volume of ex-parte affidavits and statements having been objected to by the special agent of the government, were not considered by your office as properly in the case; that upon the investigation ordered, some twenty witnesses were called in behalf of the United States, and about thirty for the claimants, and their testimony fills two printed volumes of over five hundred pages each; that the witnesses for claimants uniformly testify that all the entries, so far as they know, are desert in character, not timber land, and will not produce any agricultural crop without artificial irrigation; that the witnesses on the part of the United States substantially agree that the part of the district north of Goose-neck slough, just north of the line between townships 29 and 30, is desert in character, while that part south of that line down to Buena Vista and Kern lakes, comprising five or six townships, is not desert in character; that it appears from the records of your office that as far north as townships 22 and 23, in ranges 24, 25 and 26, over 12,000 acres of land covered by desert entries have been abandoned, because the entrymen can not obtain water; that the only entries whose validity is to be determined are those within townships 30 and 31, and ranges 25, 26 and 27; that this district composed of about five complete townships, is traversed by the Kern river, which is subject to overflow during the rainy season, and which fills some sloughs in the vicinity, thus affording some natural irrigation and supplying water for artificial canals.

Your office further reported that the field notes of survey, made in 1854, show that two of said townships are good land and three of them second-rate; that one of the witnesses for the United States testifies that he kept a diary from March 10, 1870, to the close of the year 1877, except one month in 1873, which shows that during that period there were in the summer months no rains whatever, except a good shower in July, 1870, and a rain in June, 1882; that in the year 1873 there was no rain between February 13 and November 10; none in 1874, after May 6; none in 1875, after the snow of May 15, until the rain of November 2; none in 1876 between March 7 and October 20, and none in 1877, between March 20 and November 13; that these statistics, taken in connection with the known fact that the earlier settlers were compelled, at great expense, to use artificial irrigation, to such an extent as to almost exhaust the ordinary supply of water, show that the few remaining tracts will not produce an agricultural crop without artificial irrigation.

Your office further finds that these desert entries in said five town-

ships were made by twenty-one different persons and cover 2443 acres all that remains of government land in an aggregate amount of 115,000 acres; that the desert character of the tracts covered by said entries is sufficiently established, and that the tract entered by Haggin ought not to be canceled simply because he is the owner of an adjoining ranch, and brought water to the land prior to his entry thereof; that since the water can not be used by a stranger, "it matters little whether the ditch is made by the claimant *before*, at the time, or after entry;" that the low cottonwood and willow clumps that border upon the sloughs are not of such a character or amount as to designate any of the tracts upon which they grow as timber land; that the evidence shows that no one has entered in his own name more than he is entitled to enter under the law, although many have entered adjoining tracts, and are jointly engaged in the irrigation of the whole body of land; that the evidence fails to prove any bad faith on the part of said entrymen; that it appears that said Haggin loaned money to the other entrymen and took a lien therefor upon the land, and if said certificates are not assignable, then the contract for a lien would be simply void, and in any event the question was not properly before your office in the case.

Your office also found that the land covered by said entries has been in the market for many years, and it would doubtless have been entered if valuable for timber, or if it had not required great expense for irrigation; that the entries ought not to be canceled on account of the discrepancy in the dates of the certificates and the time when the twenty-five cents per acre were paid to the receiver. Your office therefore recommended that the suspension be removed.

The order of suspension applied to desert land entries from one to three hundred and thirty-seven inclusive. Some of these entries have been canceled, since the date of said suspension.

The objections to the jurisdiction of the local land officers to make said investigation were properly overruled. They were acting under the express instructions of this Department. Witherspoon *v.* Duncan (4 Wall., 210); Lee *v.* Johnson (116 U. S., 48).

It is evident that the instructions to the local land officers contemplated that the validity of each entry should be determined separately, and the register and receiver so construing said instructions have only passed upon the desert entry of said Haggin. They find that his entry is invalid, because the land was substantially reclaimed prior to the passage of said act, and is within the inhibition of said act, being timbered or wooded land.

The second section of the desert land act provides:—

> That all lands, exclusive of timber lands and mineral lands, which will not without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses, under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The evidence shows that cottonwood and willow trees were growing on the land in question at the date of Haggin's said entry. The witnesses differ as to the number and size of the trees. Those for the claimant placing the number at less than two hundred, while the witnesses for the government state that there were over a thousand.

In the case of Riggan *v.* Riley (5 L. D., 595), this Department held that—

> Even if it be shown that the land will not produce some agricultural crop without irrigation, yet, if the testimony shows that there are several acres of timber on the land, such land can not be entered under said act.

On May 11, 1888 (6 L. D., 662), your office was advised that the paragraph in the circular of June 27, 1887 (5 L. D., 708), to wit, "Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands," did not prohibit the entry of lands that will not produce an agricultural crop, "even if such land has some or even a considerable growth of mesquite trees upon it." But "if the ordinary forest trees will grow upon the land, there is sufficient moisture in the soil to render the land non-desert in character."

I do not deem it necessary to comment in detail upon the testimony of each witness introduced, but I think the findings of the local land officers are substantially sustained by the evidence in the case. I therefore concur in their opinion that the tract covered by Haggin's said declaration was not subject to entry at the date thereof, on account of the trees growing thereon.

Upon the record presented, it will be quite impracticable to determine the validity of the other entries suspended under said order. Indeed, the record does not show that the entrymen have been duly notified, or that any hearings have been had upon their particular entries. Before any of the other entries can be canceled, hearings must be had and proof submitted by the United States or contestant, showing the invalidity of each entry. The LeCocq cases (2 L. D., 784); Henry Cliff (3 L. D. 216); George T. Burns (4 L. D., 62); John W. Hoffman (5 L. D., 2).

Since the date of the suspension of said entries, Congress passed the act of May 14, 1880 (21 Stat., 140), which provides, by the second section thereof, a preference right of entry to the successful contestant of a pre-emption, homestead or timber culture entry. Under the rulings of this Department, this act applies to contestants of desert land entries, and your office has transmitted to this Department from time to time, the record of certain contests allowed, and also applications to contest some of said entries, which have been refused by the local land officers. Said papers are herewith returned for appropriate action by your office.

I am of the opinion that the order of suspension of said entries should be revoked, and so direct. I see no objection, however, to passing upon the contests initiated prior to said order of suspension, where hearings were held and evidence submitted by the respective parties,

and also allowing the parties, who have filed applications to contest, to proceed with their contests where the grounds thereof are the invalidity of said entries.

In accordance with the request of parties, the testimony taken in this investigation, relative to the desert character of the land, so far as the same is applicable, may be used in any subsequent proceeding involving the validity of the entries in cases where stipulation has heretofore been made that it should apply.

It is not necessary, nor is it intended in this decision, to express any opinion upon the validity of the other entries suspended under said order. In view, however, of the evidence elicited, and the reports of the special agents, the local land officers should be directed, when final proof shall be offered, to make careful inquiry as to the character of the land at the date of entry, the reclamation thereof, and the good faith of the entryman in every respect, both in making said entry and his subsequent acts.

The time between the date when said order of suspension became effective, and the date of the notice of its revocation will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law.

By your office letter, dated August 13, 1889, I am advised that the land covered by said entry, No. 184, was passed to patent on December 20, 1884. This was clearly erroneous, but the patent having issued, the Department is deprived of jurisdiction in the premises, so long as the patents for said land remain intact.

Mr. Haggin asks that suit be instituted by the government to cancel said patents. This request cannot be granted, but this refusal of the Department to recommend the institution of suit will not prevent the parties claiming said land to adjudicate their rights in the proper courts of the country.

LEVI WOOD.

Motion for review of departmental decision rendered July 23, 1890, 11 L. D., 88, denied by Secretary Noble, January 13, 1891.

HOMESTEAD—APPLICATION TO ENTER.

GEORGE WATKINS.

One who has duly complied with the pre-emption law, submitted final proof, and paid for the land, is not disqualified as a homestead applicant by the fact that the local office has not issued final certificate under the pre-emption proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1891.

I have considered the appeal of George Watkins from your office decision dated June 23, 1888, rejecting his application to make homestead entry for the NW. ¼ Sec. 32, T. 27, R. 47 W., Lamar, Colorado.

The record shows that he filed pre-emption declaratory statement for the NW. ¼ Sec. 20, T. 27 S., R. 46 W., January 3, 1887.

August 29th following he made final proof. The register and receiver by letter dated November 14, 1887, say "Owing to a clerical error in Watkins' proof he had not lived on the land the necessary six months. The error was corrected later on."

He paid $200 for the land the same day proof was made, but received no receipt therefor until after his application for homestead entry. Afterwards he received a receipt and final certificate for the land, which was dated August 29, 1887.

His application to make homestead entry for the tract in question was presented at the local office September 23, 1887, and rejected same day upon the ground that he was not a qualified homesteader, because receipt and final certificate had not been issued to him on his pre-emption claim. He appealed to your office.

Alfred W. Swart filed application to make homestead entry for the land in question October 20, 1887, which was rejected because of the pending application of Watkins to enter the same tract.

Swart also appealed to your office.

After considering both appeals, you, on June 23, 1888, rejected Watkins' application and allowed Swart to make entry. Watkins appealed to this Department. His application was filed twenty-seven days before that filed by Swart. It follows if he was a qualified entryman that his application should have been allowed.

The final proof upon his pre-emption claim was made before the register and receiver, and if there was a clerical error in reducing his testimony to writing, it was an error of the local office, and he should not be prejudiced thereby. It is no where claimed that he had not fully complied with the law. On September 23, 1887, when his application was filed, he had done every thing that the law required in order to secure title to the land covered by his pre-emption claim. He had at the time of his final proof shown sufficient residence and improvement to entitle him thereto, and paid for the land. He was then entitled to his duplicate receipt. No presumption as against such showing could be properly founded upon the fact that the local office did not then deliver him the receipt and final certificate. "He had performed each obligation laid upon him by the law, not only in the matter of residence and improvement, but also as to payment of the purchase price at the proper time." Joseph W. Mitchell (7 L. D., 455); Magalia Gold Mg. Co. *v.* Ferguson (6 L. D., 218); Orr *v.* Breach (7 L. D., 292); Joseph W. Mitchell (8 L. D., 268); Eberhard Querbach (10 L. D., 142).

Your office decision is accordingly reversed, and you will direct the local officers to accept Watkins' application.

RUTH MCNICKLE.

Motion for review of departmental decision rendered November 1, 1890, 11 L. D., 422, denied by Secretary Noble, January 13, 1891.

PRACTICE—NOTICE OF CONTEST—DEFECTIVE SERVICE.

MORGAN *v.* RILEY.

Service of notice is fatally defective where the purported copy of the original notice, delivered to the defendant, does not show the true date of hearing as fixed in the original notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 12, 1891.

In the appeal of Morgan from your office decision of March 1, 1889, in the case of George W. Morgan *v.* West Riley, the following facts appear of record:

November 12, 1883, said Riley made timber culture entry for the N. ½ NW. ¼, Sec. 35, T. 4 N., R. 19 W., S. B. M., Los Angeles, California. Morgan filed an affidavit of contest against the same, August 27, 1888. On the same day notice issued, summoning the claimant to appear at the local office on December 22, 1888, to respond to the allegations charged against him.

The notice was served by one Bloomer, who left with the defendant what purported to be a copy of the original notice, but which stated the day of hearing to be on *November* 22, instead of December 22, the day fixed in the original notice. On the said 22d of December, the correct date, defendant appeared specially by counsel and moved to dismiss the contest for want of proper service of notice, and presented the defective copy of notice which had been left with him.

The register and receiver refused to dismiss, but continued their hearing on their own motion until December 31, "to allow Riley to make oath of the service made upon him." On that day Riley's affidavit was filed, showing that the notice which had been presented to the court, and naming 22d November as the day of hearing, was the only notice or copy of notice he had ever received or heard of. On the back of the original notice is the affidavit of Bloomer that he served Riley with the within notice by reading it "to and in the presence and hearing of said West Riley, and delivering him a true copy thereof."

Counsel for plaintiff on this showing did not ask for a continuance and new service of notice, but insisted that the service was sufficient. Whereupon the register and receiver, on motion of defendant, supported by his affidavit, as aforesaid, dismissed the contest because of the defective service of notice.

The plaintiff appealed to your office, and on presentation of the rec-

ord above, your office returned the affidavit of contest and ordered a rehearing under the rules, with notice properly served on defendant.

The decision of your office is right. The authorities cited by counsel for appellant are not in point The first one (Crowston *v.* Seal, 5 L. D., 213) holds only, that when the defendant, a non-resident, is shown to have received notice by registered letter thirty days before the day set for hearing, the service is sufficient. The same opinion expressly holds that "it is not enough that the notice was sufficient to put the claimant on inquiry, unless due service has been made."

Due service in this case consists in the "delivery of a copy of the notice" to the defendant. (Practice Rule 9.)

Downey *v.* Briggs, 5 L. D., 590, cited by defendant, holds that the "original notice of contest, instead of a copy," is sufficient.

In the case at bar, neither the original notice, nor a copy thereof, was left with the defendant, for there can be no question that the defective copy was the one actually left with the defendant.

This decision also follows Milne *v.* Dowling, 4 L. D., 378, in holding that the "mere fact that the claimant has knowledge of a pending contest does not bring him into court," nor render it incumbent on him to defend his claim.

There has been therefore no proper service of notice on the defendant.

The case will be remanded, in accordance with the decision of your office, which is hereby affirmed.

PRACTICE—MOTION FOR REVIEW.

HOFFMAN *v.* TOMLINSON ET AL.

A motion for the review of a departmental decision must be filed within thirty days from notice of the decision sought to be reviewed, and when so filed it operates as a supersedeas of any order or judgment made therein, but if not filed within that time the execution of the judgment can only be stayed by the direct action of the Secretary.

Secretary Noble to the Commissioner of the General Land Office, January 13, 1891.

On June 13, 1889, there came before the Department the case of Charles L. Hoffman *v.* Hiram Tomlinson and Theodore F. Barnes involving the right to the SW. ¼ of Sec. 8, T. 13 N., R. 38 W., 6th P. M., North Platte, Nebraska, which was formerly embraced in the homestead entry of the said Barnes, which he relinquished and afterwards applied to enter with two soldiers additional homestead certificates, as attorney for Hiram Tomlinson for forty acres and Daniel Emerson for one hundred and twenty acres.

Charles L. Hoffman applied to contest the entry of Barnes which was refused because said entry had been relinquished, and he then offered to make homestead entry of said tract, which was refused by the local

officers because of the pendency of the soldiers additional homestead application made by Barnes as attorney for Emerson and Tomlinson.

Your office on October 23, 1886, approved the action of the local officers rejecting the application of Hoffman to contest, and also rejected the application of Barnes as attorney for Tomlinson to locate his soldiers additional certificate for forty acres, but allowed Barnes to locate the soldier's additional certificate of Emerson for one hundred and twenty acres. The claims of the respective parties came before the Department upon the appeal of Hoffman from this decision of your office, and on June 13, 1889, a decision was rendered by the Department in said case in which it was stated that the circumstances of the case lead to the suspicion that the entries sought to be made by Barnes, ostensibly for Emerson and Tomlinson were really intended for himself, and the following order was made:—

> For the purpose, therefore, that the right of the said parties in relation to the matters in difference between them may be fully investigated and ascertained, it is ordered, that a hearing be had before the local officers when the facts in relation to the various applications of the parties can be fully inquired into and their rights regarding the lands in controversy determined. All parties in interest should be served with notice of the hearing.

Your office on June 26, 1889, transmitted to the register and receiver a copy of said decision with instructions to proceed with a hearing after due notice to all parties, and pursuant thereto a hearing was ordered for November 11, 1889. On that day Barnes, as attorney for Tomlinson, filed a motion for reconsideration of said decision of June 13, 1889, but the local officers did not deem it sufficient to delay the hearing, and the hearing was therefore had. The local officers on February 18, 1890, found that the evidence showing conclusively that neither Tomlinson nor Emerson ever resided upon the land, Hoffman's application should be allowed, and on December 19, 1890, they transmitted the record to your office. "Because of the presence of Barnes' said motion (for reconsideration of the Hon. Secretary's decision of June 13, 1889), with the record sent up by the local officers of December 19, 1890," your office without making any decision in said case, transmitted the papers for the consideration of the Department in connection with said motion for review.

A motion for review of a decision of the Department must be filed within thirty days from notice of the decision sought to be reviewed (Rule 77), and when so filed it operates as a supersedeas of any order or judgment made therein; but if not filed within that time the execution of the judgment or order can only be stayed by the direct action of the Secretary.

This motion was not filed until nearly five months had expired after the rendering of the decision complained of, and it is not alleged or shown in said motion that the notice of the decision was not received within due time. On the contrary the affidavit of Barnes, asking as

attorney for Tomlinson that said hearing be continued, which was executed September 5, 1889, shows that he at least had notice of said decision at that time, which was sixty-seven days before the motion for review was filed. As said motion was not filed in time, and as the order of the Secretary was in process of execution when the motion was filed, it is hereby dismissed and the record is herewith remanded to your office that you may pass upon the appeal of Tomlinson from the decision of the local officers of February 18, 1890, which appears with the record in said case.

SERVICE OF NOTICE BY PUBLICATION—MISNOMER.

REIMER *v.* VAN OENE.

Service of notice by publication is fatally defective, where, in the affidavit therefor, and the subsequent publication, the defendant is improperly designated as "Frederich Van Dem," instead of "Hendrik Van Oene."

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1891.

I have considered the case of George Reimer *v.* Frederich Van Dem (Hendrik Van Oene), involving timber culture entry No. 3545, for the NW. ¼ of Sec. 21, T. 128, R. 75, Aberdeen land district, South Dakota.

Contest was initiated April 21, 1888. Service was had by publication, addressed to "Frederich Van Dem", upon affidavit by contestant that inquiry of persons residing in the vicinity of the land, and of the postmaster at the post-office nearest thereto, failed to disclose the whereabouts of said "Frederich Van Dem." From the records of your office, and from the entry papers in the case, it appears that the name of the person who made said entry was not "Frederich Van Dem", but Hendrik Van Oene." Whereupon your office holds that legal notice of said contest has not been given to said "Hendrik Van Oene", the entryman. I concur in your conclusion, and affirm your decision vacating the proceedings already had, and remanding the case for further hearing.

HOMESTEAD ENTRY—PENDING APPLICATION.

RICHARDS *v.* MCKENZIE.

An entry made during the pendency of the prior application of another confers no rights as against the prior applicant; and, in the event that such application is allowed the intervening entryman should be called upon to show cause why his entry should not be canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1891.

I have considered the case of Alice V. Richards *v.* George F. McKenzie, involving lots 1 and 2, and the N.½ of the SE.¼ of Sec. 11, T. 62 N., R. 14 W., Duluth land district, Minnesota.

The tract described was formerly covered by the cash entry of one Fred Schinarzork, which was canceled by your office letter of April 10, 1888.

On April 16, 1888, about half past eight o'clock a. m., Alexander Douglass made homestead entry of the tract.

At 9 o'clock a. m., same day, McKenzie applied to make homestead entry; but his application was refused, because of the prior entry of Douglass.

From this action of the local officers McKenzie appealed to your office, which (on June 25, 1888,) sustained the action of the local officers. Thereupon McKenzie (on August 31, 1888,) appealed to the Secretary.

While said appeal was pending, before the Secretary, said Douglass, on October 15, 1888, relinquished his entry, and the same was canceled upon the records of the local office. Douglass' relinquishment was transmitted to your office which transmitted it to the Department; and the Department, on January 3, 1890, returned the papers to your office, with direction that McKenzie's entry be allowed.

The local officers complied with the directions; but wrote to your office for instructions as to what course to pursue, in view of the fact that on the date (October 15, 1888,) when Douglass relinquished his entry, they had at once allowed Alice V. Richards to make homestead entry of the tract.

Your office, on April 18, 1890, wrote to the local officers as follows:

> I do not find anything in the records to show that the Hon. Secretary was advised of said Richards' entry, consequently the McKenzie entry was allowed without in any manner considering her rights; therefore . . . . . McKenzie did not acquire any preference *right of entry* by virtue of his application to enter said land, and the proceedings as indicated in the foregoing; therefore he should now be called upon to show cause within sixty days why his entry should not be held for cancellation, and the entry of Richards' be allowed to stand, as being the first legal entry for said tract after the same was subject to entry.

From this order of your office McKenzie appeals to the Department.

Whether or not the second section of the act of May 14, 1880 (21 Stat., 140), is applicable to the case at bar need not be discussed. Irrespective of that, in view of the fact that McKenzie had made application, on April 16, 1888, to enter the tract in controversy—which application was, while pending, equivalent to actual entry, so far as the applicant's rights were concerned, and withdrew the land embraced therein from any other disposition until final action thereon—Richards' subsequent application (of October 15, 1888,) was improperly allowed, and conferred upon her no rights as against the prior applicant. (Rule 53 of Practice; Pfaff *v.* Williams *et al.*, 4 L. D., 455; Maria C. Arter, 7 L. D., 136; 8 L. D., 559; Saben *v.* Amundson, 9 L. D., 578; Arthur P. Toombs, 10 L. D., 192; Pettigrew *v.* Griffin, 10 L. D., 510).

Richards's entry having been allowed, however—although in violation of departmental rules and precedents—you will direct that she be

called upon to show cause, within sixty days from notice, why her said entry should not be canceled, and that of McKenzie permitted to stand. In case no response is received from Richards within the time specified, her entry will be canceled. If she should apply for a hearing, it should be granted, and the case re-adjudicated in accordance with the facts disclosed at such hearing, and in pursuance of the principles hereinbefore enunciated.

Your office decision of April 18, 1890, is modified as herein indicated.

PROCEEDINGS ON PROTEST—CORROBORATING WITNESS—ACT OF JUNE 5, 1872.

HINCHMAN ET AL. *v.* MCCLAIN.*

It lies within the discretion of the Commissioner to refuse an order for a hearing on protest where the allegations therein are deemed by him insufficient, and the corroborating witnesses testify from information and belief.

The fifteen townships set apart for sale for the benefit of the Flathead Indians, under the provisions of the act of June 5, 1872, did not include lands lying in part below the Lo Lo Fork of the Bitter Root River.

First Assistant Secretary Muldrow to the Commissioner of the General Land Office, March 18, 1889.

I have considered the appeal of Wilbert H. Hinchman and William H. Reed, from your office decision, dated December 28, 1887, in the contest case of said Hinchman and Reed *v.* Thomas A. McClain, returning for amendment the contest affidavit.

The record shows that on December 13, 1882, Thomas A. McClain made desert land entry No. 560, for the S. ½ of the NW. ¼, and the SW. ¼, of Sec. 14, T. 11 N., R. 20 W., Helena land district, Montana Territory.

On August 27, 1885, in accordance with published notice, he made final proof and payment for said described tract, and on September 5, 1885, receiver's receipt and final certificate No. 306 were issued to McClain for said land.

On November 8, 1887, the register transmitted to your office a protest of Wilbert M. Hinchman, and William H. Reed, against the issuance of patent to McClain for said tract, in which they alleged that

said lands will without irrigation produce an agricultural crop each year with the ordinary amount of cultivation required on other farms in the vicinity which are homestead and pre-emption claims . . . . . Deponents further say that said land is within the fifteen townships surveyed and opened to settlement for the purpose of raising funds for the confederated tribes of Flat Head Indians; and that said land is south of the Lo Lo Fork in the Bitter Root valley, and is only open to pre-emption settlers under the act of June 5, 1872 . . . . . that the final receipt of said desert land entry was obtained in a fraudulent manner by imposition on the government and its officers and the witnesses, and that the said Thomas A. McClain is not entitled to any part of said tract as a desert land claim, etc.

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* Omitted from Vol. 8.

On December 28, 1887, your office by letter "H" decided that the allegations made by protestants as to the land in dispute being within the fifteen townships reserved for the benefit of Flathead Indians, etc., "is not borne out by the records in this office." Your office also found that protestants corroborating witnesses, Theodore Upman and Pleasant Davis, depose and say that "the foregoing allegations are true to their best knowledge, information and belief," while form (4–072) prepared by your office, the corroborating witnesses are required to testify "that they know from personal observation that the statements therein made are true," and held that said witnesses cannot testify "from information and belief," and further that "it does not appear from protestants affidavit that the agricultural crop referred to would grow upon said land in sufficient quantity, without artificial irrigation at the time said entry was made, viz: January 3, 1883, to fairly remunerate the husbandman for the seed, time and labor in producing the same," and for said reason returned said affidavit for amendment in that particular, and for the required corroboration.

The protestants appealed from said decision, and therein alleged that the points of objection raised by your office are not material in this case, for the reason that the affidavit sets forth facts to show that the land is within the fifteen townships set apart for the benefit of the Flathead Indians under the law of June 5, 1872, and that all the entries that can be made on said lands outside of cash entries are homestead entries, and that the claimant has no legal right to a desert land entry by law on the tract in contest."

Counsel for protestants in their argument state that they waive their right to amend their affidavit of contest and rely upon the provisions of the act of June 5, 1872, as sufficient to warrant a cancellation of claimant's entry.

Section one (1) of said act declares (17 Stat., 226):

> That it shall be the duty of the President, as soon as practicable, to remove the Flathead Indians (whether of full blood or mixed bloods,) and all other Indians connected with said tribe, and recognized as members thereof, from Bitter Root valley, in the Territory of Montana, to the general reservation in said Territory (commonly known as the Jocko reservation), which by a treaty concluded at Hell Gate, in the Bitter Root valley, July sixteenth, eighteen hundred and fifty-five and ratified by the Senate, March eighth, eighteen hundred and fifty-nine, between the United States and the confederated tribes of Flatheads, Kootenai and Pend d'Oreille Indians, was set apart and reserved for use and occupation of said confederated tribes.

Section two (2) of said act provides that as soon as practicable after the passage of this act, the surveyor general of Montana Territory shall cause to be surveyed, the lands in the Bitter Root valley lying above the Lo-Lo Fork of the Bitter Root river; and said lands shall be open to settlement and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having duly declared their intention to become such citizens, said settlers being heads of families or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar

and twenty-five cents per acre, payment to be made in cash within twenty-one months from the date of settlement, or of the passage of this act. The sixteenth and thirty-sixth sections of said lands shall be reserved for school purposes in the manner provided by law. Townsites in said valley may be reserved and entered as provided by law; Provided, that no more than fifteen townships of the land so surveyed shall be deemed to be subject to the provisions of this act.

And provided further, that none of the lands in said valley above the Lo-Lo Fork shall be open to settlement under the homestead laws of the United States.

The records in your office show that in accordance with the provisions of section two of the act of June 5, 1872, a survey of fifteen townships, part of which are fractional, was made, and copies of which were duly filed in the local office. This survey contains the following townships, and is approved as designating the following fifteen contemplated by said act, to wit:

"Township 5, North, Range 20 W.,
" 5, " " 21 "
" 6, " " 21 "
" 6, " " 21 "
" 7, " " 19 "
" 7, " " 20 "
" 7, " " 21 "
" 8, " " 19 "
" 8, " " 20 "
" 8, " " 21 "
" 9, " " 19 "
" 9, " " 20 "
" 10, " " 19 "
" 10, " " 20 "
" 11, " " 19 "

It also appears from the records in your office that township eleven (11) north, range twenty (20) west, being in part below the Lo-Lo Fork of the Bitter Root river, is not subject to sale under the said act, and was not embraced in said reservation.

The local officers transmitted these affidavits for the consideration of your office, without expressing any opinion thereon. The duty of deciding upon the sufficiency thereof and whether a hearing should be had thereunder devolved upon your office. The action to be taken was under these circumstances largely a matter of discretion, and unless it was clearly wrong and worked an injustice should not be disturbed. Under the circumstances of this case, and in view of the fact that the appellants have virtually waived all question as to the sufficiency of these allegations, except the one hereinbefore discussed and decided, I see no reason for modifying the order made by your office.

The decision appealed from is, for the reasons herein set forth, affirmed.

MILLE LAC INDIAN LANDS ACT OF JANUARY 14, 1889.

AMANDA J. WALTERS ET AL.

The "further legislation" required by the act of July 4, 1884, prior to the disposition of the lands named therein, is provided by the act of January 14, 1889, and such legislation is now operative, as the cession of the Indian's right of occupancy has been obtained, and received the approval of the President.

Secretary Noble to the Commissioner of the General Land Office, January 9, 1891.

On March 17, 1890, there was filed in this Department, a petition on behalf of Amanda J. Walters *et al.*, and G. W. M. Reed *et al.*, parties who have heretofore been allowed to make entries for land within what is known as the "Mille Lac Indian Reservation" asking that special action be had in the matter of said entries and that patents be issued thereon without further delay.

In the decision of January 14, [8] 1890 (David H. Robbins, 10 L. D. 3), the history of both departmental and legislative action affecting these lands is quite fully set forth. In that case this Department held:

That the cession by the "Mille Lac Indians" as provided for in section one of the act of January 14, 1889 (25 Stats., 642) of their remaining interest in these lands, namely, the right of possession or occupancy during good behavior toward the whites is a condition precedent to the right to proceed, under the proviso to section six of the said act, with entries made on said lands, and that no steps can be taken towards perfecting said entries, or otherwise disposing of said lands until said cession has been obtained and "accepted and approved by the President."

In a message to Congress, dated March 4, 1890, (See Cong'l Record, March 6, 1890, page 1969), the President announced that said cession has been obtained in the manner prescribed in the first section of said act and that he has approved the same. In this message it is further set forth that:

The act of January 14, 1889, (25 Stat., 642), evidently contemplated the voluntary removal of the body of all these bands of Indians to the White Earth and Red Lake reservations, but a proviso in section 3 of the act authorized any Indian to take his allotment upon the reservation where he now resides. The commissioners (appointed under act of January 14, 1889), report that quite a general desire was expressed by the Indians to avail themselves of this option. The result of this is that the ceded land can not be ascertained and brought to sale under the act until all of the allotments are made.

In a letter accompanying the petition under consideration, written by Hon. C. K. Davis, United States Senator from Minnesota, it is contended that the proviso to section three of the act of January 14, 1889, applies only to land reserved by the treaty of March 11, 1863, and that the lands embraced in the entries referred to in the petition, and contained in the lists filed with it lie outside of the reservation as defined by that treaty (12 Stats., 1249), and can have no reference whatever to the mere right of non-disturbance upon these particular lands.

The lands embraced in these entries are a part of the original Mille Lac Reservation, created, with other reservations, in favor of the Chippewas, by the treaty of February 22, 1855, (10 Stats., 1165; Robert Lowe, 5 L. D., 541). By the treaty of 1863, as well as by that of May 7, 1864, (13 Stats., 695,) this domain, with that of the other reservations existing under the treaty of 1855, were ceded to the United States, and other lands were set apart for the Indians in lieu thereof. But there was a proviso to section 12, in both the treaties of 1863 and that of 1864, as follows:

That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with, or in any manner molest the persons or property of the whites.

The question whether this proviso would exclude the lands then ceded by the Mille Lacs from sale and disposal by the United States came up as early as 1877, when on March 1st of that year in the case of Frank W. Folsom, the Secretary of the Interior, (Mr. Chandler) decided that the proviso:

did not in his judgment, exclude said lands from sale and disposal by the United States. It was anticipated evidently that these lands would be settled upon by white persons; that they would take with them their property and effects; and it was provided that so long as the Indians did not interfere with such white persons or their property, they might remain, not because they had any right to the lands, but simply as a matter of favor.

Secretary Schurz subsequently on May 19, 1879, directed that a large number of entries that had been made under the decision of Secretary Chandler should be canceled, believing that they were unauthorized under the statutes; but subsequently again the Secretary of the Interior, (Mr. Teller) by letter of May 10, 1882, stated that he felt constrained to substantially adhere to the decision made by Secretary Chandler in the Folsom case, and on August 7, 1882, he ordered the re-instatement of the entries canceled by order of Secretary Schurz. On August 15, 1882, the local land officers were instructed to re-instate these entries. The question then came up in Congress under a resolution of the House of Representatives, dated March 21, 1884, calling on the Department for information as to the status of the Mille Lac lands. In reply to this resolution a letter from Commissioner MacFarland to Secretary Teller, dated April 25, 1884, after giving the history of the reservation stated:

No orders or instructions appear to have been issued by this office to the local office regarding the allowance of entries or filings on said lands, save the letter addressed to them, August 15, 1882, re-instating the soldier's additional entries above referred to, and it would seem, therefore, that from the entries and filings allowed by them in 1882, 1883 and during the current year, that without waiting for instructions from this office in the premises and as previously ordered, said officers had been acting upon their own judgment. (House Ex. Doc., 148, 48th Cong., 1st Sess.)

It was under these circumstances that Congress passed the act of July 4, 1884, (23 Stats., 89,) providing that said lands "shall not be

patented or disposed of in any manner *until further legislation by Congress.*" (Robert Lowe, 5, L. D., 541.)

The act of January 14, 1889, was entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota." By it was distinctly recognized the existence of subsisting and valid pre-emption and homestead entries on certain portions of this territory. By section 5 thereof it was directed that the "pine" lands be disposed of at public sale or private cash sale where not bought at auction, and by section 6, that the "agricultural" lands be sold to actual settlers only, under the provisions of the homestead law, with the proviso that

> Nothing in this act shall be held to authorize the sale or other disposal under its provisions of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

By a report of the Commissioner of May 20, 1890, made to the Secretary of the Interior, it appears that there have been upon these lands in question already patented eighty soldiers' additional entries, seventy-eight of which were patented in 1883, and two in 1884, embracing 6,270.09 acres; that there was patented the claim of Shaw-bosh-kung, under the first article of the Chippewa treaty of May 7, 1864, 664.70 acres; to the State of Minnesota as swamp lands, 701.55 acres; and to Frank W. Folsom, in accordance with Secretary Chandler's decision, March 1, 1877, 155.82 acres; making a total area patented of 7,792.16 acres. There are pending two hundred and seven soldiers' additional entries on these lands, amounting to 17,763.37 acres; the claim of Shaw-bosh-kung, under his homestead entry, No. 6, 239,153.90 acres; the unpatented claim of the Northern Pacific Railroad Co., under its grant, for 10,882.95 acres; thirty-one declaratory statement filings embracing 4,211.57 acres; six cash entries embracing 907.85 acres; and eighteen homestead entries, amounting to 3,587.40 acres; making a total area embraced in the unpatented claims of 37,507.04 acres.

It is impossible for me to conclude in view of these facts, that the provision of the act of January 14, 1889, was not intended to control the action of this Department in the further consideration of the claims above mentioned pending in the General Land Office. It is to my mind clear that this is the "further legislation" required by the act of July 4, 1884, and that the words "subsisting valid pre-emption or homestead entries" embrace the entries named upon which it is now asked by the petitioners patent may be issued. It is required that these shall be proceeded with under the regulations and decisions in force at the date of the allowance of these entries.

These regulations and decisions exist in relation to these entries the decisions being those of Secretary Chandler dated March 1, 1877, and Secretary Teller dated May 10, 1882, and the regulations being those set forth in the letter of Commissioner MacFarland, dated April 25, 1884, and there will be no further difficulty in following them.

In the previous decision in the case of David H. Robbins, (10 L. D., p. 3) the petition now before me for consideration was disallowed because this "further legislation," to wit, the act of January 14, 1889, had not taken effect, because the agreement therein provided for had not been approved by the President, as required by the terms of the act. Since then, however, as hereinbefore stated, the President has approved the agreement, the cession has become complete and the "further legislation" required has become operative. Under the previous decision of this Department the entries pending would have proceeded to patent, as many of the same class had already done, but for the act of July 4, 1884, requiring further legislation by Congress. This further legislation having been made by the act of January 14, 1889, upon this same subject-matter, with the particular phraseology therein embodied, already quoted, the right of the Department to allow the entries to proceed to patent, seems clear, aside from any question of relinquishment of claim by the Mille Lac Indians. Nevertheless it is also true and adds greatly to the force of the argument that the Mille Lac Indians joined in the agreement under the act of 1889 whereby the Indian lands save in the reservations therein mentioned were ceded to the United States. By this any possible interest the Mille Lacs may have had was transferred to the United States. I think the language of the statute of 1889 that the lands upon which the Mille Lacs have enjoyed the favor of residence so long as they should not interfere with the whites is equivalent to a declaration that this favor or license did not amount in effect to a "reservation" of these lands upon which the Mille Lacs could take allotments because it was upon these lands *alone* that subsisting valid pre-emption or homestead entries existed or were claimed under the regulations and decisions in force at the dates that they were severally allowed and which this statute declares shall now proceed to patent.

It is to be remembered also that another reservation was thereby made (the White Earth), to which the Mille Lacs could remove. There was thus provided, on the one hand legislation for the perfection of the entries of the white men, and on the other a place of abode for the Indians.

I am of the opinion therefore, that the proviso of section 3 of the act of January 14, 1889, that gives to any of the Indians residing on any of the *reservations* in the act described, in his discretion, a right to take his allotment in severalty, under the act, on the reservation where he lives, instead of being removed to and taking such allotments on the White Earth reservation, does not apply to the particular lands on which the Mille Lac Indians were before their last agreement allowed to live, under the circumstances, regulations, and decisions heretofore made by the successive Secretaries of the Department of the Interior.

The President's message was intended to go no further than the statute itself, and it is not necessary to consider its expressions apart

from the statute to which it referred and upon which it was based. Suffice it to say that the land in question was not a reservation within the meaning of the act. It was ceded in 1863; it had been declared open to entry by successive decisions from the Department under the regulations of the Land Office, and was the very land referred to and intended to be covered by the proviso to section 6.

It may be added that, pending the consideration of this question by the Secretary, the Mille Lacs, as reported by the Chairman of the Chippewa Commission, have prepared to move to the White Earth Reservation, and would not now, in all probability, take any allotments on the lands in question, even if so entitled.

Let the claims, therefore, pending, if found regular and valid in all other particulars, and as herein defined, proceed to patent. As proceedings thereon have been so long delayed, I deem the circumstances affecting them all, so peculiar and unusual as to entitle them to precedence and your very early consideration, and they are accordingly ordered to be made special.

CONTEST—SUSPENDED ENTRY—DEFECTIVE SURVEY.

BOND *v.* WATKINS.

A contest should not be entertained against an entry that is suspended on account of an alleged defective survey of the township.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 14, 1891.

I have considered the appeal of James B. Watkins from your office decision, dated June 5, 1889, holding for cancellation his homestead entry for the NE. ¼ of Sec. 35, T. 12 N., R. 1 E., Humboldt, California.

The record shows that he made homestead entry for the land in question April 14, 1885.

February 15, 1886, your office notified the local office at Humboldt, California, that a special agent had reported that the survey of township 12 N., R. 1 E., was irregular and incorrect. In view of his report you directed the local office to suspend all entries and disposals of the lands in said township of any kind pending an investigation of the matter in your office. This order was still in force, the matter of said survey not having been investigated when on December 21, 1886, following, Bond initiated a contest against said entry, averring therein that Watkins had abandoned said land.

After notice, a hearing was had before the register and receiver, May 31, 1887; both parties appeared and submitted testimony.

The local office, after considering the evidence, decided in favor of the contestant and recommended that claimant's entry be canceled.

July 20, 1887, he took an appeal to your office and alleged the following errors :—

1. That said register and receiver erred in finding that said Watkins had not complied with the law in regard to his residence on and improvements of said tract.

2. That by letter "E" of the Hon. Commissioner, received by the register and receiver of said land district in February, 1886, based upon the report of Special Agent Treadwell, claiming that the survey of said township was irregular and incorrect, this claimant was induced to move from said land. It is therefore submitted that the register and receiver should not have allowed the contest and that this claimant be granted an opportunity to resume his residence on said land.

By your office decision of June 5, 1889, you held his entry for cancellation.

The testimony offered on the trial shows that claimant made settlement on the land May, 1885, and lived there until February 15, 1886, when your office letter reached the local office ordering them to suspend action in said township until further orders. He was informed by Special Agent Treadwell that if the land was correctly surveyed the land described in his entry would be found in section 36—which section is now patented to Patrick Carroll. Claimant says he was unwilling to make any more improvements on land which he did not know would ever become his own, hence, he moved away.

There is some evidence showing that the lines run by Special Agent Treadwell places Watson's improvements on section 36, for which patent has already been issued by the State of California.

I am of the opinion that your decision holding his entry for cancellation is incorrect. It was the duty of the local officers upon receipt of your directions "suspending all entries and disposals of any kind" to have refused to act upon the contest proceedings of Bond. John Buckley (10 L. D. 297).

The contest was prematurely instituted, and should not have been considered pending the investigation of your office relating to the survey of said township.

Your decision is accordingly reversed.

ADDITIONAL HOMESTEAD—ACT OF JULY 1, 1879.

SHIRLEY *v.* SHROPSHINE.

The additional land embraced within an entry made under the provisions of the act of July 1, 1879, must be adjoining the land covered by the original entry, and the residence on such land, required by said act, can not be established nor maintained through a tenant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 15, 1891.

I have considered the case of Letha L. Shirley *v.* James W. Shropshine on appeal by the latter from your decision of May 10, 1889, hold-

ing for cancellation his additional homestead entry for the E.½ SW.¼ and NW.¼ SW.¼ Sec. 15, T. 8. N., R. 27 W., Dardanelle, Arkansas land district.

In 1869, Shropshine made a homestead entry for forty acres of land, the NW.¼ NE.¼ Sec. 15, T. 8 N., R. 27 W., Dardanelle land district, and made final proof for same and received patent therefor.

He afterward sold this tract and purchased one hundred and twenty acres "deeded land" in the same section, and moved onto it. He has lived since said time on the NW.¼ of NW.¼ of said section 15.

On February 26, 1882, he made additional homestead entry for the land in controversy and on January 27, 1887, affidavit of contest was filed against the same charging failure to reside upon and cultivate the land, etc.

Notice having been given the parties met and they were each sworn and testified and agree as to the facts, as above stated. The entryman, says "I did not reside on my original homestead at the time I made my second entry." That he only applied to enter forty acres when he made his first entry because he understood it was within railroad limits, and he had not been a federal soldier, and was told he could not enter forty acres. He admits that he has not resided upon the land in controversy but has cultivated it by tenants. It does not adjoin his original homestead nor the land on which he resides. Under the act of July 1, 1879, the *additional* land must be "adjoining the land embraced in his original entry." It is provided "that in no case shall patent issue . . . . under this act, until the person has actually and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year."

This entry therefore can not be allowed and if contiguous to the homestead it could not be entered as the entryman has not resided upon it. Residence can not be established or maintained by a tenant. See West *v.* Owen (4 L. D., 412).

Your decision, in so far as it holds the entry for cancellation is affirmed.

FOREST RESERVATION—APPLICATION TO ENTER.

DANIEL J. CANTY.

A pending application to purchase, under the act of June 3, 1878, land previously withdrawn, does not except the land covered thereby from the operation of the act of October 1, 1890, providing for the reservation of certain forest lands in the State of California.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 15, 1891.

I have considered the appeal of Daniel J. Canty from your office decision of July 19, 1889, affirming the action of the register and re-

ceiver in rejecting his application to purchase the SE.¼ of Sec. 31, T. 13 S., R. 28 E., M. D. M., Visalia, California.

The application was made under the act of June 3, 1878 (20 Stat., 89), and was rejected, because "On August 28, 1888, by telegram the Hon. Commissioner of the General Land Office directed a suspension to be made of this land, which suspension has not been reversed (revoked) or vacated," and was still of force at date of application.

It is insisted that the action of the Commissioner, suspending said land from entry, was without authority of law, and a reversal is sought for that reason.

It is unnecessary to discuss the authority upon which the suspension was made, inasmuch as Congress, by an act approved October 1, 1890 (26 Stat., 650), set apart certain land in the State of California, in which this tract is included, as a forest reservation, and the land was withdrawn by said act from "settlement, occupancy, or sale, under the laws of the United States."

By the application to purchase, no vested rights were acquired.

Your said office decision, rejecting his application, is accordingly affirmed.

PRACTICE—NOTICE OF APPEAL—RAILROAD GRANT—CANCELLATION.

DAHLSTROM *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Service of notice of appeal may be made by registered letter; and proof of such service is made by the affidavit of the person mailing such letter, attached to a copy of the post office receipt.

The cancellation of an entry by order of the Commissioner of the General Land Office takes effect as of the date when the decision is made; and the fact that such order is not received at the local office until after the definite location of a railroad, though made prior thereto, will not operate to defeat the grant.

Secretary Noble to the Commissioner of the General Land Office, January 16, 1891.

I have considered the case of Frits Dahlstrom *v.* St. Paul, Minneapolis and Manitoba Railway company, upon the appeal of Dahlstrom from your office decision of April 20, 1889, rejecting his application to enter as a homestead the SW. ¼ of the NE. ¼ of section 1, T. 129 N., R. 37 W., Saint Cloud, Minnesota.

It appears from your said office decision that one Theodorus B. Northrup made homestead entry for said tract and other lands on the 16th day of April, 1870, and the same was canceled by your office on the 14th day of December, 1871. Said tract is in the ten mile (granted) limits of the grant for the St. Paul, Minneapolis and Manitoba Railway company, St. Vincent Extension. The line of route of said railway was definitely located December 19, 1871, at which time the land described appeared upon the official records as vacant, unappropriated and unreserved and free from pre-emption rights.

March 1, 1884, Frits Dahlstrom applied to enter said land as a homestead. The register and receiver of the local office held that the cancellation of Northrup's entry by your office decision dated December 14, 1871, became effective upon its receipt at the local office, which was on the 4th day of January, 1872, and that the land was excepted from the operation of the railway grant by the subsistence of said entry at the date of the definite location of the line of route and that the entry applied for by Dahlstrom should be allowed.

The railway company appealed.

On the 20th day of April, 1889, your office reversed the decision of the local officers and rejected Dahlstrom's application subject to his right within sixty days to appeal to the Secretary of the Interior, or to apply for a hearing to afford him an opportunity to show that the land in controversy was not for any reason subject to the operation of the railway grant at the date (December 19, 1871) of the definite location of the line of route. Dahlstrom appeals.

On the 3rd day of February, 1890, Curtis and Burdett, attorneys for the railway company, filed a motion to dismiss the appeal of Dahlstrom upon the ground "That notice of said appeal was not served upon this company within the time specified and limited for that purpose, and hence, that the appeal is inoperative, ineffectual and void."

The record shows that notice of your office decision of April 20th, 1889, was given by registered letter of April 24, 1889, and received by Dahlstrom April 27, 1889, at Alexandria, Minnesota. On the 6th day of June, 1889, Dahlstrom's appeal from said decision was received and filed in the local office. The appeal is dated at Alexandria, Minnesota, June 5, 1889, and contains the following: "Now comes Frits Dahlstrom and appeals and gives this his notice of appeal to the Honorable Secretary of the Interior from the decision of the Commissioner of the General Land Office of April 20, 1889, in the above entitled case." Then follows the assignment of errors. It appears from an affidavit of Dahlstrom attached to said appeal that on the 5th day of June, 1889, at the village of Alexandria, he personally enclosed a true and correct copy of the above appeal in an envelope, postage-prepaid, and registered the same at the post office in Alexandria and deposited the same in said post office duly directed to J. W. Mason, Fergus Falls, Minnesota. That said J. W. Mason was at that time, and still is, the attorney of the above named respondent in said matter, and attaches to his affidavit the registry receipt of the postmaster at Alexandria.

On the 12th day of October, 1889, your office returned said appeal to Dahlstrom, "In order that Rule 93, of the Rules of Practice may be complied with. Fifteen days from receipt hereof will be allowed for that purpose."

On the 18th day of October, 1889, J. W. Mason as attorney for the respondent signed an acceptance of service of notice of appeal endorsed upon the back of the appeal as follows: "Due service of the within ap-

peal and notice of appeal is hereby admitted at Fergus Falls, Minn., this 18th day of October, 1889. (signed) J. W. Mason, attorney for respondent."

This last so called notice of appeal differs in no material respect from the one served by Dahlstrom by registered letter on June 5th, 1889. Rule 93, Rules of Practice provides that "A copy of the notice of appeal, specifications 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 provides: "Such service shall be made personally or by registered letter." Rule 96 provides: "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."

It appears that Dahlstrom complied with all the requirements of these rules on the 5th of June, as shown by his affidavit and the post office receipt for the registered letter. It is not shown that the attorney for the railway company failed to receive Dahlstrom's notice of June 5. The registry receipt shows that Dahlstrom's notice was sent to J. W. Mason Fergus Falls, Minn., and the last notice of appeal was accepted at Fergus Falls, Minn., by J. W. Mason, attorney for respondent.

In the light of this record it seems clear that the notice of appeal was properly and timely served, and that your office was in error in returning the appeal to Dahlstrom for any other service.

The motion to dismiss the appeal is either based upon the erroneous action of your office in returning said appeal to Dahlstrom, or else upon the mistaken assumption of fact, that no notice of appeal had been served prior to October 18, 1889. In either case the motion is not well taken and it is, therefore, denied.

As to the merits of the case it appears that Northrup's entry was canceled by your office on the 14th of December, 1871, which so far as the record shows left the tract clear and unappropriated and unreserved at that time.

Notice of your office decision cancelling Northrup's entry was received at the local office January 4, 1872. The definite location of the line of route of said railway company took place between the 14th of December, 1871, and the 4th day of January, 1872, to wit, on the 19th day of December, 1871, five days after your office decision was made and sixteen before its receipt at the local office. The question as to when the cancellation of an entry made by the Commissioner of the General Land Office takes effect, that is, whether it takes effect immediately upon its rendition, or at the time notice of it is received at the local office is very material in the case at bar. In John H. Reed (6 L. D., 563), it was said:

"When, therefore, a final judgment of cancellation is rendered by the Commissioner, the entry in question is thereby canceled, and the land then becomes subject to appropriation under the provisions of the laws relating to the public lands. A

judgment is final as to the tribunal rendering it, when all the issues of law and fact, necessary to be determined, have been disposed of so far as that tribunal had power and authority to dispose of them."

In Anderson *v.* Northern Pacific R. R. Co. *et al.* (7 L. D., 163), it was held that the cancellation of an entry by order of the Commissioner of the General Land Office takes effect as of the date when the decision is made; and the fact that such order was not noted on the records of the local office until after definite location of the road, though made prior thereto, would not operate to defeat the operation of the grant. Upon the authority of these cases the decision of your office is affirmed.

PRACTICE—REVIEW—APPEAL—CERTIORARI.

THOMPSON *v.* SHULTIS.

Rules 79, and 87 of the rules of practice are applicable to proceedings before the local office, as well as in cases before the General Land Office, and the Department.

The writ of certiorari will not be granted where the right of appeal is lost through failure of the applicant to assert the same within the period prescribed by the rules of practice.

Secretary Noble to the Commissioner of the General Land Office, January 16, 1891.

I have considered the application by Shultis for certiorari proceedings in the case of Archibald Thompson *v.* Jordan Shultis, involving timber culture entry for the N. ½ of SE. ¼ of Sec. 14, T. 1 S., R., 10 W., Los Angeles, California.

From the records transmitted by you the facts in the case appear to be briefly stated, as follows:

Shultis made entry for the tract in question May 22, 1886. Thompson filed contest on November 30, following, alleging that natural timber was growing on the land at date of entry, and that said entry was made for speculative purposes. Trial took place, and the decision of the local officers adverse to the claimant, was rendered January 23, 1888, and according to the statement of attorney for claimant, he received notice of the same January 26, 1888.

On February 25, 1888, motion for a new trial was filed in the local office. This motion was denied by the local officers on May 21, 1888. On June 20, 1888, claimant filed an appeal, and contestant filed a motion to dismiss the same for the reason that it was not filed within the time allowed by the rules of practice.

On receipt of the record in the case, your office, on May 21, 1890, dismissed the appeal of the claimant on the ground that the same was not filed within the time prescribed by the rules of practice.

On July 21, 1890, an appeal was filed from said decision.

On September 17, 1890, you decided that in view of the fact that the

appeal from the decision of the local office was not filed in time, that the right of appeal to the Department from your decision of May 21, 1890, must be denied. Hence the petition now before me. In said petition the claimant says that in their letter dated May 21, 1888, denying the motion for a new trial, the local officers stated that thirty days would be allowed for appeal, and while he does not so specifically state, it is evident that he seeks to convey the impression that he was misled by said statement and filed the appeal from the decision of January 23, 1888, in accordance therewith, viz., within thirty days from May 21, 1888. The rule of the Department required the appeal to be filed within thirty days from January 23, 1888, allowing five days additional for the transmission of notice by mail, and an additional five days for the return of appeal, after deducting the time which elapsed between February 25, 1888, the date of filing the motion for a new trial, and May 21, 1888, the date said motion was rejected by the local officers, this would have allowed the claimant until May 29, 1888, to file his appeal from the decision of January 23, 1888.

Rule of practice 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.

and rule of Practice 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.

which apply equally to proceedings before the local officers as well as before your office and this Department.

The order of the local officers refusing a further hearing was interlocutory, and as such was not subject to appeal, it was not a final decision or action within the meaning of Rule 43, of the Rules of Practice. Horn *v.* Burnett (9 L. D., 252); Bowman *v.* Snipes (11 L. D., 84).

The only appeal that could be taken was from the decision of the case on its merits, rendered January 23, 1888, and you state that the appeal filed by claimant June 20, 1888, dealt with said decision, hence claimant can not reasonably allege that he was misled by the statement of the local officers, made May 21, 1888, that thirty days would be allowed for appeal from their decision. It may be reasonable to assume that said statement had reference to the time allowed for appeal from the decision on the merits of the case, rather than to assume that the local officers made an unauthorized statement. But however that may be, the appeal was not filed in time, and if by that neglect the claimant has failed to have his case considered by your office and by this Department upon its merits, as presented at the hearing, it is wholly the fault of himself or his attorney, in failing to comply with

the plain provisions of the rules of practice, and it is not a case which calls for the supervisory action of the Department.

The petition is, therefore, denied.

PRACTICE—MOTION DAY—DEPARTMENTAL ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, January 17, 1891.

It is hereby ordered that until otherwise directed, motions to dismiss pending cases, on jurisdictional questions arising on the record, may be presented, orally or otherwise, before the office of the Assistant Attorney-General, on the first Monday in each month; such motion to be filed at least five days previous to its presentation, with ten days' notice thereof to the opposite party, where such party is represented by a resident attorney, and thirty days' where such attorney is a non-resident. Ten minutes to each party will be allowed on the presentation of such motion orally, and no question will be considered in any case that involves an examination of the testimony.

JOHN W. NOBLE
Secretary.

SWAMP LAND GRANT CONTEST.

STATE OF OREGON.

The right to contest a swamp selection is not statutory but is recognized by the Department as an aid to the Secretary in determining the true character of the land; such contests, however, should not be allowed except on a *prima facie* showing that would warrant the rejection of the claim under the swamp grant.

Secretary Noble to the Commissioner of the General Land Office, January 19, 1891.

This petition is filed by the grantees of the State of Oregon, complaining of the action of your office in refusing to recognize and transmit to the Department their appeal from your decision of July 11, 1890, refusing their application for certification and patent to lands formerly embraced in list No. 5 of Oregon swamp lands and reported as swamp by Agents Arrington and Roe, and praying that the record may be certified to the Department that the question involved therein may be considered. Said petition and the accompanying exhibits make the following case:

An examination of swamp lands in the Lakeview district, Oregon, was made by an agent of said State and an agent of the United States in 1880 and 1881, under an agreement between the State and the United States to examine conjointly and report upon the lands claimed by said State as inuring to it under the swamp land grant. As the result of

this examination, said agents reported that of a list of lands claimed by the State as swamp and overflowed 48,000 acres were dry and about 90,000 were swamp and overflowed. The 90,000 acres reported as swamp and overflowed were certified and approved for patent by the Secretary on September 16, 1882, and the claim of the State to the 48,000 acres reported as dry was rejected by the Commissioner of the General Land Office on September 25 and September 28, and his action was affirmed by the Department January 24, 1885 (3 L. D., 334). Subsequently, the State asked a reconsideration of the decision rejecting her claim to the 48,000 acres reported as dry, because of error of fact, which was refused March 3, 1885 (3 L. D., 440), upon the ground that the State was bound by the investigation made by the agents agreed upon by the United States and the State of Oregon. Afterwards, Special Agent Shackleford made a report as to the lands embraced in list No. 5, and it was then charged that some of the lands reported as swamp were dry lands and were claimed by one Owens, who had confederated with R. V. Ankeny, the agent of the government, by whom a fraudulent and incorrect report of said lands was made. Thereupon, Secretary Lamar on January 20, 1887 (5 L. D., 374), required the State to show cause why the entire list should not be canceled, and while said rule was pending Special Agent Shackleford, in pursuance of orders, re-examined the lands and reported as swamp and overflowed 57,012.11 acres embracing all the lands which are the subject of this motion.

Upon the coming in of the answer of the State to the rule, Secretary Vilas, on December 27, 1888, rendered a decision assuming to cancel certified list No. 5 and gave to the Commissioner the following instructions (7 L. D., 572):

> You will prepare another list, in which you will include such lands only as by satisfactory evidence, drawn from all reports and information *at hand*, are unquestionably shown to be swamp or overflowed and unfit for cultivation. Such other lands included in list No. 5 as are doubtful in character you will make a separate list of, and will detail two trustworthy agents to carefully and thoroughly examine, with a view to determining their true condition at the date of the granting act in 1860, and require reports exhibiting by an accurate plat and description the present condition of each subdivision and such evidence as may be taken in respect to any difference in condition at the date of the act. . . . . Such lands in list No. 5 as are satisfactorily disclosed to be not swamp or overflowed nor unfit for cultivation, you will restore to the public domain, subject to any rights which have attached to them under the laws.

In pursuance of this direction, 12,000 acres were patented as swamp land, 20,000 acres reported as dry land by Special Agent Shackleford were treated as conclusively proven and the State's claim rejected, and Agents Arrington and Roe were directed to re-examine in the field the remaining 58,000 acres and to report thereon.

A review of Secretary Vilas' decision rejecting the claim of the State to the 20,000 acres was denied, for the reason that it was not filed in time. (9 L. D., 361).

It appears that Agents Arrington and Roe made an examination of said 58,000 acres, and, when said report was filed, your office rendered a decision rejecting the claim of the State to all lands reported by such agents as not being swamp and overflowed, from which the State took no appeal, but made application to have all the lands which were reported by Agents Arrington and Roe certified and patented.

Portions of the land so reported were certified to the State, but certain alleged settlers have been permitted to make filings and entries upon some of the lands so reported, subsequent to the decision of the Secretary of December 27, 1888, revoking list No. 5, and such parties have asked to be allowed to intervene to contest the right of the State, and that hearings in each particular case may be ordered, for the purpose of determining the character of the land.

Against these applications the State protested, denying the jurisdiction of your office to pass upon the question, insisting that the report of the agents should be transmitted to the Department for the action of the Secretary.

The Commissioner denied the application of the State for certification and patent for the lands reported by agents Arrington and Roe as swamp and overflowed and inuring to the State under its grant, but ordered a hearing upon the several applications of the settlers, from which action the State appealed.

Your office declined to transmit said appeal, upon the ground that the decision appealed from directed hearings in the case, from which no appeal would lie, and this petition is filed, alleging error in said refusal, and praying that the record be certified to the Department for its action thereon.

In the case of the State of Oregon, 5 L. D., 31, Secretary Lamar, in in passing upon the question as to the right of the Department to reexamine the lands embraced in this list, and as to the means to be employed in determining the character of lands granted by the act, said:

> It is the duty of the Secretary of the Interior to determine what lands are of the description granted by the act, and his office is made the tribunal whose decision on that subject is to control. While the Department has adopted general methods for designating such lands, the Secretary is not restricted to any plan, but may adopt and employ such agencies as may in his judgment satisfactorily determine what lands are of the character granted by the act. It is immaterial what means are employed, the essential object being the ascertainment of the character of the land.

It was further held that, while the swamp land act makes no provision for contest of the right of the State to lands selected under the swamp land grant, yet the Secretary, although he had adopted one plan for determining the character of the lands, might allow contests in furtherance and in aid of the duty devolving upon the Secretary to determine the character of such lands.

While such contests are allowed, it is not from any right given by law, but as auxiliaries, to enable the Secretary to determine definitely

the character of the land. But such contests should not be allowed unless the applicants present such a *prima facie* showing as to the character of the land as would warrant the rejection of the claim of the State, if the allegations were proven.

As it is the duty of the Secretary to determine what lands are of the description and character granted by the act, his office being the sole tribunal charged with the duty of passing upon that question, and who alone can render a final judgment thereupon, I have deemed it proper to have the record before me that I may be enabled to determine the character of the contest and to what extent Agents Arrington and Roe have complied with the decision of my predecessor, of December 27, 1888, and otherwise to intelligently pass upon the questions raised by the appeal of the State.

You are therefore directed to certify to the Department the record in said case, and to suspend all action upon said contests until this matter shall be finally passed upon.

PRACTICE—NOTICE OF APPEAL SPECIFICATION OF ERRORS RESIDENCE.

KENDRICK *v.* DOYLE.

A mistake in the name of the appellant, or in the name of the appellee's attorney, occurring in the notice of appeal is not fatal thereto, where such notice is received in due time by the attorney of appellee, and no prejudice to the rights of the appellee are claimed or shown.

The specification of errors on appeal to the Department are not restricted to the points raised by the appeal from the local office.

An *exparte* affidavit cannot be considered as evidence in a contested case.

Residence in good faith in a house believed by the entryman to be upon the land covered by his entry is constructive residence on such land.

The good faith of the entryman in attempting to cultivate the land covered by his entry, may be properly considered in determining whether he has in fact shown due compliance with law in the matter of cultivation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 19, 1891.

I have considered the case of Alick N. Kendrick *v.* Thomas Doyle on appeal by the latter from your decision of June 14, 1889, holding for cancellation his homestead entry for the SE. ¼ of NE. ¼, Sec. 24, T. 16 N., R. 8 E., Sacramento, California land district.

He made homestead entry for this tract on July 5, 1882, and on June 9, 1887, Kendrick filed affidavit of contest against the same charging that "Thomas Doyle has wholly abandoned said tract; that he has never resided thereon since making said entry; that said tract is not settled upon and cultivated by said party as required by law."

Notice having been duly served, a hearing was had, the testimony of the parties submitted and the local officers found therefrom that the

entryman's cabin was not on the land in controversy and recommended the entry for cancellation, from which decision the entryman appealed, and your office upon considering the case affirmed the judgment of the register and receiver and held the entry for cancellation by reason of failure to cultivate and improve the land. From this decision Doyle again appealed.

The appeal assigns a number of errors, the principal one being that the *ex parte* affidavit of Hartwell, a surveyor, was considered in the case.

The contestant has filed a motion to dismiss the appeal because the name of Alick N. Kendrick is given as Levi J. Kendrick and because notice of appeal was addressed to "Caldwell and Little" instead of "Farley and Little" who were attorneys of contestant.

It is further urged against the appeal to the Department that "several new points are raised in this appeal that were not in the appeal to the Hon. Commissioner of the Land Office."

It is sufficient to say as to these matters that the notice and copy of appeal reached the attorneys of appellee in due time, and that the parties to the case, and the case were so designated and described that the attorneys were not misled in any way by the mistake in the name of the contestant, nor do the counsel even claim or show that their client was in any way prejudiced by these mistakes. The motion is purely technical, and is overruled.

As to the other point it is without merit. The appeal to this Department should specify the errors alleged to have been committed by the Commissioner of the General Land Office, while the appeal to that officer from the ruling of the register and receiver, should specify the errors which it is claimed they made in deciding the case. Each may have been and probably was distinctive, so there is nothing in the objection.

The case is properly before the Department, and I have considered it carefully.

Of the errors assigned in the appeal, that relating to the *ex parte* affidavit of Surveyor Hartwell is certainly well taken. The Rules of Practice prescribe the manner of taking depositions. This affidavit is in effect a deposition taken without notice, in the absence of the entryman and his counsel and it was error to consider it. See Manuel *v.* Miller (7 L. D., 433).

The competent testimony in the case shows that the entryman, Doyle, built a cabin on or near this land in 1882, and immediately established his residence therein and has resided there continuously since said time.

The witnesses on both sides agree that the southwest corner of the tract in controversy is *in doubt.* There have been a number of surveys made of the section and while five different surveyors disagree, each with the rest as to the location of the corner, it appears that Surveyor Hartwell made a survey for Kendrick in which he located the corner

92½ feet east of where he had located it when he made a survey for one Sutton. This matter of survey is immaterial, except as it reflects upon the good faith of the entryman in locating his house. Doyle testifies that he was with Surveyor Bethel some eight years ago, when he made a survey of the tract and that he, Doyle, saw the southwest corner stake of the tract set and that he built his house on the tract in controversy according to that survey. Since that time certain monuments and witness trees and evidences of the locality of the corner have been destroyed and the conflicting surveys have resulted therefrom.

It is still in doubt whether upon an accurate survey the entryman's house would be on or off the land, and it is immaterial for the purposes of this case; we have enough evidence to show that the entryman could easily have been honestly mistaken. His good faith in locating his house is not questioned, nor is his continuous residence in the house disputed.

In the case of Lewis C. Huling (10 L. D., 83), it is held that where an entryman by mistake built outside of the lines of his claim, but had occupied the house in good faith, it was constructive residence upon the land, and this is in accordance with a long line of decisions. Smith *v.* Brearly (9 L. D., 175); Lindsey *v.* Hawes, 2 Black, 554.

As to the matter of cultivation, the testimony shows, that after building his house the entryman attempted in 1883 to till a small part of this land near his house, and tried to get water to irrigate it. He hired a man to help build a dam to hold water, but the contestant and his father and brother "would cut the dam as fast as put up." It appears that the contestant's father, Collin Kendrick, contested the entryman's homestead entry at one time on the ground that it was mineral land, and although defeated in the contest, he built a fence across the tract, enclosed a large part of it and has held the same some five years. To get water to his garden near his house the entryman had to conduct it across the part of his homestead so enclosed. He was prevented by this contestant and his brother and father from going into this enclosure. He could buy water of the South Yuba Canal Company but could not conduct it to his land without going in upon the part of the tract enclosed and held by Kendricks and they prevented him from doing this. In 1886 he arranged to get water from another ditch. It was formerly used by the Idaho Company and could not be purchased until a couple of years ago, since which time he has raised some garden vegetables.

This is substantially the statement of the entryman. He says it was the "old man" Kendrick's enclosure, but all of them including the contestant prevented him going on that part of his land. The brother of contestant told him not to go into the enclosure. "He told me I was outside of the lines of that forty, and I told him that I could go inside of his stake any time I wanted to and he told me not to attempt to go in there while he was around." . . . . . "The water is inside of the enclosure, the water is on that land."

None of the Kendricks contradict these statements of the entryman, nor deny their interference with him or their trespasses upon his premises.

In the former contest it does not appear that there was any question about the house being on the land. This entryman is sixty-six years old and in infirm health and poor. He has made his living by raising goats and chickens on the land; he keeps from twenty-five to fifty goats on the tract. His improvements cost him about $100.

In the case of Mary A. Taylor (7 L. D., 200), the proof showed no breaking of the land, but some cutting of grass for hay, and that the land was principally used for pasturage and that the entryman did not take the land for the purpose of tillage. It was said:—

> It (the proof) further shows that said tract is illy adapted for tillage and the raising of grain or other agricultural crops requiring the breaking and cultivation of the soil. But raising stock and grass is an agricultural pursuit, etc.

The entry was passed to patent.

In Helen E. Dement (8 L. D., 639), it was said:—

> It is right and proper to take into consideration the degree and condition in life of the entryman in determining whether the improvements show good faith.

If it should be admitted that all the contestant claims is true, it would show the entryman, acting in good faith, built his house a little outside of the lines of his land, by a mistake that any one might have made; that he has maintained continuous residence and done the best he could, under the oppression and trespassing of the contestant and those acting in harmony with him, to make a living on the land and maintain his home there, and taking the case as it stands, I can not concur in your findings and judgment.

Your decision is therefore reversed, and the contest dismissed.

SCHOOL LANDS—INDEMNITY SELECTIONS.

STATE OF COLORADO.*

In the adjustment of the grant of school lands to the State of Colorado indemnity may be allowed for lands lost by settlement and entry, and also where the bases are covered by military reservations, or patented private grants.

Indemnity selections may be made from lands that are reasonably contiguous to the bases.

Secretary Noble to the Commissioner of the General Land Office, November 20, 1890.

I am in receipt of list No. 2 of school indemnity selections made by the State of Colorado, which has been sent to me for approval. In your office letter of October 7, 1890, accompanying said list, it is pointed out that

* Omitted from Vol. XI.

the bases of the selections of said list are (1) school sections and parts of sections wherein deficiencies exist by reason of settlement and entries; (2) also by reason of school sections within patented private grants, and (3) reservations for military purposes under executive orders.

Section 7 of the act of March 3, 1875 (18 Stat., 474), admitting Colorado into the Union, provides:

> That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of the public schools.

With regard to the rights of the States to lieu lands in place of those lost by settlement and entry, there can be no question under the above section and act, and sections 2275 and 2276 of the Revised Statutes. As to the losses because of military reservations, I think there ought likewise to be no doubt under the act of March 3, 1875, *supra*. Though there is no special act of Congress directing that the reservations named be made, yet they were established under the general authority, uniformly recognized by Congress as residing in the executive for such purposes. So that it may be fairly said that the lands, within said reservations, belong to the class of lands which have been "disposed of by . . . . . act of Congress."

I think the rule is correctly laid down in this respect by my predecessor, Secretary Lamar, in the case of the State of Colorado (6 L. D., 412–418), where he says:

> I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

The selection of lieu lands, where the bases are covered by patented private grants, was proper. This question was passed upon and decided affirmatively in the case of the State of Louisiana, on review (9 L. D., 157), and I see no reason why that decision should not cover this case.

In your said letter it is said of the selections in said list that "while said lands may not be the nearest adjacent lands to the lands lost, an examination will show that they are reasonably contiguous."

Section 2276 of the Revised Statutes says that lands selected in lieu of lands lost by settlement, etc., shall be located within the same district, and the list shows that all of the selected lands are in the same district with the bases and with each other. I think your statement that said selections "are reasonably contiguous" to the lost lands, is a sufficient compliance with the requirement of the act of 1875, *supra*, that the selections shall be "as contiguous as may be." This language may be construed as showing that it was not intended to establish an

unbending rule that lieu lands shall always be absolutely and mathematically the nearest to those lost. A reasonable compliance with the demands of the law is all that seems to be here required.

With these views I have approved said list No. 2 for 31,199.07 acres, and herewith return the same to you.

RAILROAD RIGHT OF WAY—APPLICATION.

ARIZONA AND SOUTHEASTERN R. R. CO.

An application for the right of way privilege accorded by the act of March 3, 1875, should be accompanied by a properly authenticated copy of the local statutes regulating the incorporation and organization of railroad companies.

The termini of the road should be noted on the map of definite location accompanying an application under said act.

Secretary Noble to the Commissioner of the General Land Office, January 19, 1891.

I have your letter of the 8th instant, transmitting papers relating to the organization of the Arizona and South Eastern R. R. Co. and filed under the right of way act of March 3, 1875 (18 Stat., 482); also a map showing the definite location of the company's road in Arizona, from Fairbank to Bisbe, a distance of 36.2 miles.

You recommend that the papers be accepted and that the map be approved.

In recommending the acceptance of the papers you refer to the fact that the company has not supplied the required certified copy of the Territorial law under which it was organized, but has, in its stead, filed a certificate by the Secretary of the Territory, under seal, that the company was duly organized under and according to the provisions of chapter 3, Title 12, of the Revised Statutes of Arizona, etc. You express the opinion that this certificate can be accepted as a substantial compliance with the requirement of the regulations.

I cannot agree with this view, because it is the duty of the Secretary of the Interior to himself know that the company now applying for the benefit of the right of way act has been incorporated and organized in accordance with the Arizona law. He cannot delegate this duty to a Territorial officer and he must therefore have before him the copy of the law required by the regulations. It is deemed sufficient for this purpose that a properly authenticated copy of so much of the Arizona law be supplied as relates to the incorporation and organization of railroad companies.

It is observed that the terminus of the line of road at Bisbe is not noted on the map.

The papers and map are returned herewith, without acceptance or approval, that the omissions may be supplied.

HOMESTEAD ENTRY—MEANDERED STREAM.

JACOB DUNBAR.

A homestead entry cannot be allowed for land on both sides of an existing meandered stream.

If the stream does not in fact exist, or the channel as shown by the official plat has disappeared, the plat may be reformed in accordance with the changed conditions.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 20, 1891.

On April 29, 1889, Jacob Dunbar filed in the land office at Guthrie, Oklahoma, an application asking the cancellation without prejudice of his homestead entry, made April 24, 1889, erroneously for the NE. ¼ of Sec. 30, T. 17 N., R. 2 W., I. M., with permission to make (without payment of additional fees and commissions) like entry for the NE. ¼ of Sec. 31, in same town and range, whereon he alleged settlement April 22, 1889.

On May 31, 1889, the local officers transmitted said application with their recommendation for its allowance and on December 4, 1889, the same together with Dunbar's corroborated affidavit, filed July 3, 1889, and his letter dated September 16, 1889, was considered by your office and rejected.

Dunbar appeals here.

The plats of your office show that the NE. ¼ of said Sec. 31, is made up of lots 7, 8, 9 and 14, and that lots 7, 8, and 9 are on one side of the Cimarron river, and lot 14 on an island formed by two meandered branches thereof.

It appears, however, from Dunbar's said corroborated affidavit that the meandered stream shown by the official plat as dividing the said NE. ¼ of Sec. 31, is in fact, "an old dry bed of the Cimarron river and is now good ground having high grass and young timber trees of several years growth," and from his letters, filed pending his appeal, that he has plowed and fenced "across the supposed channel," that his improvements (mostly on lot 14), comprise a house, stable, well, thirty-five acres broken and sixty or seventy-five fenced, and that he was without knowledge of such meandered stream until his application for change of entry.

The decision appealed from found as follows:

As the official plat shows the stream to be meandered and the application to amend is for land on both sides of said stream the application in its present form must be rejected. If, however, the party desires to amend his entry to include land on which he has made improvements and lying on one side only of said stream, an application to that effect will be duly considered.

That Dunbar can not, under existing regulations, be allowed to make entry for land on both sides of an existing meandered stream is not

questioned. But if such stream does not exist and the channel, as shown by the official plat, has disappeared, then said plat should be so reformed as to be in accord with the changed conditions, in the light of which the pending application should be considered.

I am, therefore, of the opinion that the matters set up in support thereof should be made the subject of inquiry by the Department. If it should appear that the meandered stream dividing said lots 7, 8 and 9 from said lot 14, has no existence in fact, the survey of the said NE. ¼ of said Sec. 31 should be corrected accordingly, and the application of Dunbar, if in other respects regular, allowed.

A hearing will, therefore, be duly had to determine the matters thus outlined and upon the evidence adduced you will re-adjudicate the case.

The decision appealed from is so modified.

PRACTICE—APPEAL—SPECIFICATIONS OF ERROR.

MORTON *v.* LANE.

Failure to file specifications of error will not defeat the appeal, where such failure is caused by the inability of the appellant to secure a copy of the decision.

Secretary Noble to the Commissioner of the Land Office, January 20, 1891.

This is an application filed by Henry C. Lane, praying that your office be directed to certify to the Department the record in the case of Alfred Morton *v.* Henry C. Lane, under rules 83 and 84 of Rules of Practice

It appears from said application and exhibits filed therewith that Morton filed a contest against the timber-culture entry of Lane, for the S. ½ of the NE. ¼ of Sec. 6, T. 96 N., R. 42 W., Des Moines, Iowa, and upon the trial of said case the local officers made the following decision:

From the testimony produced, we jointly find for the contestant that the said entryman has failed to plow, plant or cultivate the requisite number of seeds, cuttings or trees required by law in each and every year, and we, therefore, recommend that his entry be canceled.

Within the time required by the rules, the defendant filed the following notice of appeal:

To Hon. M. D. McHenry, Hon. Wm. Porter, Register and Receiver, U. S. Land Office, Des Moines, Iowa, and Alfred Morton, contestant, you are hereby notified that H. C. Lane, claimant in the above-entitled contest, has appealed from the decision of the above register and receiver, rendered on the 25th day of February, A. D. 1888, recommending that said entry be canceled upon the ground that H. C. Lane, entryman, has failed to plow, plant, or cultivate the requisite number of cuttings or trees required by law in each and every year, and recommending that his entry be canceled, to the Hon. Commissioner of the United States Land Office, Washington, D. C.

H. C. LANE,
By M. B. DAVIS,
his Atty.

No specifications of error appear to have been filed with notice of said appeal, but it is alleged by the applicant that he is informed that his attorney did file an appeal with proper specifications of error in due time.

On March 27, 1890, your office examined said case, and, finding that no appeal had been taken from the action of the local officers, considered said case under rule 48 of the Rules of Practice, and, finding that the decision of the local officers that defendant "failed to plow, plant or cultivate the requisite number of seeds, cuttings, or trees required by law in each and every year," was not contrary to existing laws and regulations, and that no fraud or gross irregularity was suggested on the face of the papers, and all parties having been duly notified of the decision, declared said decision final and affirmed the action of the local office.

From this decision defendant appealed, which your office declined to transmit, for the reason that the failure to appeal from the action of the local officers is a bar to his right of appeal from the decision of the Commissioner, affirming said decision of the local officers.

In his petition the claimant states that, while notice of said decision was served upon him, no copy of the decision accompanied the notice. It appears that he filed notice of appeal when he received notice of the adverse decision, but until he received a copy of the decision he could not specifically set forth any errors committed therein.

This case is controlled by the decision in the case of O'Brien *v.* Richtarik, 8 L. D., 192, in which it was held that the failure to file specifications of error within the required time will not defeat the appeal, where such failure was caused by the inability of appellant to secure a copy of the decision.

You will therefore transmit the record to this Department, that the case may be considered upon the appeal of Lane from the decision of your office of March 27, 1890.

MINING CLAIM-ADDITIONAL MILL SITE.

HECLA CONSOLIDATED MINING CO.

The right to a mill site under the second clause of section 2337, Revised Statutes, depends upon the existence on the land of a quartz mill or reduction works.

There is no provision of law by which a mill site can be acquired as additional to, or in connection with an existing mill site.

Secretary Noble to the Commissioner of the General Land Office, January 21, 1891.

I have considered the appeal of the Hecla Consolidated Mining Company from the decision of your office dated September 7, 1889, holding for cancellation mineral entry No. 1941, known as the Everest mill site No. 3 in no organized mining district, Beaver Head county, claimed by

said company and designated as lot 39, T. 3 S., R. 10 W., Helena land district, Montana, containing 4.97 acres. June 4, 1889, claimant made entry for said tract, and filed its application for a patent to said mill site. September 7, 1889, your office rejected the application for the reason that the last clause in section 2337 Revised Statutes "makes the right to patent a mill site dependent upon the existence on the land of a quartz mill or reduction works" and that in the case at bar "the only improvement claimed is a dam for tailings," and cited the case of the Eureka Mill Site [Charles Lennig], 5 L. D., 190, as authority for its adverse decision.

Claimant appealed upon the following grounds, viz:—

First: Section 2337 referred to says nothing of the kind.

Second: The interest of the government and the interest of claimants alike demand a more liberal construction of this section.

Third: It being the interest of all parties affected that a very different construction of the law should prevail, it is not right that the present oppressive construction should stand unless the law is mandatory upon this point.

Fourth: The law does not demand anything of the kind but on the contrary suggests a more flexible policy.

Accompanying the appeal there was filed a corroborated affidavit made by the general manager and attorney in fact of claimant, alleging substantially as follows: That in 1876 claimant began the development of numerous mines at and near the town of Trappers, at the head of Trappers Creek; that the ores were reduced at its smelting works in Glendale, about ten miles below its group of mines; that the work in mining and reducing of ores was continuous; that claimant found it advisable to treat a portion of its ore by concentrating the same before smelting; that in 1882 a concentrator was erected on Trappers creek three miles below the mines and the Everest mill sites Nos. 1 and 2 were surveyed for patent; that in treating ores in the concentrator the portion of the ore richest in lead is taken out and sent to the smelter for reduction; that the overflow, or tailings though not so rich in lead is by no means valueless; that it carries grains of ore too light to be recovered by concentration, but rich in silver; that it has been the policy of claimant to retain the tailings resulting from concentration with the expectation of erecting further machinery for the profitable treatment of the same, and had treated sixty thousand tons of ore, retaining the tailings at a continuous cost; that in storing such a large amount of tailings it covered all the available ground originally appropriated by claimant, and was extending over the ground appropriated in Everest mill sites Nos. 3 and 4; that upon mill sites Nos. 3 and 4 there are a number of charcoal kilns for use in the smelting plant at Glendale.

The deputy surveyor completed his survey of Everest mill sites Nos. 3 and 4, December, 1888, and his report of said survey is corroborative of the foregoing allegations.

Section 2337 Revised Statutes reads as follows:—

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

The application under consideration does not show that the tract asked for is used in connection with any specified vein or lode claim, nor is it definitely shown in this connection that the applicant company is the owner of any specified mining claim, it being simply generally said that it is the owner of, and operating numerous mines. It is clear the application as it is now presented is not sufficient under the first clause of said section 2337. Whether an owner of a vein or lode claim can secure title to a mill-site under this clause unless the claim shall be embraced in the application for patent for the mining claim, it is not now necessary to decide.

The application, the papers filed in support thereof, and the argument made in support of the appeal herein, all indicate that this application is made under and supposed to be governed by the provision of the second clause of said section of the Revised Statutes. It has however been the uniform ruling of this Department that the right to a patent for a mill site under this clause depends upon the existence on the land of a quartz mill or reduction works. Charles Lennig (5 L. D., 190): Cyprus Mill Site (6 L. D. 706); Two Sisters Lode and Mill Site (7 L. D., 557); Le Neve Mill Site (9 L. D., 460).

These applicants do not claim the existence on this land of any mill or reduction works, but simply ask that they be allowed to purchase the additional land described in this application because the amount acquired under the former mill-site claims (Everest No. 1 and No. 2) is not sufficient for their purposes—that is, they ask for this ground as appurtenant to their other mill site claims. The law makes no provision for acquiring land as mill sites additional to or in connection with existing mill sites, but on the contrary expressly limits the amount of land to be taken in connection with a mill to five acres. To allow this application as now made would be to disregard this limitation.

For the reasons herein set forth the application as now presented must be rejected. If these applicants shall hereafter make application for a mill site claim, covering this land, in connection with a specified vein or lode, and shall bring themselves within the provisions of the first clause of said section, the same may be considered and allowed.

The decision appealed from is accordingly modified.

It seems that this company on the same day made application for

Everest mill site No. 4, and although you rendered separate decisions on the two applications yet, there was but one appeal filed and you transmitted the two sets of papers under one cover. The statement of facts as set forth herein is applicable also to the application for Everest mill site No. 4, and the decision rejecting said application is also accordingly modified.

DESERT LAND ENTRY—REPAYMENT.

DAVID J. MORGAN.

Failure of a desert entryman to secure a permanent water supply from the source relied upon will not warrant repayment, in the absence of due showing of diligence to secure such supply from other sources.

Secretary Noble to the Commissioner of the General Land Office, January 22, 1891.

I have considered the appeal of David J. Morgan from your office decision, dated September 25, 1889, denying his application for repayment and holding his entry for cancellation for the NE. ¼ SE. ¼, SE. ¼ NE. ¼, and lot 1, Sec. 6, NW. ¼ SW. ¼, S. ½ NW. ¼ and SW. ¼ NE. ¼, and lots 2, 3 and 4, Sec. 5, T. 13 S., R. 35 E., Blackfoot, Idaho.

The record shows that he made desert land entry for the tract in question July 13, 1885. May 30, 1889, he filed an affidavit in the local office, asking to have his entry canceled and for repayment of purchase money. Accompanying the application he files his affidavit, in which he states

that at the time he made his entry he had appropriated and owned one-half of all the water of a certain stream which ran above or near the said tract of land, which said stream was known as East Canon creek; that one half of said stream at the time of said entry was amply sufficient to irrigate all of said land; * * * that he constructed ditches on every legal subdivision thereof, and during the year 1886 had the water flowing and running upon said land and through the ditches aforesaid; that he placed around every portion of the same posts and poles sufficient to fence the entire tract. During 1887 Canon creek went and became entirely dry, and the water would not come down the canon far enough to get it upon said land, and that said stream has remained dry ever since; that he has no other water right.

In his application to enter the land it was shown that he owned a water right, which would furnish ample water to permanently reclaim the land. The entry was duly made and the purchase money paid therefor has been turned into the Treasury of the United States. It can be withdrawn from the Treasury only by virtue of some law. (4 Opinions of Attorney General, page 253.)

Section 2362 of the Revised Statutes provides for repayment in cases where a tract of land "has been erroneously sold by the United States, so that from any cause the sale can not be confirmed."

The act of July 16, 1880 (21 Stats., 267), provided, that repayment may be made in any case "where from any cause the entry has been erroneously allowed and can not be confirmed," etc.

There is no showing that the tract in question could not have been irrigated in some other way than by the water from Canon Creek. Neither is it shown in his application for repayment that he made any efforts to procure water with which to irrigate the land other than those made to get the water from Canon creek.

It does not appear from the facts in this case that the land was erroneously sold by the United States, nor that said sale could not be properly confirmed, if Morgan complied with his part of the contract. The fact that an exigency has arisen which will prevent him from carrying out his part of the contract will not justify the government in paying back the purchase money. His application must therefore be refused.

Your office decision is affirmed.

Overruled 29 L.D. 112

RIGHT OF WAY ACT—MAP OF DEFINITE LOCATION.

MILWAUKEE, LAKE SHORE AND WESTERN RY. CO.

Under the right of way act, the map showing the definite location of a road should be filed within twelve months after such location, where it is made on surveyed land.

Secretary Noble to the Commissioner of the General Land Office, January 23, 1891.

I have received your letter of the 9th. instant transmitting, and recommending approval thereof under the right of way act of March 3, 1875 (18 stat., 482), maps of two sections of the definitely located line of road of the Milwaukee, Lake Shore and Western Ry. Co. in Wisconsin.

It is observed, on examination, that the line of route delineated on map No. 1 was adopted as the definite location of the road by a resolution of the board of directors of the company on August 14, 1883, and that on map No. 2, on December 13, 1887, and, further, that the maps were filed in the local office on December 2, 1890.

The lands involved were surveyed many years prior to the location of the road, therefore by the express requirement in the 4th. section of the right of way act the maps should have been filed in the local office within twelve months after such location.

They were not filed till six years, and two years, respectively, after the expiration of the statutory period and are not, therefore, subject to approval. They are returned herewith.

This ruling is in accord with those covered by letters of May 11, 1889, July 10 and December 16, 1890, returning without approval, by reason

of failure to file them in time, maps filed by the Denver, South Park and Pacific R. R. Co., the Longmont, Middle Park and Pacific Ry. Co. and the Southern Pacific R. R. Co. It should govern if similar cases arise in the future.

SCHOOL LANDS—INDEMNITY SELECTION—PRACTICE.

WILLIAM GALLOWAY.

In States where two sections of land to each township are granted for school purposes, twice the amount specified in section 2276, R. S., will be allowed for deficiencies in fractional townships.

An appeal from the decision of the Commissioner removes the case from the jurisdiction of the General Land Office, and a subsequent motion for the review of such decision can not be entertained unless the appeal has been withdrawn and made of record.

Secretary Noble to the Commissioner of the General Land Office, January 24, 1891.

This appeal is filed by William Galloway from the decision of your office of August 24, 1889, affirming the action of the register and receiver rejecting his application, filed January 15, 1889, to make homestead entry of the NE. ¼ of Sec. 9 T. 38 N., R. 2 E., Seattle, Washington.

The application was rejected, for the reason that the land had been selected as school indemnity as per list 3, filed July 23, 1870.

The sole ground of error alleged is your holding that the said lands were properly reserved, the averment being that only 480 acres less 270.50 acres in place could be legally selected as indemnity school lands in said township.

The township is fractional, having an area of 12,190 acres.

All of section 36 was taken under donation claims Nos. 38 39, and 40, to Pettles, Vail, and Lysle, respectively. Only 270.50 acres were left in place in section 16.

On the principles of adjustment, as construed by authority of O'Donald *v.* California (6 L. D., 696), where sections sixteen and thirty-six are both reserved for school purposes, the area of the township as above given entitles the State to claim 960 acres. That in place being 270.50, the selection of 680 acres by list 3 is not in excess of the amount lost from the reserved lands.

This case is decided upon its merits from the record now before me. I should add, however, that the motion filed by Mr. Galloway, on August 8, 1889, for a review of your decision of March 29, 1889, should not have been entertained, for the reason that an appeal had been filed from said decision, and while said appeal was pending your office had no jurisdiction of the case. A motion for review of your office decision should not be considered to operate as an implied withdrawal of the

appeal taken therefrom to the Secretary of the Interior. In such case, before your office can be re-invested with jurisdiction to entertain such motion, the appeal should be withdrawn and made of record. Sapp *v.* Anderson, 9 L. D., 165; Rudolph Wurlitzer, 6 L. D., 315; John M. Walker, 5 L. D., 504.

Your said office decision is affirmed.

ENTRY OF PUBLIC LAND—ACT OF AUGUST 30, 1890.

INSTRUCTIONS.

The limitation in acreage prescribed by the act of August 30, 1890, extends equally to all the land laws, and restricts the applicant thereunder to three hundred and twenty acres in the aggregate.

The provisions of said act are prospective in operation, and the right of an applicant, therefore, to secure three hundred and twenty acres of public land is not affected by the fact that he had acquired a like amount prior to the passage of said act, if he is otherwise entitled to enter such amount.

Secretary Noble to the Commissioner of the General Land Office, December 29, 1890.

I am in receipt of Acting Commissioner Stone's letter dated October 20, 1890, transmitting for the consideration of the Department his reply to the letter of the register and receiver at Oregon City, Oregon, dated September 29, same year, requesting a construction of the act of Congress approved August 30, 1890, 26 Stat., 391. The question submitted by said officers was:

In construing the act of Congress approved August 30, 1890, can an applicant who shows that he has perfected title to three hundred and twenty acres of land under the land laws of the United States previous to said August 30, 1890, *now* initiate claims for and acquire title to three hundred and twenty acres more? Or, in other words, if a person perfected title to a preemption and timber land claim of one hundred and sixty acres each, prior to August 30, 1890, can such person now file a homestead entry or other claim, for one hundred and sixty acres each and acquire title thereto?

The reply submitted for my consideration holds that, "the evil intended to be remedied was the acquisition of title to various tracts of land of one hundred and sixty acres each under the laws; that prior to the passage of this act one person could acquire title to 1440 acres of public land under certain laws for the disposition of the public domain other than mineral; that said act is not retroactive and does not in terms or by implication repeal any of the existing laws, but it does limit the amount of land which may be taken under any or all of these laws in the future to three hundred and twenty acres; that "if a person has exhausted all of his rights previous to the passage of the act, he can obtain no more land. This law gives him no new rights, nor does it take any rights away. It simply means that in making disposition of the public lands, the maximum which any one person may

obtain is three hundred and twenty acres, instead of 1440 acres, as under previous laws."

The law under consideration is a part of said act making appropriations for the United States Geological Survey, and reads as follows:

> No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement is validated by this act.

It will be observed that the limitation of the act August 30, 1890, applies to "occupation, entry *or* settlement under any of the land laws" subsequent to the passage of the act, and restricts the applicant, in the acquisition of title, to not more than three hundred and twenty acres "in the aggregate under *all* of *said laws*." The term "said laws" evidently refers to "any of the land laws" which provide for the disposition of the public domain. The limitation cannot be held to apply solely to the "settlement" laws because only three hundred and twenty acres could be acquired under the pre-emption or homestead laws before the passage of this act, and the limitation would be useless. By its terms it extends to "*all*" of the land laws and must be held to restrict the applicant to enter public lands of whatever kind or description, agricultural, coal, mineral, or lands subject to private entry, based solely upon rights acquired subsequently to the passage of said act, to three hundred and twenty acres "in the aggregate." But it is also provided that "this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement is validated by this act," and it follows therefore that the fact that a person "has perfected title to three hundred and twenty acres of land under the land laws of the United States previous to August 30, 1890," will not inhibit his acquiring "title to three hundred and twenty acres more" under any of the land laws, provided he would have been allowed to make entry under the particular law, if said act of August 30, 1890, had not been enacted.

The specific question asked by the register and receiver of Oregon City should be answered in the affirmative, and that portion of the letter which apparently restricts the limitation of said act to the acquisition of title to the public domain under the homestead, pre-emption, timber culture, timber land, and desert land laws, should be omitted. This conclusion is in accordance with the views of the Assistant Attorney-General for this Department, and the opinion of the Hon. Attorney-General, copy of which please find enclosed herewith.

You will please have a letter prepared in accordance with the views herein expressed.

OPINION.

Solicitor General Taft to Secretary Noble, December 26, 1890.

By letter of the 22d ultimo you submitted for the opinion of the Attorney-General, the question whether in construing the act of Congress approved August 30, 1890, an applicant who shows that he has title to three hundred and twenty acres of land under the land laws of the United States previous to said August 30th, 1890, can now initiate claims for and acquire title to three hundred and twenty acres more, or in other words, whether if a person perfected title to a pre-emption and timber land claim of one hundred and sixty acres each, prior to August 30, 1890, he can now file a homestead entry, or other claim, for one hundred and sixty acres each and acquire title thereto.

The provision in the act of August 30th, 1890 (Laws 1st session 1890, chap. 837, p. 391, Annual Laws), which gives rise to this question is as follows:

"No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act."

The question asked must be answered in the affirmative. The language of the provision will permit no other construction. Its whole operation is prospective. The entries upon which the limitation is to operate are those made after the act. Those made before the act, though uncompleted, are expressly saved from the operation of the act by the proviso. The verbs used are all in the future tense. "No person who *shall* after the passage of this act enter, etc., *shall be* permitted to acquire more than three hundred and twenty acres in the aggregate." The acquisition referred to clearly begins in the future. It is difficult to see why the limit upon such acquisition, in the absence of anything to the contrary, should not therefore be calculated from and after the passage of the act.

Add to the force of the language of the act that of the well known rule of construction which requires that in the absence of express provision or necessary implication to the contrary, all statutes are to be given a prospective rather than a retrospective operation, and the proper view of the provision under discussion is placed beyond doubt.

Approved:

W. H. H. MILLER,
Attorney-General.

FOREST RESERVATIONS—TIMBER TRESPASS—ACTS OF SEPTEMBER 25, AND OCTOBER 1, 1890.

INSTRUCTIONS.

Actions for trespass in case of timber cutting on lands embraced within the forest reservations created by the acts of September 25, and October 1, 1890, will not lie, where such lands are covered by final entries, prima facie valid, and made prior to the legislative or executive withdrawal under said acts.

Persons who have merely made filings on said lands, and are cutting timber thereon should be regarded as trespassers and removed from the reservations.

Homesteaders who have not perfected title to the land covered by their entries may be restrained by judicial proceedings from unlawfully denuding the land of timber until the validity of their entries can be determined.

Secretary Noble to the Commissioner of the General Land Office, January 12, 1891.

There is herewith transmitted you a copy of opinion of the Assistant Attorney-General, relating to action of certain persons of Kaweah Colony in California, about whose depredations on public timber you have referred to the Department certain reports of agent Caldwell.

Your attention is called particularly to the views of the Assistant Attorney-General expressed on page ten of his opinion, and you are directed to report to the Secretary as soon as possible the different sections falling under the different classifications made with a view to having the proper remedy made.

You will also report whether, if you know, these colonists have combined to place their titles in the hands of a single corporation.

OPINION.

Assistant Attorney-General Shields to the Secretary of the Interior, January 5, 1891.

I have the honor to acknowledge the receipt, by your reference dated December 23, 1890 (received by me on January 2, 1891), of a communication from the Honorable Assistant Commissioner of the General Land Office referring to his report of November 20, 1890, relative to the occupancy by the Kaweah Colonists of certain public lands in California recently reserved by act of Congress for a National Park, and transmitting a copy of report of special agent Caldwell thereon dated November 26, 1890, giving the result of his investigation relative to the cutting of valuable timber on said lands by said colonists.

By the first section of the act of Congress approved September 25, 1890 (26 Stats., 478), a certain tract of land in California known and described as township numbered eighteen south range thirty-one east, and sections thirty-one, thirty-two, thirty-three, and thirty-four, township seventeen south of range thirty east of Mount Diablo meridian, was reserved from "settlement, occupancy or sale under the laws of the United States, and dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people; and all persons who shall locate or settle upon or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom."

The second section of said act places said tract in the exclusive control of the Secretary of the Interior, and authorizes him to make "such rules and regulations as he may deem necessary or proper for the care and management of the same" and requires him to "cause all persons trespassing upon the same, after the passage of this act to be removed therefrom."

By the first section of an act of Congress approved October 1, 1890

(26 Stats., 650), certain tracts of land in California, with specifically described boundaries, were—

reserved and withdrawn from settlement, occupancy or sale under the laws of the United States and set apart as reserved forest lands, and all persons who shall locate or settle upon or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom. *Provided, however*, That nothing in this act shall be construed . . . . as affecting any bona fide entry of land made within the limits above described under any law of the United States prior to the approval of this act.

Section two of said act places said reservation in the exclusive control of the Secretary of the Interior, with provisions similar to those in said act of September 25, 1890; and section three provides that:

There shall also be and is hereby reserved and withdrawn from settlement, occupancy or sale under the laws of the United States, and shall be set apart as reserved forest lands as hereinbefore provided, and subject to all the limitations and provisions herein contained, the following additional lands, to wit: Township seventeen, south, range thirty east of the Mount Diablo meridian, excepting sections thirty-one, thirty-two, thirty-three, and thirty-four of said township, included in a previous bill. And there is also reserved and withdrawn from settlement, occupancy or sale under the laws of the United States, and set apart as forest lands, subject to like limitations, conditions and provisions, all of townships fifteen and sixteen south, of ranges twenty-nine and thirty east of the Mount Diablo meridian. And there is also hereby reserved and withdrawn from settlement, occupancy or sale under the laws of the United States, and set apart as reserved forest lands under like limitations, restrictions and provisions, sections five and six in township fourteen, south, range twenty-eight east of Mount Diablo meridian, and also sections thirty-one and thirty-two of township thirteen, south, range twenty-eight east of the same meridian. Nothing in this act shall authorize rules or contracts touching the protection and improvement of said reservations, beyond the sums that may be received by the Secretary of the Interior under the foregoing provisions, or authorize any charge against the Treasury of the United States.

The report of the Assistant Commissioner does not expressly state the locality in which said colonists are operating. It, however, appears in the report of said special agent Caldwell that the "Kaweah Co-operative Colony Co." composed of said colonists, had been warned by him to desist from trespassing upon government lands, report of which was made by him to the Department on August 15, 1890; that afterwards, to wit: on October 25, 1890, said agent reported to the Department that said colonists were continuing to cut timber on land "now embraced in the forest reservation created by act of Congress approved October 1, 1890;" that said company, through its secretary and business manager, J. J. Martin, notified said agent that—

the colony was now cutting timber on one of their own claims, viz: the SW ¼ of Sec. 2, T. 16 S., R. 29 E., M. D. M. (upon which Burnette G. Haskell, one of its trustees, made a filing in 1885, just before said land was withdrawn from the market), and were hauling the same to their saw mill on the NE ¼ of Sec. 10, T. 16 S., R. 29 E., M. D. M., and there converting it into lumber; that they will continue to cut timber upon their own claims in said forest reservation until restrained by the government, and that they will have to be restrained by force before they will stop.

It further appears from the report of said agent dated November 30, 1890, that on November 25, same year, the four resident trustees of said company were arrested by the United States for cutting timber upon the reservations created by said act of October 1, 1890, and that said parties would be required to give bail and stand trial in the United States court.

The Assistant Commissioner refers to report of November 20, 1890, in which he recommended that injunction proceedings be initiated. He, however, suggests three methods of procedure, viz:

First: To recognize the legality of the applications to enter the lands under the homestead or timber land acts, as the case may be, and to order hearings to establish the question as to their bona fides; or

Second: To refuse any recognition of the claimants' rights in the premises, and reject their applications on the ground that the lands are embraced in reservations set apart by acts of Congress; or

Third: To institute legal proceedings to eject the parties from the lands, and let all questions regarding their rights in the matter be settled by the courts.

The Assistant Commissioner suggests that the first method would be the just and proper one, "except for the declared determination and present defiant action of the claimants."

By said reference, my opinion is asked as to which of the several courses suggested by the Assistant Commissioner of the General Land Office "will be most efficacious to prevent the further loss of timber. Is not an injunction the way, and is there any way to defeat the entrymen on these reservations?"

The act of September 25, 1890 (*supra*), makes no express exception of "bona fide" entries made prior to the approval of the act as contained in said act of October 1, 1890. But, in my opinion, this fact would make no difference in the construction of the prior act, for it was held by the United States supreme court in the case of Wilcox *v.* Jackson (13 Peters, 513), which involved the legality of a reservation made by the Secretary of War,

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

This ruling has been uniformly followed by the courts and this Department. Gibson *v.* Choteau (13 Wall., 92), Leavenworth R. R. Co. *v.* United States (92 U. S., 733); Hastings and Dakota Ry. Co. *v.* Whitney (132 U. S., 357).

If, therefore, any of said lands have been *legally* entered, under the rulings above cited they would be excepted from the reservation, although no express exception is made in the act or order creating the same. It is essential, however, in order to except the tract from the operation of either of said acts, that it must have been *entered bona fide* prior to the date of the act, but a mere filing is not sufficient. In the case of Frisbie *v.* Whitney (9 Wall., 187), the supreme court said:

When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal titles to the land.

The court also said (id., 196):

The argument is urged with much zeal that because the claimant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done.

To this we reply, as we did in the case of Rector *v.* Ashly (16 Wall., 142), that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.

See also The Yosemite Valley Case (15 Wall, 77); Simmons *v.* Wagner (101 U. S., 260); Buxton *v.* Traver (130 U. S., 232); 8 Op. Att'y-Gen'l, 72; 10 id., 57; 11 id., 492; 17 id., 180.

Where final entries have been allowed by the local officers of lands within the limits of said reservations, in my opinion no action will lie against the entrymen so long as the entries remain uncanceled. But in the case of lands therein embraced in mere filings, which do not reserve the land, I am of the opinion that the Secretary of the Interior has the authority, under said acts, to direct the removal of any persons upon said reservation without his permission, notwithstanding such persons may have filed for the land under the pre-emption, or timber and stone act (20 Stats., 89). Where any of said lands have been entered under the homestead law and the entrymen have not acquired title thereto, they may be restrained by temporary injunction, pending the final disposition of their claims by the Department, from cutting the timber for sale and not for the purpose of clearing and cultivating the land. If the Department is of the opinion that any entries of lands within said reservations have been made in bad faith or contrary to law, hearings should be promptly ordered, after due notice, to determine the validity of the same, and the cases should be made special, in view of the public interest involved in the preservation of the reserved lands.

I am therefore of the opinion, and so advise you, that neither of the methods suggested by the Assistant Commissioner should be adopted, but that, (1) final entries of any of said lands prior to executive withdrawal or legislative reservation, *prima facie* valid, should be recognized as valid until duly canceled by the land department; (2) the parties who have not made entries of said lands, but have merely made filings thereon, and are cutting timber therefrom, should be considered trespassers and removed from the reservations, and (3) where it shall appear that homestead entrymen who have not completed title to tracts covered by their entries, are denuding the land of timber for the

purposes of sale, and not for clearing and cultivation of soil, proceedings should be instituted in the courts to restrain them from such cutting of timber, until the validity of their entries shall be duly determined by the land department.

RAILROAD GRANT—INDEMNITY SELECTIONS.

MISSOURI, KANSAS, AND TEXAS RY. CO.

During the pendency of judicial proceedings that affect the status of lands under a railroad grant, indemnity selections therefor should not be allowed.

No action should be taken on indemnity selections for land embraced within expired pre-emption filings until after notice to the claimants to assert any rights they may possess.

Secretary Noble to the Commissioner of the General Land Office, January 19, 1891.

On November 29, 1890, I transmitted to you a letter from Geo. A. Eddy, Esq., one of the receivers of the Missouri, Kansas and Texas railway company, in which it was stated that for many years, selections of land free from conflict, made by the company have been pending before your office, and that these lands have all been sold by the company to parties who are constantly demanding the evidence of their titles. Mr. Eddy asked that patents issue for such lands. The letter was transmitted to your office for report.

In response thereto by letter of December 4, 1890, you stated that under the adjustment of the grant for said company approved by the Department August 2, 1890 (11 L. D., 130), there is yet due on account of the grant 388,338.93 acres. You therewith transmitted clear list No. 32, embracing 2265.46 acres, which you stated included all the tracts selected that are free from conflicts. You further stated that there were included in said list certain "even numbered sections (two of which are in Allen county) which it has always been held by this (your) office could be selected within the indemnity limits under the act of July 26, 1866; but the question as to whether such right is granted by said act, is one of the questions involved in the suit now pending against said company embracing lands in Allen county."

The suit referred to was instituted by the Attorney-General on the recommendation of this Department (4 L. D., 573). In recommending the suit the Department held that said company was not entitled to even sections, (1) in the indemnity limits of its road where overlapped by the primary limits of the Leavenworth, Lawrence and Galveston road, and (2) in the common indemnity limits of the two roads. The suit involving these questions is still pending, and while technically it embraces only such lands in Allen county, the decision will necessarily affect the title to lands similarly situated outside of that county. An inspection

of the plats of your office shows that two of the tracts in said list are actually involved in said suit, and some ten others similarly situated, but outside of said county, will be affected by the decision. In view of these facts, I am of opinion that such tracts should be eliminated from the list, and that title to the same should not be passed until said suit is finally determined.

You further state that—

> A large number of the tracts included in this list are covered by expired filings under which no one is now asserting claim, and they are listed under departmental decision in the case of Northern Pacific Railroad Company *v.* Stovenour (10 L. D., 645).

In a similar case the Little Rock and Memphis R. R. Co. (11 L. D., 595), it was held that, (syllabus), "No action should be taken on indemnity selections for land covered by expired filings until after notice to the claimants to assert any rights they may possess." It was said in that connection, that while rights under such filings have ceased, settlement, if continued would defeat the company's right of selection, and you were directed to notify such claimants to assert their rights if any they had. I have concluded that a similar course should be followed in this instance.

You will, therefore, notify these claimants to assert their rights, if any they have, within thirty days from notice.

The list is accordingly returned for action in accordance herewith. Inasmuch as these selections have been pending for a long time, I suggest that this matter be speedily attended to.

UNIVERSITY GRANT—TERRITORIAL SELECTIONS.

STATE OF SOUTH DAKOTA.

By the provisions of section 14, act of February 22, 1889, each of the Dakotas is entitled to seventy two sections of land under the grant for university purposes; and the lands selected by the Territory of Dakota, lying wholly within South Dakota, inure to said State under said act.

Secretary Noble to the President, January 20, 1891.

I transmit herewith for your approval a list of lands (list No. 1) lying within the limits of the State of South Dakota, which had been heretofore selected for the Territory of Dakota for university purposes, under the act of February 18, 1881 (21 Stat., 326).

The fourteenth section of the act of February 22, 1889 (25 Stat., 676), for the admission of the States of North Dakota, South Dakota, Montana and Washington into the Union, provides that all the lands granted to the Territories of Dakota and Montana by the act of February 18, 1881, for university purposes, "are hereby vested in the States of South Dakota, North Dakota and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States."

On August 4th last, I submitted to the Attorney General the following questions, relative to the proper construction of said section 14, to wit :—

First, by this act is there a grant of seventy-two sections of land to the State of North Dakota and seventy-two sections to the State of South Dakota, or does each State take under the grant only thirty-six sections?

Second, shall the lands which were selected for the Territory, and which lie wholly within the State of South Dakota, be certified by this office to that State, or shall they be certified to both North Dakota and South Dakota jointly?

In response thereto, the Attorney-General, on August 11, submitted as his opinion that it was the intention of the act of February 22, 1889, to grant to each of the Dakotas the full quantity of seventy-two sections of land, and that the sections that had heretofore been selected for the Territory, and which lie wholly within the limits of the State of South Dakota, inure to that State under the provisions of said act.

The Commissioner calls attention to section 19 of the act of February 22, 1889, which provides that "all lands granted in quantity or indemnity by this act shall be selected under the direction of the Secretary of the Interior," and expresses a doubt as to whether your approval is still essential to the vesting of title to the lands in the State.

Acting upon the opinion that the act of February 22, 1889, does not dispense with the necessity of the ap proval of the President as one of the essential requirements of the grant, and concurring in the opinion of the Attorney-General that under the provisions of said act each of the Dakotas is entitled to seventy-two sections under the grant for university purposes, and that the lands heretofore selected by the Territory lying wholly within the State of South Dakota inure to said State, under the act of February 22, 1889, I have the honor to submit for your consideration said list No. 1, embracing sixty-nine sections with an aggregate area of 44,382.49 acres, and recommend the approval thereof to the State of South Dakota.

DESERT LAND ENTRY—PRELIMINARY AFFIDAVIT—FINAL PROOF.

LEWIS WOLFLEY.

The preliminary affidavit in desert entries must be made upon the personal knowledge of the entryman derived from a personal examination of the land, and the final proof thereunder be made before the local officers, or the judge or clerk of court of the county in which the land is located, or commissioner of the United States Circuit Court having jurisdiction over the county in which the land is located.

Secretary Noble to Hon. Lewis Wolfley, January 24, 1891.

I have given careful consideration to the request contained in your letter of November 22, 1890, with reference to the modification of cer-

tain instructions and rulings of this Department relating to desert land entries.

The regulations and rulings now in force require that the preliminary affidavit in said entries be made upon personal knowledge, derived from personal examination of the land, and that the final proof in the same be made before the local officers or the judge or clerk of court of the county in which the land is located, or commissioner of the United States circuit court having jurisdiction over the county in which the land is located.

You request that modification be made to the effect that the preliminary affidavits may be made upon information and belief before some office authorized to administer oaths, and that the final proof may be made before any commissioner of a United States circuit court.

The effect of this modification would be to allow parties residing in any portion of the country to make entry and perfect title to desert lands by means of agents or attorneys without any personal knowledge of the tracts claimed by them, as all the expenditure of labor and money necessary to perfect title could be furnished by said agents and attorneys who might thus easily obtain control of vast tracts of land contrary to the spirit and intent of the act.

The present rules and regulations governing entries of this class have been perfected after mature deliberation and are believed to be in accordance with the true intent and spirit of the desert land act, as well as in accordance with a sound and just policy relating to the administration of the law governing the disposal of the public lands, and I see no good or sufficient reason why the same should be changed.

The request contained in your letter must, therefore, be denied.

TIMBER CULTURE CONTEST—BREAKING.

WALKER *v.* ROSSON.

The statutory requirement as to breaking can not be waived even though the land covered by the entry will raise crops without previous breaking.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 26, 1891.

I have considered the case of James W. Walker *v.* Nellie E. Rosson, on appeal by the latter from your decision of June 4, 1889, holding for cancellation her timber culture entry for the SE.¼ Sec. 35, T. 3 N., R. 2 E., Tuscon, Arizona land district.

On March 27, 1885, she made timber culture entry for this land and on August 9, 1886, Walker filed affidavit of contest against the same, alleging that no portion of said tract had been plowed or broken since the date of entry.

Notice of contest having been served, the parties met at the local office and upon hearing the testimony, the local officers held that the contestant had failed to maintain the charge and recommended the dismissal of the contest. From this action the contestant appealed, and your office, on June 4, 1889, reversed said decision and held the entry for cancellation.

From this decision the claimant appealed.

The testimony is brief, and shows that the charge is true, but it is sought to avoid it by showing that the ground is sandy and loose, and that it did not need plowing or stirring with a plow, and upon this point it is attempted to show that farmers in that vicinity frequently plant crops, after clearing the ground of brush, without plowing, but the preponderance of the testimony shows that this is not done by the farmers who succeed best, but is done in cases of emergency and by careless, indifferent, farmers. The testimony shows the land to be a sandy loam, arid, except when irrigated, but no water has as yet been provided to irrigate the tract.

I have examined the cases cited by counsel, in which it is claimed that the entryman has been excused from breaking the required number of acres, in certain cases, and while it is well settled that an entryman may utilize the breaking done by a former occupant, as in McKenzie *v.* Killgore (10 L. D., 322), I am unable to find any decision which authorizes this department to say that the statutory requirements as to breaking, may be waived, because the sand and loam on the surface is loose and light.

I find no substantial error in your judgment. It is therefore affirmed and the entry will be canceled.

RIGHT OF WAY—ACT OF MARCH 3, 1875.

RIO GRANDE SOUTHERN R. R. CO.

Maps submitted for approval under the right of way act, must have the termini of the sections of road that they represent accurately described and fixed, so that uncertainty and confusion may be avoided.

Secretary Noble to the Commissioner of the General Land Office, January 26, 1891.

I return herewith, without approval, the map of a section of the Rio Grande Southern R. R. filed under the right of way act of March 3, 1875 (18 Stat., 482), and transmitted to the Department with your letter of the 22nd. instant recommending that it be approved.

The affidavit and certificate attached to the map state that the section of road is twenty miles in length, extending from Sec. 6, Tp. 44 N. R. 10 W., to Sec. 18, Tp. 42 N. R. 9 W., but do not fix the points in such sections where it begins and ends. These vague and unsatis-

factory descriptions are capable of including a section of indefinite length, hence my action as above noted.

Maps submitted for approval under the right of way act must have the termini of the sections of road that they represent accurately described and fixed so that uncertainty and confusion may be avoided.

PRACTICE—APPEAL—NOTICE—RULE 70.

FERGUSON *v.* COPELAND ET AL.

Rule 70 of practice, as amended, is not applicable to an appeal from a decision holding an entry for cancellation.

An appeal will not be entertained in the absence of notice to adverse parties in the case.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 27, 1891.

On October 9, 1888, your office rendered a decision in the case of James B. Ferguson *v.* Icem P. Copeland, Cicero A. Owen and Loren J. Ives, holding for cancellation Ives' timber culture entry for lots 3 and 4, and S. ½, NW. ¼ Sec. 2, T. 32 S., R. 37 W., Garden City land district, Kansas, dismissing Owen's application for the tract and awarding to Ferguson the preference right of entry, as a successful contestant.

About December 1, 1888, Ives made application to you for a reconsideration of your adverse decision, and that his entry be not canceled and that a further hearing be ordered in the premises.

August, 14, 1889, you rejected said application and adhered to your former decision, whereupon Ives appealed to this Department, and accompanying his appeal his attorneys filed the following statement, viz.,

Sir: In the matter of the appeal of Loren J. Ives a copy of said appeal was not served upon appellee for the reason that Rules 43 to 48, and Rule 93 of the Rules of Practice are not applicable to an application to enter public land. This view by us as attorneys for Ives follows the ruling laid down . . . in the case of Hugh L. Mullen *v.* Heirs of Harry E. Aylsworth, decided May 2, 1889. (178 Press copy Book, L. and R., page 144.)

Upon examination of this case I find that it is not similar to the case cited for the reason that Ives had already made entry for the tract in dispute, and your office having held his entry for cancellation, Rule 70 of the Rules of Practice as amended, does not apply. Therefore, and as it clearly appears that there are adverse parties in the case at bar, entitled to notice, under Rules 86 and 93, of the Rules of Practice, which appellant has not complied with, his appeal can not be considered and the same is accordingly dismissed.

HOMESTEAD ENTRY—RELINQUISHMENT—DESERTED WIFE.

TYLER *v.* EMDE.

The right of a deserted wife to make homestead entry of land on which she is residing at date of desertion will be recognized, as against the adverse claim of another based upon a relinquishment, executed by the husband in pursuance of a conspiracy to defraud the wife of her rights in the premises.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 28, 1891.

I have considered the case of Malvina McDaniel Tyler *v.* Fred H. Emde, on appeal by the latter from your office decision of April 19, 1889, holding for cancellation his pre-emption filing for NE. ¼, Sec. 33, T. 23 S., R. 13 W., Larned, Kansas.

It appears that on March 11, 1885, Moses M. Tyler made homestead entry for said tract and that on December 19, 1885, his relinquishment of the same was filed and his entry canceled. On the same day, upon the cancellation of the entry Emde filed declaratory statement for the tract, alleging settlement the same day. On March 20, 1886, said Malvina Tyler made homestead entry for the tract, indorsing her application "To date from settlement December 19, 1885, act of May 14, 1880."

Both Emde and Malvina Tyler gave notice of proof, to be offered on August 24, 1886, and each protested against the proof of the other. The latter alleged that she was the wife of said Moses Tyler and had lived with him upon said tract from May 20, 1884, that Tyler had fraudulently executed said relinquishment, that he had deserted her, that she still continued to live on the land, and was entitled to enter the tract as a deserted wife. Emde claimed priority of right to the land by reason of settlement and residence.

A hearing was had before the local officers to determine the rights of said parties.

The local officers concurred in finding that Mrs. Tyler with her said husband and family had taken up her residence on said tract on May 20, 1884, and that she and her two children had continued to live there up to the date of hearing, that "about June, 1885, domestic trouble arose between Mrs. Tyler and her husband, and he threatened to sell the place and leave her, and tried to get her to leave;" that on December 18, 1885, Tyler sold the relinquishment and improvements to Emde for $3,900; that Tyler "on two former occasions tried to sell the land," but Mrs. Tyler prevented the consummation of these attempted sales by informing them that she intended to stay on the land."

They further found as follows:

There is no doubt that Moses Tyler, Emde and one Eisenberg—defendant's uncle—entered into a conspiracy to deprive the aged Mrs. Tyler and her helpless children of this home which she had done much to improve and make comfortable. Their plan was evidently to keep Mrs. Tyler in total ignorance of the transaction until opportunity had lapsed for her to file as the deserted wife of Tyler. Moses Tyler in-

tended to desert her when he sold the land to Emde, and for the purpose of adjudicating the rights of these parties he may and ought to be considered to have abandoned her at the time this transaction between the parties to the sale was consummated. They persuaded her that Emde had bought only three acres off the corner of the land, and that the money this brought was to be used to make proof and perfect the entry.

They recommended that Emde's filing be canceled and that Mrs. Tyler's proof be accepted.

On appeal, your office in said letter of April 19, 1889, found as follows:

In this case I am satisfied from the evidence that the entryman Tyler, intending to desert his wife and the land, sought to defeat his wife's right under the law . . . for his own gain, by executing a formal relinquishment of the land and filing it in the district land office, having a collu sive understanding with Emde the claimant in the case, by which the latter was simultaneously to apply for and initiate a claim to the land, the purpose being secretly pursued, and the transaction assuming the character of an attempted sale through the form of relinquishment on one side and filing on the other, by which the wife and the land were to be deserted, and the wife at the same time defeated of her right to acquire title to the homestead, on which she was living. . . . . It is clear to my mind that Tyler's relinquishment of his entry and his abandonment of his family were both done in pursuance of one design; that his acts of pretended marital duty after his relinquishment were mere fraudulent pretenses, the more effectually to accomplish his designs against the rights of his wife and family. It is equally clear that Emde aided in this design, and attempted to avail himself thereof, in order by what they called a purchase, to get possession of the family homestead.

After a careful review of the testimony I fail to find any good ground for disturbing the conclusion of your office and the local officers that Tyler and Emde conspired to prevent Mrs. Tyler from exercising her rights as a deserted wife, and that Tyler's remaining with his wife for a period after the relinquishment was a part of the conspiracy intended to cover their real designs.

In the first place I would be slow to disturb the finding of facts of the local officers, who had the witnesses before them in a case like this, where so much must depend on the surrounding circumstances, and the character and conduct of the witnesses at the trial. It is a familiar doctrine in the Department that 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., and for these reasons the Department looks with great respect on the conclusions of the local office as to matters of fact. Morfey *v.* Barrows (4 L. D., 135); Austin *v.* Thomas (6 L. D., 330).

Again, concurring decisions of your office and the local office as to the facts are generally accepted as conclusive by the Department where the evidence is conflicting. Chichester *v.* Allen (9 L. D., 302); Collier *v.* Wyland (10 L. D., 96).

It is quite clear from the evidence that Tyler and Emde endeavored to conceal from Mrs. Tyler the real nature of the transaction. On the day of the relinquishment Emde, appeared on the tract engaged in

digging a cellar. In answer to an inquiry from Mrs. Tyler he told her he had bought three acres from Moses for $100 each, in order to enable the latter to make final proof; that he was going to build a house on the tract, and that if Moses could not prove up he would move the house off the land. Tyler told this same story to his wife and to Milton Tyler. It is impossible to account for this deception except as the local officers did. Emde's admission that he gave Tyler permission to live in the house until about March 18, 1886, is also in line with this conclusion. As three months would have elapsed by that time from the date of the relinquishment, Mrs. Tyler would then presumably have been barred from making entry under the act of May 14, 1880. Emde also admits that Tyler told him not to let Mrs. Tyler know of the transaction for the present. Tyler forbade his wife to speak to Emde on the subject. Emde was a stranger in the vicinity and not acquainted there but lived in a distant county. He says his uncle J. C. Eisenberg "put him on the track of the trade." Eisenberg was engaged in business in the vicinity with one Cashion. Emde says that on the day of the relinquishment Tyler was paid $1,015, being $15 in cash and $1,000 by check. He is not certain whether he or Cashion made the payment. He says, "I believe I paid him." He says the remainder was paid afterwards by Eisenberg. He thinks it was on March 15, following, though he was not present. He recollects the date by the fact that on that day he gave Eisenberg a note for the amount. The transaction of March 15, Eisenberg says, consisted in his discounting a note of $1,000 for Tyler. The note was signed by Emde, Eisenberg and Cashion, on December 18, 1885, payable twelve months after date. It was endorsed: "Pay to J. C. Eisenberg Moses M. Tyler." Eisenberg denies that Emde borrowed money from him on March 15, or gave his note for the same. He says distinctly that Emde's statements to the contrary are untrue. This conflict is not explained, and one or the other of these witnesses is to that extent discredited. He says that Emde borrowed no money from him and gave him no security for signing the note. Emde's personal property (he had no realty) consisting of farming implements, etc., is estimated by Eisenberg to be worth not less than $1,000. It does not appear that Cashion was secured. The only other note was one for about $800, signed by the same parties. This note has not been paid.

I have concluded that the relations of these parties, their admissions, the conflict in the testimony, the failure of Emde to remember items of great importance in the case and the nature of the transaction, are such as to warrant the conclusion of the local officers, that Emde, Tyler and Eisenberg entered into a conspiracy to defeat the rights of Mrs. Tyler as a deserted wife, that Emde and Eisenberg were aware of all the facts and that Tyler's remaining at home for a short period, was part of the conspiracy, and a mere subterfuge to conceal his real intention. Adding to this the fact that your office reached the same conclusion,

I am unable to see any warrant for disturbing the findings of fact in the decision appealed from.

I, therefore, find that Mrs. Tyler was a deserted wife on December 19, 1885, when the relinquishment was filed in pursuance of the agreement. From that time I hold that she was a settler. Under the act of May 14, 1880, she was entitled to the time allowed to pre-emptors to put her claim of record. Pre-emptors on unoffered land may file at any time "within three months from the time of settlement." Excluding the first day, December 19, Mrs. Tyler had all day of March 20, 1886, to place her claim of record, and this without reference to the conspiracy. She made entry on the latter date.

As she was a settler at the instant of the cancellation of Tyler's entry, and the prior settler, her rights are fully protected by the law.

Admitting that Emde made settlement on December 19, which is questioned, and has since continued to reside on the tract, still it appears that at the filing of the relinquishment he was in Larned and his settlement therefore was subsequent to that of Mrs. Tyler.

The decision appealed from is accordingly affirmed.

ISOLATED TRACT—ISLAND—RIPARIAN OWNERSHIP.

RIVERSIDE ISLAND.

The disposition of an isolated tract, surveyed as an island, is not precluded by the fact that such land is not at all times surrounded by water, if in fact there is no basis for a claim thereto under riparian ownership.

Acting Secretary Chandler to the Commissioner of the General Land Office, January 29, 1891.

I am in receipt of your communication of the 21st instant, submitting for my consideration certain facts developed by the surveys of three islands in Lake Pistakee, T. 45 N., R. 9 E., Illinois.

You state that these surveys were made in accordance with the letters of the Department, authorizing the surveys of Riverside, Watts' and Nett's islands, in Lake Pistakee.

The application for the survey of Riverside Island showed that the width of the channel on either side of the island and the main shore is fifty feet, and the depth at ordinary stages of the water is about eight feet.

The application for the survey of Watt's Island showed that the width of the channel between the island and the main shore is from one hundred to three hundred feet, and the depth at ordinary stages of water is about from six to twelve feet.

The application for the survey of Nett's island showed that the width of the channel on either side between the island and the main shore is from three to four rods, and the depth at ordinary stages of water from two to six feet.

The present survey shows that these several tracts are not entirely surrounded by water at all times, but that they are environed by swamp and overflowed land when the water on the lake is at the ordinary or low stage, and that the strip of swamp land lying between the island and the main shore is only subject to inundation in times of high water.

In view of these facts, you state that it does not appear that those tracts are islands, as they are not surrounded by water at all times, and you submit the matter for further instructions in the premises.

From the facts set forth in your letter, I see no reason why these islands should not be offered at public sale to the highest bidder, as directed in the letters of the Department authorizing said surveys, especially in view of the fact that the surveys have now been made.

The question as to whether they are islands is not material. If they do not belong to the proprietors of the main shores, by virtue of their riparian rights, they are unsurveyed public lands of the United States.

From the plat of the original survey and from the report of the surveyor and the plat of the present survey, it would seem that these islands were first formed in the lake, and the swamp land between them and the main shore was afterwards formed.

It does not appear from the facts stated in your letter that the islands were formed by accretion to the main shore, and I can, therefore, see no ground upon which they might be claimed under riparian proprietorship.

PRACTICE—APPEAL—SPECIFICATION OF ERROR.

McLAUGHLIN *v.* RICHARDS.

An appeal will not be entertained by the Department in the absence of specifications of error as required by the rules of practice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January, 29, 1891.

On February 15, 1887, William G. Richards made homestead entry for lots 1 and 2 of NE¼, lot 3 of NW¼, and SE¼ NE¼ Sec. 2, T. 16 N., R. 8 E., Sacramento, California.

November 26, 1887, Thomas McLaughlin initiated a contest against the same, alleging abandonment and failure to establish residence upon the land. A trial was had at which both parties appeared and submitted testimony.

After considering the case, the local office, on August 16, 1888, recommended that McLaughlin's contest be dismissed.

On June 29, 1889, your office affirmed the finding of the register and receiver, and dismissed said contest. From your office decision McLaughlin has appealed to this Department. His appeal reads as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE AT
Washington, D. C. Contest No. 557.

Thomas McLaughlin, contestant and appellant, vs. William G. Richards, H. A., and respondent.

To William G. Richards, respondent, and to Ed. F. Taylor, his attorney, you will please take notice that Thomas McLaughlin, said appellant, does hereby appeal from the decision made and rendered by the Hon. William Stone, Acting Commissioner, on the 29th day of June, 1889, in said case; and from the whole thereof; on all questions both of law and fact.

Dated this 12th day of September, 1889.

J. I. CALDWELL,
Attorney for appellant.

To said William G. Richards and Ed. F. Taylor, attorney for respondent.

(Endorsement): Service of the within notice of appeal by copy thereof accepted this 12th day of September, 1889.

W. G. Richards, H. A., and Ed. F. Taylor, his attorney.

Richards has filed a motion to dismiss McLaughlin's appeal because there has never been filed any specification of error, as required by Rules of Practice Nos. 88 and 90, which read as follows:

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 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.

These rules were adopted to subserve the public interests, and to aid the Department in the transaction of business, and so long as they exist they have in effect the force of a statute. (Parker *v.* Castle, 4 L. D., 84.)

In the case of Stevens *v.* Robinson (5 L. D., 111), rules 88 and 90 are held to be mandatory, and not merely directory. See also Pederson *v.* Johannessen (4 L. D., 343); Stevens *v.* Robinson (id., 551); Schweitzer *v.* Wolfe (5 L. D., 158), and Rudolph Wurlitzer (6 L. D., 315).

The appeal in the case at bar entirely fails to designate clearly and concisely the errors complained of, but leaves the opposing party, your office, and this Department, wholly in the dark as to the particular respect in which McLaughlin deems your office decision to be wrong.

The party complaining ought to be able, and by these rules is required, to point out the particular errors complained of, and not leave this Department to fish out of a voluminous record supposed errors.

This appeal is defective in that it does not set forth any specification of error as required by rule of Practice No. 88. For that reason said appeal is dismissed.

RELINQUISHMENT—ACT OF JUNE 3, 1878.

PARKS *v.* HENDSCH.

The rule that one who has parted with his interest in a claim will not be permitted to relinquish the same is for the protection of the transferee, and should not prevent action on a relinquishment, where it is asked by the transferee, who also alleges non-compliance with law as against the existing entry.

Land chiefly valuable for a deposit of slate found thereon and unfit for agriculture may be entered under the act of June 3, 1878.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 29, 1891.

I have considered the case of Robert B. Parks *v.* Emil H. Hendsch on appeal by the former from your decision of September 23, 1889, rejecting his application to purchase under the act of June 3, 1878 (20 Stat., 89), lots 3 and 4 and the N. ½ of the SW. ¼ of the NW. ¼ and the NW ¼ of the SE. ¼ of the NW ¼ of Sec. 5, T. 1 N., R. 12 E., Stockton, California land district.

On August 12, 1875, Hendsch filed mineral application for said land designating the same as the Pacific Slate Quarry Mining Claim.

On July 10, 1889, Parks filed an affidavit of contest against said claim alleging that Hendsch had wholly abandoned the same and had done no work there for five years; that said tract is not worked by said party as required by law, and that said land "containing no minerals but being a slate quarry was illegally filed upon under the mineral laws."

On the day set for the hearing both parties appeared and the contestant submitted the testimony of himself and two witnesses showing that Hendsch had sold his claim some six years previously and had done no work there afterwards, and that Parks (the contestant) had purchased the claim from Hogan (Hendsch's grantee) about the first of July, 1889, and that there is no indication on the land of gold, silver, lead, cinnabar, copper or coal; that it is wholly unfit for agricultural purposes, and is valuable only for the deposit of slate found there. On the same day Hendsch executed before the receiver a relinquishment of his claim and Parks thereupon presented his application to purchase the land under the timber and stone law. The papers were then transmitted to your office for appropriate action.

Your office held that the lands are subject to entry under the mining laws and not under the act of June 3, 1878, refused to act upon Hendsch's relinquishment because made after he had sold all his interest in the claim and said:

If the present owner can not complete said mineral application and desires it canceled, he should file his relinquishment, with proper evidence of ownership and the application will be canceled.

Parks appealed from that decision alleging error in holding that said land was subject to entry as mineral land, in not accepting the relinquishment of Hendsch and in not allowing the application under the timber and stone law.

In my opinion this mineral claim should, upon the facts disclosed, be canceled. The rule that one who has parted with his interest in a claim will not be allowed to relinquish the same is for the protection of the transferee. In this case, however, the transferee and present owner of the claim is asking and insisting that the relinquishment shall be acted upon. Furthermore, the party who holds Hendsch's claim has alleged that the law has not been complied with in the matter of that claim. Under these circumstances said claim ought to be, and is hereby directed to be, canceled.

This leaves for consideration Park's application for said land under the act of June 3, 1878. In the decision of the case of Maxwell *v.* Brierly (10 C. L. O., 50), cited in the decision appealed from, Secretary Teller referred to the case of W. H Hooper (1 L. D., 560), and said:

> Your decision was also prior to that of my predecessor, who held, October 8, 1881, in the case of Hooper, in accordance with your circular instructions of July 15, 1873, that whatever is recognized as a mineral by the standard authorities, and is found in such quantity and quality as to render the land more valuable on this account than for agriculture, was "valuable mineral deposit" within the purview of the act of May 10 1872, and hence that gypsum and limestone so found, subjected the tract to the operation of the mining laws, as has been held under other rulings, with respect to asphaltum, borax, auriferous cement, fire-clay, kaolin, mica, marble, petroleum, slate and other substances under like conditions,

expressed his concurrence in these views and held the land there in question, on account of its being "more valuable for its limestone than for agricultural purposes," subject to entry under the mineral laws. I do not find any case in which this Department has been called upon to determine whether a tract of land made valuable by a deposit of slate may be disposed of under the mineral law. Your office did, however, on October 23, 1874, so rule. (C. M. L., 161; S. M. D. 487). This ruling was made, however, prior to the passage of said act of June 3, 1878. That act provided for the sale of lands within the States of California, Oregon, Nevada, and in Washington Territory valuable chiefly for timber or stone, but unfit for cultivation, but that nothing therein should authorize the sale of "lands containing gold, silver, cinnabar, copper or coal."

This land is valuable for the stone found there, is unfit for agriculture and contains none of the deposits mentioned in said act as excluding land from purchase thereunder. It seems to be of the very character contemplated by said act and therefore subject to entry thereunder. Parks' application, if in all respects regular should be allowed. The decision appealed from is reversed. The mineral entry for this land having been relinquished the question as to whether it might have been entered under the mineral laws was thereby eliminated from the case and it has not therefore been found necessary to determine that question.

FINAL PROOF—RESIDENCE—EQUITABLE ACTION.

MARY J. MAIN.

In the absence of protest, final proof may be accepted, and the entry equitably confirmed, where compliance with law is satisfactorily shown, and the proof is regularly taken except, that on account of sickness, the claimant's testimony is taken at her residence in accordance with due notice given by the officer designated to take said proof.

The continuity of residence is not broken by temporary absences made necessary by the poverty of the claimant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 29, 1891.

I have considered the appeal of Mary J. Main from your decision of March 6, 1889, suspending her entry and allowing her to make new final proof within the lifetime of her entry, showing compliance with law.

She made homestead entry for the E. ½ SW. ¼, Sec. 18, and E. ½ NW. ¼, Sec. 19, T. 157 N., R. 66 W., Devils Lake, North Dakota, land district, on July 31, 1886, and on November 21, 1888, made final proof before the probate judge of Towner county, Dakota Territory, and applied to purchase the land.

The notice published fixed the 20th day of November as the time, and the probate judge's office, at Cando, Dakota Territory, as the place where the final proof would be taken, but on account of the sickness of claimant, her testimony was taken at the house of R. W. Main, her brother-in-law, on the 21st, as stated.

Owing to the fact that the proof was not taken as advertised, the local officers transmitted it to your office, pursuant to instructions, and on March 6, 1889, the same was considered and the entry suspended, as above stated, from which the entryman appealed.

I think the following facts may be fairly deduced from the record:

1st, That she is a citizen of the United States;

2d, That her husband abandoned her in 1885, and since that time has contributed nothing to her support or the maintenance of her child;

3d, That she made homestead entry for this land July 31, 1886, and on the 15th of November, following, moved a house thereon and lived therein a part of the time up to April 28, 1888, when she established her actual residence on the tract;

4th, That she has resided there continuously since said date, except that a part of each week she has been obliged to work out for her support and that of her child, and to improve the claim;

5th, That she has the following improvements upon the land: A frame house, ten by twelve feet, worth $50; forty acres of breaking, valued at $200; and had sowed two acres of wheat which had, at the date of proof, been killed by the frost, but that she had prepared the entire forty for the next year's crop;

6th, That she had one cooking stove and belongings, one bed and

bedding, a table and some chairs, dishes, etc., in the house, necessary for her use;

7th, That she was in poor health at and prior to the time of her entry;

8th, That she has attempted to acquire title to this tract in good faith. While it is true that these improvements in the main were put upon this tract by her brother-in-law, yet it is also true that she, by her manual labor, compensated him therefor, and that he has no interest in this land, other than to see that his sister-in-law, in her indigent circumstances, and ill-health, was provided with a home. Her statements throughout, bear the impress of truth, and as there is no motive assigned why she is seeking to defraud the government, I can not rid my mind of the belief that she is struggling with poverty and disease to secure this land as a home for herself and child.

It is well settled that "The continuity of residence is not broken by temporary absences, made necessary by the poverty of the claimant." See Lewis F. J. Meyer, 10 L. D., 492; also Rosa E. Riggs, ibid., 526; George F. Lutz, 9 L. D., 266.

Notice was duly published that final proof would be taken before the judge of probate of Towner county, Dakota, and the judge certifies that he gave due notice that he would take her testimony at the house of R. W. Main, on the 21st. No protest or objection, written or oral, was made on the day advertised at his office, nor at any time, to said proof.

In my judgment the proof, under all the circumstances, ought not to be rejected. The evidence manifests good faith in the entryman, and, as the matter is between the government and her alone, I am of the opinion that the final proof should be accepted, but as there was an irregularity in taking it, clearly owing to the sickness of the entryman, the entry, upon the acceptance of the proof, will be referred to the board of equitable adjudication for its consideration under the appropriate rule.

Your decision is modified accordingly.

PRE-EMPTION ENTRY—QUALIFICATION OF PRE-EMPTOR.

ENGLER *v.* MOLEE.

One who is the owner of three hundred and twenty acres of land is not qualified to purchase public land as a pre-emptor.

An allegation that a portion of such land had been sold prior to final proof must fail, where the deed therefor had not been delivered, or filed for record, or the alleged transferee put in possession of the land, and where there is no satisfactory evidence that any consideration passed between the parties for the tract in question.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 29, 1891.

I have considered the appeal of Elias Molee from your decision holding for cancellation his declaratory statement for the NE. ¼ of Sec. 2, T. 121, R. 58, Watertown, South Dakota.

The record shows that Molee filed declaratory statement for said tract June 10, alleging settlement June 7, 1886, and offered pre-emption proof before the clerk of court for Day county on January 19, 1887, at which time Jacob Engler, who had on December 18, 1886, made timber culture entry for the tract in question, filed his protest against said proof, alleging that Molee had not resided upon the land as required by law, that he took said tract for speculative purposes, and that he was disqualified from entering the same as he was the owner of three hundred and twenty acres of land. A hearing took place at which both parties appeared and submitted evidence. The local officers found that Molee's residence on the land had been a pretense and that he held said claim for speculative purposes, and you affirmed their decision.

I think said finding, at least as to the want of residence on the land, is sustained by the evidence.

It is clear that most of his time was spent in the town of Bristol where he boarded with a man by the name of Strandness. In answer to the question "What portion of the time did you stay with Strandness as compared with the time you stayed on your claim," he said, "I think a little over two thirds."

During all the time of his alleged settlement he was the owner of at least two hundred and eighty acres of land, and no reason is alleged or shown why he may not have made the claim his home in fact, as well as in name.

In his protest Engler stated that Molee was disqualified as a pre-emptor, by reason of the fact that he was the owner of three hundred and twenty acres of land, and evidence was introduced on that point, but neither the local office nor your office made any finding thereon.

Molee testified that at the time he made settlement, and at the time he offered proof, he was the owner of two hundred and eighty acres of land. The evidence shows that he purchased a tract of one hundred and sixty acres from Joseph Wankey on May 12, 1886, and a tract of one hundred and twenty acres on May 28, 1886, and a tract of one hundred and sixty acres on October 21, 1886.

It thus appears that during a certain period at least of his alleged settlement on the tract, he was the owner of more than three hundred and twenty acres of land, and under the provisions of the pre-emption law he was thus disqualified from making entry for said tract, hence when he applied to make entry it was incumbent upon him to show that he was qualified. At the hearing Molee testified that he sold the Wankey tract of one hundred and sixty acres to Torgus Strandness, the man with whom he boarded in Bristol, in September, 1886, but that he did not make the deed until November 18, 1886, but he also testified that he had the deed in his possession, and there is no intimation in the record that the same was ever delivered to Strandness, neither is there any satisfactory evidence that Strandness knew that such a deed was in existence. When asked if the contract made between them in

September was in writing Molee replied that it was not, when asked "did he pay you any money," he answered, "He was to deduct from the board and provisions he furnished me." Prior to this he had testified that Strandness furnished him board and provisions and that he helped him (Strandness) around the store and house when there. Whether or not this was the compensation agreed upon for said board does not appear, but there certainly is no satisfactory evidence that any consideration passed between them for the tract in question.

Neither is there any evidence that Strandness was put into possession of, or exercised any control over, the tract in question. In a word, there is no evidence whatever to show that Molee ever parted with the possession of the deed, or the right to retain it.

The deed was not filed for record with the register of deeds, until January 22, 1887, three days after Molee had submitted his proof, and as he testified, two days after he had ascertained that a protest had been filed against the same.

These facts can not fail to create the suspicion that the deed in question was not made in good faith, but, however that may be, it must be held from the evidence that the deed to Strandness had not been delivered at the date Molee offered his final proof January 19, 1886, and that title to the tract had not passed, hence he was the owner of four hundred and forty acres of land.

On this fundamental principle, the supreme court in the case of Younge *v.* Guilbeau (3 Wallace, 636), say:—

> The delivery of a deed is essential to the transfer of title. It is that final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery.

Thus Molee had not only failed to reside on the land, but he was not a qualified pre-emptor, and your decision holding his declaratory statement for cancellation, must be affirmed.

On October 4, 1890, you transmitted the relinquishment, by Engler the protestant, of his timber culture entry for the land in question. This fact, however, does not change the status of the claim of Molee, as the same was illegal.

PRACTICE—APPEAL—SIOUX HALF BREED SCRIP.

WALTER BOURKE.

The withdrawal of an appeal, after the expiration of the time allowed for taking the same, and filing a motion for review, does not revive the right of appeal if the review should be denied.

Sioux half breed scrip issued under the act of July 17, 1854, is not transferable, and the beneficiary is estopped from questioning the validity of a location made under a duplicate issue of scrip, as such location could only be made for his benefit.

Where title to a tract of land has been acquired by the beneficiary through a location of duplicate scrip, he cannot claim the right to locate the original scrip upon another tract, while the patent to the former is outstanding.

Secretary Noble to the Commissioner of the General Land Office, January 31, 1891.

This is an application filed by William Wallace, attorney in fact for Walter Bourke, praying that an order be issued directing you to certify to the Department the record in the proceedings in the matter of the application of Bourke to locate, by his attorney W. R. Wallace, the original Sioux half breed scrip No. 430 C., issued for eighty acres, upon certain unsurveyed non-mineral land, within the jurisdiction of the land office at Coeur d'Alene, Idaho.

This application was forwarded by the register to your office, and, on January 24, 1887, in passing upon said application, you canceled the location and retained the original scrip in your custody, for the reason that the records in your office show that a duplicate of said scrip had been issued in lieu of the original, which was alleged to have been destroyed, and that said duplicate had been located March 9, 1880, by Henry T. Wells, the attorney in fact of Walter Bourke, upon the S. ½ of the SW. ¼ of Sec. 29, T. 125 N., R. 62 W., Dakota, and that patent issued therefor December 10, 1881. On March 13, 1889, Wallace as attorney in fact, filed an appeal from said decision, which was withdrawn on June 6, 1889, and a motion for review of said decision of January 24, 1887, was filed July 17, 1889, and a hearing asked for to determine the validity of said original scrip and location. On September 6, 1889, you held that Wallace was duly notified of the decision of January 24, 1887, and no appeal having been properly taken therefrom, the motion was denied.

On February 17, 1890, counsel for Wallace filed another motion for review of said decision, which was also refused, August 16, 1890.

On September 18, 1890, Wallace, as attorney in fact of Bourke, again filed an appeal from the decision of January 24, 1887, which you declined to transmit, holding by your decision of October 21, 1890, that no attempt was made to appeal from the decision of January 24, 1887, for more than two years after it was rendered, and that Wallace having received legal notice thereof, has now no right of appeal.

A motion for review of this last decision, declining to transmit the appeal, was denied by you, November 10, 1890, and upon the refusal to transmit said appeal, Wallace filed the application for certiorari now under consideration.

It is claimed by the applicant that he was not served with notice of said decision in the mode and manner prescribed by the Rules of Practice, and that the records do not show affirmatively that such service had been made. In other words, it is claimed that no official notice was given to Wallace, either in person or by registered letter, but I do

not find that it is denied that he had actual notice of the decision long prior to March 13, 1889, when he filed his application. But, conceding that prior to the date last mentioned he had no such notice of the judgment as would bar his right of appeal, if exercised within sixty days therefrom, still it appears from the application and exhibits attached thereto that he failed to exercise such right within the time required by the rules after that date. On June 6, 1889, eighty-five days after the date on which he acknowledges that he received notice, he withdrew his appeal, for the purpose of filing a motion for review. The Commissioner was without jurisdiction to entertain such a motion so long as the appeal was pending, and hence it was necessary to withdraw it for that purpose and leave the case as if no appeal had been filed. If the motion for review had been filed before the expiration of the time allowed for appeal, it would have suspended the running of that time while said motion was pending undetermined, but, if the time had expired prior to the filing of such motion, the withdrawal of an appeal for the purpose of filing a motion for review could not revive the right to file an appeal, if the motion for review should be denied, as no appeal under the rules of the Department can be taken from the denial of a motion for review, but must be taken from the original decision and within the time required by the rules, deducting therefrom only the time while the motion for review was pending.

But, independent of this question, I do not see that this petition presents such a case as would invoke the exercise of the supervisory authority of the Secretary.

In brief, the facts are simply these: Sioux half breed scrip No. 430 "C" for eighty acres was issued to Walter Bourke, under the act of July 17, 1854 (10 Stat., 304), which provided "that no transfer or conveyance of any of said certificates or scrip shall be valid"

On October 26, 1870, Henry T. Wells, as attorney in fact for Walter Bourke, made application for the issuance to him of Sioux half breed scrip 430 "C," originally issued to Walter Bourke, in lieu of the lost original, and on July 26, 1871, the Acting Commissioner of Indian Affairs, upon the production of satisfactory evidence to that bureau of the loss of said original, and that it had not been located, issued a duplicate of said scrip and delivered it to Henry T. Wells, as attorney in fact for the said Walter Bourke, who, on March 9, 1880, located it upon the S. ¼ of the SW. ¼ of Sec. 19, T. 125 N., R. 62 W., Dakota, upon which patent issued December 10, 1881, to Walter Bourke.

On June 5, 1886, W. R. Wallace, as attorney in fact for Walter Bourke, located the original of said scrip on a tract of unsurveyed land within the jurisdiction of the land office at Coeur d'Alene, Idaho, and the papers were transmitted to your office, which canceled the location and held the original scrip in its custody, for the reason that the rights of the scripee had been satisfied by patenting to him the land embraced in the location made with the duplicate, as above stated.

As this scrip is not transferable, the only party in interest is the scripee, and he is estopped from questioning the validity of the location under the duplicate scrip, as the location could only be made for his benefit. So far as his rights are affected thereby, it is immaterial whether the location was made under the original or duplicate scrip, if the government or some one else asserting an adverse claim to the land located is not complaining, for the government has conveyed to him by patent title to the quantity of land for which said scrip was issued, and he can not claim the right to locate the original scrip upon another tract of land until the title to the former tract has been reconveyed to the government, or the patent canceled.

But it is also charged that the duplicate scrip was issued against the protest of Bourke, which was filed with the Commissioner of the General Land Office, while the application for the issuance of the duplicate scrip was pending before the Commissioner of Indian Affairs. The ground of this protest was that Wells had no authority whatever to act for Bourke in the matter of said scrip. It is now also charged that said original scrip was in existence when the duplicate was issued. Conceding that said protest was before the Commissioner of Indian Affairs when he issued the duplicate scrip, yet I do not see from the record before me that it was improvidently issued. While it is now alleged that the original scrip was then in existence, it does not appear that that fact was communicated to the Commissioner of Indian Affairs, or that profert of it was made or offered to be made. Again, the protest filed with the Commissioner of the General Land Office was signed by George L. Otis, as attorney for Bourke. He was not the attorney of record in any case then pending, nor did he file a power of attorney or show any written authority to act for his alleged principal. Bourke was then living, and no reason is shown why the protest was not supported by an affidavit of facts made by him.

Filed with the application for the issuance of scrip were the affidavits of two witnesses as to the loss of said original, as called for by the Commissioner, and also a certified copy of the power of attorney, purporting to have been executed by Bourke to Wells, dated May 7, 1866, and recorded in the district court of Stearns county, Minnesota. Such evidence was not overcome by the protest of a third party, unverified, who professed to speak as attorney for his principal, without showing the source of his knowledge.

It is also charged that the original scrip has always been in the custody of the petitioner, and that the location of the duplicate scrip was based upon fraudulent and forged papers and powers of attorney, fabricated by Hugh S. Donaldson, the notary before whom the power of attorney to Wells purports to have been executed, and who was dismissed from the army for forging muster rolls of troops, and who subsequently aided in perpetrating similar frauds in four hundred and fifteen applications for the issue of Chippewa half breed scrip.

Admitting the truth of these charges, it does not affect the question now presented by this application, which is, whether a second location of scrip will be allowed in favor of a scripee while the records show that title is outstanding in him for another tract of land located for him on the same scrip.

If the facts are true, as alleged by the applicant, the courts are open for his relief.

It is sufficient to hold that from the record before me no cause is shown for the issuance of the writ of certiorari, and it is therefore refused.

PRACTICE—EVIDENCE—RULE 41.

DRUMM *v.* TORMEY.

Under rule 41 of practice the local officers are entrusted with discretionary power in the matter of determining whether additional testimony will cause unnecessary expense.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1891.

I have considered the case of James Drumm *v.* Christopher Tormey, on appeal of the latter from the decision of your office of June 6, 1889, holding for cancellation his homestead entry No. 3574, of the S½ SE¼, Sec. 13, and E½ NE¼, Sec. 24, T. 4, N., R.11 E., Sacramento, California.

* * * * * * *

At the hearing, after examining all the witnesses of the contestant, and taking the testimony of the homestead claimant and his wife, the ocal officers, on motion of the attorney for the contestant, held, in substance, that any further testimony in the case would cause unnecessary expense to the contestant, and would be barred unless paid for by the claimant. Exception was taken to this ruling, and the claimant refused to offer other testimony on the terms stated, although he claimed that one or more additional witnesses were present and ready to testify. His appeal, of which notice was given at the hearing, is based mainly upon the ground that the ruling is in violation of the rules and regulations of the Department, and hence erroneous.

The fifty-fourth rule of practice specifies that the 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 Stats., 140), must pay the cost of the contest. Rule fifty-six provides that the accumulation of excessive costs under rule fifty-four will not be permitted; but when the officer taking testimony shall rule that a course of examination is irrelevant, and checks the same under rule forty-one, he may, nevertheless, in his discretion, allow the same to proceed at the sole cost of the party making such examination.

Under the rule last named, the local officers are entrusted with dis-

cretionary power in the matter of taking testimony. This power is important and should be exercised with sound discretion. After hearing the testimony of the witnesses in this particular case, it was evident that no amount of testimony could counteract that given by the claimant himself in the matter of residence, which clearly proved that he had no such residence upon the land embraced in his entry as the homestead law requires. The local officers were justified, therefore, in holding that additional testimony would cause unnecessary expense, and would not be allowed, otherwise than at the cost of the party asking for the examination of other witnesses.

The decision of your office sustaining the contest and holding the entry of Tormey for cancellation, must be and it hereby is affirmed.

PRE-EMPTION ENTRY—SECOND FILING.

JOHN CLAMPETT.

A pre-emption filing made through the consent and procurement of the claimant exhausts his pre-emptive right, and an entry by him under a subsequent filing is illegal and must be canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1891.

I have considered the appeal of John Clampett, from your decision dated February 4, 1889, refusing his application for the restoration of his pre-emption right and holding for cancellation his pre-emption cash entry for the E. ½ NE. ¼, Sec. 5, W. ½ of NW. ¼, Sec. 4, T. 7 S., R. 20 W., Kirwin land district, Kansas.

On October 1, 1881, he filed his pre-emption declaratory statement No. 18507, for said tract alleging settlement September 30, 1881, and made cash entry therefor, April 12, 1884. April 2, 1888, your office suspended the entry for the reason that his final proof showed that he had made a pre-emption filing for another tract in June, 1874.

June 8, 1888, he filed his own uncorroborated affidavit alleging that "some years previous to his entry, he made settlement on a tract of land in Brooks county, Kansas, with the intention of claiming it as a pre-emption, and subsequently paid a land agent for placing a filing on the same. . . . he does not now remember the location of said land." That soon after said settlement his crops were destroyed by grasshoppers and he was obliged to leave the land, and before he was able to return to it he was informed it was occupied by others, and not knowing that he had exhausted his pre-emption right, he filed for the tract in dispute, and since entry he had sold the land to an innocent party, and asked that his cash entry be restored and approved for patent.

February 4, 1889, you decided that claimant's first filing was legal

and had exhausted his right as a pre-emptor and held his entry for cancellation.

In August, 1889, he filed another uncorroborated affidavit, in which he alleged that in the summer of 1874, he squatted on a piece of land near Bull City, Kansas, and lived there about a month and a half; that when one of his neighbors was going to the land office at Kirwin, "I gave him two dollars and fifty cents and requested him to file for me, as that was the practice at that time. I gave him no application nor any paper of any description, I never made any application with any one but simply asked this man to do me the favor." Claimant further alleged that he did not know whether his neighbor went to the Kirwin land office; that he never received a receipt for any money paid at said office excepting the money paid on his second filing and entry.

October 1, 1889, your office adhered to its former decision that claimant's cash entry was invalid, whereupon he appealed to this Department.

The records in your office show that on June 8, 1874, he filed his pre-emption declaratory statement, No. 3443, for the SW. ¼, Sec. 34, T. 6 S., R. 16 W., in same land district, and as it sufficiently appears from his own sworn statements, that such former filing was made with his procurement and consent, I am of the opinion that his second filing for another tract of land and the cash entry thereon was made in violation of the provisions of section 2261 R. S., which declares 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.

For the reasons herein stated, and as the purchaser from claimant obtained no better title than that which claimant assumed to possess, and as all such purchasers are charged with notice of the law, and your supervisory control over the action of the local officers (Travelers' Insurance Co., 9 L. D., 316), the decision appealed from is accordingly affirmed.

OMAHA INDIAN LANDS—FORFEITURE.

EDWARD UHLIG.

A purchaser of Omaha Indian lands, whose claim was forfeited for non-payment, may be permitted, in the absence of any adverse right to complete his payments where it appears that he had made due tender of the necessary sums prior to the judgment of forfeiture.

Secretary Noble to the Commissioner of the General Land Office, February 4, 1891.

In the appeal of Edward Uhlig from your office decision of October 18, 1889, the record shows that, on May 18, 1885, he made his declaratory statement for the NE. ¼ of Sec. 26, T. 24, R. 5 East, Neligh, Nebraska. July 16, 1886, he made final proof.

This tract was a part of the Omaha Indian reservation, and his settlement and filing were made under the act of August 7, 1882 (22 Stat., 341), the purchase price being eleven dollars per acre.

March 14, 1889, his said entry was canceled as to the west half of said quarter section for conflict with another and prior entry, and on the 18th of the same month (he being in default for more than two years in the payment of interest), he was notified by the local officers to pay said interest within sixty days, or his entry would be held for cancellation. This notice was in pursuance of instructions from the General Land Office, under the provisions of the supplementary act of May 15, 1888 (25 Stat., 150), "authorizing the Secretary of the Interior to extend the time of payment to purchasers of the lands of the . . . . Omaha Indians."

He failed to make payment within the time, and on June 12, 1889, such failure was reported to the Commissioner of the General Land Office, "in order that said entry might be duly canceled."

August 13, 1889, the failure of Uhlig to pay interest and the action of the register and receiver thereon was reported to the Secretary of the Interior, and by departmental decision of August 31, 1889 (Omaha Lands, 9 L. D., 326), the tract was declared forfeited, and, October 9, his filing was canceled on the records of the General Land Office.

August 2, 1889, prior to the decision of the Secretary, declaring a forfeiture of the lands embraced in his filing, Uhlig applied at the local office to make payment of the interest due, and tendered the same. His offer and tender were refused by the local officers, from which action he duly appealed, and your office, by its said decision of October 18, 1889, affirmed the action of the register and receiver, and he now further prosecutes his appeal to this Department.

The decision of this Department, declaring the land forfeited for nonpayment of interest, was made in ignorance of the fact that prior thereto Uhlig had tendered the interest due, for the records of this Department show that the first information received by the Secretary as to the offer of Uhlig was by letter of your office of December 21, 1889, transmitting the papers in the appeal now being considered.

On receipt of this record, the Department directed your office to instruct the register and receiver of the land office at Neligh to suspend the sale of said lands, "until further advised." (See departmental decision of December 23, 1889.)

Now, for the first time, all the facts are before me for consideration.

The third section of the supplementary act of May 15, 1888 (25 Stat., 150), provides that:

> The Secretary of the Interior is hereby directed to declare forfeited all lands sold under said act, upon which the purchaser shall be in default for sixty days after the passage of this act in payment of any part of the purchase money, or in the payment of any interest on such purchase money for the period of two years previous to the expiration of said sixty days.

From the language of this act, it is apparent that although the purchaser may be in default within the meaning thereof, yet before he can be divested of his rights in the land a forfeiture must be declared by the Secretary of the Interior. This declaration of forfeiture is in the nature of a judgment at law, or a decree in equity divesting the purchaser of all right and title to the land. Neither courts of law nor equity favor penalties or forfeitures, and it is, I believe, the universal practice in courts of law to allow the defendant to avoid a forfeiture of his rights by payment of the demand and accrued costs at any time before judgment is rendered, while courts of equity in many cases allow such payment even after the decree and before sale thereunder.

And it has been the practice of this Department, when no rights but those of the claimant and the government are concerned, to allow the claimant to cure his laches at any time before cancellation or other forfeiture is declared.

In this case the claimant tendered payment of all dues, August 2, 1889, twenty-nine days before judgment of forfeiture was rendered by this Department. The claimant has abundantly shown his good faith by making his home on the land ever since his settlement thereon, by very valuable improvements, and by cultivating nearly the entire eighty acres every year since his settlement. Moreover, he shows by his affidavit that he was prevented from making his payment in time by reason of sickness, which confined him to his bed for many months and rendered him incapable of transacting any kind of business.

The decision of your office is therefore reversed, and the local officers are directed to accept the tender of interest, if renewed, and to allow Uhlig to make the subsequent payments of principal and interest, in compliance with the statutes in relation to the Omaha Indian lands.

The decision of this Department of August 31, 1889 (Omaha Lands, 9 L. D., 326), is hereby set aside and held for naught, so far as it affects the land in controversy, to wit: the E. ½ of the NE. ¼ of Sec. 26, T. 24, R. 5 E.

PRACTICE—NOTICE OF APPEAL—INITIATION OF CONTEST.

DE MARS *v.* DONAHUE ET AL.

A motion to dismiss an appeal on the ground that service thereof was not made upon appellee or his attorney, must be denied where it appears that service was duly made upon one, who, as attorney, had prior thereto represented the appellee; and where it is not claimed that the notice as served did not in fact reach the appellee, or that he was in any manner prejudiced by the service as made.

An affidavit of contest left with the register, but not made of record, nor deposited for such purpose, does not confer upon the party executing the same the status of a contestant, nor secure to him any right that can be asserted as against one claiming under a subsequent relinquishment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1891.

I have considered the appeal of Casmeers De Mars from your decision of May 9, 1889, in which you approve the action of the local officers in their rejection of his application to make timber culture entry for the N. ½ SE. ¼, and SE. ¼ of SE. ¼, Sec. 9, T. 154 N., R. 65 W., Devils Lake, North Dakota, land district.

The record shows that on August 6, 1888, he made said application accompanying it by the necessary affidavits, and the local officers rejected the same endorsing it as follows:

August 6, 1888. Rejected for the reason that the land described in application is covered by T. C. No. 3065, of James Cowan filed July 30, 1888. 30 days allowed for appeal.

E. G. Spilman, register.

From this rejection he appealed to your office and set forth as the grounds of his appeal,

That one Donahue had formerly made a homestead entry for the land, that he, De Mars, had filed a contest against the same. That Donahue had relinquished his entry as a result of said contest and that this appellant had a preference right of entry at the time Cowan made entry. He says the local officers erred in rejecting said application.

In support of these statements there are filed a number of affidavits including that of De Mars, and on the other hand there are filed the affidavits of Cowan and others, and a statement by the register. Upon considering the case, your office affirmed the action of the local officers from which De Mars appealed to the Department.

A motion is made by Cowan through one D. E. Morgan, his attorney, to dismiss the appeal because notice thereof was not served upon him (Cowan) or Morgan as his attorney.

It appears that proper service of notice was made upon J. F. Cowan as attorney for James Cowan and from the affidavit of J. F. Cowan filed in the case, I am satisfied he had been acting as attorney for James Cowan in this case, until it reached the office of the Commissioner, and it appears that when notice was served on him he did not inform the person serving it that he was not attorney, further it does not appear, and is not claimed, that the notice so served, did not reach James Cowan, or that he was in any way prejudiced by the service being made upon J. F. Cowan, as his attorney, hence I think the motion should be overruled, and it is so ordered.

In his appeal to this Department, in addition to the matters contained in the appeal to your office, the appellant sets up some eight assignments of error. They consist of statements by the attorney as to what the facts are, and in denials of the facts alleged. The fourth and fifth assignments assert that the local officers neglected their duties and deny the truth of the statements that his attorney did not wish a notice issued upon his affidavit of contest. The sixth states that the statement

that the attorney for De Mars "refused to take a notice from the land office" is absolutely false.

This appeal is signed by John W. Maher, attorney for De Mars. The affidavits filed in the case and the official statement of the register, satisfy me that the attorney for De Mars, while he has gone beyond what is contemplated by the rules of practice, in the assignments of error in an appeal, has also gone beyond what the facts in the case warrant.

De Mars in his affidavit says that he was informed that Donahue would sell a relinquishment of his homestead entry and he authorized his attorney to offer $100, for it, and afterward he raised the bid to $125, but Donahue had sold before this price was offered. He "further says that the pendency of said negotiations was one of the causes for his not serving notice of contest on said Donahue."

It appears that these negotiations had run along several weeks, when Cowan purchased the relinquishment, paying $220, therefor. When it was entered of record and Donahue's entry canceled, Cowan made his entry.

This affidavit was on file in your office, and bears date May 27, 1888; again on August 27, 1888, De Mars filed an affidavit in which he says, "The pendency of said negotiations was the cause of deponent not trying to serve notice of contest on Donahue." So it appears that it was not the fault or negligence of the government's agents that no notice of contest was taken from the office or served, but on the contrary it is true as the register states, nothing was done because Mr. Maher ordered that nothing be done.

The affidavit of contest is before me. It is not marked filed.

Cowan, in his affidavit in the case, says he has no knowledge of any contest against the entry and that he "was wholly ignorant of Casmeers De Mars, or any other person, having any claim or rights in or to said land and knew nothing of the claims De Mars now makes until August 31, 1888, and that the records of the land office at Devils Lake failed to show any trace of such claims as De Mars now urges."

This is fully corroborated by J. F. Cowan, who searched the records, and the register; and the reason why no record was made is explained by the register, who says Maher did not desire it done.

In the case of Webb *v.* Loughrey (on review, 10 L. D., 302), it was held that:

> While a contest is not initiated until the issuance of notice, yet the contestant, by filing the affidavit, secures for himself a right to proceed with his contest that can not be defeated by the execution or filing by the entryman of a relinquishment of his right under such entry.

But it was in contemplation, under this rule, that the contestant had filed his affidavit in good faith, intending to serve notice and proceed with the case, and not that he could deposit an affidavit in the office (keeping it off record), so that he might hold it over the entryman, to force a relinquishment at a low price.

In the case at bar, it appears from the statements of the witnesses and the appellant himself that the object was to negotiate for the relinquishment, rather than to contest the entry of Donahue, and Cowan seems to have been the "highest bidder." It is not a case calling for the interference of the Department.

I am satisfied that the affidavit of contest was not deposited in the office, with the intention of having any action taken, until the negotiations should fail, and the trouble seems to have arisen out of the register allowing himself to become a "bailee," to hold the affidavit on deposit, instead of a register to place it on record and proceed upon it in accordance with law. But as this was done at the request of Maher, he cannot complain.

Your decision is affirmed.

RAILROAD GRANT—ISSUE OF PATENTS.

ATLANTIC AND PACIFIC R. R. CO.

The patents issued to this company for lands earned under its grant should contain in express terms an exclusion of "all mineral lands other than coal and iron lands."

The vacant unappropriated odd sections within the primary limits of the grant of June 10, 1852, were not "reserved" lands when the grant of ten odd sections per mile was made by the act of 1866 to the Atlantic and Pacific, and therefore passed to said company when found within the primary limits thereof.

As the grant was made to the Atlantic and Pacific, patents must issue in the name of said company for lands that were earned by the construction of the road, irrespective of the fact that a portion of said road is now owned by another company.

Secretary Noble to the Commissioner of the General Land Office, February 6, 1891.

I am in receipt by your transmission of lists 11 and 12, designating lands in the State of Missouri, and list 13 of lands in the State of Arkansas, for which, you recommend, patents should be issued to the Atlantic and Pacific Railroad Company, under the grant to it by the act of July 27, 1866 (14 Stat., 292).

List 11 is for 1,284.05 acres of land within the primary limits of said road, and lists 12 and 13 are for 1,078.45 and 5,147.33 acres, respectively, within the indemnity limits thereof. As to lands in said lists, it is certified, that they are vacant, unappropriated, free from conflicts, and properly subject to said grant. In addition, it is shown by the affidavit of A. C. Wooley, the duly authorized agent of the applicant, that he is well acquainted with the character of all of said lands and every legal subdivision thereof, and that they are essentially non-mineral in character and suitable for agricultural purposes. It is also further certified that the indemnity selections, together with the amounts heretofore certified and patented, do not exceed in the aggregate the total of the lands to which said company is entitled.

In view of the foregoing statements, I have approved the said lists for the respective amounts thereof, and return the same to you that they may be carried into patents, excluding therefrom, in the terms of the grant, "all mineral lands other than coal or iron lands." Let this be so expressed in the patents.

A portion of the lands described in list 11 is of the lands which remained to the United States under a grant of six even numbered sections made to the State of Missouri, to aid in the construction of a railroad from the city of St. Louis to the western boundary of the State, by act of June 10, 1852 (10 Stat., 8). But it was held by this Department, in 8 L. D., 165–9, that the vacant and unappropriated odd sections within the six miles or primary limits of this old grant of 1852, were not "reserved" lands when the grant of ten odd sections per mile in the States was made to the Atlantic and Pacific Company by the act of 1866, *supra*, and, therefore, passed to the last company under said grant whenever they fell within the primary limits thereof; thus, said lands come to be included in list 11.

It is proper here to observe, that in response to a rule issued by my predecessor, Secretary Lamar, on May 23, 1887, requiring the Atlantic and Pacific Railroad Company to show cause why the indemnity withdrawals, theretofore made, for its benefit, should not be revoked, that company disclaimed any interest in the part of the road constructed within the State of Missouri, and stated that, "by foreclosure sale and reorganization," it was now the property of the St. Louis and San Francisco Railroad Company.

From this it would seem that the lands in the lists, this day approved, are really for the benefit of the last-named company. With this, however, the Department is not concerned, as the portion of the road in Missouri, along which the listed lands lie, was constructed within the time prescribed by law, and the grant for said lands being made to the Atlantic and Pacific Railroad Company, the Department must issue patents in the name of the grantee company, which will in contemplation of law hold the title thus conveyed in trust for the party or parties entitled thereto.

RAILROAD GRANT—FORFEITURE—ACT OF SEPTEMBER 29, 1890.

MOBILE AND GIRARD RAILROAD.

The provisions of section 8, act of September 29, 1890, constitute a legislative limitation on the grant to the Mobile and Girard company, made by the act of June 3, 1856, and restrict said grant to the lands earned by the construction of the road from Girard to Troy.

The authority of the governor under the granting act to certify to the completion of twenty miles of road is limited to the fact of such completion, and does not extend to conclusions of law; hence his certificate as to the sufficiency of the "agreement and arrangement" by which the road was constructed from Pollard to Mobile is an assumption of jurisdiction not conferred by the statute.

The declaration of the company's acceptance of the provisions of the act of September 29, 1890, is satisfactory; and the relinquishment filed by said company is accepted as re-investing in the United States the title to all lands required to be relinquished by said company, and furnishing a basis for further action in the adjustment of its claims.

The acceptance of said relinquishment will not, however, be held as waiving any objection to the validity or sufficiency of said instrument, not apparent on the face thereof, that may hereafter appear or be presented.

Instructions given for determining what lands are subject to the grant, and for the presentation of claims that are recognized and protected by the act of 1890.

Secretary Noble to the Commissioner of the General Land Office, February 7, 1891.

By letter of October 28, 1890, you submitted for my approval a draft of a circular letter of instructions under the land grant forfeiture act of September 29, 1890 (26 Stat., 496).

I have heretofore, on December 24, 1890, 11 L. D., 625, expressed my views on the questions thus presented, and suggested that instructions affecting the grant for the Mobile and Girard road (act of June 3, 1856, 11 Stat., 17), be omitted from the circular, inasmuch as the questions therein involved are peculiar. I will now proceed to consider the recommendations in your said letter, affecting said road.

The first section of said forfeiture act provides:

That there is hereby forfeited to the United States and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

Section eight, thereof provides:

That the Mobile and Girard Railroad Company, of Alabama, shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles. And the Secretary of the Interior in making settlement and certifying to or for the benefit of the said company the lands earned thereby shall include therein all the lands sold, conveyed, or otherwise disposed of by said company not to exceed the total amount earned by said company as aforesaid. And the title of the purchasers to all such lands are hereby confirmed so far as the United States are concerned.

But such settlement and certification shall not include any lands upon which there were *bona fide* pre-emptors, or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States.

The right hereby given to said railroad company is on condition that it shall within ninety days from the passage of this act, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior, a valid relinquishment of all said company's interest, right, title, and claim in and to all such lands within the limits of its grant, as have heretofore been sold by the officers of the United States for cash, where the government still retains the purchase money, or with the allowance or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or as are claimed under the homestead or

pre-emption laws as aforesaid, and the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed, and all such claims under the pre-emption or homestead laws may be perfected as provided by law. Said company to have the right to select other lands, as near as practicable to constructed road, and within indemnity limits in lieu of the lands so relinquished. And the title of the United States is hereby relinquished in favor of all persons holding under any sales by the local land officers, of the lands in the granted limits of the Alabama and Florida Railroad grant, where the United States still retains the purchase money but without liability on the part of the United States.

By letter of November 7, 1890, you forwarded a paper purporting to be an acceptance on the part of said company, of the terms of said forfeiture act, and a relinquishment under said section eight, with your opinion as to the validity of the same.

The questions involved have been discussed, orally and by brief, by attorneys representing certain purchasers from said company

The first clause of said section eight, is clearly a legislative declaration that said company has built eighty-four miles of its road, (from Girard to Troy) and is entitled to the quantity of land earned by such construction.

It is claimed in the argument that in addition to said eighty-four miles there have been built, under said grant, sixty-three other miles of road—from Pollard to Mobile. In support of this claim said attorneys refer to a certificate of the Governor of Alabama dated March 19, 1884, and filed in the Department by one W. J. Van Kirk on April 1, 1884, and on that day referred to your office.

Said certificate reads as follows:

To the Honorable the Secretary of the
Interior of the United States.

I, Edward A. O'Neal, Governor of the State of Alabama, do hereby certify, that the Mobile and Girard Railroad was completed from Girard in Russell County, to the town of Union Springs in Bullock county, Alabama, within a continuous length of fifty-four miles by the first day of November, 1859; and was completed in June, 1867, from Union Springs to Thomas Station, now known as Inverness within a continuous length of nine miles, and was completed in June, 1870, from Inverness to Troy in Pike county, Alabama, within a continuous length of twenty-one miles, making the completion of said railroad within a continuous length of eighty-four miles from Girard to Troy, Alabama; and is now being operated by the Mobile and Girard Railroad company, and is the railroad designated as "the Girard and Mobile Railroad from Girard to Mobile, Alabama, in the act of the Congress of the United States entitled "An act granting public lands, in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," approved June 3, 1856.

I, also, further certify, that the Mobile and Great Northern Railroad Company, which was incorporated in February, 1856, completed in September, 1861, a railroad from Pollard to Tensas, Alabama, within a continuous length of forty nine miles, and completed, by April, 1872, a railroad from Tensas to the city of Mobile, Alabama, within a continuous length of fourteen miles, making the completion of a railroad within a continuous length of sixty-three miles from Pollard to Mobile; and that said railroad from Pollard to Mobile now constitutes a part of the Mobile and Montgomery railway and is being operated from Montgomery to Mobile.

I, also, further certify, upon satisfactory evidence furnished to me, and which is on file in this office, that the locating engineer of the Mobile and Girard Railroad com-

pany definitely located, by April 15, 1858, the line of the railroad of said company from said town of Union Springs to Blakely on the waters of Mobile bay, Alabama, and that the Mobile and Girard Railroad company adopted the same as the final location of their line of railroad; and subsequently, the said Mobile and Great Northern Railroad company, under and by an agreement and arrangement with the Mobile and Girard railroad company, built their railroad from Pollard to Tensas, substantially on the same line of the Mobile and Girard Railroad, located by the locating engineer as above stated, and the Mobile and Girard Railroad company was to build their railroad from Union Springs to Pollard, under an arrangement for the running of through cars over both of said roads, but was prevented by the occurrence of the war from doing so, and that this agreement and arrangement was made with the view and for the purpose of complying with the provisions of said act of Congress and of securing said grant of public lands to aid in the construction of railroads in this State.

This certification is made, that the government being informed of the facts, may take such action as may be deemed appropriate in the premises.

Prior to the receipt of this certificate it appears your office had no official knowledge of the completion of any portion of said road.

However during the years 1860 and 1861 all the vacant lands within the granted and indemnity limits of said grant from Girard to Mobile were certified to the State for the benefit of said company, except possibly some six hundred and forty acres, and transferred to said company. Said lands aggregated 504,167.11 acres but 19,076.42 of which were opposite said stretch of eighty-four miles.

Both of your said letters are based on the supposition that the company is entitled only to the quantity of lands earned by the construction of the road from Girard to Troy.

I concur in this view of the law.

Said section eight, provides that said company "shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy a distance of eighty-four miles." This I understand to be a legislative limitation on the grant. Your office has never recognized the road from Pollard to Mobile as constructed under the granting act, and has frequently so reported to Congress.

By letter of March 27, 1882, transmitted to Congress, your office stated (H. Ex Doc., No. 114, 47th Cong., 1st Sess), that unofficial notice of the construction of eighty-four miles had been received and that Commissioner Drummond had recommended the restoration of the lands not earned, but that the decision in Schulenberg *v.* Harriman (21 Wall, 44), prevented such action. By letter of January 11, 1883, your office reported to Congress that nothing had been done in the meantime by said company looking to the completion of the road between Troy and Mobile (H. Mis. Doc., No. 17, 47th Cong., 2nd Sess). By letter of February 2, 1884, transmitted to Congress, your office stated that, "eighty-four miles of road, extending from Girard to Troy, have been constructed." (S. Ex. Doc. No. 90, 48th Cong., 1st Sess). These reports were, prior to the filing of the certificate of the Governor. Afterwards, however, in the annual report for 1885, (pp. 40, 41) your office stated that the length of the line of said railroad was 223.6 miles; that fifty-four miles of the road had been built before the expiration of the grant; that

thirty miles had been built thereafter; and that 139.6 miles were still uncompleted. When the bill was under discussion the committee on public lands submitted these same figures to the House with the additional statement that the amount to be forfeited on said line was 536,064 acres. This latter figure represents exactly the amount of land granted for the portion of the line south of Troy,—139.6 miles in length,—and the statement showed that but thirty-four miles of the road had been built and that the forfeiture was to operate on all the remnant of the line. (Cong. Rec. 51st Cong., 1st Sess, Vol. 21, p. 7976). In discussing the section here in question, with a proposed amendment, Mr. Oates of Alabama, said:

Mr. Chairman, I will state for the information of the House the purpose of this amendment. The total amount of this grant to that railroad company aggregated something over 900,000 acres. A little over one-third of the railroad was constructed or completed—eighty-four miles. Therefore, the road earned something over 300,000 acres. The company has sold and conveyed to different parties about 235,000 or 240,000 acres.

They have suffered a few thousand acres also to be sold by the State for taxes, and the lands sold for taxes were generally bought in small bodies of one hundred and sixty acres, or sometimes half a section, and have been settled by farmers and are being improved and cultivated.

The object of this amendment is simply this: It requires the Secretary of the Interior, when settling with this company and allotting to them the 300,000 acres earned by constructing a part of the road, to include that amount of land that they have sold to other parties. I do not want those parties who have purchased lands from the company to be deprived of their lands, and let the company have other lands. You are going to give the company the quantity of lands they have earned, to wit, in round numbers 300,000 acres.

(Ibid., 7979).

It should be presumed that Congress acted with a knowledge of the Governor's certificate; in fact it appears that a brief was filed with the proper committees of Congress in which the certificate was set forth in full. It is inconceivable that Congress would have passed an act without referring to these facts, confirming to the company the vast body of lands along the line from Pollard to Mobile, in the face of the statements from the sources to which it must look for the facts, viz., the committee, and your office, that the road had not been constructed under the granting act.

The authority of the Governor in the premises is found in the fourth section of the granting act, as follows:

That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States.

While it may be admitted that the certificate of the Governor to the fact of the completion of twenty miles of the road, as the same was completed, would ordinarily conclude the Department and the courts, it does not at all follow that the certificate furnished in this case was such as to close the question in issue, especially in Congress. The Governor certifies that a railroad was built, not by the Mobile and Girard company, but by the Mobile and Great Northern railroad company, substantially on the line as located by the former, "under and by an agreement and arrangement" with said company, "and this agreement and arrangement was made with the view and for the purpose of complying with the provisions of said act of Congress, and of securing said grant of public lands to aid in the construction of railroads in this State." Here the Governor assumes a power not conferred by the statute. He constitutes himself the judge of the merits of an "arrangement" between the companies. In this he exceeded his jurisdiction. The statute made him the judge of a fact, not of the law. This arrangement and agreement has never been submitted to the Department, and even now, when the matter is here for final executive action, the nature of the agreement is not disclosed. The certificate has never been acknowledged as valid by the Department in reference to said line, and the conclusion that Congress ignored it is entirely in keeping with the facts and the words of the forfeiture act.

As to the words of said section eight, I am of opinion they are in harmony with this conclusion, and with no other.

If the first section stood alone all the lands certified opposite to said eighty-four miles would have been confirmed, as far as this act goes, to the company. The eighth section makes an exception to this and instead of all the actual lands themselves so situated, gives the company a quantity equal to what they have so earned, made up, if possible, of those sold by the company, but reserving from the company the lands opposite to said eighty-four miles and elsewhere upon which there were *bona fide* settlers on January 1, 1890. In other words it worked a partial forfeiture even opposite said stretch of road. Furthermore, it reserved from the company, in consideration of the quantity so given, upon the relinquishment of the same, all lands along the *entire grant* theretofore sold by the officers of the United States for cash where the government still retains the purchase money, and all lands theretofore entered under the pre-emption or homestead laws, with the allowance or approval of such officers or claimed thereunder as aforesaid. This is the object of section 8. As sales, entries and settlements were not confined to lands opposite to said eighty-four miles, it is impossible for me to conclude that Congress confirmed the grant from Pollard to Mobile, without *mention* of the same and without similar restrictions on that line.

The facts and the terms of the act point to one conclusion, that the line from Girard to Troy must be considered as the only portion of said road constructed under the law.

Inasmuch as the quota of lands to be allotted to the company under said section eight, is to be made up, if possible, from lands sold or otherwise disposed of by the company, and "shall not include any lands upon which there were *bona fide* pre-emptors, or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States," I have concluded that before the allotment is made, it will be necessary to ascertain what lands the company has so sold, and also what tracts were covered by claims on January 1, 1890, as aforesaid.

To that end you are instructed to direct the local officers to publish a notice requiring all persons having such *bona fide* pre-emption or homestead claims to any of the lands within said grant on January 1, 1890, to come forward within ninety days from date of the notice, and make known their claims by filing a duly corroborated affidavit setting forth in each case the facts upon which the claim is based and the qualifications of the claimant.

You will also call upon the company to file a statement, properly certified to, of the lands sold, conveyed, or otherwise disposed of by the company, the date of each sale, or disposition to be given and the name of the transferee.

The right to select indemnity for lands relinquished is confined to the indemnity limits, and to be exercised as nearly as practicable to the constructed road.

Purchasers of lands opposite to the unconstructed road are protected by the third section of said act.

By your said letter of November 7, you submit a letter from said attorneys enclosing "a certified copy of a certain resolution, adopted by the board of directors of the Mobile and Girard railroad company on October 17, 1890, accepting the provisions of the act of Congress approved September 29, 1890, and relinquishing to the United States all the company's interest, right, title and claims in and to certain lands covered by settlement and other claims."

You state that the company is required by said section eight, to accept the provisions of the forfeiting act, and also to file a valid relinquishment in favor of three classes of persons, viz:

1. Sales made by the United States where the purchase money is retained, 2, entries permitted by the local officers, and 3, persons claiming on January 1, 1890, under settlements made under the homestead or pre-emption laws.

As to the first and second classes, the lands covered thereby not having been certified, a simple waiver of claim would release the lands from any cloud that might have existed, and the title heretofore conveyed upon such sales and entries, would become complete.

As to the third class, viz., those covered by settlements the title is outstanding in the company under the certifications heretofore made, and unless the lands are reconveyed, or the title set aside by due process of law, I cannot see how such claims are to be allowed to "be perfected as provided by law," as provided for in said section eight.

The paper filed purports to be a certified copy of a resolution adopted by the board of directors of the Mobile and Girard Railroad company, but, upon this fact, there

might be some doubt as the person signing the certificate, merely signs himself "Secr'y."

I am of the opinion that any relinquishment filed should be authorized by a resolution of the board of directors, but executed by the president of the company, certified to by the Secretary of the company, and duly acknowledged.

Subsequently to the date of your letter said company filed a copy of resolutions adopted at a meeting of its board of directors held at Columbus, Georgia, on December 8, 1890, wherein the resolution referred to in your letter was recited and the president of the company was authorized to execute in the name and behalf of the company a formal relinquishment of all the company's interest "In and to all the lands required to be relinquished to the United States by said act." At the same time there was filed a relinquishment executed as it was said, in pursuance of said resolution. Upon the suggestion of certain informalities in said resolutions and in the execution of the relinquishment the company filed another relinquishment, dated January 26, 1891, in accordance with resolutions adopted at a meeting held on January 15, 1891, at Girard, Alabama.

By the resolution authorizing the execution of this last instrument the action of said board of October 17, 1890, accepting the terms and conditions of said act was "adopted, ratified, and confirmed as valid and binding acts and deeds of this company from the day of the date thereof," the action of said board at the meeting of December 8, 1890, was also ratified and confirmed, the relinquishment executed by the president of said company on December 8, 1890, was approved, ratified and confirmed, and as it was said "out of abundant caution and as an evidence of its good faith towards the United States," the provisions of said act were then again accepted and the president was authorized to execute and file another relinquishment.

The papers now presented seem to be regular and sufficient to meet the requirements of the law. The declaration of acceptance by the company of the provisions of said act of September 29, 1890, is full and positive and the relinquishment presented will be received as re-investing in the United States the title to all the lands required by said act to be by said company relinquished and as thus furnishing the basis for further action in the adjustment of said company's claims. This action will not, however, be held as waiving any objection to the validity or the sufficiency of said instrument, not apparent upon the face thereof, that may hereafter appear or be presented.

The title having been reconveyed there no longer exists any obstacle to proceedings on the part of claimants for these lands for perfecting title thereto and you will direct the local officers to immediately give notice to that effect and that proof in support of such claims should be submitted at once.

Herewith are returned the papers accompanying your letter of November 7, 1889, and such papers as have been filed in connection therewith.

MINERAL ENTRY—ORDER OF CANCELLATION—TRANSFEREE.

SAN JUAN PLACER.

A mineral entry allowed by the local office should not be canceled for the failure of the entryman to furnish additional proof, called for by the General Land Office, unless the record shows affirmatively that due notice of such requirement was given the entryman.

A transferee, holding under an entry thus canceled, is entitled to a re-instatement of the entry, if it appears that notice of the additional requirements, and of the order of cancellation, was not duly given; and on such re-instatement an opportunity may be accorded said transferee to show the facts with respect to the entryman's compliance with law.

Secretary Noble to the Commissioner of the General Land Office, February 5, 1891.

This is an appeal by Ward C. Pike from the action of your office refusing his application for the recall of an order canceling mineral entry No. 34, for the San Juan Placer claim, embracing the W. ½ of W. ½ of SE. ¼ of SE. ¼, E. ½ of SW. ¼ of SE. ¼, and the E. ½ of NW. ¼ of SE. ¼ of Sec. 22, T. 2 N., R. 14 E., M. D. M., Stockton, California.

Said entry was made April 21, 1873, by William Wiggins, John R. Comfort, Leon Bullier and E. McMichael. By letters to the local office, dated April 23, 1875, August 15, 1877, and February 16, 1881, your office required the entrymen to furnish proof of the posting of the San Juan application and diagram on the land, of the non-existence of known lodes thereon and of continued peaceable possession.

The evidence thus required not having been produced, your office, by letter of May 28, 1887, required the entrymen "to elect within thirty days from notice whether they will furnish the additional proof called for in said letter, or rely upon the proof submitted."

No response was made to this letter, and on September 2, 1887, your office held said entry for cancellation for failure to furnish the required proof. No appeal being taken from this action, the entry was canceled by your office on December 12, 1887. Subsequent to such cancellation, the land in question was, as stated by your office, "relocated under the name of the Crystal Spring Gravel Placer, by F. E. McTarnahan *et al.*, who filed their application for patent for the same, and on May 23, 1888, made entry therefor."

On April 24, 1889, Pike filed said application, wherein he sets out that in 1881 and 1882 he bought the interests of entrymen, McMichael and Comfort and of one Zanetta in the San Juan entry, that, being advised by counsel that the San Juan entrymen having paid the government price for the land his rights could not be affected by the Crystal Spring entry, he did not "adverse" such application, that his grantors expended some six thousand dollars in working the claim, that he has lived on the land for fifteen years and placed a thousand dollars worth of improvements thereon, that he has been without notice of the

said requirements of your office, and that if accorded an opportunity he can establish a compliance with the law by the San Juan entrymen.

By decision, dated June 8, 1889, adhered to July 6, 1889, after consiciding Pike's additional affidavit, filed June 13, 1889, your office denied said petition.

The appeal here, filed August 17, 1889, is from this action.

It is not shown by the papers before me or by the records of your office whether or not the San Juan entrymen had notice of your said office letters of April 23, 1875, and August 15, 1877. By a letter dated Sonora, California, May 5, 1882, Messrs. Street and Street, who signed as attorneys for applicants, made inquiries concerning the San Juan patent to which your office, on May 17, 1882, replied and enclosed a copy of said letter of February 16, 1881. Pike, in a protest (filed pending his appeal) against the Crystal Spring entry, swears that he "verily believes that said Street and Street were never employed by any of the said entrymen, Wiggins and others, to write said letter."

Notice of said letters of May 28, and September 2, 1887, was sent to the San Juan entrymen by registered mail, but returned undelivered. It does not, however, appear by the present record, or the files of your office, whether or not they (San Juan entrymen) were notified of the letter of December 12, 1887, canceling their entry.

Thus, it appears that notice to the San Juan entrymen of the said proceedings by your office is not affirmatively shown. It would therefore seem that such entry has been improperly canceled. Pearce *v.* Wollscheid, 10 L. D., 678.

As said notice can not be presumed, the same should, I think, be made the subject of further inquiry, to the end that the status of the San Juan entry can be properly determined. If it should appear that the San Juan entrymen were without such notice, their said entry ought, in my opinion, to be reinstated and the applicant, Pike, accorded an opportunity to prove their compliance with the law.

You will therefore direct that a hearing be duly had, after notice to the Crystal Spring claimants, to determine the question of said notice to the San Juan entrymen. At the hearing thus ordered you will also direct that testimony be submitted touching the allegations contained in Pike's said application to re-instate his entry, and also in his protest, filed pending the appeal here, against the Crystal Spring entry.

Upon the evidence thus adduced, if it is shown that no notice of the requirement for further proof nor of the cancellation was duly given, you will re-adjudicate the case. Pending the said investigation the Crystal Spring entry will stand suspended.

The decision appealed from is modified accordingly.

PRICE OF LAND WITHIN RAILROAD LIMITS.

WILLIAM D. BAKER.

Odd sections, or parts of such sections, within the primary limits of the grant to the Northern Pacific Railroad Company, that are excepted from the grant by existing entries, are properly subject to disposal only at the double minimum price, if such entries are subsequently canceled.

Northern Pacific R. R. Co. *v.* Yantis, 8 L. D., 58, overruled.

Secretary Noble to the Commissioner of the General Land Office, February 5, 1891.

I am in receipt of your communication of September 30, 1890, transmitting for my consideration and action the application of William D. Baker for repayment of double minimum excess, paid by him April 4, 1890, for the SE. ¼ Sec. 25, T. 18 N., R. 6 W., Seattle, Washington, containing one hundred and sixty acres.

It appears from the record that said tract is within the primary limits of the grant to the Northern Pacific Railroad Company, and was excepted from the operation of said grant by reason of the homestead entry No. 1644 existing at date of definite location, and which was subsequently canceled.

It is claimed that this land was single minimum land at the date of the purchase, under the ruling of the Department, in the case of Northern Pacific Railroad Company *v.* Yantis (8 L. D., 58), and that the excess was therefore erroneously charged and repayment should be made under the act of June 16, 1880 (21 Stat., 287), which provides that in all cases where parties have paid the double minimum price for land which has afterwards been found not to be within the limits of a railroad grant, the excess of one dollar and twenty-five cents per acre shall be paid to the purchaser thereof or his heirs or assigns.

The construction given said act, relative to excess payments of lands supposed to be within the limits of railroad grants, is that when a purchaser has been charged the double minimum price for lands supposed to be subject to said price by reason of being within the limits of a railroad grant, and it is subsequently determined that at the date of purchase the lands were not subject to the double minimum, it is the same as if the lands were supposed at date of purchase to be within the limits of a railroad grant, and were afterwards found to be outside of said limits. The act is remedial, and should be liberally construed. Duthan B. Snody, 1 L. D., 532; Thomas Kearney, 7 L. D., 29; Jacob A. Gilford, 8 L. D., 583. See also letter of May 29, 1889, Vol. 79, L. & R., page 238.

Therefore, the material question in this case is, whether the land was single minimum at the date of purchase.

In the case of Northern Pacific Railroad Company *v.* Yantis, 8 L. D., 58, it was held that the increase in price to double minimum of lands

within the limits of the grant to the Northern Pacific Railroad Company is expressly limited by the terms of the grant to the "reserved alternate sections," which in this grant are the even sections, and such increase of price does not extend to an odd numbered section excepted from the operation of the grant.

The decision in the Yantis case was not upon the question of repayment, but upon the right to amend a homestead entry within railroad limits, where the amount originally applied for was improperly restricted by the local officers. It, however, expressly decided that the odd sections within the limits of the grant to the Northern Pacific Railroad Company are single minimum lands, for the reason that the grant to said road expressly limited the increase in price to the "reserved alternate sections," which relates solely to the even sections. Under this construction of the grant, the land in controversy would be classed as single minimum, and under the rulings of the Department Baker would be entitled to repayment.

A careful consideration of this question has led me to the conclusion that the doctrine announced in the Yantis case is not a true construction of the act, and is not in harmony with the decisions of the Department upon that subject.

The 3d section of the act of July 2, 1864 (13 Stat., 365), granted, to aid in the construction of this road, every alternate section of public land not mineral, designated by odd numbers, within the limits therein described, to which the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed.

The 6th section of the granting act directed that the land should be surveyed for forty miles in width on both sides of the road, and that the "odd sections hereby granted shall not be liable to sale," etc., but that the pre-emption and homestead laws should be extended to all other lands on the line of said road when surveyed, "excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

While, strictly speaking, the even sections are the alternates of the odd sections, yet, when we consider the act in all its parts, it is apparent that the term "reserved alternate sections" was intended to embrace all sections or parts of sections not granted to which the pre-emption and homestead laws were extended, saving only the rights of settlers whose settlements were made prior to withdrawal. This is evidently the true intent and spirit of the act, the obvious purpose of which was that all sections or parts of sections not granted and excepted from the operation of the grant from any cause whatever should, if subject to the pre-emption or homestead laws, be sold at the enhanced value by reason of their proximity to the road. There could have been no purpose in selling an even section for two dollars and fifty cents per

acre, and the adjoining odd section for one dollar and twenty-five cents per acre, simply because one was an even section and the other an odd section.

A settler on part of an odd section prior to and at date of withdrawal acquired a right to take that land as single minimum, for the reason that his rights were acquired before the lands were raised. As to those settlers, the odd sections settled upon and excepted from the grant were not raised, but when that settlement was abandoned and the land became subject to the settlement and entry of any other settler, it took the character of an even section, and for all purposes contemplated by the grant it was a "reserved alternate section."

The even sections were not reserved in the sense that that term is usually applied in speaking of the reservation of public lands, but, on the contrary, the grant expressly declared that these sections, in common with the odd sections excepted from the grant, should be subject to settlement and entry, under the settlement laws.

Therefore the words "reserved alternate sections" mean those "sections and parts of sections which remain to the United States," this being the language generally used in other grants to indicate what lands within the limits of the grant shall not be sold for less than two dollars and fifty cents per acre, which include all lands remaining to the government within said limits subject to sale under the public land laws. Clark *v.* Northern Pacific Railroad Company, 3 L. D., 158; Atlantic and Pacific Railroad Company, 5 L. D., 269.

Not only does this seem to be the true and only reasonable construction of the act, but such construction had previously been given to that grant by the Department in the case of Clark *v.* Northern Pacific Railroad Company, *supra.*

The question as to the price of odd sections within the granted limits of the Northern Pacific Railroad Company and excepted from said grant was directly involved in the case last cited. In that case the Secretary held that it is

> entirely consonant to reason and good construction, where a grant is made declaring that the alternate even sections reserved to the United States shall not be sold for less than $2.50 per acre, with added provisions excepting out of the grant such odd sections as may fortuitously happen to be found in certain designated conditions, without mentioning the terms upon which such odd sections shall be disposed of, to hold that as the Department is constructively authorized to treat them as public lands in the same category as the even sections, and to dispose of them in the same manner, they should bear the same price.

Then, after observing that it could not have been the intent of Congress to fix a different price for lands lying side by side and governed by the same law as to disposal merely from the fact that one was designated as an odd and the other as an even section, he concludes:

> I accordingly decide that the law should be so construed, and direct that, for future disposal within railroad limits, where the statute requires the double-minimum to be paid for the alternate sections you hold all the lands at such price, thus pro-

ducing perfect uniformity in all respects as to the tracts in the same circumstances, observing, of course, the right of settlers before withdrawal to pay at the minimum price as provided by law.

This case was not referred to in the Yantis case, although the ruling in the one case was directly contrary to the other, and I can not believe such ruling would have been made, if attention had been called to the case of Clark.

Being satisfied that the construction given to the act by the Secretary in the case of Clark *v.* Northern Pacific Railroad Company is the true construction, the decision in the case of Yantis *v.* Northern Pacific Railroad Company is overruled.

It follows that the land entered by Baker is double minimum land, and the application for repayment should therefore be refused.

PRE-EMPTION ENTRY—REPAYMENT.

MARTIN REYNOLDS.

Repayment can not be allowed where a pre-emption entry is canceled on account of the false testimony of the claimant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 5, 1891.

On April 27, 1883, Martin Reynolds filed his pre-emption declaratory statement No. 3808, for the E. ½ NE. ¼ and SW. ¼ of NE. ¼, Sec. 12, T. 113, R. 60 Huron land district, South Dakota.

November 10, 1883, he offered final proof and cash certificate No. 5589 was issued to him for the land.

In September, 1884, Joel B. Shelton, initiated contest against said entry alleging that it was perfected through fraud and in violation of law, as Reynolds had, on June 29, 1882, filed his pre-emption declaratory statement for the NE. ¼, Sec. 17, T. 112, R. 60, Mitchell series, and thereby exhausted his pre-emption right.

Hearing was duly ordered and had and the local office found in favor of contestant and recommended the cancellation of the entry.

Reynolds appealed, and the action of the local office was approved by your office and, on a second appeal, was finally affirmed by this Department, on April 12, 1888, Shelton *v.* Reynolds (6 L. D., 617).

June 26, 1889, Reynolds, as entryman, and one F. T. Day, as mortgagee and holder of a tax deed, filed a joint application for the repayment of the purchase money.

September 23, 1889, your office rejected this application on the ground that Reynolds in his pre-emption affidavit swore he never had the benefit of any right under section 2259, Revised Statutes; and that in his final proof to the question—"Have you ever made a pre-emption filing or entry of land other than that you now seek to enter?" he answered,

"No," and thereby forfeited under the provisions of section 2262, the money he may have paid for such land.

Reynolds alone appealed, and accompanying his appeal, he filed his own uncorroborated affidavit together with the uncorroborated affidavit of his present attorney for the purpose of showing his good faith in the premises.

At the hearing in the case of Shelton *v.* Reynolds, *supra*, claimant's former attorney testified in 1882 that he prepared for Reynolds his declaratory statement, which, having been duly executed, was by him, the attorney, sent to the Mitchell office, where it went of record as declaratory statement No. 18,675, and the receipt therefor was shortly after returned to him; that he delivered the same to Reynolds; that soon afterwards Reynolds came to him and stated that he was going up on the Northern Pacific Railroad, and that he had sold his claim to one Doctor Bullard, and asked him (the attorney) to make out the necessary papers; that he drew a relinquishment and retained the same in his possession until Reynolds and Bullard completed their trade; that afterwards Reynolds went away, and some time later returned from up north, and upon his said return told witness that "Bullard had beat him out of his claim."

Reynolds, on the other hand, testified that after making his declaratory statement, he frequently called on his attorney to learn if said declaratory statement had been filed in the local office, and was each time told that nothing had been heard from it, and that as soon as it was recorded he would hear from it; that about July 28, 1882, his attorney stated that he did not think the declaratory statement had gone of record and that it probably would not until the land office had gone to Huron; that in about two months claimant told his said attorney to stop the filing and not let it go through; that he did not want to lose his right and would not be there, as he was out of money and could not wait until the Huron office should open; that in August he went to the northern part of the Territory, and afterwards to Illinois, and in short that he had acted in good faith throughout, believing that he had not exercised his pre-emption right and that he was therefore entitled to make a second declaratory statement as he did and to have the benefit of the same.

In his uncorroborated affidavit Reynolds alleges—

That the relinquishment to which my name is signed by me, and acknowledged July 31, 1882, was so made and signed . . . . without my knowing what it was, nor the nature of it. That my attorney presented . . . . certain papers for me to sign which he said it was necessary for me to sign to get a filing to record; that I signed whatever he presented to me, that I never knew until years afterwards that I had signed and acknowledged a relinquishment on the NE. ¼, Sec. 17, T. 112 N., R. 60 W., until years after. That when I made pre-emption declaratory statement on (the) E. ½ NW. ¼, and SW. ¼ NE. ¼, Sec. 12, T. 113 N., R. 60 W. I was informed and honestly believed that I had never had the benefit of a preemption right; I honestly believed that the declaratory statement on the NE. ¼ Sec. 17, T. 112 N., R. 60 W., had never gone to record and had never been received by the

land officers, I was informed of this by the plat clerk of the Huron land office in the spring of 1883, before I made pre-emption on said last quarter and got an abstract from the Huron land office, showing such to be the case. That in making said declaratory statement I believed I was stating the truth and not committing perjury and I make these statements as a reason for the refunding to me of the $150, purchase money paid for said one hundred and twenty acre tract; that I was then an ignorant man as to the land laws and relied entirely on what was told to me by my attorney and the land officers. . . . I never knew until in the year 1885, that my (first) declaratory statement . . . had been accepted by the Mitchell land office and gone to record, but on the contrary I was informed by my attorney it had never been accepted . . . and I thought I had a right to depend on his representations.

Upon review of the record herein, I find that claimant has not acted in good faith, that his statements are contradictory and can not be accepted to disprove the record evidence in the case which sufficiently shows that he testified falsely in making his final proof and thereby forfeited the money which he paid for the land covered by his second filing and entry John Carson (9 L. D., 160).

The alleged mortgagee did not appeal from the decision of your office, nor does it appear from any record in this case that his mortgage was foreclosed either before or since the entry was held for cancellation.

I am convinced there was no error in the decision appealed from and the same is accordingly affirmed.

HOMESTEAD ENTRY—ALIENATION.

JAMES C. KANE.

Where one alienates a portion of the land covered by his cash certificate, before patent issues, he does so at his peril, for if the reviewing officers subsequently find the final proof so unsatisfactory that it must be wholly rejected and new proof required, he can not then truthfully make the affidavit required by section 2291, R. S., and his entry must in consequence be canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 6, 1891

On March 25, 1884, James C. Kane made homestead entry of the S. ½ SE. ¼ Sec. 30, and N. ½ NE ¼ Sec. 31, T. 4 N., R. 29 W., McCook, Nebraska. He made commutation proof April 3, 1885, and final certificate duly issued.

On March 3, 1888, your office suspended his cash entry and rejected the final proof offered in support thereof and allowed the entryman to submit new proof during the lifetime of the entry. Kane appealed, and on March 29, 1889, this Department affirmed the action of your office, and held that the proof then submitted was not satisfactory, in failing to show that he established and maintained a residence in good faith upon the land.

On October 31, 1889, he submitted new proof, in pursuance of the requirement above set out. By your office letter of November 20, 1889,

you reject the same and hold his homestead entry for cancellation. He again appeals to this Department.

His new proof shows additional improvements, consisting of a new house, stable, and ten acres of breaking, valued at $120; that he re-established his residence on the land April 20, 1889, and continuously resided thereon. But the proof shows that he traded eighty acres of the land for other land in 1885.

The proof submitted on April 3, 1885, having been rejected, proof *de novo* was required. Although the cash certificate was issued upon the proof, yet claimant was required to make new proof, and the first having been held for naught, it was the same as if no proof had been submitted. Before the new proof was submitted, he had alienated a part of the land, and was therefore unable to make the affidavit which is expressly required by section 2291—"that no part of said land has been alienated, except as provided in section twenty-two hundred and eighty-eight."

This is such an act as can not be cured, however well he may have complied with the law in other respects; nor will the fact of the issuance of his final certificate protect him, for it was given upon proof which was afterwards deemed unsatisfactory, and new proof was required. A purchaser of land on the faith of a cash certificate takes an equity only, and is charged with notice of all defects in the title. (Richardson *v.* Moore, 10 L. D., 415). And where one alienates a portion of the land covered by his cash certificate, before patent issues, he does so at his own peril, and if the reviewing officers subsequently find that the proof is so unsatisfactory that it must be wholly rejected and new proof required, he can not then truthfully make the affidavit required by section 2291, and the entry must necessarily be canceled.

For the reasons above given, your decision is affirmed, and the cash entry held for cancellation.

RAILROAD GRANT—DEFINITE LOCATION—ACT OF JULY 25, 1866.

CALIFORNIA AND OREGON R. R. CO. *v.* PICKARD.

The right of the company under the grant of July 25, 1866, attaches to the granted sections when the map designating the line of road is filed with the Secretary of the Interior, and accepted by that officer.

Secretary Noble to the Commissioner of the General Land Office, February 6, 1891.

In the case of the Oregon and California R. R. Co. *v.* George Pickard, said company appeals from your office decision of July 12, 1889, rejecting its claim to the NE. ¼, Sec. 21, T. 2 S., R. 5. E., Oregon City, Oregon.

Said tract is "within the twenty mile granted limits" of the grant to the appellant, act July 25, 1866 (14 Stats., 239), and also within the

limits of the withdrawal of November 13, 1870, for the Northern Pacific Railroad company.

It was embraced in the homestead entry of Lorenzo D. Cross, made January 12, 1870, and canceled September 19, 1883.

On October 1, 1883, Joseph Weber made homestead entry for the land. Both Weber and wife subsequently died leaving a minor child, whose guardian conveyed the land to Pickard under section 2292, R. S.

By the decision appealed from, your office found that the appellant's rights "attached in this vicinity" on January 29, 1870, and that the land, being then covered by the Cross entry, was excepted from the operation of its grant and subject to entry by Weber.

The appeal here is based upon the allegation that your office erred in finding that the appellant's rights attached as aforesaid on January 29, 1870.

In support of this allegation it is set out that the records of your office show that the map of the survey of the appellant's road opposite the land was filed in your office October 29, 1869, that the same was transmitted to the Department November 4, 1869, and returned with the approval of the Secretary (Cox) January 29, 1870.

Section 2 of the act of July, 1866, *supra*, after describing the extent of the grant to the appellant provides that upon filing "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."

Counsel insist that under this provision the rights of the appellant attached to the lands designated by said map showing some sixty-one miles of its route on October 29, 1869, when the same was filed and not as held by your office on January 29, 1870, the date of its approval by this Department.

This contention is, I think, disposed of adversely to the appellant by the decision of the Department in the somewhat similar case of Prindeville *v.* Dubuque and Pacific R. R. Co. (10 L. D., 575).

In that case the Department declared that in 1882 the supreme court in the case of Van Wyck *v.* Knevals (106 U. S., 360), held that the right of a land-grant company attached to its granted lands when a map designating its line of road is filed with the Secretary of the Interior "and accepted by that officer."

This ruling the Department further declared to be a modification of its decision of November 30, 1875, in the case of Swift *v.* California and Oregon R. R. Co., (2 C. L. L., 733) upon which counsel rely.

I must accordingly find that your office has correctly held the rights of the appellant to have "attached in this vicinity" on January 29, 1870. Consequently, the tract in question, having been excepted from

the appellant's grant by the prior entry of Cross, was subject to the entry of Weber under whom Pickard now claims.

The judgment of your office is affirmed, the appellant's claim to the land is rejected and Pickard's application for patent thereto may be considered.

The Northern Pacific Railroad company is not now in the case.

UNIVERSITY LANDS—APPLICATION FOR RE-INSTATEMENT.

STATE OF MINNESOTA.

An application of the State in 1889, for the re-instatement of university selections canceled in 1882 on the governor's relinquishment, comes too late for favorable action, where most of the lands have in the mean time been sold by the United States.

Secretary Noble to the Commissioner of the General Land Office, February 6, 1891.

By the act approved July 8, 1870 (16 Stat., 196), the Commissioner of the General Land Office was authorized and directed "in adjusting the claim of the State of Minnesota to lands for the support of a State university to approve and certify selections of land made by the governor of said State, the full amount of seventy-two sections (40,080 acres), mentioned in the act approved February 26, 1857" (11 Stat., 166), without taking into account the lands that were reserved at the time of the admission of the State into the Union, and donated to said State by the act approved March 2, 1861 (12 Stat., 208).

By your office letter of November 12, 1889, you denied the application made by Mr. W. P. Jewett, on behalf of the State of Minnesota, for a re-instatement of canceled selections, Duluth district, and this appeal is taken from that judgment.

The following are the grounds of error assigned:

1. In holding that said State has no right to reinstatement upon the grounds stated by the Commissioner.
2. Error of the Commissioner in holding that the application is a motion to make new selections, and not for re-instatement of the selections erroneously disregarded.
3. Error by the Commissioner in not considering the charges against Buchanan affecting his good faith in making entry of the lands.
4. General error of law in denying the right of the State, and in rejecting its application for the re-instatement of the selections involved.

Under the grant above referred to, certain tracts were selected by the State in list No. 2, and filed in the local office December 12, 1873.

On November 26, 1881, a list, consisting of thirty-nine subdivisions and covering 4,797.09 acres, and purporting to be a descriptive list of the lands selected and claimed by the State by list filed December 12,

1873 (above referred to), was filed in the local office. Appended to this list is the following:

I, J. S. Pillsbury, Governor of the State of Minnesota, do hereby release and relinquish to the United States all the right, title, claim, or interest which the State of Minnesota has acquired in the lands above described, and hereby request, in behalf of the State of Minnesota, that the selection by the State of said lands be canceled.

In pursuance of the governor's request, the selections were canceled upon the records, May 20, 1882, and cash entries were afterwards made upon most of the relinquished tracts.

On September 30, 1889, Mr. Jewett, on behalf of the State, requested a cancellation of the cash entries, and a further consideration of the claims of the State under her original selections in behalf of the university. This request was accompanied by affidavit, made by Ex-Governor John S. Pillsbury, in which he states that on November 20, 1881, as governor of the State of Minnesota, he gave notice that the State relinquished the land;

and affiant is informed and verily believes that in 1885 W. P. Jewett, land agent of the State of Minnesota, notified the proper authorities at Washington not to restore said lands, or any of them, until the State could make a new examination of them and report the results of said examination; . . that said Jewett was notified that the said lands would not be restored until said report was made; that thereafter the said Jewett notified affiant, as chairman of the executive committee of the University of Minnesota, that said lands would be held subject to the further order of the State; and affiant employed one James A. Buchanan, in about the month of ——— 1887, to make an examination of the said lands; that affiant believed Buchanan was acting for the Auditor of State, and in pursuance of his employment he examined the lands and made his report to affiant; that affiant paid Buchanan the sum of $86 for the work; . . that this affidavit is made for the purpose of obtaining the grant of so much of said lands as may be desired to the State of Minnesota as a part of the university land grant.

In a letter, dated February 26, 1889, Mr. Jewett speaks of Buchanan's employment to re-examine the lands and report the character thereof, and that he did make the examination, but instead of making his report to Governor Pillsbury, he made application at the land office, about May 27, 1888, to enter these lands at private cash entry, at minimum price; that the officers improperly allowed the entries—being upon lands which had never been offered at public sale; that the lands have been entered by various parties. He asked a suspension of the cash entries, and that a special agent be sent to examine the lands and attach the logs cut therefrom.

In your said office decision you say: "If any request for re-instatement of the selections or for reservation thereof was ever made, I am unable to find trace of it in this office;" that your records fail to show any pledge given to Mr. Jewett for the re-instatement of the cancellations as referred to in Governor Pillsbury's affidavit; that, although an agreement of the kind may have been made by a clerk to Mr. Jewett, six years after the cancellation, such agreement could have no official recognition or significance. It will be observed that the cancellation

was entered on the records May 20, 1882, on the request of Governor Pillsbury, made November 20, 1881.

Conceding that Mr. Jewett, as the State agent, in 1885, "notified the proper authorities . . . . . not to restore said lands," such notification was made three years after the cancellation of the selections; and it could only have been regarded as an application to make new selections.

On September 30, 1889, seven years after the cancellation, Mr. Jewett asks a further consideration of the claim of the State under her original selections. Most of the lands embraced therein were then taken at private cash entry, and without considering the question as to the validity of these entries, the application of the State, so tardily made, must be denied.

Your decision denying the motion to make said re-instatement is accordingly affirmed.

APPLICATION FOR SURVEY ISOLATED TRACT.

JAMES P. BUTCHER.

The practice of the Department in passing upon applications for the survey of isolated tracts of land, formed since the original survey of the township, is to refuse such application, where the Commissioner recommends such action, and where objection is made to the survey, unless the refusal of the application denies to the applicant a right under the general land laws.

Secretary Noble to the Commissioner of the General Land Office, February 7, 1881.

I am in receipt of your communication of the 20th ultimo, transmitting for my consideration the application of James P. Butcher, of Zora, Missouri, for the survey of an island situated in the Osage river, in Sec. 5, T. 40 N., R. 19 W., 5th P. M., Missouri, which you recommend be disallowed, in view of the claims of the owners of the lands upon the shores opposite the island, and the small amount of improvements made thereon by one Criss Williams, and not by the applicant.

The practice of the Department, in passing upon these applications for survey of isolated tracts of land formed since the original survey of the township, has been not to grant said applications where the Commissioner of the General Land Office recommends that they be disallowed, and where objection is made to said survey, unless the refusal to grant said applications would deny to the applicants a right under the general land laws.

I see nothing in this application to take the case out of the general rule, and it is therefore disallowed.

SIOUX HALF BREED SCRIP—LOCATION—UNSURVEYED LAND.

ALLEN ET AL. *v.* MERRILL ET AL. (ON REVIEW).

One who by stipulation agrees to be impleaded in a pending proceeding with "the same force and effect" as though he originally had been made a party thereto, can not be heard to object to the authority of the Department to pass upon the validity of his claim thus presented.

Sioux half breed scrip is intended by the statute as evidence of a purely personal right in the half breed to locate and receive patent for the number of acres named therein, and can not be used as a means to secure title to lands except for the sole benefit of the half breed himself.

A location made by one acting in his own interests, and not for the use and benefit of the half breed, is in contravention of the statute under which the scrip is issued.

The right to locate this scrip on unsurveyed land can only be exercised where the half breed has made improvements on such land, and the improvements in such case are a condition precedent to the location, and must be made for the use and benefit of the half breed.

Circular regulations, not in conflict with the statute under which they are issued, have all the force and effect of law.

The validity of all rights claimed and set up by adverse parties may be properly determined on the final disposition of the case.

Secretary Noble to the Commissioner of the General Land Office, January 28, 1891.

Three several motions for review of departmental decision of February 18, 1889, in the case of Joseph W. Allen *et al. v.* Lewis Merrill *et al.* (8 L. D., 207), have been filed by parties claiming to be aggrieved by that decision.

The parties complaining are Lewis Merrill, who claims to act as attorney-in-fact for Joseph Brown, a half-breed Sioux Indian, and to represent William D. Williams, as attorney-in-fact, by substitution, for two other half-breed Sioux Indians, Mary B. Young (formerly Mary B. Lagree) and Lewis Carron, sole heir at law of Napoleon Carron, deceased; Edmund T. Winston, who claims to represent W. W. Hale as attorney-in-fact for Sophia Huot, also a half-breed Sioux Indian; and Michael H. Brown, claiming in his own right as homestead entryman. By the decision complained of certain locations made by Merrill and Winston, respectively, of certificates or scrip issued severally to the aforesaid half-breed Sioux Indians, under the act of July 17, 1854 (10 Stat., 304), covering lots 5 and 9, in Sec. 26, and the N. ½ of the NW. ¼, and SW. ¼ of the NW. ¼ of Sec. 36, T. 16 N., R. 55 E., Miles City land district, Montana, and the homestead entry of Brown, for said lots 5 and 9, were directed to be canceled.

It appears that the township embracing the lands in question was surveyed in the field between August 23, and September 14, of the year 1881. The township plat was filed in the local office June 12, 1882, and the lands were opened to entry, after published notice for that purpose, June 19, 1882.

The further facts shown by the record, so far as deemed pertinent to the questions presented by these several motions, and about which there appears to be little or no material controversy, are as follows:

On August 7, 1880, there was presented at the local office at Helena, Montana, Sioux half-breed certificate, or scrip, No. 310 D., issued November 24, 1856, under the act aforesaid, to Sophia Huot, calling for one hundred and sixty acres of land, to which there was attached a certain paper purporting to be a letter of attorney, and to have been executed January 3, 1871, by said Sophia Huot and her husband, authorizing one W. W. Hale of Ramsey county, Minnesota, "to select and locate at any land office in the United States the lands to which we may be entitled" by virtue of said certificate or scrip, and to ask for and receive a patent for the same. Accompanying these papers were two affidavits, executed by Edmund T. Winston, presumably by whom the papers were presented, dated respectively August 6, and August 7, 1880. In one of these affidavits, namely, that of August 6, it is stated that the "improvements placed upon the land claimed by Sophia Huot consist of one log house, sixteen by eighteen feet, now under the course of construction." The affidavit of August 7, is partly printed and partly written on the back of a paper that purports to have contained on its face at that date printed forms only, with blanks not then filled out, of a certificate of receipt by the local officers of Sioux half-breed scrip; of an application to locate lands in satisfaction of Sioux half-breed scrip; and of a certificate of location. The blanks in these several forms appear to have been filled out at Miles City, Montana, on December 23, 1883. The certificate of receipt describes the scrip as No. "310, letter D", and the application describes the land as lots 5 and 9, Sec. 26, T. 16 N., R. 55 E., and is signed "Sophia Huot, by W. W. Hale, her attorney in fact." The certificate of location states that on the day of its date (December 20, 1883,) the scrip was located on the land thus described, containing 72.27 acres. In said affidavit it is stated by Winston that "I am acquainted with the unsurveyed tract of land described within, by personal examination of the same on the 25th day of July, 1879, and there was no person living on the same at that time, nor were there any improvements on it except those of Sophia Huot, nor any person claiming said tract." It further appears that on August 7, 1880, the receiver of the Helena office issued a receipt in the name of Sophia Huot, for "Sioux half-breed scrip No. 310 D., dated November 24, 1856, said scrip to be located" upon the land therein described, "when the same has been surveyed and the plat thereof filed in this office." The letter of attorney given by Huot to W. W. Hale, as aforesaid, contains no provision allowing the substitution of any one to act in the latter's stead, and there does not appear to have been anything in the papers as presented by Winston at the Helena office authorizing him to act, either for Huot, or for her attorney, Hale; nor was there anything to show who placed the improvements described on the land,

or to whom they belonged, nor that such improvements were, in fact, on the land at that time.

On October 13, 1880, Lewis Merrill, claiming to act as attorney for Joseph Brown, presented at the local office at Miles City, Montana, Sioux half-breed certificate, or scrip No. 596 D., issued November 24, 1856, under the act aforesaid, in the name of said Brown, and calling for one hundred and sixty acres of land. Attached to this scrip was a paper purporting to be a letter of attorney, without power of substitution, and to have been executed by said Brown February 28, 1872, authorizing Lewis Merrill "to select and locate at any land office in the United States the land to which I may be entitled by reason of my 'Sioux half-breed Lake Pepin reserve' scrip, to wit: Number 516, letter D, for 160 acres," and to ask for and receive a patent for the same. Accompanying these papers were two affidavits of Merrill, both dated October 13, 1880. In one of these affidavits Merrill states "that the improvements placed upon the land claimed by Joseph Brown consist of one house about fourteen feet by twenty feet, partially completed, and now in course of construction;" and in the other he says, "I am acquainted with the tract of land described within by personal examination of the same on the twentieth day of August, 1880, and that there was no person living on the same at that time, nor were there any improvements on it, except those of Joseph Brown, nor any person claiming such tract." This latter affidavit is written on the back of a paper which purports to have then contained on its face blank forms only of an application to locate Sioux half-breed scrip, and for the certificates of the local officers, of the receipt of the scrip and of the location thereof. The blanks of these several forms purport to have been filled out September 19, 1882, that being the given date of each of them. As thus filled out, the certificate of receipt refers to the scrip as "No. 596, letter D," and the application describes the land applied for, as the southeast fractional quarter, or lots 5 and 9, Sec. 26, T. 16 N., R. 55 E., and is signed "Joseph Brown by Lewis Merrill, his attorney in fact." The certificate of location states that said scrip was on the day of the date thereof (September 19, 1882,) located on the tract thus described, containing 72.27 acres. It also appears that on October 13, 1880, the receiver issued his receipt in the name of Joseph Brown, for "Sioux half-breed scrip number 596, letter D, ... to be located" on the land therein described, containing one hundred and sixty acres. It does not appear to whom this receipt was delivered. On the margin of said letter of attorney appears the following, under date of September 19, 1882: "I, Lewis Merrill, attorney in fact, do hereby apply to correct clerical error by which 516 was written by inadvertence and mistake instead of 596." On September 20, 1882, Merrill made affidavit before the register, in which he stated

that on the 13th of October, 1880, in filling up the blank space for the figures describing the scrip certificate of Joseph Brown, he did so in his own proper person and in

his own handwriting, as now appears on the face of the power of attorney of said Brown, constituting said Merrill his attorney-in-fact; that the number of said scrip certificate was called off to him by either the register or receiver of the land office and filled up from said calling off; that it now appears that 516 was written instead of 596; . . . . . that said error of 516 instead of 596 was an unintentional clerical error, made by inadvertence, and that his full purpose and intent in filling in said number in the power of attorney was to make the number the same as that on the scrip certificate.

These statements are corroborated by the unsworn certificate of the register. It thus appears that this power of attorney, at least as to the description of the scrip, was given in blank, and that Merrill, the alleged attorney, filled out these blanks more than eight years after the date of its purported execution. It was originally in printed form, with blanks for the name and residence of the maker, the name and residence of the attorney, and the description of the scrip. These blanks are all filled out in the handwriting of Merrill, and there is no distinguishable difference, either in the color of the ink used, or in the age of the writing, between the matter written in any one of these blanks as compared with that written in all or any of the others.

It further appears that on October 13, 1880, Merrill presented at the Miles City land office Sioux half-breed certificate, or scrip No. 236 C, issued November 24, 1856, under the act aforesaid, to "Mary B. Lagree, of about the age of five years," calling for eighty acres of land, attached to which was a paper purporting to be a letter of attorney, "with full power of substitution," and to have been executed June 14, 1872, by Mary B. Young and her husband, authorizing one Daniel G. Shillock, of Minnesota, "to select and locate, at any land office in the United States" the lands to which she "may be entitled" by virtue of the aforesaid certificate, or scrip, and to ask for and receive the patent therefor. By endorsement on the back of said paper, dated July 15, 1873, and apparently duly executed, it appears that Shillock substituted one William D. Williams as attorney, in his stead, for the parties named, with like authority in all respects. Accompanying these papers were two affidavits of Merrill, both dated October 13, 1880, in one of which he states "that the improvements placed upon the land claimed by Mary B. Young (formerly Lagree) consist of one log house, about ten by fifteen feet, partially completed and now in course of construction;" and in the other, that "I am acquainted with the tract of land described within, by personal examination of the same on the twentieth day of August, 1880, and that there was no person living on the same at that time, nor were there any improvements on it except those of Mary B. Young . . . . . nor any person claiming said tract." This latter affidavit, as in the case of Joseph Brown, is on the back of a paper which purports to have contained on its face at that date printed blank forms only, of an application for the location of Sioux half-breed scrip, and for certificates by the local officers of the receipt of the scrip, and of the location of the same. These blank forms appear to have been filled out

September 19, 1882. As thus filled out, the certificate of receipt refers to the scrip as "No. 236, letter C," and the application describes the land sought to be located in satisfaction thereof, as the N. ½ of the NW. ¼ of Sec. 36, T. 16 N., R. 55 E., and purports to have been signed by William D. Williams, as attorney in fact for said Young and her husband. The certificate of location states that on the day of its date (September 19, 1882,) the scrip was located on the tract thus described, containing eighty acres. In a further affidavit by Merrill, made before the register September 20, 1882, he states that the house spoken of in his former affidavit as in the course of construction, "was fully completed and finished, and other further improvements made upon said land, to wit, plowing for a garden, and duly marking by distinct stakes and mounds, the corners of said lands, and that from time to time continuously since further improvements have been made." No receipt appears to have been issued by the receiver in this case, for the scrip on the day of its presentation.

It also appears that on October 13, 1880, said Merrill presented at the Miles City local office Sioux half-breed certificate, or scrip No. 83 B, calling for forty acres, issued under the act aforesaid, November 24, 1856, to "Napoleon Carron, of about the age of three months," attached to which was a paper purporting to be a letter of attorney, "with powers of substitution and revocation," and to have been executed May 23, 1872, by Lewis Carron, "sole heir at law of Napoleon Carron, deceased," authorizing Daniel G. Shillock "to select and locate, at any land office in the United States," the lands to which he "may be entitled" by virtue of said certificate or scrip, and to ask for and receive the patent for such lands. By endorsement on the back of this letter of attorney, dated July 15, 1873, and apparently duly executed, William D. Williams was substituted by Shillock to act in the premises in his stead, with like authority, in all respects. Accompanying these papers were two affidavits of Merrill, each dated October 13, 1880, and stating, "that the amount of improvement placed upon the land claimed by Lewis Carron is one foundation for a house, about ten feet by twelve feet, in course of construction," and the other, that "I am acquainted with the tract of land described within, by personal examination of the same on the twentieth day of August, 1880, and that there was no person living on the same at that time, nor were there any improvements on it except those of Lewis Carron, nor any person claiming the tract." This affidavit, as in the other cases, is on the back of a paper which purports to have contained on its face at that time printed blank forms only, of an application for the location of Sioux half-breed scrip, and for certificates of the receipt of the scrip by the local officers, and of the location of the same. The blanks of these several forms appear to have been filled out September 19, 1882, that being the date they respectively bear. The certificate of receipt refers to the scrip as "No. 83, letter B," and the application describes the land sought to be located in satisfaction

thereof, as the SW. ¼ of the NW. ¼, Sec. 36, T. 16 N., R. 55 E., and purports to have been signed by said Williams as attorney in fact for Lewis Carron. In the certificate of location it is stated that on the day of its date, the scrip was located on the tract thus described, containing forty acres. It further appears that on October 13, 1880, the receiver issued his receipt in the name of Lewis Carron, sole heir at law of Napoléon Carron, deceased, for "Sioux half-breed scrip No. 83, letter B, for forty acres, dated November 24, 1856, to be located upon" the tract of land therein described, "when the same has been surveyed and the plats thereof filed in this office." It does not appear to whom this receipt was delivered, if to any one.

In neither of the three cases represented by Merrill does there appear to have been presented with the scrip, or with the application to locate the same, any affidavit, or other evidence, showing when, by whom, or under whose direction, the alleged improvements were placed upon the land described, nor for whose use and benefit such improvements were made; nor does it appear by what authority Merrill assumed to act in the cases of Mary B. Young and Lewis Carron, either for the half-breeds, or as agent for Williams, their alleged attorney.

On January 28, 1882, one Thomas Kean filed in the local office his corroborated affidavit, alleging that on April 19, 1881, he settled on the NW. ¼ of said section 36, with the intention of claiming the same under the pre-emption law; that his improvements consist of a log dwelling house, and that he has continuously resided thereon ever since his said settlement. The affidavit then refers to the filings by Merrill of the certificates, or scrip, of said half-breeds, Young and Carron, as covering portions of his claim, and denies the validity of said filings, alleging that none of the parties "ever made legal settlement on this land as required by the statute," or "ever lived in Glendive," and asking that the title to said lands be withheld and an opportunity afforded him to produce evidence in support of his pre-emption claim. No action appears to have been taken on this protest at the time of its filing.

On June 19, 1882, Joseph W. Allen was allowed to make entry of said lots 5 and 9, section 26, under the soldiers' homestead act of June 8, 1872 (17 Stat., 333). The papers appear to have been endorsed by the receiver, "Allowed subject to S. H. B. S. located by Lewis Merrill, attorney-in-fact." On the same day Thomas Kean filed his pre-emption declaratory statement for said NW. ¼ of Sec. 36, alleging settlement April 19, 1881.

On September 4, 1882, Allen and Kean filed in the local office a paper, in which they asked, as adverse claimants, that the Huot scrip be adjusted in accordance with the regulations in regard to compactness, but reserved all questions of fact. On the same day, they filed another paper, calling attention to the fact that the letter of attorney given by Joseph Brown, authorized the location of scrip "No. 516, letter D," and not that which was presented by Merrill, as aforesaid, and asking that

the locations (so called) made by Merrill for said Brown, Young and Carron, "be rejected and no adjustment made thereof that will interfere with their rights and title," reserving "all questions of fact as to improvements, etc., by the scripees." On September 18, 1882, Merrill filed a paper, alleging that on August 20, 1880, he located the Joseph Brown scrip "No. 596, letter D," on the lands claimed; that proper improvements were made on the same; and he denied that Winston or any one else had made any improvements thereon for Huot, or that a reasonable adjustment of the Huot scrip would include any part of section 26. He offered to make proof of these statements.

On September 19, 1882, Michael H. Brown was allowed to make homestead entry for said lots 5 and 9 of section 26. He alleged settlement November 15, 1881.

On September 22, 1882, Allen and Kean filed in the local office a paper stated by them to be an appeal from the action of the register and receiver, in adjusting and locating the several pieces of scrip represented by Merrill (presumably on September 19, 1882), alleging, in substance, that Merrill had not submitted the evidence required by the regulations, properly designating the tracts embracing the improvements claimed; that the several applications were not accompanied by any "affidavit of the Indian or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian, ... and that they are for his personal use and benefit; that the power of attorney alleged to have been given by Joseph Brown is invalid;" that the scrip was not adjusted in accordance with the maps and descriptions filed; that gross irregularities appear on the face of the papers; and asking that the action of the local officers in adjusting and locating the scrip deposited by Merrill, be set aside and said locations rejected.

On June 22, 1883, there was filed in your office by Charles and William B. King, attorneys of this city, a paper reciting the proceedings theretofore had relative to the several pieces of scrip represented by Merrill, contending that there have been no allegations sufficient to put in question the integrity or validity of said claims, but concluding with the request, in the event the Commissioner should think otherwise, that no time be lost in ordering a hearing to determine whether or not the requirements of the act of July 17, 1854, had been met by said scripees.

By letter of your office, dated September 6, 1883, the various claims to the several tracts in controversy were briefly stated, together with the allegations contained in the several protests filed by Allen and Kean, and in view thereof, and in order "that the rights of all parties in interest" might be protected, a hearing was ordered to determine the validity of the several scrip locations.

On September 19, 1883, the local officers transmitted to your office new plats of survey of the Huot claim, accompanied by a letter from Winston, asking "that an adjustment be made at an early date and a

hearing ordered." It further appears that on September 29, 1883, your office adjusted the Huot scrip, so as to embrace lots 5 and 9, section 26, subject to any prior adverse rights. On November 23, 1883, the attorneys for Merrill filed in your office a protest against said adjustment of the Huot scrip, alleging that the same was in prejudice of his previously acquired rights.

On January 7, 1884, it was stipulated in writing by the several parties claiming an interest in the lands in question, including Winston, that said Winston should be impleaded in the hearing then pending, without further delay, the same as though he had been made a party to the contest at its commencement. This stipulation was transmitted to your office January 16, 1884, and by telegram of March 13, 1884, the local officers were instructed to allow all the parties interested to intervene. At the hearing, Allen, Kean, Brown and Winston appeared, each in person and by attorney. Merrill appeared by attorney alone. They all submitted testimony in support of their respective claims. The hearing was concluded April 11, 1884.

On August 21, 1884, the local officers rendered their decision, in which they awarded to Sophia Huot lot 5, Sec. 26, and recommended that her claim as to lot 9 be canceled. Lot 9 was awarded to Joseph Brown and his claim as to lot 5 was held for cancellation, as were also the homestead entries of Allen and Brown covering said lots 5 and 9. To Mary B. Young was awarded the NW. ¼ of the NW. ¼ of Sec. 36, and her claim as to the NE. ¼ of the NW. ¼ of said section was held for cancellation. The SW. ¼ of the NW. ¼ of said Sec. 36 was awarded to Lewis Carron, and the pre-emption filing of Thomas Kean, as to the tracts awarded to Young and Carron, was held for cancellation. From this decision Merrill, Winston, Allen, and Kean, each appealed.

It is proper that the act (July 17, 1854, *supra*), under which the scrip herein mentioned was issued to the half-breeds named, together with the departmental regulations adopted from time to time, in aid of the administration thereof, should be next referred to.

By said act of Congress, the President of the United States was authorized--

to exchange with the half-breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit by the ninth article of the treaty of Prairie du Chien,"

dated July 15, 1830, and for that purpose—

to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title and interest, according to such form as shall be prescribed by the Commissioner of the General Land Office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of said grant or reservation *pro rata* among the claimants, which said certificates or scrip may be located upon

any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements: *Provided,* That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reseservation: *And provided further,* That no transfer or conveyance of any of said certificates or scrip shall be valid.

The first instructions to local land officers under the act were by circular of March 21, 1857 (1 Lester, 627). The circular described the several classes of lands upon which the scrip was locatable, called attention to the non-assignability thereof, directed that the same must be located acre for acre, in the name of the scripee, either in person, or by his or her guardian or duly authorized agent, and further provided that:

Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements . . . . . his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix, with certainty, the exact locality wanted, serve as the best notice in our power to settlers, that conflict may be avoided, and enable you, when the public surveys are made, to designate the legal subdivisions embracing the location.

A second circular was issued February 22, 1864 (1 C. L. L., 721), in which it was provided, relative to locations upon unsurveyed lands, that

Where the half breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor on unsurveyed land, and, of course, cannot adjust his location until after the return of the township plat to the district land office. Hereafter, and within three months, he should repair to such land office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statements.

Another circular was issued January 29, 1872 (1 C. L. L. 723). By this circular registers and receivers were directed, with the view to protect the interests of the government, "and to carry out the law in its meaning," to see that certain requirements therein mentioned should be strictly complied with in all applications to locate scrip on unsurveyed lands. The stated requirements are:—

1st. That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made *by* or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land, and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

2d. The filing of the scrip must be considered in the character of a location, and should such filing not be followed within the time prescribed by our circular of Feb-

ruary 22, 1864, relating to the location of this scrip, by an adjustment to the official plat of survey, you will immediately thereafter, adjust the same yourselves, as near as may be practicable, from the map and description filed by the party, and forward the same to this office with regular abstract and reference to your action; or, if you are unable to determine the locality of the land in the public surveys, you will report the fact, forwarding therewith all the papers in the case, for our action.

Further instructions were issued November 12, 1874 (1 C. L. L., 725), wherein it was directed that in case of the death of a scripee, intestate, the scrip might be located by his legal heirs; if adults, in person or by attorney, and if minors, by their guardian, or by an administrator. In either case, it was provided that "the application to locate must be accompanied by a certificate under seal of a court having probate jurisdiction, to the effect that the scripee died intestate, and that the parties claiming to be heirs are such in fact, and the only heirs."

On May 28, 1878, another circular, amendatory of the circulars of 1864 and 1872, was issued, in which the instructions contained in said former circulars, hereinbefore quoted, were reiterated. (2 C. L. L., 1355.)

On December 2, 1887, your office, acting upon the several appeals aforesaid, held that the evidence submitted in support of the different scrip locations failed in every instance to show that improvements had been made upon the land claimed, by, or under the personal supervision or direction of the Indian, or for his or her personal use and benefit, or, in either of the cases, that the Indian ever had any personal connection with the land; that the Indians had, in fact, never seen the land, or improvements, or had any interest in the latter, or any personal connection whatever with either; that it was not the intention of the law, "in providing for the issue of this scrip and making it unassignable . . . . . that it should become the means by which speculators might appropriate choice tracts of land prior to survey, under the transparent pretense of protecting the Indians in their improvements thereon;" that the proofs required by official regulations had not been submitted, and the several applications, for that reason, should have been rejected by the local officers; that the alleged improvements were not a *bona fide* fulfillment of the legal conditions, but a clear attempt to evade the law; and in view thereof the several scrip locations were held for cancellation. It was further held that Michael H. Brown had failed to assert his settlement claim within three months after the filing of the township plat, and his entry was therefore held for cancellation, and that of Joseph W. Allen allowed to stand. The pre-emption filing of Thomas Kean was also allowed to stand. From this decision Merrill, Winston and the entryman Brown, severally, appealed.

Upon said appeals the case was argued by counsel, both orally and by printed briefs, before my predecessor, Secretary Vilas, who rendered the decision now complained of. In that decision, after a statement of the proceedings in the matter of the several scrip locations, less elaborate, but not materially different from that herein contained, it is further

stated, in substance, that the facts relative to these locations, as freely admitted by counsel who have argued the questions involved, are that in every instance the half-breed sold his scrip prior to the attempted location of it, and received from the purchaser the agreed price therefor; that the transaction was consummated by the delivery of the scrip and the execution and delivery therewith, by the half-breed, of two letters of attorney, in printed form, but left in blank as to the name of the attorney and generally as to all the particulars of description, by one of which authority was given to locate the scrip and do whatever might be necessary to that end and to obtain patent, and by the other, to sell and convey any lands which the half-breed might thereafter acquire in the United States; that the manner of using these letters of attorney has been to file with the scrip the one authorizing the location, not disclosing the existence of the other, and when the location is made, a conveyance of the land is executed by some one by virtue of the other letter of attorney, the blanks of which are filled out accordingly; and it was held, in effect, that the scrip mentioned conferred upon the half-breed a purely personal right; that while no restriction was put upon his power to sell the land when located, until that time, no other person could acquire any share or interest in the right, nor could the half-breed transfer to another the personal privilege thus conferred upon him to locate the land; that the transfer of the scrip being prohibited by statute, the right of location could not be recognized in one claiming such right by virtue of two letters of attorney, one to locate the scrip and the other to sell the land when such location is made, by means of which a transfer of the scrip was in fact effected; that the right of location upon unsurveyed lands is limited by the requirement that the half-breed shall have made improvements thereon; that improvements made not by or for the use of the half-breed, but for the immediate use and benefit of a party claiming the right of location by virtue of a letter of attorney, are not such improvements as meet the requirement of the statute; that, while a scrip location lawfully made may serve to pass the legal title to the land out of the United States, no title can be acquired under a location made by one for his own benefit, contrary to the statute and the regulations issued thereunder, nor does the adjustment of a scrip location to the lines of the public survey validate such location, if theretofore invalid. For these reasons, the decision of your office, so far as it held the several scrip locations in question for cancellation, as having been made in violation of the law and the regulations thereunder, was affirmed. It was further held that Michael H. Brown had settled on the land embraced by his entry under a contract to purchase the same and not to acquire title thereto under the homestead law. His entry therefore was directed to be canceled and that of Allen allowed to stand as being superior thereto, subject to his showing due compliance with the law,

Kean's filing was allowed to stand, and he was required to make new proof thereunder.

Numerous errors are alleged by Merrill and Winston, respectively, in their said motions, but it is not deemed necessary that these allegations should be here set forth in detail, inasmuch as they involve considerable repetition of substantially the same subject matter of complaint, and, with one exception, present the same questions. This exception is in the case of the Huot location. Winston contends that it was error to have attempted to determine the validity of this location upon the present record, claiming that there is no charge made by any one sufficient to call such location in question. In other respects the various contentions of these several appellants are practically the same, there having been no determination, either by your office, or by the Department on appeal, of their respective rights as conflicting claimants to lots 5 and 9, section 26. These contentions are, in effect,—

I. That upon the admitted facts, as above substantially set forth, the several scrip locations in question are within the intendment of the statute, and, so far as concerns their attempted impeachment on the ground of the alleged transfer of the scrip prior thereto, by means of its delivery, accompanied by two letters of attorney, executed by the half-breed, the one to locate and the other to sell the land, or for the reason that they were made by parties claiming the right by virtue of said letters of attorney, such locations should be sustained.

II. That the improvements required by the statute when a location is sought to be made upon unsurveyed lands, are for the purpose of giving notice of the claim, and do not constitute a condition precedent to such location, nor are they essential to the validity thereof, except as against an intervening adverse claim, without notice, prior to the adjustment of the location to the public survey.

III. That the departmental regulations issued under the act of Congress impose upon the scripee additional requirements to those prescribed in the act itself; that such regulations are in contravention of the statute and therefore unauthorized; and that it was error to exact a compliance with their requirements in the matter of the locations in question.

IV. That it has been the uniform practice of the Land Department in the past to issue patent upon scrip locations of the same character, and made in the same manner, as those in question, whereby a rule of executive construction has been established in the premises, in disregarding which the Department erred in the decision complained of.

By the attorney of Brown, the homestead entryman, it is contended, (1) that as the hearing herein was ordered for the purpose of determining the validity of the scrip locations, it was error to have considered the status of his entry, and (2) that the evidence does not justify the conclusion that he settled on his claim under a contract of purchase and not in accordance with the homestead law.

It is believed that the foregoing fairly presents all the material questions raised by the several motions for review, though much more briefly than therein stated.

On the same day the decision in this case was rendered, the Department decided two other cases, in each of which similar questions to those herein presented, relative to the location of Sioux half-breed scrip upon unsurveyed lands, were involved, and motions for review have been filed in those cases by the losing parties. In view of their similarity, the cases have been heard together on review. They have been twice orally argued by able counsel, and lengthy and exhaustive briefs upon the questions involved have also been filed.

I do not think the Department erred in passing upon the validity of the Huot location. It appears that after the hearing was ordered upon the protests against the locations made by Merrill, Winston submitted to your office plats of survey of the Huot claim and asked that an adjustment be made in accordance therewith, and a hearing ordered. The adjustment was accordingly made, covering tracts to which the former proceedings showed there were several adverse claims. These adverse claims were known to Winston, which fact is presumably the reason for his asking that a hearing be ordered. Against the location as made there was formal protest. True, the protest was not sworn to, but Winston, by stipulation with the parties to the hearing as already ordered, having agreed to be impleaded therein with "the same force and effect" as though he had been made a party to the contest at its commencement, and having been by direction of your office impleaded accordingly, he must be considered as having waived any defects in the formal proceedings calling in question the validity of his claim. It was certainly not for a vain purpose that he requested, or was allowed the privileges of the hearing. Having been accorded those privileges, and having taken full advantage thereof by submitting testimony in support of his claim, in the same manner as did other parties to the contest, the Department committed no error in my judgment in passing upon the question of his rights.

This brings me to consider the important question to be determined on this review. It relates to the validity of the scrip locations and is presented by the several joint contentions of the claimants thereunder.

It is perfectly plain to my mind, as a matter of original construction, that by the act of Congress the scrip in question was intended to be the evidence of a purely personal right in the half-breed to locate and receive patent for the number of acres of land therein called for. That this is true is clearly shown by the declaration in the act that no transfer or conveyance of the scrip shall be valid. If the scrip could not be legally transferred or assigned, it must necessarily follow that it could not be used as a means to acquire title to lands by any person other than the half-breed himself, or by his agent or attorney. It was, there-

fore, obviously intended for the sole benefit of the half-breed. It could be lawfully located only by him in his own proper person, or for his sole use and benefit, by his legally constituted agent or attorney. These propositions will scarcely be seriously questioned. They are the result of the clear and unambiguous provisions of the statute. In view thereof, do the locations in question come within the intendment of the law? That they were not made by the half-breeds in person is beyond question. In my judgment, it is equally clear, so far as the present record shows, that they were not made by a legally constituted agent or attorney, and for the sole use and benefit of the half-breeds named.

They were all upon unsurveyed lands. In the Huot case the location was made by Winston. The record fails to disclose any authority whatever in him to make the location or to act in any manner in the premises. The alleged letter of attorney authorizing the location was given to W. W. Hale, without power of substitution. Hale could not therefore have delegated to another the authority thus delegated to him by the half-breed, even if he had attempted to do so. There does not appear, however, to have been any such attempt. While the only application in the record purports to have been signed by Hale as the attorney for Huot, it bears date long after the location was made, and was evidently nothing more than a mere blank form at the date of the location and remained so until after the lands were surveyed. Hale had nothing to do with the location. He simply appears, at some time or other, to have signed a blank form of application and placed it in the hands of Winston, who made the location, not for the use and benefit of the half-breed, but for the sole use and benefit of himself. The record shows that his contract with Hale was that the latter, as attorney for the half-breed, should convey the lands to him after the location had been made, and that a conveyance was executed in pursuance of such contract. It thus appears that the Huot scrip was attempted to be used by Winston as a means to acquire title in himself to a portion of the public lands, plainly, in my judgment, in contravention of the letter and spirit of the statute.

It is vain to claim that the location was made by him as the attorney for the half-breed. In the first place, there is no evidence of any such attorneyship, as has been already shown, and, in the next place, it clearly appears that Winston acted for himself in making the location and not as the attorney for anybody. Action by an attorney as such necessarily implies the existence of a principal, and that the action is for the principal. Such was not the case here. As a matter of fact, the scrip had been sold by the half-breed, and coming in the course of time into the hands of Winston, he used it for his own benefit. It was evidently not contemplated that the half-breed should have any beneficial interest in the land sought to be acquired by the use of the scrip.

The several locations made by Merrill depend upon substantially the same state of facts, both as to the means used, and the results sought

to be obtained. Some differences, however, exist. In the cases of Young and Carron the letters of attorney were given with authority for substitution, and it appears that the attorney, Shillock, did substitute one Williams to act in his stead in the premises, but there is nothing to show that Merrill had an authority directly or indirectly from the half-breeds to make the locations. In the case of Joseph Brown, if the letter of attorney be accepted as genuine according to the purport of its face, it follows, necessarily, that Merrill acquired no right by virtue of that power to locate the scrip in question. He could not, under that power, locate any other scrip than that therein described, namely: "No. 516, letter D." If, on the other hand, we go outside the letter of attorney to seek an explanation of the discrepancy between the scrip located and that therein described, it appears, according to Merrill's own showing, that the alleged letter of attorney was, when signed by the half-breeds, nothing more than a mere blank form, and therefore carried with it no authority for any purpose. It is difficult to conceive how it can be seriously claimed that this letter of attorney gave Merrill any authority concerning the scrip, "No. 596, letter D," which he attempted to locate thereunder.

It is apparent here, as in the Huot case, that the scrip was located by Merrill not for the benefit of the half-breed, but for the sole use and benefit of himself. There was on his part no agency or attorneyship for the half-breeds. It was not contemplated that they should acquire by the operation any beneficial interests in the lands. In each case the scrip was used by Merrill as a means to acquire title in himself to the lands in question. It is proper also to note that in the Carron case there was no evidence presented showing the death of the scripee, Napoleon Carron, or that Lewis Carron was his sole heir. This location was therefore not made in accordance with the instructions of November 12, 1874, above referred to. So far as this record shows the scripee may be a living person.

It is contended with great earnestness that these locations are valid, notwithstanding the manner in which they were made. In support of the contention several authorities are cited from the courts. They are the cases of Gilbert *v.* Thompson (14 Minn., 544); Thompson *v.* Myrick (20 Minn., 205); and the latter case in the supreme court on appeal (99 U. S., 291). These authorities have been examined. In my judgment they do not go to the extent claimed for them.

In Gilbert *v.* Thompson, the case chiefly relied upon, both parties claimed title to the land, which was the subject of controversy, through one Amelia Monette, a Sioux half-breed. The plaintiff claimed by deed directly from Monette, dated May 29, 1867, and the defendant by deed from one Benjamin Lawrence, as attorney in fact for said Monette, dated July 18, 1857. By the power of attorney under which the latter deed was executed Lawrence was authorized by Monette

For me and in my name to enter into and take possession of all the real estate belonging to me, or of which I may *hereafter become seized,* situated in the county of

Wabasha, in the Territory of Minnesota; and for me to lease, bargain, sell, grant and confirm the whole or any part thereof; . . . . . and for me and in my name to make, execute, acknowledge, and deliver unto the purchaser, or purchasers, good and sufficient conveyances.

As against this showing of title in the defendant, the plaintiff offered to prove by parol evidence that the lands were acquired by means of scrip issued to Monette, the half-breed, under the act of July 17, 1854, and that the transactions at the date of the power of attorney involved a transfer of the scrip, and were therefore designed to evade and defeat the act of Congress. The court held that the power of attorney could not be thus contradicted, and declined to admit the testimony; and as between the contending parties, the title in the defendant was upheld. In its opinion the court said :—

It was the intention of Congress that the right to acquire public lands by means of this scrip, should be a personal right, in the one to whom the scrip issued, and not property in the sense of being assignable; but no restraint is imposed upon the right of property in the land, after it is acquired by location of the scrip. In the scrip itself the half-breed had nothing which he could transfer to another; but his title to the land, *when perfected under it*, was as absolute as though acquired in any other way. It follows therefore that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. . . . . A power of attorney, so far as it intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would remain the same; it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell; but a simple power to sell, executed by a half-breed, is good till revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases . . . . . Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide.

The controlling points in the case, as decided by the court, plainly were, (1) that a simple power to sell, executed by a half-breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip, if within its terms, and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip, could not be received to defeat the power.

These propositions furnish no support, in my judgment, to the contention in behalf of the locations here in question. That a power to sell may extend to lands afterwards lawfully acquired by means of scrip is not attempted to be controverted; and no question relative to the admissibility of evidence, such as that considered by the court, can possibly arise in this case, for the simple reason that the government is here a party interested, whereas the controversy in that case was between contending claimants for the land after the government had parted with its title. While the rule of evidence laid down may properly be enforced in controversies in the courts between individual claimants, it does not follow that such a rule is to be here applied as against the gov-

ernment whose interest it is, before it parts with its title, to see that the law has been faithfully complied with. It is entirely within the jurisdiction of this Department to inquire into the matters alleged against the present locations no matter by whom or how they are presented; not only for the purpose of passing upon the equities of the case as between contending claimants, but for the purpose of ascertaining whether the requirements of the law have been fully met. It is with this view, primarily, that the present inquiry is made, and I know of no rule of evidence to exclude any testimony relating to the character of the locations. That the court did not pass upon the question here involved is clearly shown by their statement that "we do not decide" whether a power to sell contained in an instrument on its face a transfer, *the power being merely incidental* to the transfer, would be upheld. That is the question here—the only difference being the manner of its presentation. It properly arises here on the record; in Gilbert *v.* Thompson it did not, the evidence of the transfer being excluded on technical grounds, and therefore was not decided.

Thompson *v.* Myrick goes no further. It does not reach the question in the case at bar. It was in fact ruled on Gilbert *v.* Thompson by the State court, and that ruling was affirmed by the supreme court on appeal.

The case of Sophia Felix (unreported) is cited from the Department. It was decided in 1863. In that case, however, there was nothing to show that there had been in fact a transfer of the scrip by Felix, the half-breed. On the contrary, it appeared that she had signed the application to locate her own scrip, and there being no proof to the contrary, her signature was accepted as genuine, and the location allowed as for her use and benefit. "Whether she could sell or did sell the land after the location of her scrip," said the Department, "we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the courts." The case therefore does not go to the extent of holding valid such a transaction as that here considered.

The next question relates to the improvements required on unsurveyed lands. The act provides that the scrip "may be located," among other lands, upon any "unsurveyed lands, not reserved by government, upon which they" (the half-breeds) "have respectively made improvements." I think this language clearly makes the improvements a condition precedent to the location. Congress has specifically declared what lands shall be subject to the scrip, thereby excluding all other lands than those defined, from the right of location. If unsurveyed, they must be lands upon which the half-breeds have made improvements, or they can not be located with the scrip. The improvements constitute a part of the description of the lands defined as locatable.

This view is strictly in accord with the uniform construction given the act by the Department, shown by the circulars of instruction from time to time issued thereunder as above referred to. And in the Sophia Felix

case, *supra*, it was expressly stated, speaking of unsurveyed lands, "that improvements are requisite as an antecedent to the right of location."

But it is in the third place contended in effect, that these circular instructions are in contravention of the provisions of the act, in that they impose upon the scripee conditions not authorized thereby. I do not so regard them. It was clearly within the power of the Land Department, and, indeed, it was its plain duty, to issue such regulations as were deemed necessary to secure a faithful administration of the law, and to prevent its evasion. It was thus required that when locations were sought to be made upon unsurveyed lands, evidence should be furnished showing that the lands contained improvements made by the half-breed, or under his personal direction; in other words, showing that the half-breed had a direct connection with the land, and was claiming it for his personal use. This requirement is in no sense in contravention of the statute. It adds nothing to it. Unsurveyed lands are not locatable under the act, unless they contain improvements made by the half-breed. The regulation simply furnishes a means of showing that in this respect the law has been observed. It goes no further. Not being in conflict with the statute, these regulations have all the force and effect of law. Hessong *v.* Burgan (9 L. D., 353), and cases cited.

The evidence thus required was not furnished when the present locations were made. The facts are that the improvements were not made by the half-breeds, or for them in any sense whatever. They had nothing to do with the locations, and there was no purpose that they should have any beneficial interest in the improvements or in the land. It is not denied that improvements may be made by an agent. That was not the case here. They were made by the parties locating the scrip, not for the half-breeds, but for their own use and benefit. This it seems to me was in violation of the letter and spirit of the statute.

The further contention is that these locations should be sustained for the alleged reason that they were made in accordance with the then and previously prevailing practice of the Department in like cases, under which it is claimed patents have heretofore uniformly issued. On this point a number of cases, in which patents have gone out, are cited from the files of the Land Department. Two only are claimed to bear directly upon the question of the transfer of the scrip. These cases have been examined. They are not analogous to the case at bar. There is nothing on the face of the record in either of them even tending to show that there had been a sale or transfer of the scrip. One of them (Josette St. Germaine, Scrip No. 628, letter A, R. & R. No. 99, San Francisco, California,) was a case in which there was a power of attorney executed by the half-breed, authorizing the attorney named, or his substitute, to locate the scrip, and upon such location to sell the land. By letter of substitution, duly executed, the attorney appointed another to act in his stead. Application was made to locate the scrip December 24, 1866, several months after the lands had been surveyed

in the field, and the certificate of location bears date February 11, 1867, the day on which the plat of the survey was filed in the local office. In the other case (Nancy Rock, Scrip No. 94, letter C, R. & R. No. 108 Otter Tail, Minnesota,) there was also a letter of attorney authorizing the location of the scrip and the sale of the land. The application and certificate of location both bear date December 17, 1860, after the lands had been surveyed and plat filed.

Whatever may have been the real facts of these cases, it is certain that the records do not disclose anything tending to impeach the *bona fides* of the locations. It was upon the papers filed that the Land Department acted in passing the locations to patent. These papers showed a simple power given by the half-breed to locate his scrip and to sell the land after location. That this could lawfully be done is not questioned. The record failing to show anything to the contrary, the necessary legal presumption was, and is, that the locations were lawfully made. These two cases, therefore, furnish no support to the present contention.

The other cases relate chiefly to the question of improvements on unsurveyed lands. Quite a number have been cited. It is claimed with reference to them that the locations were made on unsurveyed lands, and afterwards adjusted to the public surveys and passed to patent without any improvements being shown or required. Most of these cases have been examined. With few exceptions they are found to be cases wherein the application to locate was presented after the lands were surveyed in the field. The certificates of location were issued after the plats of the survey were filed in the local office. The locations were generally made by attorney, but in no case is there anything on the face of the record to show that the transaction may not have been simply the *bona fide* exercise, by the half-breed, of the right to do by attorney what he might lawfully have done himself. It is not necessary to comment upon what appears to have been the practice in those cases. They are not analogous to the cases here. That fact is a sufficient answer to the contention of counsel. But few cases are found of locations made before *actual* survey in the field, in which improvements were not shown. In those, it may be said, there appears to have been no other defect in the locations, and therefore they differ very materially from the cases now under consideration.

Upon the whole, the cases cited failed to show in my judgment that there has existed that uniform practice which is claimed to have prevailed. I find nothing therefore in the former practice to justify the Department in approving the locations in this case. The discussion may properly end here. It follows from what has already been said that there is no error in the decision on review, of which Merrill or Winston can complain.

It yet remains to dispose of the questions raised by Brown, the homestead entryman. I do not think the Department erred in determining

the status of his entry. The hearing was had in order that "the rights of all parties in interest may be protected." Brown was a party in interest and a party to the hearing. He appeared at the trial and submitted testimony in support of his entry, as against the prior entry of Allen, and was given all possible privilege in that regard. I see no good reason therefore why the validity of his claim should not have been passed upon, and the Department committed no error in my judgment in determining his rights. It may be further remarked that his entry was improperly allowed in the first instance, inasmuch as the lands were covered by the prior entry of Allen, which, while it remained of record, operated to segregate the lands from the public domain and to exclude them from further entry.

The allegation that the evidence does not justify the conclusion that Brown did not settle on his claim with the intention to acquire title under the homestead law, can not be sustained. The statement in the decision complained of that Brown moved on to the land in December, 1882, is evidently a mere clerical error, and was not a controlling matter in the conclusion arrived at. That the year was in fact 1881, instead of 1882, can make no material difference. There is no further statement of any particular evidence upon which a change of ruling is desired. The particular respects in which it is claimed that the evidence does not justify the conclusion of the Department are not set forth. There is simply the general allegation. I do not think therefore any sufficient reason is furnished for disturbing the former ruling.

In view of the foregoing, the several motions for review are denied.

SIOUX HALF BREED SCRIP—PRACTICE—CONTESTANT.

HYDE ET AL. *v.* EATON ET AL. (ON REVIEW).

If the location of Sioux half breed scrip is illegal and invalid, a deed of ratification executed by the beneficiary can not give it validity; nor will such deed preclude the Department from inquiring whether the improvements placed on the land were in fact for the personal use and benefit of the beneficiary.

In the disposition of a case it is competent for the Department to consider and determine all questions presented by the record.

Questions as to the preference right of entry can only arise on the application to exercise such right, and should not be decided prior to that time.

An application to contest, filed during the pendency of proceedings against the claim in question, should be suspended until the disposition of the pending suit, and if such suit results in the cancellation of said claim the application of the second contestant must then be refused.

Secretary Noble to the Commissioner of the General Land Office, January 28, 1891.

I have considered the motions filed by the parties in interest asking for a review of departmental decision of February 18, 1889 (unreported), in the case of Thomas W. Hyde and Angus McDonald *v.* Frank W.

Eaton, and Orilie Stram and Fred F. Huntress second contestant, involving Sioux half breed scrip locations of lots 3, 5 and 6, and the SE¼ of the NW¼ Sec. 30, T. 63 N., R. 11 W., under certificate 19 "D", and of lots 1 and 2 and the SW¼ of the NE¼, and the NW¼ of the SE¼, same section, under certificate 19 "E," in the Duluth, Minnesota land district; also the application of Thomas W. Hyde to file pre-emption declaratory statement for lots 5 and 6, the SE¼ of the NW¼ and the NE¼ of the SW¼ of said section, and the application of Angus McDonald to file pre-emption declaratory statement for lot 2, the N½ of the SE¼ and the SW¼ of the NE¼ of said section 30; and also the application of Huntress to contest both the scrip locations and the claims of Hyde and McDonald.

The facts pertaining to these various claims are sufficiently set forth in the decision complained of, and it is not deemed necessary to recapitulate those facts here.

On the part of the scrip claimants, twenty-one specifications of error are assigned. These specifications, except such as are hereinafter specifically mentioned, present questions which were presented in the motion for review in the case of Allen *et al. v.* Merrill *et al.* and which are in the decision this day rendered therein fully discussed. The conclusion reached there is adopted here, and further discussion of those questions is unnecessary.

The first specification, which is in the following words: "Error in fact in holding that Frank W. Eaton 'filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney in fact for such purpose,'" is without merit. Eaton states in his testimony (p. 67) that the power of attorney was filled out after it had been acknowledged and after it was received by him, and whether the act of writing in his name as the attorney in fact was performed by him or by some one else is wholly immaterial.

In the eleventh and twelfth specifications it is insisted that the location of this scrip June 16, 1883, after the execution of the power of attorney May 25, 1883, was such an immediate and timely execution of the power as to take this case out of the general reasoning in the case of Allen *et al. v.* Merrill *et al.*, and that it was error to assume as a fact applicable to this case "that in every instance the half breed sold the scrip many years before the attempted location of it." Admitting that there was error in the decision complained of in the statement quoted, it is not of sufficient importance to justify a conclusion different from that heretofore reached. The important and controlling facts remain, and the mere fact that the power of attorney was executed a few weeks only prior to the date of the location, instead of years, is not material. There is nothing in the matters set up in these two specifications to justify the granting of this motion.

The sixteenth specification alleges that there was "Error in law in not finding and holding that the deed of ratification and confirmation executed

by said scripee precluded any examination into the fact as to whether the improvements on these lands were made for her personal use and benefit." I do not think the position taken by the Department on this phase of the case has been successfully assailed in the arguments advanced in support of this specification. The question is not one between the beneficiary of this scrip and her alleged attorney in fact, but is one between the claimants under the scrip locations on the one side, and the other claimants and the United States on the other; and as against the United States or claimants in good faith under the public land laws, the deed of ratification can have no effect. The question to be determined is whether the locations in question were made in good faith in accordance with the law and regulations. As was said in the decision complained of: "If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which had not in it the germ or essence of legal vitality." There was no error in said decision on this point.

This disposes of all specifications of error in the motion for review filed in behalf of the claimants under said scrip locations adversely, and the conclusion reached in the original decision in regard to these locations will be adhered to.

The motion for review filed in behalf of the pre-emption claimants contains sixteen specifications of error, alleging in substance that the merits of these claims were not brought in question by the order for a hearing or the notice issued thereon; that the testimony touching the validity of those claims should have been excluded; that even admitting such testimony, it is not sufficient to warrant the conclusion reached, that the testimony was misquoted in said decision; that it was error to hold that the appeal of these parties from the action of the local officers rejecting their respective applications to file declaratory statements, which appeal was never acted upon by your office, was sufficient to bring their claims before this Department for consideration; and that it was error to refuse them a preference right of entry.

On October 9, 1884, Hyde and McDonald each filed a paper, duly verified by affidavit, termed "an application for leave to contest" the scrip locations mentioned herein, in which applications the qualifications of the respective parties as pre-emptors were duly set forth and in each of which it was alleged that the party making the same had settled upon the land described therein "for his own exclusive use and benefit" with the intention of filing declaratory statement therefor under the pre-emption laws. On July 20, 1885, these parties each presented his declaratory statement for the tract claimed by him, which statements were rejected by the local officers. From this action of the local officers the applicants each filed an appeal, which appeals were transmitted to your office August 25, 1885. With these facts thus presented your office ordered a hearing. At this hearing testimony was submitted for and against not only the scrip locations but also the

claims of these pre-emption applicants. The local officers found in favor of the validity of the scrip locations, and in view of that fact declared it unnecessary to consider "the bona fides of Hyde and McDonald or their rights under the pre-emption law."

The decision rendered in your office made no disposition of the applications of Hyde and McDonald. The applications of these parties to file pre-emption declaratory statements came up with the record in the case and it was entirely competent for this Department, in the exercise of the jurisdiction conferred upon the head of it, to consider and determine all questions presented by the record. The testimony alleged to have been misquoted is contained in the following extract from the testimony of Hyde found in the original decision:

Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?—A. Yes, there was a contract.

Q. Where is it?—A. I don't know.

Q. When and where did you last see it?—A. I have not seen it since it was drawn up by Mr. White.

Q. What did it contain?—A. It contained that, when I proved up I was to secure him a one-half interest.

It seems the last answer should have read "It contained that, when I proved up I was to secure him *on* a one-half interest." This change does not, however, destroy the effect of the testimony taken as a whole, or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case, and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed. Croghan Graves (9 L. D., 463).

After the filing of the motions for review herein, to wit: on July 10, 1889, affidavits of Hyde, McDonald and S. F. White were filed. Hyde in his affidavit sets forth in substance that he settled upon this land and built a house on the NE¼ of the SW¼ of said section 30, wherein he has continued to reside; that his improvements have cost, as he verily believes, to exceed $3,000; that whatever agreement he had with White did not affect or refer to the above described tract upon which his house stands, but referred only to the land claimed under the scrip locations; that said agreement was "That if at the time said contest should be ended in favor of affiant said affiant should be owing for services in contest, then and in that even the should secure the payment of said services upon the undivided one-half of said land;" that as a matter of fact he has paid his attorney from time to time in cash and has paid him in full, and that affiant never contemplated giving said attorney any interest in the land, but always contemplated paying him in cash for his services. McDonald sets forth that his agreement with White was that he would secure the payment of any sum that might be due for attorney fees at the close of the contest by giving a mortgage on a one-half interest in said claim, and that he has already

paid his attorney in full in cash. White's statement, in so far as it relates to the matter of the contract between him and these parties, is as follows:

> Deponent further says that, while he has not seen the written contract between himself and Hyde for a long time, and can not give the exact terms of said contract, that he does remember that said contract contained a description of the lands supposed and intended to be affected thereby and that description does not include the northeast quarter of southwest quarter of section No. 30 aforesaid.

This is apparently an effort to take the tract described out of the contract mentioned and to clear it of the taint attaching to the claim. A contract made before entry to convey any part of the land filed for renders invalid the whole claim. The statements made in these affidavits do not in my opinion destroy the force of the testimony given at the hearing or call for further action on these claims. (Smith *v.* Custer *et al.*, 8 L. D., 269.)

The question as to whether these parties, Hyde and McDonald or either of them, were entitled to a preference right of entry was not expressly decided in the decision complained of, but it may perhaps be said that question was inferentially decided adversely to them by the declaration that the land was "open to disposal under the public land laws of the United States applicable thereto." Any question as to their preference right of entry would arise only upon application within thirty days after due notice of the cancellation of the scrip locations to exercise such right and it ought not to be decided prior to that time. Saunders *v.* Baldwin (9 L. D., 391), and authorities there cited.

The decision complained of will be modified to the extent of saying that the question as to a preference right of entry in either of these parties is not decided. It is not intended herein to express any opinion whatever upon that question.

It is alleged that a part of the land in question has been entered by other parties since the promulgation of said departmental decision, and if this be true those parties will be entitled to notice if the attempt shall be made to exercise a preference right of entry.

This leaves yet to be disposed of the claim of Huntress who, subsequently to the hearing had herein before the local office, filed an affidavit of contest attacking both the scrip locations and the pre-emption claims. No action could at that time be taken on this application, and it was held to await the determination of the proceedings then in progress. Those proceedings resulted in the cancellation of the scrip locations and the rejection of the applications to file pre-emption declaratory statements. This left nothing for Mr. Huntress to contest, and his said application to contest should have been refused. The question as to whether he was entitled to a preference right of entry had not arisen, and the decision upon it was error. The decision complained of is, as to that portion relating to the claim of Huntress, hereby modified in accordance with the views herein expressed.

This disposes of all questions arising under the various motions for review, and the decision complained of is modified in the particulars indicated herein.

On November 11, 1889, a patent was issued by your office for lots 1 and 2 and the SW¼ of the NE¼ of said section 30 without authority of law or sanction of the Department. How said patent came to be issued has been the subject of investigation by the Department, and the action of those individuals by whose connivance or neglect the said patent was allowed to go out from the Department has been condemned. So long, however, as said patent remains outstanding and uncanceled, the Department has no jurisdiction to make any disposition of said land. John P. S. Voght (9 L. D., 114).

INDIAN ALLOTMENT.—RELINQUISHMENT—ACT OF FEBRUARY 8, 1887.

GEORGE PRICE.

A non-reservation Indian who has made application for an allotment under section 4, act of February 8, 1887, has no authority to relinquish the same, except by the consent and under the direction of the Department.

Secretary Noble to the Commissioner of Indian Affairs, November 29, 1890.

Your communication of November 20th was duly received, and in pursuance of your request to know whether a non-reservation Indian has a right to relinquish his claim to lands under the fourth section of the general allotment act of February 8, 1887, prior to the approval by the Secretary of the Interior, you are informed that no such relinquishment can be made without such approval. The question does not appear to have arisen, however, in any legal way, and the case is apparently a merely hypothetical one, the local land office having refused to allow the relinquishment proposed by the Indian.

I enclose you a copy of the opinion of the Assistant Attorney-General, to whom the question was referred, which has been approved by me.

OPINION.

Assistant Attorney General Shields to the Commissioner of Indian Affairs, November 28, 1890.

I have the honor to acknowledge the receipt, by reference from First Assistant Secretary Chandler, of a communication from the Indian Office transmitting the relinquishment of George Price, a non-reservation Chippewa Indian, covering his entry No. 6 of the S ½ of the SE ¼, and the S ½ of the SW ¼ of Sec. 9, T. 58 N., R. 18 W., Duluth land district, Minnesota, made July 28, 1888, under the provisions of the general allotment act of Congress approved February 8, 1887 (24 Stats., 388).

From the papers presented, it appears that said Price presented said reliquishment, which was marked "filed August 30, 1890," by the register of said office, but was rejected by the local office for the reason that they had no authority to allow the same, and for the further reason that they considered said "relinquishment to be in fact a sale, as Frank B. Seldon, the same person who filed said relinquishment at the same time made application for said land, which application is held subject to your (Comm'r G. L. O.) action." Said relinquishment and communication of the local office were referred by the General Land Office to the Indian Office on October 9, 1890, with a request "for instructions in regard to same." In a communication dated November 20, 1890, the Indian Office acknowledged the receipt of said reference, and after referring to the provisions of said Indian allotment act, and also to the act of Congress approved May 14, 1880 (21 Stats., 140), requested to be advised by the Department "whether a non-reservation Indian has the right to relinquish his claim to land covered by application for allotment under the 4th section of the general allotment act of February 8, 1887, prior to the approval of the same by the Secretary of the Interior." Said section 4 provides:

That where any Indian not residing on a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided.

Section 5 of said allotment act provides:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

On September 17, 1887, the Department issued a circular prescribing the rules and regulations relative to allotments under said fourth section, which (p. 4) require the applicant—

to make oath that he is an Indian of the —— tribe; that he was born in the United States; that he is the head of a family, or a single person over eighteen years

of age, as the case may be; that he was not residing upon a reservation at the date of the act aforesaid (February 8, 1887), or, in lieu of the latter declaration, that no reservation has been provided for his tribe, by treaty, act of Congress, or executive order; that he has made actual bona fide settlement upon the lands he desires to have allotted to him, for his exclusive use and benefit, and that he has not previously had the benefit of said fourth section.

This must be corroborated, in so far as his Indian character, nativity, and actual bona fide settlement are concerned.

The proper construction of said fourth section has been heretofore considered in an opinion rendered by this office at the request of the First Assistant Secretary, on June 22, 1889 (8 L. D., 647), wherein it was stated that—

viewing the act in all its parts, thus gathering all its purposes and its whole scope, it would seem that it must have been the purpose of Congress to allot to Indians, not living on a reservation, or for whom no reservation has been provided, and to the minor children of such Indians, lands to the same extent, in the same manner under the same restrictions and limitations, *mutatis mutandis*, as were enacted in the case of Indians living upon reservations; with the additional requirement, however, of actual settlement upon the tract applied for by the non-reservation adult Indians.

The view above expressed was reiterated in an opinion subsequently rendered upon the proper form of patents to be issued to the Lac de Flambeau band of Chippewas in Wisconsin. (9 id., 392.)

The rights of the Sioux Indians residing upon lands outside of the reservation and their relation to the United States under the provisions of the act of Congress approved March 2, 1889 (25 Stats., 888), were considered at length in an opinion rendered by me on February 27, 1890, where after a careful consideration of the various treaties, laws and decisions of the supreme court of the United States it was stated:

What the effect of these provisions of the law and treaty might be as to the Indians *after patents* are issued it is unnecessary now to discuss. It is obvious that until such allotments are made and patents issued, the Indians remain in a 'state of pupilage . . . . as wards subject to a guardian' whose rights the United States is bound to protect. (See Op. A. A. G., Book "D" p. 224.)

Again, on July 12, last (12 L. D., 181), in an opinion rendered by me on the question whether a half-breed Indian who had "availed himself of his pre-emption and homestead rights" is entitled to an allotment under the provisions of said general allotment act, it was stated, *inter alia*, that it was the intention of Congress that the allotment act "should be administered, so far as practicable, like any other law based upon settlement," and the views of the Indian Office were concurred in, namely, that the Indian who had already severed his tribal relation and "received the full benefit of the pre-emption and homestead laws" was not entitled to an allotment under the general allotment act.

I am clearly of the opinion that a non-reservation Indian who has made an application for an allotment under said fourth section of the act of 1887 has no authority to relinquish the same except by the consent and under the direction of the Department. If good reason be

shown why an allotment should be changed, the Secretary of the Interior prior to the issuance of patent for the same may allow the allottee to change to another tract. But said act of May 14, 1880, has no application to Indian allotments under the provisions of said act of 1887.

It does not appear that either Price, the Indian, or Seldon, the applicant, appealed from the action of the local office, and hence, as was said in my opinion of July 12, 1890, supra, "any expression of opinion by the Department upon a hypothetical case is, at least, premature."

SCHOOL LANDS—INDEMNITY SELECTION.

LEVI JEROME ET AL.

Indemnity school selections made by the Territory of Washington under the act of February 26, 1859, reserve the land covered thereby from sale or entry, and the land thus selected is not released from such reservation by the act providing for the admission of said Territory into the Union.

Secretary Noble to the Commissioner of the General Land Office, February 10, 1891.

I have considered the appeals of the following named persons from the decision of your office of July 3, 1889, rejecting their applications to make homestead entry of the tracts respectively set opposite their names:

Levi Jerome, SE. ¼, Sec. 8, T. 30 N., R. 1 W., Seattle, Washington;
Samuel Hutchins, NW. ¼, Sec. 9, T. 30 N. R. 1 W., " "
Arthur Daniels, E. ½ NE ¼ & Lots 7 and 8,
Sec. 10, T. 10 N., R. 3 E., " "
S. F. Horton, SW. ¼ Sec 8, T. 30 N., R. 1 W., " "
T. G. Abbott, W. ½ NW. ¼ & N. ½ SW. ¼,
Sec. 12, T. 19 N., R. 3 E., " "
G. W. Smith, SE. ¼ Sec. 10, T. 19 N., R. 3 E., " "
Otto Schultz, S. ½ NE. ¼, Sec. 8, T. 30 N. R. 1 W. " "
John C. Corwin, NW. ¼ Sec. 8, T. 30 N., R. 1 W., " "

The several applications herein described were made in April, 1889, and rejected by the register and receiver.

The grounds of error are the same as alleged in the case of L. H. Wheeler, *infra*, who made homestead application for the NE. ¼ of Sec. 15, T. 38 N., R. 2 E., Seattle, Washington. At the time these several appeals were filed, the Wheeler case was pending on appeal in this Department, and a copy of the arguments and specifications of error in the Wheeler case is filed for consideration in these cases.

The Wheeler case was decided by this Department October 13, 1890 (11 L. D., 381), and the following statement is there made:

But independently of this, the act of February 26, 1859 (Revised Statutes, 2275), is a general provision applicable alike to all the States and Territories, and this provision is not repealed as to the State of Washington by the 17th section of the enabling act of February 22, 1889, but is retained as a part of the grant for school purposes by the 10th section of said act. Therefore the reservation made by the selection of said tracts, while the territorial government existed, still continues until said selection shall be canceled.

By the act of March 2, 1853 (10 Stat., 172), establishing the territorial government of Washington, Congress "reserved for the purpose of being applied to the common schools in the Territory" sections sixteen and thirty-six, and in all cases where said sections "or either or any of them" shall be occupied prior to survey thereof, the county commissioners in the counties where the lands were situated were authorized to locate other lands to an equal amount, in lieu of the sections so occupied.

By the act of February 26, 1859 (11 Stat., 385), other lands were appropriated to compensate deficiencies for school purposes where sections sixteen and thirty-six "are fractional in quantity, or where one or both are wanting, by reason of the township being fractional, or from any natural cause whatever." This was a general act, applying to all the States and Territories, and by it the county commissioners of Washington Territory were authorized to locate lieu lands from additional bases. The lands thus appropriated as lieu lands for sections sixteen and thirty-six were reserved from all other modes of conveyance. John W. Bailey *et al.*, 5 L. D., 216.

The 10th section of the act of February 22, 1889 (25 Stat., 676), admitting the Territory of Washington (and other Territories) to statehood, is as follows:

> That upon the admission of each of said States into the Union, sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections or any part thereof have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools—such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

The fourth paragraph of section 17 of said act is as follows:

> That the States provided for by this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide.

The act also provides lands for university purposes; agricultural lands; lands for internal improvements, and lands to the State of Washington for a scientific school, a State normal school, public buildings at State capital, and for State charitable, educational, penal, and reformatory institution—aggregating 500,000 acres. These several grants were made in lieu of the grants of land for purposes of internal improvement, made to new states by the 8th section of the act of September 4, 1841 (5 Stat., 453), and in lieu of any claim or demand under the swamp land act of September 28, 1850 (9 Stat., 519). The clause, namely, "That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act," relates more directly to the several grants made

to the four states admitted into the Union, in lieu of the provisions contained in the act of September 4, 1841 (*supra*), and of the act of September 28, 1850 (*supra*).

In the act of March 2, 1853 (*supra*), to establish the territorial government of Washington, provision was made for the reservation of sections sixteen and thirty-six, for the purpose of being applied to the common schools, and express authority was there given to the county commissioners to locate lieu lands, where said sections were settled upon prior to survey. Congress afterwards (February 26, 1859, *supra*,) enlarged the reservations in the words of the act, "and other lands are also hereby appropriated to compensate deficiencies for school purposes," etc.

It is insisted that the act of February 22, 1889, admitting these States into the Union, restricted the grants for school purposes, as provided by the act of 1853 and of 1859.

The act of 1853 does not grant the lands therein described; it only reserves sections sixteen and thirty-six for the purpose of being applied to the common schools, in contemplation of a future grant. Thomas E. Watson (on review) 6 L. D., 75.

The lands were first granted to the States upon their admission into the Union; and certainly it was not intended by Congress, in the act granting the lands, to annul the provisions then made for reserving the lands for school purposes.

The act of February 26, 1859 (*supra*), was a general act, applicable alike to all the States and Territories, and to construe the act admitting the four States into the Union as restricting the lieu lands for school purposes, provided for in the act of 1859, would be to assume that Congress made less provisions for the four new States than for the other States in the Union.

And until the legislature of the State of Washington shall provide the manner in which indemnity lands for school purposes shall be selected, and such manner shall be approved by the Secretary of the Interior, under the act of 1889 (*supra*), the reservations made by the selection of said tracts while the territorial government existed will continue, until it be shown that the land was not subject to selection by reason of adverse rights acquired prior to selection.

For the reasons above given, the several applications to make homestead entries must be, and they are hereby, rejected. See case of Hulda M. Smith, 11 L. D., 382.

My attention has been called to the fact that the State selection of the NE. ¼ of the SW. ¼ of Sec. 12, T. 19 N., R. 3 E., was held for cancellation by your office, under date March 14, 1889, and that no appeal was filed from such action. Since this tract is included in the land above described as applied for by T. O. Abbott, I see no reason why he should not be permitted to make entry for said tract, if he is qualified, and the records of your office show the land subject to such entry.

Your said office decision is accordingly affirmed.

INDIAN ALLOTMENTS—ACT OF MARCH 2, 1889.

UNITED PEORIA AND MIAMIES.

The authority to make allotments under said act terminates when the Secretary has approved the lists, furnished him by the chiefs, containing the names of all members of the tribe then in existence who are entitled to allotments.

The inadvertent omission of a member of the tribe from the allotment list approved by the Secretary, may be corrected on due proof of the fact.

Secretary Noble to the Commissioner of Indian Affairs, June 25, 1890.

I acknowledge the receipt of your communication of 26th ultimo, transmitting a communication from Frank Beaver, Chief of the Peoria, etc., Indians, in which he calls attention to the fact that since allotments were made to said Indians, under the act of March 2, 1889, there have been born ten children who are by birth and inheritance members of said tribe, and entitled to be placed upon the said roll, and in which he asks on behalf of said Peoria, etc., tribe of Indians, that an additional roll of membership be made on which shall be placed the names of these children; and that the necessary steps be taken and orders made under which they shall be each given two hundred acres of land out of the surplus lands of the tribe.

You express the opinion that the provisions of the act relative to allotments have been fully executed, and that no authority now exists to make further allotments thereunder, and submit the matter for my decision.

The said act provides (25 Stats., 1013)—

That the Secretary of the Interior is hereby authorized and directed, within ninety days from and after the passage of this act, to cause to be allotted to each and every member of the said Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, upon lists to be furnished him by the chiefs of said tribes, duly approved by them, and subject to the approval of the Secretary of the Interior, an allotment of land not to exceed two hundred acres, out of their common reserve, to each person entitled thereto by reason of their being members of said tribes by birth or adoption;" and further, "That sections one and two of this act shall not take effect until the consent thereto of each of said tribes separately shall have been signified by three-fourths of the adult male members thereof, in manner and form satisfactory to the President of the United States.

In accordance with said provisions the consent of each of said tribes to sections one and two thereof has been signified by three-fourths of the adult male members of said tribes, in manner and form satisfactory to the President, and a list of the members of said tribe of Indians has been duly approved by the Department, and allotments have been made and patents issued therefor.

The act provides that the remaining or unallotted lands shall be held in common by said United Peorias and Miamies, as follows:

After the allotments herein provided for shall have been completed, the residue of the lands, if any, not allotted, shall be held in common under present title by said United Peorias and Miamies in the proportion that the residue, if any, of each of the said allotments shall bear to the other.

Said act further provides that at the expiration of twenty-five years from the date of the passage of the act the remaining or unallotted lands may be equally divided among the members of said tribes, or sold and the proceeds divided as follows:—

At the expiration of twenty-five years from the date of the passage of this act, all of said remaining or unallotted lands may be equally divided among the members of said tribes, according to their respective interests, or the same may be sold on such terms and conditions as the President and the adult members of said tribe may hereafter mutually agree upon, and the proceeds thereof divided according to ownership as hereinafter set forth.

I am of the opinion that the provisions of said act of March 2, 1889, entitled "An act to provide for allotment of land in severalty to United Peorias and Miamies in Indian Territory, and for other purposes," have been complied with, so far as the same are now applicable, and that no authority now exists to make further allotments thereunder.

Except that if a mistake was made as to Elizabeth A. Doherty and land enough remains she should have an allotment. Let this be investigated.

The enclosure of your letter is herewith returned, also a copy of opinion by the Assistant Attorney-General.

OPINION.

Assistant Attorney-General Shields to the Secretary of the Interior, June 23, 1890.

A letter of the Commissioner of Indian Affairs dated May 26, 1890, and accompanying papers, have been referred to me by you for examination and an expression of opinion upon the questions involved. These arise under the act of March 2, 1889 (25 Stats., 1013), "to provide for allotment of land in severalty to United Peoria and Miamies in Indian Territory, and for other purposes." The first section thereof extends and makes applicable the provisions of the general allotment act of February 8, 1887 (24 Stats., 388), to the Confederated Peoria and Western Miami tribes of Indians, and to their reservation, located in the northeastern part of the Indian Territory.

in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said act, except as to section six of said act, and as otherwise herein provided.

It is then declared:

That the Secretary of the Interior is hereby authorized and directed, within ninety days from and after the passage of this act, to cause to be allotted to each and every member of the said Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, upon lists to be furnished him by the chiefs of said tribes, duly approved by them and subject to the approval of the Secretary of the Interior, an allotment of land not to exceed two hundred

acres, out of their common reserve, to each person entitled thereto by reason of their being members of said tribes by birth or adoption.

It is further provided that "As soon as all the allotments or selections shall have been made as herein provided," the Secretary shall cause a patent to issue to each person entitled, for his or her allotment, reciting, among other things, that the land shall not be alienated for twenty-five years from date of patent.

Section two of the act provides:

> That in making allotments under this act no more in the aggregate than seventeen thousand and eighty-three acres of said reservation shall be allotted to the Miami Indians, nor more than thirty-three thousand two hundred and eighteen acres in the aggregate to the United Peoria Indians; and said amounts shall be treated in making said allotments in all respects as the extent of the reservation of each of said tribes, respectively . . . After the allotments herein provided for shall have been completed, the residue of the lands, if any, not allotted, shall be held in common under present title by said United Peorias and Miamies in the proportion that the residue, if any of each of the said allotments shall bear to the other. And said United Peorias and Miamies shall have power, subject to the approval of the Secretary of the Interior, to lease for grazing, agricultural, or mining purposes from time to time and for any period not exceeding ten years at any one time, all of said residue, or any part thereof, the proceeds or rental to be divided between said tribes in proportion to their respective interests in said residue. . . . At the expiration of twenty-five years from the date of the passage of this act, all of said remaining or unallotted lands may be equally divided among the members of said tribes according to their respective interests, or the same may be sold on such terms and conditions as the President and the adult members of said tribe may hereafter mutually agree upon, and the proceeds thereof divided according to ownership as hereinbefore set forth.

It appears from the papers before me that, in April, 1889, the chief of the Peorias prepared and forwarded to the Department a list of the members of his tribe, and thereon allotments were duly made in accordance with the provisions of the act of March 2, 1889, and patents issued. The chief of the tribe, under date of May 7, 1890, in a communication to the Commissioner, calls attention to the fact that

> since said allotments were made, ten children have been born, members of the tribe, and requests that an additional roll of membership be made to include said children, and that necessary steps be taken and orders made under which they shall each be given two hundred acres of land out of the surplus land of the tribe.

In addition to the above list, the chief of the Peorias has filed here another, containing the names of seven women, who, he says, married members of, and were adopted into, the tribe after the roll, upon which allotment was made, was prepared by him. He desires that allotments should also be made to these women. But, inasmuch as the surplus is only 2,618 acres, not enough to make a full allotment to all those named, he thinks that the children should be first provided for to the full amount, for the "obvious reason that a claim of blood inheritance is stronger than a claim based simply on inter-marriage with the tribe and the custom to recognize such relationship by adoption into the tribe."

As the application in behalf of the women was not before the Commissioner of Indian Affairs, he has expressed no opinion thereon; but

in relation to the application in behalf of the children, he says: "In my opinion, the provisions of the act relative to allotments have been fully executed, and that no authority now exists to make further allotments thereunder."

In answer to this opinion of the Commissioner, it is urged that the act of Congress being merely directory in its character, the Secretary may make additional allotments as children are born to the tribe, as often as the chief may furnish a list, until the surplus is exhausted; that to hold otherwise would make Congress perpetrate an injustice upon children born after the first allotment.

The question here presented is not entirely free from difficulty, and strong arguments may be advanced on both sides of it, from an equitable standpoint; but the executive cannot be controlled by such considerations alone, and must execute the law as he finds it, and gathering its intention from the language used.

I think it may be conceded that, so far as the allotments are required to be made "within ninety days from and after the passage of this act", the language is simply directory, and that allotments made after that time would not be invalid, because of that reason alone. Here time is not of the essence of the act to be performed, and it is apparent that, were the performance of that act restricted to the prescribed ninety days, great injustice would result to the Indians, through no fault of theirs, but through the want of action on the part of others over whom they, the intended beneficiaries under the act, would have no control. Endlich on Statutes, sec. 434–436.

I think, theretore, that section one of the act may be read as though the time limit was not in it, and notwithstanding the allotments, it is stated, were not actually made until after the expiration of the ninety days, they were, in my opinion, properly made under the authority of the statute of 1889.

On the other hand, it would seem that the duty of making allotments, upon lists presented and approved by him is mandatory upon the Secretary, the rule being that where power is given to public officers and the public interests or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory, and imposes a "positive and absolute duty." Supervisors *v.* United States (4 Wall., 435–446); Endlich (Sec. 312).

The obligation to make said allotments being thus mandatory upon the Secretary, the law pointed out, by the same mandate, when that duty should be performed. It would have been a vain thing to have imposed upon that officer an imperative duty and have omitted to point out under what circumstances it was incumbent upon him to discharge that duty, so that its actual performance by him might be indefinitely postponed. Clearly, Congress intended that the allotments should be made and completed within a reasonable time, for in the second section of the act it is said, "After the allotments herein provided

for shall have been completed, the residue of the lands, if any, not allotted, shall be held in common," etc. Unquestionably this language plainly contemplates an absolute completion and ending of the work of making the allotments provided for. When this point of completion is arrived at, the duty of the Secretary in the premises seems to be ended, for it is declared that then "the residue of the lands, ... not allotted, shall be held in common under present (treaty) title" by the Indians, with power to lease the same for a period not exceeding ten years; that thereafter an ultimate division, among the members of the tribe, of said surplus lands or their proceeds, shall be made.

The above provisions, and the plain language in which they are expressed, make it clear to me that Congress did not intend the provision relating to allotments to be a continuing one, as long as any land was left to divide. It was reasonably certain, in the course of time and nature, that other marriages of whites with members of the tribes would occur, and consequently that other adoptions therein would take place, also that other children would be born. If it had been intended that every time a new member was adopted into the tribe or another child born therein that another allotment should be made, it would have been easy to say so, or at least to have left the surplus in a condition that an implication to that effect would have been justified. But not only is the completion of the allotments expressly ordered, but the residue or surplus thereafter is so disposed of that only another act of Congress can change its destination.

Having reached this conclusion, the next question is, when was the allotment completed, in contemplation of the act?

I have but little difficulty in determining that the allotment is completed when the Secretary has approved the lists, furnished him by the chiefs of the tribes as directed in the act, containing the names of all members of the tribes then in existence who are entitled to allotments. The chiefs are authorized to prepare and approve the lists of allottees, and there is no pretence here that correct and complete lists were not presented, except, perhaps, in one case hereinafter referred to. The Secretary is to approve or disapprove of the lists thus presented, and, under his supervisory power, cause mistakes therein to be corrected or omissions supplied. When he has approved of such lists, the mandate of the law has been complied with as to the imposed obligation to make allotments. The other duties under the act, relating to the issue of patents, approving leases, etc., all relate to matters to be done after the allotments "have been completed," and are no part, properly speaking, of the act of making the allotments.

When this act has been done, the further provision of the act operates, "proprio vigore," removes the residue of said lands beyond the exhausted jurisdiction conferred for a special purpose, and restores them to the Indians for use in common under the former treaty title.

The allotments in the present case were approved by the Secretary on April 23, 1889, on lists seemingly correct. The lands, after the completion of that act, passed beyond his jurisdiction for the purpose of making allotments, and I do not see how, one, two or five years thereafter, he can at will resume special jurisdiction of the lands, withdraw them from the reservation in which the law placed them, and make allotments thereof to parties who were not *in esse*, or if living, not members of the tribe when the first allotment was made.

In addition to the application made in behalf of the seven married women before referred to, Elizabeth A. Doherty has also filed an application here for an allotment, claiming that she was a member of said tribe at the time the lists were prepared and that her name was inadvertently omitted. If this allegation be true, it is such a mistake, or omission, as in my opinion the Secretary has a right and ought to correct by causing an allotment to be made to her. But it is a mere unsworn allegation on her part, though her statements are apparently confirmed in a letter from the chief. These statements are somewhat confused, and it does not clearly appear that Mrs. Doherty was entitled to an allotment as claimed. I would suggest the matter be investigated, and if it is made satisfactorily to appear that she was a member of the tribe at that time, and her name was improperly omitted from the approved list, that upon the formal presentation of her name by the chief, you cause the mistake to be corrected and an allotment to be made to her, if the Peorias be yet entitled to that much land, the said act of Congress limiting the aggregate amount of their allotments to 33,218 acres.

APPLICATION TO ENTER—INITIATION OF RIGHT.

WILLIAMS *v.* CLARK.

The right of an applicant for public land should be held to relate back to the date when the application is actually made, irrespective of a later date, shown by the papers, through no fault of the applicant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1891.

I have considered the case of John A. Williams *v.* Charles W. Clark, involving certain lands in the Harrison land district, Arkansas.

Williams, on July 23, 1881, made homestead entry of the E. ½ of the NE. ¼ of Sec. 24, T. 19 N., R. 29 W.

Clark, on January 28, 1886, filed affidavit of contest against said entry on charge of abandonment.

Hearing was had March 6, 1886. The entryman defaulted, and decision was rendered by the local officers in favor of contestant.

On or about September 1, 1886, the local officers issued notice to both parties that decision had been rendered in favor of contestant. The entryman did not appeal from this decision, and his entry was canceled

by your office letter of August 12, 1887, which also directed the local officers to notify Clark of his preference right to enter the tract.

The entryman states, in substance, that he went to Missouri on business, and was there taken very sick; that he remained sick for a year; that this was the reason of his apparent abandonment of the entry, of his default at the hearing, and of his failure to appeal; that upon his recovery he returned to Arkansas, where, on February 20, 1888, he filed pre-emption declaratory statement for the identical tract formerly covered by his homestead entry.

On February 18, 1889, he made final proof, showing that about February 16, 1888, he built a house, in which he established residence, with his wife and one child, on March 12th following, continuing to reside therein until making proof; that he had built a stable, fenced fifteen acres, which he had put in crop, and planted fifteen acres of orchard.

Against this proof Clark protested, claiming the tract by virtue of his preference right of entry; alleging that upon the decision of the local officers in his favor in 1886 he had moved on to the tract; that the improvements which Williams claimed to have been made by himself were not so made, but had been mainly put on the place by a prior occupant named Foster; that he (Clark) had continued to reside upon the tract awaiting the action of your office in the matter; that the notice of the cancellation of Williams's homestead entry, and of his own preference right—having been sent to Brightwater, Arkansas, which was *not* his post-office address—was not received by him until February 24, 1888; that on the same day he made out a homestead application, which was forwarded to the local office, accompanied by the money for fees and commissions.

This allegation of Clark's was met by the counter allegation of Williams that Clark had received notice at an earlier date—to wit, in August, 1887.

Thereupon your office, on March 28, 1889, ordered a hearing to determine the date when Clark received notice of the cancellation of Williams's entry. Such hearing was had June 11, 1889. Williams, although he acknowledged receipt of notification by registered letter, made default. Clark made affidavit that he received notice February 24, 1888, and not before. This was corroborated by the testimony of a witness who saw him on that date take from the post-office the letter containing said notice.

Your office therefore, on August 3, 1889, held that "Williams' filing must, accordingly, be held to have been made in contravention of Clark's right as a preferred claimant, and his proof is rejected."

From your decision Williams appeals, on the following ground:

The statute in such cases made and provided prescribes that not more than thirty days shall elapse between notice of cancellation to contestant, and the filing of his entry thereafter. It is noted herein that the year 1888 was a "leap-year"; that February of 1888 had 29 days; *per* consequence, the period from February 24 to March 26, 1888, was thirty-one days.

Inasmuch as Williams defaulted at the hearing ordered specially to determine the date when Clark received notice of the cancellation and of his preference right of entry, and inasmuch as in his appeal he tacitly abandons all claim that Clark received such notice prior to February 24, 1888, all dispute as to the date of receipt of said notice by Clark is eliminated from the controversy, and the only question in issue is, did Clark apply to make entry of the tract within thirty days from February 24, 1888?

Clark's testimony at the (last) hearing, relative to this branch of the case, concludes as follows:

> That I received notice from the said land office of the cancellation of said homestead entry, and of my preference right allowed within which to homestead the land, on the 24th day of February, 1888, and not before; and that *immediately*—to wit, on the same day—to homestead the land.

It will be observed that in order to complete the sense it is necessary to understand the words, "I applied," as being inserted just preceding the last four words above quoted. That such was the intention of the affiant is plain from his affidavit in regard to the same subject, made on the occasion of his protesting Williams's homestead proof, as follows: "On the 24th day of February, 1888, I made application, through John Black, clerk of the county court of Benton county, Arkansas, to homestead," etc.

The application included not only the E. ½ of the NE. ¼ of Sec. 24, T. 19, R. 29, previously covered by Williams's entry (*supra*), but the adjoining W. ½ of the NW. ¼ of Sec. 19, T. 19, R. 28. There was a discrepancy in the records of the local office and those of your office as to the area of the NW. ¼ of the NW. ¼ of said Sec. 19; and the local officers declined to accept Clark's application until this discrepancy was reconciled. The register wrote Mr. Clark, on March 19, 1888:

> You can now send in your application, ... as we have just received a letter from the Commissioner of the General Land Office that the NW. ¼ of the NW. ¼ of Sec. 19, T. 19, R. 28, contains only 37.70 acres, in place of 65.70 acres as shown by our records. I have written John Black to-day, and if he still has your application he will send it on at once.

The homestead affidavit and the non-mineral affidavit were sworn to on the 24th of February; so not only Clark's corroborated affidavit, but the entry-papers other than the application, the correspondence with the register relative thereto, and all attendant circumstances, indicate that Clark's application, although bearing date March 26, 1888, was in fact made on the 24th of February, 1888—the day when he received notification of the cancellation of Williams's entry and of his own preference right.

The entryman having done everything that the law required him to do, and the delay in the acceptance and dating of his application having resulted, not from any fault of his, but from a discrepancy apparent upon the government records, his right will be considered as relating

back to the time when the application was made, regardless of its later date. (See, as bearing incidentally upon this point, Lytle *v.* Arkansas, 9 How., 333; Patrick Kelley, 11 L. D., 326.)

Your office decision appealed from is therefore affirmed.

SCHOOL LANDS—INDIAN RESERVATION—INDIAN RIGHT OF OCCUPANCY.

HENRY SHERRY.

The fee to the school sections within the Menomonee Indian reservation passed by the school grant to the State, subject however, to the Indian right of occupancy, which yet exists, and neither the State, nor its assignee, can in any way interfere with the full enjoyment of said right.

Acting Secretary Chandler to the Commissioner of Indian Affairs, November 11, 1890.

I acknowledge the receipt of your communication of 29th ultimo, reporting action taken relative to timber on 16th sections in the Menomonee reservation, Wisconsin, and asking the decision of the Department as to what are the rights of the respective parties claiming adverse interests under the law and facts presented; and of your communication of 6th instant transmitting communication of Messrs. Hooper and Hooper, attorneys for Mr. Henry Sherry, a claimant to certain lands within some of said sections.

In response thereto, I transmit herewith an opinion of the Assistant Attorney General for the Department of the Interior, to whom the matter was referred, in whose views I concur.

Judge Shields says:

Under the rulings in Beecher *v.* Wetherby, it would seem to be clear that the fee simple to the school sections, within the present Menomonee reservation, had passed from the United States to the State of Wisconsin, yet, being subject to the Indian right of occupancy, a right which has, in this instance, existed continuously from the discovery of the country to the present day, and a right which yet exists; in my opinion neither the State nor its assignee can in any manner interfere with the full enjoyment of that right. For the State's officers or its assignee to cut timber upon said sections, during the right of occupancy of the same by the Indians, would unquestionably be a curtailment of the full enjoyment of that right which the supreme court has said 'is unlimited;' and consequently is a violation of law. United States *v.* Cook, *supra*, (p. 593). The cutting of timber upon said sections being illegal, in my opinion, it follows that the State's officers or its assignees can have no right to pass through the reservation for the purpose of committing said illegal act.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, November 10, 1890.

I have received by your reference, with a request for an opinion upon the questions presented, a letter and accompanying papers from the Commissioner of Indian Affairs relative to the school sections in towns

30 R. 15 and 16 within the Menomonee Indian reservation in the State of Wisconsin.

The Menomonee Indian reservation in Wisconsin was first defined and bounded by treaty of August 19, 1825 (7 Stats., 272). By a second treaty of October 18, 1848 (9 Stats. 952), said Indians ceded to the United States all their lands in Wisconsin, other lands being set apart for them west of the Mississippi river. It was stipulated, however, in the eighth article of said treaty that they were to be permitted to remain on the ceded lands for the period of two years and until the President should notify them that the same are wanted. The Indians having remained upon the ceded lands, and not desiring to leave them and go to the new reservation assigned them beyond the Mississippi, by another treaty of May 12, 1854, (10 Stats., 1064), those lands were ceded back to the United States, and in consideration of such cession, and to give to the Indians the lands "desired by the tribe and for the purpose of giving them the same for a permanent home," the present reservation was established and described as—

> that tract of country lying upon the Wolf river, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being townships 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

The townships and sections referred to by the Commissioner of Indian Affairs are within this reservation as they were originally within the Indian country and within the first reservation established by the treaty of 1825, *supra*.

By section 7 of the act of August 6, 1846 (9 Stats., 56), to enable the people of the Territory of Wisconsin to form a State government, it was provided:

> That section numbered sixteen in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of the schools.

Wisconsin was admitted into the Union by the act of May 29, 1848 (9 Stats., 233).

In 1852 the township lines of the public surveys were extended over towns 30 R. 15 and 16 and nearly all of the lands ceded in the treaty of October 1848 by the Menomonees to the United States; In July and August, 1853, said townships were sectionized and the plats of the surveys thereof were approved February 20, 1854; prior to the establishment of the present reservation by the treaty of May 12, 1854, *supra*.

By treaty of February 11, 1856 (11 Stats., 679), the Menomonee Indians ceded to the United States a tract of land, not to exceed two townships in extent, along the western part of their said reservation on its southern line, for the purpose of locating thereon the Stockbridge

and Munsee Indians. By act of February 6, 1871 (16 Stats., 404), all of said last-mentioned two townships, except eighteen sections thereof, were directed to be sold and were subsequently sold.

Some time after 1873 one Beecher, who had purchased from the United States and received patent for section 16, T. 28, R. 14, part of the land sold under the last-cited act, replevied from Wetherby certain logs cut by the latter on said section sixteen, which he claimed by purchase from the State as of its school lands. The case of Beecher *v.* Wetherby finally reached, and was decided by, the United States supreme court, (95 U. S., 517). It was there held that by the compact with the State the fee simple title to section sixteen in every township of the public lands, or the lands which might be embraced within those sections, which had not been sold or otherwise disposed of, passed to the State; that they were set apart from the public domain and withdrawn from any subsequent disposition, and all that remained for the United States to do in respect to the same was to identify the sections by appropriate surveys, if they had not been surveyed, and make proper transfer of title; but they could not be diverted from their appropriation to the State by any sale or disposition subsequent to the compact with the State, p. 524. Referring to the claim that the lands in controversy had been part of a prior reservation for the Indians, the court said that the right which the Indians had was only that of occupancy, and at the time the logs were cut the Indians had removed from the lands in controversy, and the act of February, 1871, *supra*, directing the sale of said lands should be held to apply only to those sections outside of the school sections in said township. It was decided therefore that the title of the State to the school section was superior to that of Beecher claiming to have bought from the United States under the act of 1871, *supra*.

I understand from the letter of the Commissioner of Indian Affairs submitted to me, that the State of Wisconsin, having sold sections sixteen in towns 30 R. 15 and 16 to one Sherry, the latter claims the right of ingress and egress, through the Menomonee reservation, for the purpose of cutting and hauling timber from said sections sixteen. To this proposition the Indian Office objects, and you wish my opinion whether, under existing circumstances, in view of the decision in Beecher *v.* Wetherby, *supra*, Sherry has the right to cut and remove the timber from said sections.

There is a marked difference between the condition of the land in controversy in that case, and the land in the present case. There the Indians had abandoned possession of the land, and the United States officers, misapprehending the purport of the act of 1871, *supra*, had undertaken to sell the sixteenth section along with the other sections. In the present case, the Indians have never abandoned or been out of possession of the land and are yet in possession of the same. They were in possession of it when the country was first discovered. Their

right to it was recognized by the first treaty of 1825. When, on October 18, 1848, after the admission of Wisconsin into the Union, they agreed to cede to the United States all of their lands within that State, it was expressly stipulated that they were to be permitted to remain in possession thereof until notified by the President to the contrary. They did remain in possession and never were notified by the President. On the contrary, the former treaty was virtually abrogated *pro tanto*, and a new treaty made whereby a portion of the ceded lands were secured to them for a permanent home, and they are yet in possession of the same. Therefore, the important element of abandonment which existed in the case of Beecher *v.* Wetherby is absent in this and we have instead a continuous occupancy.

The title by which the Indians possessed these lands is the only and original one by which a right to any portion of the public domain is recognized as residing in them. It was the title by occupancy; and, in this case, it was specially guaranteed to them as before stated. Says the supreme court in United States *v.* Cook (19 Wall., 591):

> the right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession when abandoned by the Indians attaches itself to the fee without further grant.

This is repeated in Beecher *v.* Wetherby (p. 525), in somewhat different language. The court says:

> The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such consideration of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

And to the same effect is the opinion of the court in Buttz *v.* Northern Pacific R. R. (119 U. S., 55–66), where it was said:

> The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.

These excerpts fully state the law applicable to the case under consideration and furnish the answer to the inquiries of the Commissioner of Indian Affairs. Under the rulings in Beecher *v.* Wetherby, it would seem to be clear that the fee simple to the school sections, within the present Menomonee reservation, had passed from the United States to the State of Wisconsin, yet, being subject to the Indian right of occupancy, a right which has, in this instance, existed continuously from the discovery of the country to the present day, and a right which yet exists; in my opinion, neither the State nor its assignee can in any manner interfere with the full enjoyment of that right. For the State's officers or its assignee to cut timber upon said sections, during the right of occupancy of the same by the Indians, would unquestionably be a curtailment of the full enjoyment of that right which the supreme court has said "is unlimited"; and consequently is a violation of law. United States *v.* Cook, *supra*, (p. 593). The cutting of timber upon said sections being illegal, in my opinion, it follows that the State's officers or its assignees can have no right to pass through the reservation for the purpose of committing said illegal act.

Whilst the law as before stated is, in my opinion, clear, it may be observed that no great hardship is inflicted upon the State, by the protection extended over the occupation by the Indians of the school sections; inasmuch as, though the United States can do nothing to devest the fee simple title of the State to said sections, the State is empowered in such cases to select other lands in lieu of such occupied sections, which latter are thereby released from the State's right and title. The State can hardly be interested in getting the particular school sections, and a grant of equal quantity would seem to put it in as good a condition as the other States which had received the benefit of this bounty. Heydenfeldt *v.* Daney, &c., (93 U. S. 634–8).

In the case of the State of Colorado (6 L. D., 412), where the question was as to the State's right to indemnity for school sections within an Indian reservation, which had been practically disposed of prior to the admission of the State into the Union, and where the school grant was substantially the same as that of Wisconsin, it was said: (p. 418)

> I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

I think the rule thus stated is the true one and should be followed.

The matter is optional with the State, however. If it elects to take lieu lands, it abandons its claim to the designated section: if, on the other hand, it prefers to take the identical school section named in the grant, it must wait until it is disencumbered of the Indian occupation; and whilst so waiting it must in no wise interfere with the full enjoy-

ment of that occupation by cutting timber, or otherwise, for the Indians are entitled to the use of the timber as an incident to their occupation. United States *v.* Cook, *supra*, (593).

I have been unable to obtain a copy of the opinion in the case of Sherry *v.* Gould, stated, in the papers sent me, to have been decided in the United States circuit court for the eastern district of Wisconsin. It has not been published in the Federal Reporter, which usually publishes all decisions of interest made in the different United States circuit courts, and no copy of said decision, though referred to by the attorneys of Sherry, was furnished the Indian Office. I am unable, therefore, to consider that decision in connection with my opinion as herein given. I assume, however, that the decision referred to followed the rulings of the United States supreme court in the cases cited and others in the same line. It would not, in that event, be in conflict with my views. If, on the contrary, said decision is not in harmony with those quoted, it should not be accepted either as authoritative or persuasive, and therefore would not have affected the conclusion arrived at.

INDIAN ALLOTMENT RIGHTS—ACT OF FEBRUARY 8, 1887.

HENRY FORD.

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An Indian who has abandoned the tribal relation, and received the full benefit of the pre-emption and homestead laws is not entitled to an allotment under the general allotment act of February 8, 1887.

Secretary Noble to the Commissioner of Indian Affairs, July 15, 1890.

Yours of 24th ultimo received as to right of Indian to allotment under the general allotment act, when he has availed himself of pre-emption or homestead right.

Your views are confirmed by the Assistant Attorney General, in whose opinion (herein) I concur.

You will proceed accordingly.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, July 12, 1890.

I have the honor to acknowledge the receipt, by reference from the Honorable First Assistant Secretary of the Interior on the 25th ultimo, of a communication from the Honorable Acting Commissioner of Indian Affairs submitting a statement relative to the claim of "a half-breed Indian of the Piegan tribe to an allotment of land assumed to be under the provision of the general allotment act of Congress approved February 8, 1887 (24 Stats., 388)." By said reference an opinion is requested "on the question submitted by the Commissioner of Indian Affairs."

The Acting Commissioner states that according to the admission of said Indian he has "availed himself of his pre-emption and homestead rights" and he wishes to know whether he is entitled to an allotment "under the Indian allotment right." After quoting said fourth section and commenting on the same, and also the sixth section of said act, the Acting Commissioner states "that a person of the Indian race who has availed himself of his pre-emption and homestead rights cannot be deemed an Indian within the meaning of the fourth section of the general allotment act, and that he is therefore entitled to no benefits thereunder." He further states that "Should these views be concurred in by the Department, this office will be guided by them in the consideration of future cases of a like character."

In my opinion given on the general allotment act, dated June 22, 1889, it was stated that:

> Its immediate purpose is to obliterate the tribal relations of the Indians, so far as to induce them to become individual land owners, thence stepping by easy gradations it is hoped, along the path of civilization into the dignity of citizenship. To make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement. (Op. Asst. Att'y-Gen'l for Dept. of the Int., Vol. C, p. 175).

Again, on the eleventh ultimo, this office considered said general allotment act in connection with the act of Congress approved May 23, 1872 (17 Stats., 159), providing homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory, within the limits of the reservation selected for the Pottawatomie Indians in said Territory, and an opinion was given that the Indians could not take allotments under both of said acts, but they could elect, if the former executive action requiring them to take allotments under the general allotment act be modified, to take allotments under either of said acts. (Op. Asst. Att'y Gen'l, Vol. E, p. 74).

The general allotment act was not intended to give allotments to those Indians who have already severed their tribal relations and received the full benefit of the pre-emption and homestead laws. I am of the opinion, therefore, and so advise you, that the views of the Indian Bureau on the subject seem to be correct. It may be remarked, however, that there does not appear to be any case before the Department, as Henry Ford, the half-breed referred to, has not appealed from the decision of the Honorable Acting Commissioner, and hence any expression of opinion by the Department upon a hypothetical case is, at least, premature.

SCHOOL LANDS—TERRITORIAL RESERVATION.

PATRICK DOUGHERTY.

The Land Department has no power of disposal over land reserved for school purposes, and settlers thereon after survey can not be authorized by the Department to remain in the occupancy of such lands until they are subject to disposal by the State.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1891.

I have considered the appeal of Patrick Dougherty from your office decision of September 4, 1889, affirming the action of the register and receiver rejecting his application, made August 31, 1889, to make homestead entry of the SW. ¼ of Sec. 36, T. 9 S., R. 42 E., Blackfoot, Idaho.

The facts are fully set forth in your said office decision; the judgment of cancellation and reasons given therefor are in harmony with the law and existing regulations. It is therefore affirmed.

I find, however, the following statement appended to your said office decision:

> You will add also the statement that, in view of the peculiar circumstances of this case, this office will not disturb appellant's occupation of the land, if upon investigation it shall appear that his allegation as to honesty and innocence of his intention in going thereon are true, and that his occupation is without waste or injury to the tract.
>
> Being protected against other interference by the territorial statutes and by the fact that no one else can acquire title to the land under the federal laws, he may continue to occupy his farm until the Territory shall become a State, after which the tract will be at the disposal of the new State government.

The act of March 3, 1863, reserving land for school purposes in the Territory of Idaho (Sec. 14, 12 Stat., 808), so far as it affects the reservation of the land, has the same force and effect as a school grant to the State; and this Department has no power or authority to impair the right of the State to such lands or recognize the right of any settler thereon, except such as is expressly authorized by law. John W. Johnson, 11 L. D., 527; Thomas F. Talbot, 8 L. D., 495.

It follows, therefore, that the Department can not exercise the power to dispose of the lands so reserved by Congress for school purposes; nor should any encouragement be held out to one who has settled upon such lands after survey that his occupation thereof "will not be disturbed," or that "he may continue to occupy his farm."

INDIAN ALLOTMENT—RELINQUISHMENT—SECOND PATENT.

ALEXIS F. BAILLY.

The authority conferred upon the Secretary of the Interior by the act of October 19, 1888, to accept the surrender of a patent issued to an Indian, and direct the issuance of another in lieu thereof, extends to cases arising since the passage of said act, as well as prior thereto.

Secretary Noble to the Commissioner of Indian Affairs, March 22, 1890.

I acknowledge the receipt of your communication of 25th ultimo, enclosing patent issued June 10, 1889, to Alexis F. Bailly, Sisseton allottee No. 119, for certain lands in the Territory of Dakota, which was returned to your office by Mr. Bailly on December 23, 1889, with his relinquishment endorsed thereon, for correction of his allotment, so as to give him the tract upon which his house was situated,—and recommending that the said patent be canceled and a new one issued covering the lands selected by him, as noted on the schedule approved November 17, 1888.

This patent having been erroneously issued, I have, in accordance with the opinion of the Assistant Attorney General for the Department of the Interior (copy enclosed) accepted the surrender of, and canceled the same, and have this day transmitted the patent to the Commissioner of the General Land Office, with direction that a new patent be issued in lieu thereof.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, March 18, 1890.

By letter of the 25th ultimo, the Commissioner of Indian Affairs recommended that the patent issued to Alexis F. Bailly, on June 10, 1889, be canceled and a new one issued instead, under the act of October 19, 1888 (25 Stat., 611).

You referred the matter informally to me, for my opinion on the question, whether said act applied to patents issued after its passage. In response, I have the honor to submit the following:

Alexis F. Bailly, an Indian of the Sisseton and Wahpeton tribe, being Sisseton allottee No. 119, on October 15, 1888, notified the Department that he desired his allotment changed so as to give him the tract upon which his house was situated. "This request appears to have been overlooked by the General Land Office, and the patent was issued June 10, 1889, with the original description." This patent is now returned, with the relinquishment of the Indian, and the request that a new patent issue with the proper description, which is furnished.

Said act authorizes the Secretary of the Interior to accept the surrender of and to cancel patents conveying the land therein described, and theretofore issued to four certain members of the Sisseton and

Wahpeton Indians, and surrendered by them to the United States, and to allot to said Indians such lands as they would severally be entitled to, under the act of February 8, 1887 (24 Stats., 388), had no previous patents to them been made.

Section two provides:

The Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: *Provided*, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of the act of February eighth, eighteen hundred and eighty-seven.

The original draft of this act was submitted to the Senate by your predecessor, Secretary Vilas, in his letter of June 7, 1888, Indian Div. No. 55, p. 253, in which he stated that of the four Indians specially named in the act three had received patents for lands upon which they did not live, and one for land which was not desirable farm land, and recommended the relief, which the act afterwards afforded. The letter continued:

Cases similar to those now under consideration will likely arise on other reservations where patents have heretofore been issued to some of the members of the tribe residing thereon under treaty provisions.

The taking of land in severalty by the Indians is a matter of the utmost importance to them, and the Department in proceeding with the execution of the general allotment law among those tribes whose members are ready, willing, and sufficiently advanced in civilization to assume the duties, responsibilities, and privileges imposed and conferred by that law, is desirous of affording every Indian capable of making a selection the privilege of selecting the very best tract of land possible on the reservation for his or her allotment.

If any of the few who have patents are found to be dissatisfied therewith because the land covered thereby is unfit for farming purposes, or because the patent does not cover the land selected by them and upon which they are residing and have made valuable improvements, or for any other good and sufficient reason, I think they should have the privilege of taking an allotment under the general allotment act upon surrendering the existing patents and transferring their right, title, and interest in the land thereby conveyed to the United States.

I have therefore, caused to be prepared the accompanying draft of proposed legislation authorizing the cancellation of the patents in the four cases particularly named therein, and which constitute the special subject now under consideration, and have further so framed it as to authorize the like surrender and cancellation of patents in similar cases that may arise in the progress of allotment of land to the Indians under the general allotment law.

The last paragraph of the draft, which afterwards, in a modified form, became section two, *supra*, read as follows:

And the Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian

to whom a patent has *heretofore* been issued for land on the reservation to which such Indian belongs, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent and allow the Indian so surrendering the same to make a selection of other land and receive patent therefor, under the provisions of the act of February eighth, eighteen hundred and eighty-seven.

It will be observed that the Secretary proposed to limit the relief to cases where the patent had *theretofore* been issued.

The draft was referred to the Committee on Indian Affairs and afterwards reported to the Senate with certain amendments, one of which was, "In line 5, to strike out the word 'theretofore.'" Cong. Rec., 50th Cong., 1st Sess., 7420. The amendments were concurred in without debate, and the bill was passed. In the House the bill passed without debate. While I do not find any express explanation of this amendment, it seems obvious that the intention of the committee and the Senate was to extend the relief to cases where the patent had not *theretofore* issued. I find nothing in the further history of the act to contravene this conclusion. While on its face the term "has been issued" seems to refer to patents issued prior to the passage of the act, the entire paragraph will bear the interpretation that the relief was intended to apply to all cases where patent had been issued prior to the question being presented to the Secretary. The use of the word "whenever" seems to reinforce this view. In this view the Secretary would be authorized to issue another patent "whenever" he considered that an erroneous patent "has been issued." This view also harmonizes with the action of the Senate, and is in keeping with the well known maxim that a remedial statute is to be liberally construed with reference to the purpose of its enactments. Bechtel *v.* United States (101 U. S., 597). I find nothing in the history of the case to indicate that those who received patents after the passage of the act would not be as much entitled, equitably, to the relief as those who received them prior thereto.

I am, therefore, of opinion that the present applicant is entitled to the relief prayed for.

OKLAHOMA TOWN SITES—EVIDENCE—RULE 42.

INSTRUCTIONS.*

Secretary Noble to Townsite Trustees in Oklahoma, August, 18, 1890.

It has been brought to my attention that the provisions of rule 42, for the guidance of registers and receivers in taking testimony in contest cases, which are made a part of the rules for your observance in allotting lots on town-sites in Oklahoma, may delay the progress of

* Omitted from Vol. XI.

your work by requiring each witness in the case on trial, to await the transcribing of the stenographer's notes to sign his testimony, before you can proceed to the consideration of another case, the rule is therefore, so far as your duties are concerned, modified in all cases or instances you deem fit to omit transcribing testimony until it is required for use in the case on appeal, or otherwise. You will, in such cases, direct the testimony to be written out, and, as a board, certify that the evidence so transcribed is the true and correct transcript thereof as given by the witnesses upon the trial, which certificate shall stand in lieu of the signature of the witnesses, and the evidence so certified shall be treated on appeal by the Commissioner of the General Land Office, and the Secretary of the Interior and given the same consideration as though signed by each witness in accordance with the provisions of said rule 42.

Any witness may, however, be detained and required to sign, whenever the board requires it. To this extent, and no farther, is rule 42 modified.

OKLAHOMA TOWN SITES—PRACTICE—APPEAL—REVIEW.

INSTRUCTIONS.*

Secretary Noble to the Commissioner of the General Land Office, August 21, 1890.

To avoid delays likely to occur in the prosecution of appeals in townsite cases in the Territory of Oklahoma, under existing rules, whether as to original location of lots, or otherwise, now pending, or that may hereafter arise, it is deemed advisable to modify the rules of practice relative to appeals, rehearings and motions for reviews, relating thereto, so that time allowed for taking appeal and serving notice thereof, with due specifications of error and argument, shall in all cases, be limited to ten days from receipt of notice of the decision, with a like period allowed the appellee, after he, or his attorney of record, shall have received notice of said appeal, specifications of error and argument, within which to file argument in response.

All motions for review and re-hearing shall be filed within ten days after the judgment complained of, as herein provided for in case of appeal. If neither party shall present his appeal, or motion for review within the time herein provided for, you will consider the case closed, and proceed accordingly.

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* Omitted from Vol. XI.

FINAL PROOF—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 24, 1891.

Registers and Receivers:

GENTLEMEN: Your attention is directed to the practice that obtains in a number of local land offices of allowing an accumulation of final proofs therein, together with the money in payment for the land, with the receivers. These proofs are suspended on account of non-action of one or both officers. You are directed to discontinue this practice.

Receivers will also keep a separate cash book of all moneys received in this way, showing the date of receipt and date when proof is acted upon, and such moneys must be reported each week on form 4–120 under the fifth item of debits. All final proofs accompanied by payment for the land, which are not acted upon by *both officers* within one week after being received, must be reported to the Commissioner of the General Land Office with satisfactory reasons for delay. These instructions must be complied with.

Very respectfully,

LEWIS A. GROFF,
Commissioner.

RAILROAD LANDS—FORFEITURE ACT—PENDING APPLICATIONS.

WISCONSIN CENTRAL RAILROAD.

Directions given for the disposition of applications to enter railroad lands, pending at the passage of the forfeiture act of September 29, 1890.

Secretary Noble to the Commissioner of the General Land Office, December 8, 1890.

By letter of October 29, 1890, you state that the grant made by act of May 5, 1864 (13 Stat., 66), for the Wisconsin Central railroad, was forfeited by the act of September 29, 1890, opposite the portion of the road between Ashland and Superior, the same being unconstructed at date of the passage of said act; that there are pending in your office, on appeal from the action of the local officers rejecting the same, applications by a great many persons for such lands, some of which date back as far as 1883, and that in many cases there are two or three applications for the same land; that the presentation of such applications at a time when the land was not subject thereto, conferred no right upon the applicant, but the pendency of the same, undisposed of, bars further disposition of the land involved; that the act of forfeiture recognizes settlements in good faith existing at the date of its passage, and confers a preferred right of entry upon such settlers; and that the same condition is presented upon all the roads and grew out of the

policy of suspending action upon applications, where, if taken, it must be adverse to the applicant.

That the complications thus arising may be adjusted without delay, you recommend that in the notice of restoration under the forfeiture, there be inserted a notice to prior applicants, that such prior applications confer upon them no right to the land, and that upon the date mentioned in the notice the lands will be open to entry without regard to said applications, and that all such applications shall be rejected by said notice.

Section two of said act provides:

> That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior shall make such rules as will secure to such actual settlers these rights.

While the proposed action is a departure from the ordinary method of hearing each case on its merits, I believe it will do no actual injustice to any one, and will result in carrying out the provisions of the act with regard to actual settlers, speedily and in accordance with the intent of the law.

You will accordingly direct that notice be given each such applicant to the end that he may have an opportunity of presenting a new application, on the restoration of said lands. With this addition said recommendation is approved.

PROCEEDINGS ON REPORT OF SPECIAL AGENT—NOTICE.

STEBBINS. *v.* SWEETMAN ET AL.

Failure to apply for a hearing within the specified time after due notice of a rule to show cause why an entry should not be canceled, is a confession of the charge pending against the entry, and a waiver of all claims to the land.

Notice to the entryman's agent of an order holding an entry for cancellation is notice to the entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 12, 1891.

I am in receipt of your letter of December 7, 1889, transmitting the record in the case of Maria G. Stebbins *v.* The United States and James L. Sweetman, in compliance with the order of this Department of September 26, 1889, issued upon the application of said Stebbins, setting forth that an appeal was wrongfully denied her from your office decis-

ion of June 28, 1889, and asking that a hearing be ordered on the matters set forth in her said application.

From the record thus before me, it appears that, on January 2, 1883, Maria G Stebbins filed her declaratory statement for the SW. ¼ of Sec. 8, T. 130 N., R. 57 W., Fargo, now North Dakota, alleging settlement September 13, 1882. She submitted her proof July 24, 1883, which was allowed, and cash certificate, No. 6968, issued July 31.

December 26, 1885, Special Agent W. W. McIlvain made a report as to her said entry, when he found that she had never established residence on the tract; that, although her settlement is alleged as of date September 13, 1882, she was in fact never in the Territory until the spring of 1883, and recommended that the entry be held for cancellation.

June 29, 1886, your office held said entry for cancellation, allowing her sixty days after notice in which to apply for a hearing to show cause why her entry should be sustained.

December 6, 1887, the register and receiver reported that, although the claimant had been duly notified of the action of your office in holding her entry for cancellation, she had taken no action thereon, and that the time allowed her in which to apply for a hearing had expired. After receipt of this report, to wit: March 26, 1888, your office canceled her said entry uncon ditionally, and declared the land subject to entry by the first qualified applicant.

June 27, 1888, three months subsequent to the above order of cancellation, Elizabeth Bell made homestead entry for the same land, which was canceled by relinquishment, September 17, 1888, and on the same day James L. Sweetman (present claimant) filed his declaratory statement for the same, on which he submitted his final proof March 26, 1889.

On the same day, Stebbins filed with the local officers a protest against the acceptance of the proof of Sweetman, alleging prior rights in herself to the land.

April 10th of the same year she filed an application to re-instate her cash entry, which had been canceled, as hereinbefore set forth, in which, after alleging her settlement, filing, improvements, cash entry, etc., she alleged, "that she has never had any official notice of the suspension or cancellation of her said cash entry;" that she had been informed within the present month that a special agent had made an examination, etc. This application is sworn to and subscribed by her father, James M. Stebbins, on April 4, 1889, at Cook county, Illinois.

The register and receiver did not act upon the offered proof of Sweetman, nor the protest of Stebbins, nor her application for re-instatement of her entry, but, on April 24, 1889, transmitted the same to your office for your consideration.

June 28, 1889, your office overruled the protest of Stebbins against the proof of Sweetman, and refused her application to re-instate her

canceled entry, on the ground that by her failure to apply for a hearing to sustain her entry within sixty days after receipt of notice that the same had been held for cancellation. Under the report of the special agent, she had had her day in court, and could not thereafter be heard to complain if her entry was finally canceled.

The report of the special agent, if true, fully warranted the cancellation of her entry, so the only question for consideration is: Was the claimant, Maria G. Stebbins, duly and legally notified of the action of your office in holding her entry for cancellation by letter of June 29, 1886; for, if she was, her failure to apply for a hearing within the prescribed time is a confession of the charge in said report, and a waiver of all claims to the land. (W. H. H. Findley, 6 L. D., 777.)

The evidence of such notice as presented by the record is:

1st. The registry receipt of the postmaster at Fargo of a letter from the receiver of the Fargo land office, addressed to Maria G. Stebbins, Kenosha, Wisconsin. This receipt is dated August 11, 1887.

2d. The registry return receipt for said letter, signed Maria G. Stebbins, per J. M. Stebbins. This return receipt is dated at Kenosha, Wisconsin, August 16, 1887.

J. M. Stebbins is a lawyer and the father of Maria G. Stebbins, the claimant.

At the time of her alleged settlement and entry she was unmarried; she is now married, and residing with her husband (Frank Loomis) at St. Paul, Minnesota.

It also appears from the records of this Department now before me that, on January 2, 1883, date of claimant's filing, her father, James M. Stebbins, filed his declaratory statement for the NE. $\frac{1}{4}$ of the same section; also, on the same date, Zalmon G. Stebbins, son of said J. M. Stebbins and brother of claimant, filed for the NW. $\frac{1}{4}$ of the same section; that on December 1, 1882, James M. Stebbins made timber-culture entry for the SE. $\frac{1}{4}$ of the same section; that on the last named date Zalmon G. Stebbins made timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 9, same township and range, and on the same day Maria G. Stebbins, claimant herein, made timber-culture entry for the SE. $\frac{1}{4}$ of Sec. 4, same township and range.

From the two reports of the special agent, one in relation to the claim now under consideration and one in relation to her said timber-culture entry, it satisfactorily appears that Maria G. Stebbins was not in the Territory of Dakota at the date of her alleged settlement and filing, nor at the date of her timber-culture entry; that she was never in the vicinity of either claim, until the spring or summer of 1883; that her settlement, filing, and timber-culture entry were made through the agency of her father, J. M. Stebbins, and that he also acted for his son in the initiation of his claims; that after making real or pretended settlements on these several pre-emption claims, in the fall of 1882, before the said lands were open to settlement, he employed a lawyer to make

out the papers and file them as soon as the plats were filed in the local land office. His agency for his daughter is thus clearly established at the initiation of her claim.

This agency is not denied, either in her application to re-instate her canceled entry, or in her application for an order directing the Commissioner to transmit the papers for the inspection of this Department.

In both these applications the only allegation disputing the fact of notice, or impeaching its validity, is the bare assertion, in her application for certiorari, "that she never had any such notice as alleged," and in her application to re-instate her entry, "that she has never had any official notice of the suspension or cancellation of her said cash entry."

Practice Rule 17 provides that this notice may be served by registered letter, which was properly done in this case.

Whether, ordinarily, a receipt by another of the registry letter directed, as in this case, to the party entitled to notice would be sufficient proof of service, is not necessary to discuss. Surely, when the person receipting for the letter is shown, as in this case, to have been the active agent of the claimant, in the transaction to which the notice is pertinent, in the absence of proof to the contrary, the agency is presumed to continue, and he would be authorized to receive and receipt for the letter containing the notice, and the claimant would be bound thereby. This is a rule of law of so universal application that no citation of authorities is necessary.

It follows, therefore, that the claimant having failed to apply for a hearing after the receipt of notice of the suspension of her entry, she has forfeited her rights in the premises. Her protest in no wise impeaches the good faith of Sweetman, nor charges non-compliance with law on his part.

Her application to re-instate her entry is denied, and your office decision is affirmed.

PRE-EMPTION ENTRY—CONFLICTING SURVEYS—EQUITABLE ADJUDICATION.

E. D. METCALF.

An entry in accordance with the lines of survey as shown by the map on file in the local office, but afterwards found to embrace land within a military reservation, may be equitably confirmed, on the release of such land from said reservation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 14, 1891.

March 11, 1885, Edward D. Metcalf made his declaratory statement for the SW. ¼ SW. ¼, Sec. 2, lots 1, 2, 3, and 4, Sec. 3, lot 1 Sec. 10, and the N. ½ of the NW. ¼ Sec. 11—all in T. 50 N., R. 82 W., Cheyenne (now Buffalo), Wyoming. September 25, 1885, he submitted his proof and

made cash entry for the same. According to the map then on file in the district office, his entry covered 161.50 acres, for which he paid one dollar and twenty-five cents per acre.

The lots above described border on the east side of the Fort McKinney military reservation, and by the map aforesaid were shown to contain, respectively, 8.61, 8.31, 8.25, 8.19, and 8.14 acres. Guided by this map, the claimant built his house and other improvements on lot one in Sec. 3. These improvements are valued at five hundred dollars. By a resurvey, made some time subsequent to the one upon which this map was drawn, the east line of the reservation was established farther east, so as to include all claimant's improvements within the reservation, and reduced the area of his entry to 134.82 acres.

In 1888, a third survey was made, which deviated from the lines of both the original and corrected surveys, but still left the claimant a trespasser on the reservation.

January 9, 1889, by executive order, the eastern boundary of the reservation was removed a quarter of a mile west from where it was originally established, leaving all the lands embraced in Metcalf's original entry, "entirely outside of the now eastern boundary of the reservation."

This order, changing the eastern line of the reservation, also directed the lands thus vacated to be turned over to the Secretary of the Interior for disposal under the act of July 5, 1884 (23 Stat., 103).

By letter of March 16, 1889, your office directed the local officers to notify Metcalf to make application for the re-instatement of his original entry, embracing 161.50 acres, stating that "no conflict or infringement on the lands now embraced within the military reservation appears to exist."

March 24, 1889, he applied (as notified) to have his original entry reinstated, and on receipt of his application your office, by letter of May 1, 1889, denied the same, and held that "Should Metcalf desire to acquire title to the said 26.68 acres, he must proceed in conformity with said act." (23 Stat., 103.)

May 10, 1889, he applied for a reconsideration of this action, which was denied by your office letter of August 6, 1889, and he now appeals to this Department, and asks for equitable relief, if it should be found that he is not entitled to his original entry under a strict construction of law.

Whether he is entitled to said entry by law depends upon the true location of the east line of the reservation, a question that might be difficult to determine from the record before me, because it appears that there have been three surveys of that line, no two of which harmonize.

The claimant not having settled upon the land prior to its reservation for military purposes, nor prior to January 1, 1884, is not entitled to enter the same under the act of July 5, 1884, but under the provisions of that act he would be compelled to compete or bid against strangers to

the record for land enhanced in value by the improvements he had placed upon it in the honest belief that he was entitled to the land under his filing and entry.

Furthermore, such belief was induced by the map on file in the office at the time of his entry, which was held out as correct by the local officers and so recognized by the pre-emptor, never doubting that the east line of the reservation was where it was represented to be by said map.

All conflict as to this land was removed by the order of January 9, 1889, locating the eastern boundary of the reserved land a quarter of a mile west of its original location, and now the claim of Metcalf rests between him and the government.

No fault can be attributed to him for the mistake (if it be a mistake) in the boundary, and his filing and subsequent improvements and entry were made in conformity to the directions of the register and receiver and in accordance with a plat, used and recognized by them in accepting filings and allowing entries thereunder.

Under these circumstances, I do not deem it necessary to measure the rights of the applicant by the strict rules of law, but think he has shown himself entitled to equitable relief. His application will therefore be referred to the Board of Equitable Adjudication, with recommendation that his entry be allowed as originally made.

The decision of your office is reversed.

OSAGE LAND—FINAL PROOF.

WYDLER *v.* KEELER.

The ruling announced in the case of Rogers *v.* Lukens, with respect to final proofs under Osage filings, cited and followed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 14, 1891.

I have considered the case of Fred Wydler *v.* George E. Keeler on appeal by the former from your decision of June 3, 1889, holding for cancellation his Osage declaratory statement for lots number 1 and 2 and the S. ½ NE. ¼, Sec. 30, T. 26 S., R. 14 W., Larned, Kansas, land district.

Your decision of June 3, 1889, revokes and recalls the decision of December 12, 1888; it states the record and testimony fairly and substantially, as did also your decision of December 12, 1888. Since your decision, to wit, on September 16, 1889, in the case of Hessong *v.* Burgan (9 L. D. 353) this Department reviewed the question of final proof on Osage filings, and after a full discussion of the question, it was said:

The rule laid down in Rogers *v.* Lukens, Reed *v.* Buffington Elliott *v.* Ryan and Baker *v.* Hurst, is more consonant with reason and the decisions of the supreme court and the uniform practice of the Department than the doctrine announced in Epley *v.* Trick *supra*. Therefore the latter case must be and is hereby overruled.

Under this ruling, your decision of June 3, 1889, based upon the ruling in Epley *v.* Trick (8 L. D. 110) must be reversed and your former decision be affirmed. The final proof of Keeler is therefore rejected, and his declaratory statement held subject to that of Wydler.

OSAGE LAND—CONFLICTING CLAIMS—FINAL PROOF.

CATRON *v.* GEISTER.

Where Osage claimants for the same tract are both in default in the matter of submitting final proof, the one who first takes steps to cure such default is entitled to the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 14, 1891.

I have considered the case of Elias J. Catron *v.* Bessie Geister, upon the appeal of the former from the decision of your office, dated May 29, 1889, affirming the action of the local office, and holding for cancellation his Osage declaratory statement upon lots 1 and 8, Sec. 4, and approving his final proof as to lots 2 and 7, and approving Geister's final proof on her Osage declaratory statement for lots 1 and 8, Sec. 4, and lot 4, Sec. 3, all in T. 27 S., R. 24 W., Garden City land district, Kansas.

Your office letter of May 29, 1889, fairly sets forth the facts in the case and I concur with your findings thereon.

It will be noticed that the time within which Catron should have submitted his final proof expired January 21, 1887, and that the time within which Geister should have submitted her proof expired January 30, 1887. These parties were then in default after these respective dates, and both being so in default Geister first took steps towards curing such default. Under these circumstances, the land in dispute should be awarded Geister. Delapp *v.* Jackson (7 L. D. 308).

The decision appealed from is affirmed.

RAILROAD SELECTION—PRE-EMPTION CLAIM.

DARLAND *v.* NORTHERN PACIFIC R. R. CO.

A pre-emption claim can not be perfected for land covered by a prior pending indemnity selection, but may remain of record subject to the final disposition of the selection.

Secretary Noble to the Commissioner of the General Land Office, February 14, 1891.

This appeal is filed by George W. Darland from the decision of your office of May 7, 1889, rejecting the claim of Darland for the SE. ¼ of Sec. 5, T. 130 N., R. 79 W., Bismarck, Dakota.

The tract is within the indemnity limits of the grant to the Northern Pacific Railroad Company, and was selected by said company January 8, 1885, as per list No. 26.

On July 15, 1886, Darland filed declaratory statement for said tract, alleging settlement June 20, 1884, and, on June 25, 1887, he offered to make final proof, at which date James McLaughlin and Henry F. Douglas, who claimed by purchase from the railroad company, appeared and protested against the acceptance of said proof.

The testimony taken at the hearing shows that Darland did not make an actual settlement upon the land until June, 1885. The mere clearing out of a spring in June, 1884, not followed by occupation of the land until June, 1885, does not constitute such a settlement as would bar the company of its right of selection, especially when it is shown by his own testimony that during the summer or fall of 1884 he built a shanty upon section eight and occupied it for a time, and afterwards moved it within the limits of the plat of the townsite of Winona.

These selections were made under the following instructions of the Department:

MAY 28, 1883.

THE COMMISSIONER OF THE GENERAL LAND OFFICE,

SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Company not actually required to supply the lands lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant.

The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States, seeking homes, under the settlement laws, along the line and in the vicinity of the Northern Pacific grant, requires, for the best interest of the country, and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very respectfully,

H. M. TELLER,
Secretary.

Subsequently, on August 4, 1885, instructions were issued, requiring preliminary lists to be filed, specifying the particular deficiencies for which the indemnity is claimed, but it was also provided that, where indemnity selections had theretofore been made, without specifying the particular bases, the company should be required to designate the particular deficiencies before allowing further selections. (4 L. D., 90.)

The company complied with these instructions as to list No. 26, making said selection legal and regular in this respect.

In the case of Northern Pacific Railroad Company *v.* John O. Miller (on review), 11 L. D., 428, it was held that indemnity can only be selected in lieu of a section or part of section lost in place, and the basis for such selection must be specifically designated and shown to be excepted from the grant before indemnity can be allowed, and that where a selection is made without designating the basis, the invalidity of such selection may be attacked by a settler. But the selection in that case was not protected by the order of May 28, 1883, for the reason that it had never been withdrawn, and was therefore not of the character of lands contemplated by said order.

The decision of your office rejecting the final proof of Darland is affirmed, but his filing should not be canceled, but remain subject to the rights of the company, if the selection of the company should be finally certified.

HOMESTEAD CLAIM—HUSBAND AND WIFE—RESIDENCE.

EMMA F. STEWART'S HEIRS.

A married woman can not, during the existence of the marital relation, maintain a residence separate from that of her husband, in a house built across the line between settlement claims held by each separately; and such residence confers no right under the homestead law that can be perfected by the heirs of the wife.

Secretary Noble to the Commissioner of the General Land Office, February 14, 1891.

This is a petition by Duncan G. Stewart, Edward Doten, and Albert Doten, claiming as heirs of Emma F. Stewart, née Doten, asking a reconsideration of the departmental decision of October 6, 1890, in the matter of the latter's homestead entry for lots 1 and 2, and S. ½ NE. ¼, described in said decision as NE. ¼ of Sec. 6, T. 121 N., R. 62 W., Watertown series, Aberdeen, Dakota.

The unquestioned statements contained in said decision show, that Emma F. Doten filed pre-emption declaratory statement May 30, alleging settlement on the land May 15, 1880, that she made said homestead entry, May 6, 1881, that on June 8, 1881, she married Duncan G. Stewart, apparently one of said petitioners; that Stewart had previously made homestead entry for the adjoining SE. ¼ of said Sec. 6, that about October 15, 1881, "the two" began the construction of a frame house sixteen by twenty-four feet, across the line dividing said quarter sections, that Stewart and wife began a joint residence in said house, November 5, 1881, that such residence continued until April 24, 1882, when the entryman died, that Stewart, after making proof July 11, 1887, in support of his own entry, made proof as heir, April 28, 1888, in support of the entry in question.

On April 27, 1889, your office held the entry in question for cancellation.

Stewart appealed, whereupon the Department by the decision that I am now asked to reconsider affirmed the action of your office. The pending petition is based mainly upon an allegation to the effect that "the full compliance with the law by her heirs after her death," cured any defect in the entryman's residence.

The finding by the Department to the effect that the entryman and her husband, during the period claimed for her residence on the land, lived in the said house as one family is not denied. As she could not then maintain a residence separate from that of her husband, it follows that the entryman was at the time of her death, disqualified from perfecting the entry in question. L. A. Tavener (9 L. D., 426).

The petitioner's claim being, therefore, void *ab initio* their subsequent acts (not specifically described in the petition) in connection with the land, can not be considered.

The petition is denied.

PRACTICE—FAILURE TO COMPLY WITH THE RULES.

WITT *v.* HENLEY.

Where an excuse is offered for a failure to comply with the rules of practice, a definite statement should be made of the facts relied upon, and such statement supported by the affidavit of the party in interest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 14, 1891.

On February 28, 1887, Elias E. Henley made final proof on his Osage declaratory statement No. 4892, for the NE. ¼ of Sec. 17, T. 30 S., R. 25 W., Garden City, Kansas, and on March 8, thereafter, Frederick H. Witt made final proof on his Osage declaratory statement for the same land.

It appears that both parties protested against the proof of the other. A hearing was had, and the register and receiver, on September 7, 1887, rendered their decision rejecting Witt's proof and dismissing his protest against that of Henley.

On October 11, 1887, he took his appeal from said decision to your office.

On November 4, 1887, Henley filed a motion to dismiss the appeal, for the reason that no notice thereof, nor a copy of the specifications of error, had been served upon him or his attorneys.

Notice of this motion was served on Witt by registered letter, mailed to his usual place of residence, but no proof of the service of the notice of appeal or any denial of the facts set up in the motion to dismiss the appeal has been filed in the case.

On June 8, 1889, you sustained Henley's motion to dismiss said appeal, and, under Rule of Practice 48, affirmed the action of the register and receiver. This appeal is brought to reverse that judgment.

It is insisted that your office erred in dismissing the appeal, "for the reason that no notice of the decision of the local office awarding the land to Henley was served upon Witt, and was not received by his attorney soon enough for him to confer with Witt and then make the appeal within the time."

Appellant had abundant time and opportunity to have presented this fact to your office after he was served with the notice of the motion to dismiss his appeal. There is nothing in the record showing that such fact was presented. He now for the first time states his reasons (above quoted) for his failure to give the notice required by Rule of Practice 46. That rule is mandatory and has all the force and effect of law. He undertakes to excuse his laches by a statement of his attorney, not under oath.

Without entering into the question as to whether it is too late in an appellate tribunal to ask that his laches in the first instance be excused, it is sufficient to say that where a plain rule for the guidance of parties litigant is not observed, and an excuse is offered therefor, that the facts in extenuation of such laches should be definitely stated and supported by the oath or affirmation of the party in interest. This has not been done.

Your said office decision rejecting Witt's final proof and holding his declaratory statement subject to that of Henley is therefore affirmed.

HOMESTEAD ENTRY RESIDENCE—COMPULSORY ABSENCE.

LEWIS QUARNBERG.

A compulsory absence of the homesteader and his family, caused by the land being flooded with water, does not interrupt the continuity of residence that has been established and maintained in good faith.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 16, 1891.

I have considered the appeal of Lewis Quarnberg from the decision of your office of May 1, 1889, rejecting his final proof made in support of homestead entry No. 5859 of the N½ NW¼, SW¼ NW¼ and NW¼ SW¼, Sec. 11 T. 20 S., R 2 W., Salt Lake City, Utah.

He made this entry January 12, 1883. Prior thereto he had settled on the land and commenced building a log house, which he completed and occupied in May, 1882. It appears in evidence that he resided on this tract continuously from that time to May, 1885, having never until then been absent; but in May, 1885, he was forced to leave the land in consequence of its being completely flooded with water. This sastdier

was caused by an irrigating company, who raised the waters of Round Valley lake for purposes of irrigation. The water around his house was a foot in depth, and it became necessary for him and his family to retire and seek a place of safety elsewhere, there being no dry land on his homestead where he could locate another dwelling.

On the 12th of May, 1888, having prior to that time given the usual notice by publication, he appeared with his witnesses before the clerk of the court for Millard county, the judge of that court being absent, and made his final proof. This proof, when presented to the local officers, was rejected by them for the reason that the claimant had failed to live upon the land as the law required.

On appeal, your office affirmed this action of the local officers, and thereupon Quarnberg appealed to this Department, and the case is now before me for consideration.

In presenting this appeal, he alleges, in effect, that his entry on the land was made in good faith, his purpose being to secure a permanent home for himself and family, and that he complied with the requirements of the law as to residence, cultivation and improvements, as far as it was possible for him to do so. His improvements consist of a log house covered with a board roof, a corral, and some fencing. It was shown in proof that his land was better for grazing than for cultivation in grain, and in two seasons he harvested about one hundred tons of hay. He had around him a growing stock of horses, cows, sheep, and other domestic animals, and was in a prosperous condition at the time of the above mentioned disaster. Whenever the waters partially subsided, he used such parts of the land as could be used for grazing his stock, but his dwelling continued to be surrounded by water up to the time of making final proof, and its occupation was thus rendered impossible.

The circumstances of his case are peculiar, and are entitled to be considered with some degree of favor by reason of their equities.

Under the provisions of the homestead law, continuous residence is required; but when an actual residence has been once established, and the good faith of the entryman thereby shown, temporary absences, not inconsistent with an honest purpose to comply with the law, are excusable and may be regarded as constituting a constructive residence. Israel Martel (6 L. D., 566); and Montgomery *v.* Curl (9 L. D. 57). In Parsons *v.* Hughes (8 L. D., 593), it was held that the continuity of the residence was not broken by a forcible ouster from the land and a subsequent compulsory absence therefrom.

In a number of cases, where, by reason of high altitude and deep snows, a continuous residence on the land is impracticable, if not impossible, it has been held that such lands are, nevertheless, subject to filing and entry under the pre-emption and homestead laws, and parties making such filings or entries have been allowed to make final proof and perfect their titles, although such proof showed absence of

the claimant from the land for months at a time during the winter season. Daniel Lombardi (7 L. D., 57), and Jesse H. Wagner (9 L. D., 450). The cases cited are in principle like the one under consideration.

Quarnberg was driven from his home by the force of circumstances over which he had no control and could not avert. He established an actual residence on the land and remained there continuously for several years. When the waters partially subsided, he used such parts of the land as he could for grazing his cattle. He evinced every disposition to comply with the homestead law as far as possible, and in making his final proof testified it was his purpose to resume actual residence on the land whenever it could be properly drained and rendered habitable for himself and family. When forced to retire from his homestead, he went to the town of Scipio, about ten miles distant, and earned a livelihood by his daily labor. During his absence he boarded or lived in a rented house up to 1887, when he purchased a small house in Scipio. This may have the appearance of an established residence elsewhere; but it is not shown that he resided in the house he purchased, nor can it be material whether he occupied a rented house or one of his own; he was obliged to provide an abiding-place of some kind for himself and those dependent upon him.

As no adverse claimant appears, I am of the opinion that the final proof of Quarnberg should be accepted and patent certificate issued.

The decision of your office is accordingly reversed.

PRIVATE ENTRY—ACT OF MARCH 2, 1889.

WILLIAM H. CLARK.

A private entry of land excluded from such disposition by the act of March 2, 1889, and allowed after the passage of said act, is invalid and must be canceled, though made before the local officers had been officially notified of the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1891.

William H. Clark has appealed from your decision of January 25, 1890, holding for cancellation his private cash entry for the NW. ¼ of the SE. ¼ of Sec. 20, T. 38 N., R. 16 E., Menasha land district, Wisconsin.

The application to enter was allowed by the local officers at Menasha on March 4, 1889—they not yet having at that date been notified of the passage of the act of Congress of March 2, 1889, prohibiting the disposal of public lands at private entry thereafter (except in the State of Missouri).

The ground of appeal is, in substance, that inasmuch as the local officers had not been officially notified of the passage of the act, and inasmuch as they allowed the entry and received his money, the act should not be considered as applicable to his case.

The language of the act of March 2, 1889 (25 Stat. 854), is as follows: "From and after the passage of this act no public lands of the United States, except those in the State of Missouri, shall be subject to private entry."

A private entry on the 4th of March, therefore, even if allowed by the local officers, is invalid.

Your decision is affirmed.

PROCEEDINGS ON FINAL PROOF—PROTEST.

BLAKELY *v.* KAISER.

The local office may properly take action on a protest against final proof, even though it is filed after the submission of such proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1891.

I have considered the case of Sarah A. Blakely *v.* Ella Kaiser, involving the NE. ¼ of Sec. 25, T. 114, R. 66, Huron land district, South Dakota.

Blakely contested the entry of one O'Mara, and upon proof furnished by her it was canceled, October 13, 1884. Kaiser was allowed to make homestead entry of the tract, February 3, 1885—the contestant not having applied to exercise her preference right. November 16, 1885, Blakely applied to enter, but was refused, because of the prior entry by Kaiser. On December 22, 1886, Kaiser offered final (commutation) proof. The next day Blakely filed protest against said proof, alleging that she received no notice of the cancellation of O'Mara's entry until October 24, 1885, and that she applied to enter within thirty days thereafter. A hearing was had, at the conclusion of which the local officers found in favor of Blakely. Kaiser appealed to your office, which also (October 18, 1888,) found in her favor. Kaiser appeals to the Department.

There is another branch of the case. On May 21, 1887, Kaiser filed an affidavit of contest against Blakely, alleging failure to establish residence on the tract as required by law. Both the local office and your office found in favor of Blakely; and from your decision so far as it relates to this branch of the case Kaiser does not appeal, at least, in her appeal she makes no reference thereto.

Her appeal alleges three grounds of error, to wit: "The Hon. Commissioner erred in dismissing the contest. The decision is contrary to the evidence and contrary to the law."

The preceding allegations are too indefinite to warrant consideration (Levi W. Hulbert, 12 L. D., 29).

He erred in holding that the protest against the final proof of Kaiser was filed in time, one day after the proof was submitted. . . . . The notice of intention

to make final proof by Kaiser operated as notice to all the world that at a certain time and place she would offer proof, and that was the day the protest ought to have been filed. Filing one day after was too late.

This point is not well taken. If the local officers received information tending to show that Miss Blakely had a paramount claim to the tract, it mattered not how it reached them, nor when; even if no protest had been filed, and the information relative to her rights had been a matter of personal knowledge with them, or had come to their knowledge in an informal manner, it would have been their duty to notify her thereof, and to inform your office regarding the same. See Henry Buchman, 3 L. D., 223.

Your decision is affirmed.

TIMBER CULTURE CONTEST—NOTICE.

BERRETH *v.* MIDGAARD.

In proceedings against a timber culture entry the wife of the entryman is entitled to notice, where it is known that the entryman has disappeared, and that his whereabouts can not be discovered.

Acting Secretary Chandler to the Commissioner of the General Land Office, February 19, 1891.

On October 26, 1885, Sine N. Midgaard made a timber culture entry for the SE¼ of Sec. 18, T. 125 N., R. 74 W., Aberdeen, South Dakota.

March 1, 1889, Andrew O. Berreth filed his affidavit of contest against said entry. Not being able to get personal service on the entryman, he made affidavit under date of April 26, 1889, in which he stated that "he made inquiry and search in the vicinity of the land for the whereabouts of the claimant . . . . but from no one could information be had that said claimant resided or was present within the Territory of Dakota." Whereupon, notice was given by publication that proof to sustain the contest would be taken before Frank E. Devan, at Mound City, Dakota, on July 9, 1889. Hearing was duly had, and on July 24, 1889, the register and receiver recommended claimant's entry for cancellation.

Mrs. Midgaard received no notice of said hearing, and it is alleged in her behalf that her husband, the claimant, disappeared from their house in 1887, since which time nothing has been heard from him, and she believes him to be dead. She heard of the contest of Berreth against said timber culture entry a few days before the hearing had thereon, when she immediately wrote to C. E. Lennan, an attorney, to appear and defend the case, but her letter was not received in time to enable him to appear in the case.

November 30, 1889, the local officers were informed by your office that the case of Berreth *v.* S. N. Midgaard was closed, and that the timber culture entry of the latter was canceled. On December 12, 1889, Berreth was allowed to make timber culture entry for the tract in dispute.

January 27, 1890, Mary L. Midgaard, wife of the entryman, filed an appeal from your decision of November 30, 1889; and on February 8, 1890, your office refused to recognize her right to appeal said case, on the ground that "It is not shown that Midgaard is dead, and wife is not a party to the record." Thereupon, she filed her application for certiorari, which was, on June 4, denied because not accompanied by a copy of the decision complained of. This denial, however, was stated to be "without prejudice to another application."

On August 19, 1890, she filed another application for certiorari, accompanied by a copy of the decision complained of. The Department, acting upon her second application, on October 30, 1890, directed your office to certify the record in said case to this Department for examination and consideration. Pursuant to said direction, on November 21, 1890, your office transmitted to this Department the record in the case, which is now before me.

From an examination of said record, it appears to be established that Midgaard disappeared in the fall of 1887, leaving his wife and two small children in destitute circumstances, since when his whereabouts have been unknown. Mrs. Midgaard, his wife, believes him dead; but whether he is or not is not of much consequence for the purposes of this case, for, in either case, she is, by right of marriage, to be regarded as representing his property left behind. If he is alive, she has all the rights of a deserted wife, and if he is dead, her interest as his widow and the mother of and natural agent for his minor children is to be recognized. It was well-known fact in the neighborhood of this land that claimant had gone away before this contest was initiated, and it was also well known in that neighborhood that he left behind him his wife and children and that they still live in Dakota.

Mrs. Midgaard should have been notified of and heard in said contest. As was said in departmental decision on the second application for certiorari in this case:

> In the absence of the husband, the wife is presumed, if there be no showing to the contrary, to be his agent to the extent of having that general control over his property which must be lodged somewhere. (2nd Bishop's Law of Married Women, Sec. 413.)

If the entryman complied with the timber culture law until he disappeared in 1887, and since that time, if Mrs. Midgaard, representing him or herself, has complied with the law, she has such an interest in the claim that she is entitled to be heard in the matter of the contest thereof.

In view of the fact that no proper notice was served on Mrs. Midgaard, the local officers acquired no jurisdiction whatever to determine the matters charged in Berreth's affidavit of contest. It follows that the proceedings had in this case have been without any jurisdiction, and are therefore void. You will accordingly cancel the timber culture entry of contestant, Andrew O. Berreth, for the land in dispute, and cause

the entry of Sine N. Midgaard to be restored. The filing of Berreth's contest was regular, but the hearing was had by the local officers without jurisdiction. You will therefore direct the register and receiver to permit Berreth, if he so desires, to cause a new notice to be issued and served on Mrs. Midgaard, and direct a hearing to be had on said contest, at which she will have an opportunity to defend her late husband's entry with a view that the same may inure to the benefit of herself and family.

After said hearing, and the receipt of the register and receiver's opinion thereon, together with the record thereof, you will readjudicate the case.

JOHNSON *v.* WALTON.

Motion for review of departmental decision rendered in the case above entitled September 12, 1890, 11 L. D., 278, overruled February 27, 1891.

ALLOTMENT OF INDIAN LANDS—RESERVATION.

C. N. COTTON.

The general allotment act of February 8, 1887, gives the Indians the same right within a reservation created by executive order as if made by treaty or act of Congress; and lands subject to such right can only be relieved therefrom by Congressional action.

The use and occupancy of unsurveyed public land by one who has established a trading post thereon is not such a claim as will serve to except the land from a subsequent executive order creating an Indian reservation.

Secretary Noble to the Commissioner of Indian Affairs, December 27, 1890.

I acknowledge the receipt of your communication of the 8th instant and enclosures relative to the claim of Mr. C. N. Cotton that the land occupied by him should be excluded from the Navajo reservation created by executive order of January 6, 1880. With said communication you submitted a draught of an executive order, recommending that it be laid before the President for his signature amending and modifying that of January 6, 1880 so as to exclude from the operation thereof any tract or tracts of land which were settled upon or occupied or to which valid rights had attached under then existing laws of the United States, prior to January 6, 1880.

The letter was referred to the Hon. George H. Shields, Assistant Attorney General for the Department of the Interior, who holds that:

The general allotment act of February 8, 1887 (24 Stat., 388) referred to by the Commissioner, unquestionably gives to the Indians the same rights in a reservation created by executive order as if made by treaty or act of Congress. This being so the land embraced therein is subject to allotment, and the surplus can be restored only in accordance with the terms of said act, which require that the negotiations with

the Indians for the sale of such portions of the reservation not allotted 'shall not be complete until ratified by Congress,' (Sec. 5 of said act) but Congress can by additional legislation except the same from the provisions of said act of 1887. If this be the true construction of said act of 1887, and I think it is, it would be inconsistent to ask the President to issue an order excepting said lands from the effect of the order of 1880, and, in effect, attempt to do that which can only be done by an act of Congress.

In accordance with said opinion, your recommendation that the said draught of an executive order be laid before the President for his signature is not concurred in, and to enable Mr. Cotton to secure relief by Congressional action, you are hereby directed to reserve the land covered by his improvements and occupied by him from allotments under the act of February 8, 1887 until further advised by the Department.

The opinion of the Assistant Attorney General is herewith enclosed, and the enclosures of your letter are herewith returned.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, December 24, 1890.

I have the honor to acknowledge the receipt, by your reference of the 18th instant, of a communication from the Honorable Commissioner of Indian Affairs, dated the 10th instant, relative to the possessory claim of C. N. Cotton, within the addition to the Navajo Indian reservation made by executive order of January 6, 1880. The Commissioner states that the claim of Mr. Cotton that his place was occupied long prior to the date of said order, and therefore should be excepted from the effect thereof, was referred to special agent Vandever for investigation; that said agent reported that Mr. Cotton had lived on his place now within the limits of said addition to the reservation since the spring of 1878; that he had thereon a trading post, with a large number of buildings, and the best store on the reservation; that from the information he could obtain, Mr. Cotton settled upon his place with the intention of making it his home two years before the reservation was extended over the land occupied by him. The Commissioner further states that said executive order made no exception from the withdrawal from sale and settlement "of tracts settled upon or occupied," as is the case in the subsequent order of May 17, 1884; that the land in question was unsurveyed and Mr. Cotton had acquired no vested right to the same; that it had not been the policy of the Department to recommend the appropriation of lands occupied by settlers in good faith unless it was considered necessary for the wants of the Indians, in which case compensation for the improvements is recommended to be paid to the settlers; that since the act of Congress approved February 8, 1887 (24 Stat., 388), the Indian Office has held that lands within an

Indian reservation created by executive order can only be restored in pursuance of an agreement with the Indians interested, which must be ratified by Congress; that the Commissioner inclines to the opinion "that where lands to which private parties have acquired *valid or even inchoate rights*, have been included in an Indian reservation by executive order, such order may now be so modified as to except such lands from the operation thereof," and he submits a draft of an executive order modifying said order of January 6, 1880, with a recommendation that the same, if concurred in by the Department, be presented to the President for his signature.

By said reference my opinion is asked whether the course suggested by the Commissioner should be pursued.

It is undoubtedly true that the President had the authority to extend the reservation over the lands in question.

In the case of Grisar *v.* McDowell (6 Wall., 381), the supreme court said:

> From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. (Wolsey *v.* Chapman, 101 U. S., 770.)

The occupation by Cotton did not prevent the executive order from taking effect on the land in question. Mr. Attorney-General McVeagh (17 Op., 160) was of the opinion that where a pre-emption filing had been made on public lands, the land embraced therein could be set apart by the President for reservation for military purposes at any time previous to payment and entry by the settler under the pre-emption law, but that land covered by a homestead entry could not be so set apart so long as the entry remained of record, citing: Witherspoon *v.* Duncan, 4 Wall., 218; Yosemite Valley Case, 15 Wall., 77; Frisbie *v.* Whitney, 19 Wall., 187.

The general allotment act of February 8, 1887 (24 Stats. 388), referred to by the Commissioner, unquestionably gives the Indians the same rights in a reservation created by executive order as if made by treaty or act of Congress. This being so, the land embraced therein is subject to allotment, and the surplus can be restored only in accordance with the terms of said act, which require that the negotiations with the Indians for the sale of such portions of the reservation not allotted "shall not be complete until ratified by Congress" (Sec. 5 of said act), but Congress can by additional legislation, except the same from the provisions of the said act of 1887. If this be the true construction of said act of 1887, and I think it is, it would be inconsistent to ask the President to issue an order excepting said land from the effect of the order of 1880, and, in effect, attempt to do that which can only be done by an act of Congress. It may be conceded that Mr. Cotton has acted in good faith, and that it is a great hardship to extend said reservation over the premises occupied by him. But his remedy must be given by con-

gressional action, and not by an executive order. But to enable him to secure relief by legislative action, it is suggested that the Indian Office be directed to reserve the land covered by his improvements and occupied by him, from allotment under said general allotment act, until further advised by the Department.

For these reasons, in my opinion, the draft submitted ought not to be presented to the President for his signature, and you are so advised.

FINAN *v.* PALMER ET AL.

Motion for review of departmental decision rendered in the case above entitled, September 23, 1890, 11 L. D., 321, overruled by Secretary Noble, February 27, 1891.

HOMESTEAD ENTRY—RE-INSTATEMENT.

CHARLES R. PARKER.

The right of re-instatement may be accorded where an entry is canceled on account of a prior valid adverse claim and such claim is subsequently withdrawn.

Secretary Noble to the Commissioner of the General Land Office, February 28, 1891.

I have before me your communication of the 5th instant, in which you request to be advised whether Charles R. Parker may have his former entry, for the NE. ¼ of Sec. 20, T. 27 N., R. 43 E., Spokane Falls, Washington, re-instated or be allowed to make a second entry for said tract.

It appears from the papers transmitted by you that on the 21st day of May, 1888, Charles R. Parker made homestead entry for said tract.

On May 14, 1889, the acting commissioner of Indian Affairs addressed a communication to the Department in which he called attention to Parker's entry as being in violation of law for the reason that said land was in the possession and occupation of an Indian named Pa-ock-a-tin or Pierre, of the Upper Spokanes, whose family had been in the peaceable possession of the tract for seventy seven years. It was further recommended that the Commissioner of the General Land Office be instructed to direct the local officers in whose district the land in question is situated, to immediately cancel said Parker's entry and allow the Indian Pa-ock-a-tin or Pierre to enter the tract under the fourth section of the general allotment act (24 Stat., 388).

On the 17th day of May, 1889, the Department concurred in the recommendation and request of the Commissioner of Indian Affairs, and instructed you to carry out the same.

On the 8th day of June, 1889, the acting commissioner of your office asked to be advised whether Parker's entry should be canceled outright on the report of the Indian Agent, or the same "be held for cancellation, allowing the entryman to be heard in his own behalf before final action is taken."

On July 28, 1890, you were advised that the instructions given on May 17, 1889, were explicit, and that it was the wish of the Department that action be taken as therein directed.

On the 6th day of August, 1890, your office canceled Parker's entry and directed the local officers to note the cancellation on their records, and allow the Indian Pa-ock-a-tin or Pierre, to enter the tract under the fourth section of the general allotment act (24 Stats., 388).

On the 27th day of August, 1890, your office transmitted a report of the register of the local office at Spokane Falls from which it appears that the Indian Pa-ock-a-tin and other Indians voluntarily went to the local office to talk over their land matters with Special Indian Agent Geo. P. Litchfield. It appears that some years ago said Indian agreed to sell to Charles R. Parker, all his claim to the tract of land for the sum of $100; that Parker paid him at different times sums amounting in the aggregate to $55, and that about the 1st of December, 1890, Parker paid him the balance, $45, due on a note given to the Indian by Parker. The Indian stated that he was then entirely satisfied and that he did not desire to make any claim whatever to the land. He said, "When I have sold anything, I am done with it." The Indian also signed a statement, made before the register of the local office, which was witnessed by Hal J. Cole, Indian Agent, and Special Indian Agent Geo. P. Litchfield relinquishing all his right or claim to the tract of land, and reciting the sale of it to Parker.

It appears that Parker is a good citizen, a man of a family and very poor. The register says: "I believe that the Department would be doing an act of justice that would be fully borne out and warranted by the facts in this case, in a re-instatement of Mr. Parker in his claim" on the tract. The register of the local office at the same time transmitted the application of said Parker to have his homestead entry re-instated.

On the 15th of December, 1890, the Commissioner of Indian Affairs addressed to you a communication relating to this matter and the report of Special Agent Litchfield upon it, from which it appears that this Indian is old and unable to cultivate the land even if he so desired; that he has no sons and that his daughters are all married and living upon an Indian reservation; that he, the Indian, wishes to remove thereto and live thereon with them. That he does not desire to enter said land. Agent Litchfield recommends that Mr. Parker be allowed to renew his filing on the land and the Commissioner of Indian Affairs says,—"This office can see no reason why the said tract should be held longer for the use and benefit of the Indian Pa-ock-a-tin, or Pierre."

While, as a rule, the law allows only one homestead entry, yet, there

are well established exceptions. As was said in Thurlow Weed (8 L D., 100), "A mistake which involves no wrong, and is attributable to causes reasonably likely to produce it, ought rarely to forfeit the privilege of gaining one homestead, when honestly sought in good faith by a genuine settler with a family." See also Patrick O'Neal. Id., 137. In this case I find that Parker comes clearly in the spirit as well as letter of the rule. You are accordingly instructed to re-instate Parker's entry for the tract of land described, as requested by him.

FINAN *v.* MEEKER.

Motion for review of departmental decision rendered in the case above entitled September 23, 1890, 11 L. D., 319, overruled by Secretary Noble, February 27, 1891.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

UNION PACIFIC RY. CO.

In proceedings for the recovery of title under the act of March 3, 1887, the demand for reconveyance is a statutory requirement to be made only by the direction of the Secretary of the Interior, and should be served either personally, or by registered letter, upon the officers of the company, or some one holding sufficient authority to receive and acknowledge service of such demand.

Secretary Noble to the Commissioner of the General Land Office, February 28, 1891.

By letter of December 11, 1890, your office transmitted three lists of lands to this Department (lists marked "A" "B" and "C"), stated to have been erroneously patented to and for the benefit of the Union Pacific Railway Company. The lands included in list "A" are within the limits of the grant of July 1, 1862 (12 Stats., 489), and July 2, 1864 (13 Stats., 356), to the Kansas Pacific Railway Company, in the State of Kansas.

The lands included in list "B" are within the limits of the grant to said company in the State of Colorado.

The lands included in list "C" are within the limits of the grant of July 1, 1862, and July 2, 1864, *supra*, to the Union Pacific Railway Company, in the State of Nebraska.

The tracts described in lists "A" "B" and "C" are all of the odd-numbered sections, and are within the limits of the two grants for the benefit of the Union Pacific Railway Company.

Your letter states that on September 10, and October 25, 1890, you gave the Union Pacific Railway Company notice to show cause why demand should not be made on said company to reconvey said land

to the United States. You enclose in your letter the answers of the Company stating its reasons why no steps should be taken by the United States to repossess itself of said land. The company states that long before the passage of the act of Congress of March 3, 1887 (24 Stats., 556), under which proceedin gs may be had to regain the title to said lands, the company had conveyed the greater part of the lands embraced in said three lists to bona fide purchasers; that another part of said lands has been sold by said company to bona fide purchasers, and that said company is bound by its contracts with said purchasers to convey to them the lands sold to them and a part of whose purchase-money has been paid; that the remaining portion of said lands still belongs to said company, but the company says that the issue of the patents by the United States government is an adjudication and a determination under the law as to the right of the company under the law to said lands.

By letter of December 20, 1890, your office transmitted three lists of lands to this Department: list "D" including lands in the State of Nebraska, "E" lands in the State of Wyoming, and "F" lands in the Territory of Utah. The lands embraced in these three lists are situated within even-numbered sections and are within the limits of the grant for the benefit of said Union Pacific Railway Company.

The lands embraced within these lists were erroneously patented to said company under the provisions of the act of June 22, 1874 (18 Stats., 194).

Your letter states that, on November 7, 1890, you gave the Union Pacific Railway Company notice to show cause within thirty days why the United States should not begin proceedings under the act of March 3, 1887, to have said erroneously patented lands restored to the public domain. You enclose also a statement from said company in answer to your letter to show cause, as above. This statement is substantially the same as made by said company in relation to the lists marked "A" "B" and "C."

The tracts made the basis for the selections in lists "D" "E" and "F," were covered at the date of definite location with settlement claims; consequently were excepted from the grant, and do not come within the purview of the act of June 22, 1874, *supra*, which provided only for the case where the settlement claims were recognized and allowed "subsequent" to the company's rights.

The lands included in lists "A" "B" and "C" were excepted from the operations of the grants for the benefit of the railway company because they are shown by your records to have been claimed by homestead and pre-emption settlers at the date of the filing of the map of definite location of said road in your office.

The Department has heretofore passed upon all the points raised by the company in its answers to the rule laid upon it to show cause. See Winona and St. Peter R. R. Co. (9 L. D., 649); St. Paul and Sioux

City R. R. Co. (10 L. D., 50); Central Pacific R. R. Co. *v.* Rees (id., 281); Prindeville *v.* Dubuque and Pacific R. R. Co., (id., 575); Central Pacific R. R. Co. *et al. v.* Valentine (11 L. D., 238).

It appears that the attorneys for the railway company have construed your notice to show cause why demand should not be made, as the demand itself. You have, however, in the matter of said notice, very properly followed the rule established in the case of Winona and St. Peter R. R. Co. *et al.* (6 L. D., 544), where it is made the duty of your office, in any case where it appears that lands have been erroneously patented by the United States to or for the use of any railroad company, to serve notice on said company to show cause within thirty days why proceedings should not be taken in accordance with the provisions of the act of March 3, 1887, to secure the restoration of said lands to the government. This notice to show cause should not be confused or confounded with the demand to be made by you on said company to reconvey said lands to the United States This demand is a statutory requirement, to be made only by direction of the Secretary of the Interior, and should be served either personally or by registered letter upon the officers of said company or some one holding sufficient authority to receive and acknowledge service of said demand.

It appears from the records of your office that the lands embraced in lists "A" "B" "C" "D" "E" and "F" have been erroneously patented to and for the use of said Union Pacific Railway Company; and, in answer to the rule to show cause, it has failed to assign any legal reason why proceedings should not be instituted against it under the act of March 3, 1887.

You are therefore directed to demand from the Union Pacific Railway company a reconveyance of the lands described in said lists; and if the company neglect or fail to make said reconveyance within ninety days after demand, you will prepare and transmit to this Department a report of the fact and a record of all the proceedings in relation to the matter, to be forwarded to the Attorney-General that he may take proper action in the premises.

NORTHERN PACIFIC R. R. CO. *v.* POTTER ET AL.

Motion for review of departmental decision rendered in the case above entitled November 29, 1890, 11 L. D., 531, overruled by Acting Secretary Chandler February 26, 1891.

FINAL PROOF—NEW PUBLICATION.

SARAH A. LARKIN.

Where final proof is submitted on indefinite notice, it may be accepted in the absence of protest, after new notice given in due form.

Secretary Noble to the Commissioner of the General Land Office, February 27, 1891.

Your office, on January 31, 1887, rejected the final proof of Sarah A. Larkin (a soldier's widow), upon the homestead entry made by her husband for the SW. ¼ of Sec. 17, T. 101, R. 63, Mitchell land district, South Dakota.

Mrs. Larkin appealed to the Department, which held that her proof was insufficient, for the reason that in the published notice of claimant's intention to offer final proof no date was fixed; and she was required "to publish a new notice, and furnish new proof as of the date of her former proof."

Said departmental decision was dated September 26, 1888; but for some reason unknown (and under the circumstances not important) it was not promulgated by your office until October 8, 1890.

The claimant now directs attention to the fact that since the rendition of said decision some slight changes have been made in the practice of this Department, in the direction of more liberal rulings in favor of settlers upon the public lands; and applies (within thirty days from receipt of notice of said decision) for a review thereof, and an application of present rulings to the claimant's case—especially in view of the fact that seven years (lacking less than a month) have passed since she made final proof and received final certificate, and that for other reasons it would now be difficult to reproduce the proof which the Department has already held to be in itself sufficient—the *notice* only being defective.

Under the peculiar circumstances of the case, I see no reason why this application should not be granted.

The rule of the Department now is:

Where final proof is submitted on indefinite notice, it may be accepted, in the absence of protest, after new notice given in due form. (Alice Summerfield, 10 L. D., 372; Frank Aldrich, ib., 587.)

In the cases above cited the proof was indefinite as to the officer before whom the proof was to be taken; in the case at bar it was indefinite as to the date upon which it was to be taken. There appears no reason why the same practice should not obtain in the one case as in the other.

You will therefore direct that new notice be published, in due form, of the claimant's intention to offer final proof; and if, upon the day so

advertised, no protest or objection is filed, then the proof hitherto made shall be accepted as final and sufficient.

The departmental decision of September 26, 1888, is modified accordingly.

MASSEY *v.* MALACHI.

Motion for review of departmental decision rendered in the case above entitled August 19, 1890, 11 L. D., 191, overruled by Secretary Noble, February 28, 1891.

RAILROAD GRANT—TERMINAL LIMIT.

MICHIGAN LAND AND IRON COMPANY.

The line of constructed road is made the measure of the grant provided for in the act of April 20, 1871, and the Marquette, Houghton and Ontonagon company in availing itself of the benefits conferred by said act thereby accepted as the measure of its grant the one provided in said act.

By the express terms of said act the co-terminous principle is recognized in determining the measure of the grant, and this not with the line of definite location, but with the "line of road as completed" as the basis.

In the execution of the forfeiture act of March 2, 1889, the western terminal line, separating the lands opposite the unconstructed portion of said road from those opposite the constructed portion thereof, must be drawn at right angles to the line of constructed road.

Secretary Noble to the Commissioner of the General Land Office, March 2, 1891.

By letter of March 12, 1889, you transmitted to this office a draft of letter to the local officers at Marquette, Michigan, containing instructions for their action in the disposition of lands held to be affected by the act of March 2, 1889, (25 Stats. 1008) and accompanied by a plat showing the terminal limits of the completed portions of the Marquette, Houghton and Ontonagon Railroad as determined by your office. This letter of instruction was approved March 13, 1889. Afterwards the Michigan Land and Iron Company (limited) claiming to be the transferee of said railroad company filed in your office its petition alleging that the terminal line at the L'Anse end of constructed road as shown by the said map was improperly and erroneously located without notice to the parties interested, or an opportunity being afforded them to be heard in the premises and asked that said map be corrected "so as properly to show the true terminal line at the L'Anse end of constructed road." You declined to consider this petition upon the grounds that it was not shown that the petitioner was a proper representative of the railroad company, and that you had no jurisdiction over the matter. The petitioner thereupon filed an appeal which you refused to entertain, where-

upon said land company filed in this Department a petition for a writ of certiorari. This petition was allowed (11 L. D. 466) and all papers were transmitted by you. Full opportunity has been afforded all parties in interest to present their views upon the questions involved by way of both oral and written arguments.

By the act of June 3, 1856 (11 Stat., 21) there was granted to the State of Michigan to aid in the construction of certain railroads between points named therein "every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads," said lands to be held by the State of Michigan for the use and purpose expressed, to be applied in the construction of that road for which they were granted. It was further provided that the lands granted to said State should be subject to the disposal of the legislature thereof for the purposes expressed and no other, and by section 4 of said act it was provided as follows:

Sec. 4. And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.

The legislature of Michigan by act of February 14, 1857 (Laws of Michigan 1857, p. 346) accepted said grant and conferred upon various companies the part of the grant appertaining to the various lines of road mentioned in the granting act, that portion from Marquette to Ontonagon being conferred on the Marquette and Ontonagon Railroad Company. On January 14, 1859, this company filed in your office a map showing the definite location of the line of its road. On July 21, 1860, your office certified to the State all the vacant lands within the place or granted limits as fixed by said map of definite location. From Marquette westerly for a distance of about twenty miles the lines of three of the companies claiming under said grant were, as fixed by the maps of definite location, substantially the same. This section of twenty miles of road was constructed by the Marquette and Bay de Noquet Company, and a certificate by the governor of said State of this fact was filed in this Department November 20, 1862.

By the act of June 18, 1864 (13 Stat., 137), and joint resolution of same date (13 Stat., 409) the time for the completion of the road between Marquette and Ontonagon was extended five years beyond the time fixed in the granting act for its completion. By the act of March 3, 1865 (13 Stats., 520), there was granted to the State of Michigan for the

purpose of aiding in the construction, among others, of a railroad from Marquette to Ontonagon for the use and benefit of the Marquette and Ontonagon Railroad Company four additional alternate sections of land, per mile to that granted by the act of 1856 to be selected upon the same conditions, restrictions and limitations as are contained in said former act. Section 2 of this act provides as follows:

That the lands granted by said act of Congress and by this act shall be disposed of only in the following manner, that is to say: When the governor of the State of Michigan shall certify to the Secretary of the Interior that any ten consecutive miles, upon the route of either of said roads, is completed in a good and substantial manner, as a first class railroad, then the Secretary of the Interior shall cause a cerl tificate or certificates to issue to said State for one hundred sections of land, for the benefit and use of such company, and so from time to time for each completed section of ten miles, of either of said roads, one hundred sections of land, until the whole shall be completed.

Section 6 of this act provides as follows:

That each of said companies shall grade, in a good and substantial manner, ready for the ties twenty miles of its road within two years, and twenty miles additional thereof in each year thereafter: *Provided*, That if said companies or either of them shall neglect or fail to do so, or to complete its road within the time herein specified, the land granted to such company shall revert to the United States.

On November 17, 1865, the Governor of said State certified to the completion of a section of twenty miles of the road from Marquette to Ontonagon, commencing at a point on the Marquette and Bay de Noquet road, eighteen miles west of Marquette.

By joint resolution of May 20, 1868 (15 Stat., 252), after declaring that the failure to grade twenty miles of road within two years from the passage of the act of March 3, 1865 and twenty miles additional each year thereafter should not cause a forfeiture, provided such company should complete its road on or before December 31, 1872, it was said:

And provided further, That if the said Marquette and Ontonagon Railroad Company, in the State of Michigan, shall not have completed according to law ten additional miles of their railroad, on or before the first day of January A. D. eighteen hundred and sixty-nine, and shall not in like manner complete ten miles of said railroad in each and every year thereafter, then it shall be lawful for the legislature of the said State of Michigan to declare the grant of lands to said company to be forfeited and to confer the said grant of lands upon some other company in the same manner as if the said grant was now for the first time made to the said State of Michigan.

It seems the Marquette and Ontonagon Railroad Company made default in the matter of the construction of its road, and that the legislature of Michigan declared the grant to said company forfeited, and conferred it upon the Houghton and Ontonagon Railroad Company. By the act of April 20, 1871 (17 Stat., 643), Congress authorized a resurvey of the line of said road as follows:

That the Houghton and Ontonagon Railroad Company, a corporation organized and existing under the laws of the State of Michigan, and upon which the said State, in pursuance of a joint resolution of Congress approved May twentieth, eighteen hundred and sixty-eight, has conferred the grants of land made to aid in the con-

struction of a road from Marquette to Ontonagon, be authorized to make a resurvey and new location of that part of the line between Marquette and Ontonagon to be constructed by said company: *Provided,* That the said company shall be entitled to select and receive only its complement of lands for each mile of road constructed and completed, in the manner required by law, from the alternate odd-numbered sections of lands belonging to the United States and within the limits heretofore assigned to said line of road: *Provided further,* That on the completion of said survey a map of the new line shall be filed with the Commissioner of the General Land Office: *And provided further,* That said company shall not be entitled to receive any lands for any increased length of the new line hereby authorized, and shall only be entitled to receive its lands coterminous with its line of road as completed: *And provided,* That nothing contained in this act shall be held to interfere with homestead or pre-emption rights under existing laws.

A new line was surveyed departing from the line fixed by map of definite location at the town of Champion, by the adoption of which point of departure a section of constructed road some seven miles in length was virtually abandoned. The road was constructed from Champion to a point at or near L'Anse, a distance of 32.26 miles, and certificate of such fact was made by the Governor of the State February 6, 1873. In June 1873, the Governor issued to the Marquette, Houghton and Ontonagon Railroad Company a patent for a large body of lands claimed to have been earned by the construction of the road from Marquette to L'Anse, which patent embraced certain lands which lie opposite the unconstructed portion of road as fixed by the terminal line located by your office. In 1881 the railroad company sold and conveyed to the Michigan Land and Iron Company (limited) 238,049.16 acres of land, about 13,000 acres of which are according to the terminal line fixed by your office, opposite the unconstructed portion of said road.

On March 2, 1889, Congress passed an act entitled "An act to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon in said State" (25 Stat., 1008) which act so far as it is deemed necessary to quote therefrom, at this time, reads as follows:

That there is hereby forfeited to the United States and the United States hereby resumes the title thereto all lands heretofore granted to the State of Michigan by virtue of an act entitled "An act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State and for other purposes," which took effect June third, eighteen hundred and fifty-six, which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain: *Provided,* That this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted: *And provided further,* That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "an act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

Sec. 2. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad hereinbefore mentioned under any act of Congress making a grant of public lands in the State of Michigan, *Provided:* That such lands lie opposite such constructed road, or if indemnity lands are provided in such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road:

Many objections have been urged against the rights of various parties to be heard herein, but I have thought proper to hear a full discussion of the questions involved and to allow all parties interested an opportunity to present argument in support of their respective claims.

Many claims are made by the various parties who have been heard in this matter, and many questions have been discussed in the arguments made that will not be considered at this time. The question to be determined now is as to the correctness of the line established by your office to mark the boundary between lands opposite the unconstructed portion of this road, and those opposite the constructed portion thereof, and only those matters the consideration of which is necessary to a proper determination of that question will be noticed at this time.

Whether the lands, which shall by the terminal line finally adopted be determined to lie opposite the unconstructed portion of the road, will be held to be, by the force of the forfeiture act alone, public lands, or whether it will be necessary to go into the courts in order to reinvest in the United States the title thereto, will be hereafter determined.

A great amount of argument has been advanced, and many authorities have been cited in support of the proposition that the located line is the measure of the grant and that the terminal lines must be fixed with reference to the line of road as shown by the definite location. This may be accepted as correct as a general proposition. The facts in this case are, however, somewhat peculiar and different from those usually presented in such cases. A line of road was definitely fixed by the filing and acceptance of the map of 1859, and it was not afterwards subject to change so as to affect the grant, except upon legislative consent. Van Wyck *v.* Knevals (106 U. S. 360). The road was not constructed upon the line thus designated, and by the act of 1871 the "legislative consent," required as a pre-requisite of a change of route was given. By that act Congress authorized the Houghton and Ontonagon Railroad Company, upon which the State, after default made by the Marquette and Ontonagon Company, had conferred the grant, "to make a re-survey and new location of that part of the line between Marquette and Ontonagon to be constructed by said company." The company accepted the privilege, made a new survey, and on January 8, 1872, filed in your office a new or second map of definite location, fixing thereby its road on a line materially different from and, as appears from the maps filed herein, considerably shorter than the line fixed by the map filed in 1859. According to the statement in the brief filed in behalf of the Michigan Land and Iron Company, the road from

Champion to L'Anse was subsequently built upon the line fixed by this second map of location. It is insisted on the part of the railroad company and claimants under it that the terminal line fixed by your office was by mistake drawn at right angles to the *constructed* road instead of at right angles to the line of *definite location*; evidently referring to the line of definite location fixed by the map of 1859, and entirely ignoring the map filed in 1872. Admitting the contention that the line of definite location, and not the line of constructed road is to be taken as the basis for fixing the terminal line of the grant, the question would then be presented which of the two lines of location is to be accepted and considered as *the* line? This aspect of the matter does not seem to have presented itself to the attorneys for the claimants under the grant. In my view of the matter, however, this question will not arise, and it will not be necessary to answer it.

The act of 1871 provides that "said company shall be entitled to select and receive only its complement of lands for each mile of road constructed," and the company by accepting the benefits conferred by said act, and availing itself of the privilege thereby granted, accepted as the measure of its grant of land that provided in said act *i. e.*, the line of constructed road. Upon this point, the act here under consideration is similar to, but even more explicit than the act under consideration in the case of Cedar Rapids and Missouri River R. R. Co. *v.* Herring (110 U. S., 27) wherein it was held that the length of the road as constructed was to be taken as determining the quantum of the grant. Said act of 1871 contains another limitation or restriction as to the lands to be taken, when it declares that said company "shall only be entitled to receive its lands coterminous with its line of road as completed." In the face of this plain and unequivocal provision, it has been contended that the coterminous principle does not apply to this grant. It is certainly only necessary to quote the language of the act to show this position is wholly untenable. The coterminous principle is by this language made applicable to this grant, and this not with the line of definite location, but with the "line of road as completed" as a basis. The provisions of the forfeiture act for the carrying into effect of which it became necessary to establish a terminal line, strengthens and confirms this position. It is provided that said act shall not be construed as forfeiting any lands theretofore earned by the location and construction of any portion of any railroad therein mentioned, provided that such lands lie opposite such constructed road. The new line adopted by the company under the provisions of the act of 1871, and upon which the road was constructed, furnishes the measure for the quantity of the grant, the basis for determining its extent, and, in fact, the basis for each step in the adjustment thereof, except that the side lines as fixed with the original line of definite location as a basis are by the express provisions of said act of 1871 retained as marking the lateral boundaries within which the land granted is to be taken.

That the terminal line which it has become necessary to fix in order

to separate the lands opposite the unconstructed portion of this road from those opposite the constructed portion thereof preliminary to further action to carry into effect the provisions of said act of forfeiture must be drawn at right angles to the line which shall be determined to constitute the basis for the adjustment of said grant is a proposition, the correctness of which will not be assailed by the parties here seeking to have the line here in question changed. That proposition is asserted by them, and forms the foundation for their argument, the only question of difference between them and your office being as to what line is the proper basis. This proposition has been recognized and acted upon by this Department, and approved by the courts, and it is unnecessary to comment further upon it.

It is strongly urged that the State by issuing patents for certain lands fixed the terminal line of this grant, and that such action ought not to be ignored. In reply to this, it may be said that Congress has seen fit to enact a law forfeiting a part of said grant, and that for the carrying into effect of that law, it has now for the first time become necessary to establish the terminal line in question. There is nothing to show that the State has ever formally fixed or protracted any line, nor would the government, if she had done so and made an error therein, be bound by such action.

After a careful consideration of the question here involved in the light and by the aid of the full and elaborate arguments made, I am of the opinion that the line heretofore fixed by your office is correctly fixed, and that there is no good reason for granting the petition herein, and the same is therefore denied.

PRACTICE—REVIEW—NOTICE OF APPEAL—OSAGE FINAL PROOF.

REED *v.* BUFFINGTON (ON REVIEW).

Where a motion for review is lost or mislaid in the General Land Office, a copy of such motion may be properly filed and considered.

The acceptance of service, by the authorized attorney of the appellee on a brief filed in support of an appeal, is sufficient to confer jurisdiction on the Department.

Where such an acceptance is coupled with an objection to the consideration of the appeal, on the ground of improper service, such objection, to receive consideration, should be presented in due form and supported by proof.

The submission of final proof under an Osage filing is held to relate back to the filing of notice of intention to submit the same, where said notice is filed in due time, and the failure to make proof within the period fixed by the regulations is not caused by the negligence of the claimant.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 10, 1891.

I have considered John B. Reed's motion for review of departmental decision dated August 8, 1888 (7 L. D., 154) in the case of said Reed *v.* Jennie Buffington, involving the SE. ¼ of Sec. 7, T. 28 S., R. 16 W.,

Larned, Kansas land district, said tract being a part of the Osage Indian trust and diminished reserve land.

This motion is marked "Filed May 20, 1889," nearly a year subsequently to the date of the decision complained of.

It seems that with letter of October 20, 1888, the attorney for Buffington transmitted to your office a paper in said case entitled "Answer of Defendant to Plaintiff's motion for review." On April 5, 1889, the attorneys for Reed transmitted a reply to this answer to their motion for review. On April 13, 1889, the attorneys for Reed addressed a letter to your office stating that on September 24, 1888, they were notified of the decision of August 8, that on October 13, Mr. C. A. Morris, one of the firm representing Reed, personally filed with the Assistant Commissioner at the General Land Office a motion for review, with specification of errors, and asked to be advised of the status of the case.

In the letter of your office to the local officers, dated May 13, 1889, it was said in relation to said motion:

> The records of this office fail to disclose the filing of such motion, but the fact that in due course, to wit on the 31 of October N. B. Freeland mailed to the Hon. Secretary of the Interior, an answer to such motion duly served upon Morris and Morris, and the affidavits of C. A. Morris, that at the time of the filing of the motion, Morris and Morris were Reed's attorneys raise a strong presumption that such motion was filed as alleged, and lost or mislaid in this office.
>
> You will therefore advise the parties in interest than if Morris and Morris can furnish a true copy of such motion it may be filed, *nunc pro tunc*, within thirty days from notice hereof after notice to the other party. Should such copy not be obtainable, a new motion may be substituted upon complying with the rules of practice relative to serving notice of such motions.

On May 20, 1889, the attorneys for Reed filed a motion for review, accompanying it with the affidavit of C. A. Morris, setting forth that it is an exact copy of the motion filed by him October 13, 1888. Under these circumstances, it was proper to allow Reed to supply a copy of the motion for review, and such motion will be considered.

In this motion, it is urged there was error in the decision complained of in the following particulars:

First. In not dismissing Buffington's appeal from the Commissioner's decision because notice thereof was not served on Reed or the party then acting as his attorney.

Second. In holding Reed responsible for the delay in making his final proof, caused by the local officers fixing the date for such proof beyond the expiration of six months from the date of filing he, Reed, having filed in the local office notice of his intention to make such proof March 21, 1885, thirty-seven days before the expiration of said period of six months.

Third. In holding Buffington's claim a valid one, she having according to her own statement made settlement "the first and second day of September 1884" and not having filed her declaratory statement until December 4, more than three months after said settlement.

Fourth. In holding that Reed should have made his final proof within

six months from the date of his filing, it appearing that at the date said period expired, the protest against Buffington's final proof had been filed and no further steps looking to a disposition of said land could properly have been taken until the final determination of that controversy.

The attorney for Buffington has filed an answer to said motion, asserting that it should be dismissed because not presented by any one appearing on the record as attorney for Reed; that "an attack upon a final judgment, for the purpose of reversing or vacating the same by motion is a proceeding unknown to the law of practice and procedure and not authorized by any Rule of Practice prescribed by the department;" that the matters alleged in said motion are not sufficient to affect the decision complained of; that the matters alleged in said motion are not true; and that Buffington is entitled to the land on other grounds than those set forth in said decision.

It is sufficiently shown that the parties presenting this motion are the duly authorized attorneys for Reed. The rules prescribed by this Department provide that motions for review of the decisions of the Secretary "will be allowed in accordance with the legal principles applicable to motions for new trials at law after due notice to the opposing party." Rule 76 Rules of Practice. In the presentation of this motion, the rules applicable to such cases seem to have been duly conformed to, and the same will therefore be considered. The objections to said motion on its merits will be passed upon in the consideration of the questions presented by said motion.

As to the first point made in support of the motion for review, that is, that the appeal should have been dismissed because service of notice thereof was never properly made, the following facts appear from the record. At the hearing before the local officers, Reed was represented by J. W. Miller and Morris and Morris. Notice of the appeal to the Commissioner was served upon Miller who filed a reply. Reed addressed to the local officers a letter dated January 12, 1887, stating that Morris and Morris were alone authorized to represent him in said case, Miller not having had any authority to act as attorney since about the close of the hearing before them. At the same time, he wrote to the Commissioner making the same statement, and saying also that he has just learned that an appeal had been filed from the decision of the local officers and a reply thereto by Miller as attorney, and asked that all the papers might be returned and an opportunity to examine said appeal and file an answer thereto afforded him. In the decision of the General Land Office, of February 17, 1887, this request was refused, and the land awarded to Reed. The evidence of service of notice of the appeal to this Department is the following acceptance found on said appeal: "Service accepted this 18th day of March, 1887.

(Signed) J. W. MILLER
G. M.
Atty. for Plf."

No answer to this appeal was ever filed in behalf of Reed. Afterwards the attorney for the appellant filed a supplemental brief on which appears the following acceptance:

Copy of this paper served on us this 26th day of Nov. 1887 but objected to for the reason that it is not taken in time and no appeal has ever been taken or service made on Reed or his authorized attorneys.

(Signed) MORRIS AND MORRIS
Attys. for Reed.

No further or other appearance for Reed was made until the filing of the motion for review now under consideration. I am of the opinion that this acknowledgment of the service of a paper in the case by the authorized attorneys of Reed was sufficient to confer upon this Department jurisdiction in the case. It is true this acceptance of service was coupled with an objection to the consideration of the appeal because notice thereof had not been properly served, but such objection to entitle it to consideration by the Department should have been presented in due form and supported by proof. With a reply to the answer to this motion for review, there were filed several affidavits, among them one by J. W. Miller, stating that he was not, on March 18, 1887, acting as the attorney for Reed, that prior to that time, N. P. Freeland, the attorney for Buffington, asked him to accept service of notice of the appeal to this Department, but he (affiant) refused to do so, stating that he was not then representing Reed in this case and had no authority to accept service; that he never signed an acceptance of service of said appeal, and never authorized any one to sign such instrument for him.

There is also an affidavit by George Miller stating that on March 18, 1887, he was acting as clerk in the law office of J. W. Miller; that on said day N. B. Freeland came to said office (J. W. Miller being absent) and asked affiant to sign the name of J. W. Miller to an acceptance of service of appeal in the case of Reed *v.* Buffington; that he (affiant) objected to doing so, but upon being assured by Freeland that it was all right, and that J. W. Miller was then the attorney for Reed, consented to and did sign said J. W. Miller's name to such acceptance. These statements, if they had been properly presented while the case was pending on appeal would have received due consideration, and the charges made would have been carefully investigated. There is no allegation that these facts were not known or could not have been discovered and presented while the case was pending in this Department, and I am not inclined now to act upon them.

For a proper consideration of the second and third objections, a short statement of the facts presented by the record in the case is necessary.

The record before me shows, and Reed himself so testifies, that Reed filed his declaratory statement October 29, 1884, and not October 16, as stated in the decision of your office and in that of this Department. In this declaratory statement, Reed alleges that he made his settlement on

July 29, 1884, but in his testimony given at the hearing in this case, he fixes as the date of that settlement July 24. This latter statement made under oath and in the course of a judicial proceeding instituted for the purpose, among others, of determining the exact date of his settlement, must control, and his rights must be determined thereby.

Buffington filed her declaratory statement December 3, 1884, alleging therein that she made her settlement September 4 of that year. In her testimony given at the hearing before the local officers, she states positively, however, that she made her settlement on September 2, and this statement must, as in Reed's case, determine her rights.

It thus appears that Reed was in default in failing to file his declaratory statement within three months from date of settlement, as required, and that Buffington, by a due compliance with the regulations, might have defeated his claim. She, however, made default in the same particular, and hence her claim can not be held to prevent the perfection of Reed's claim by a subsequent compliance on his part with all the requirements.

The evidence concerning the connection of these parties with the land is exceedingly contradictory, but it is, I think, satisfactorily shown that Reed was the prior settler, and that he was the first to establish an actual residence there. I am not inclined to find fault with the conclusion that both these parties were at the dates of their respective applications to purchase actual settlers on the land.

It seems from the statement made by the local officers that on March 8,1885, notice of Buffington's intention to submit final proof on May 8, was issued. It appears from the papers that on March 21, 1885, notice of Reed's intention to make final proof was issued, May 14, being fixed therefor. This notice was given more than thirty days prior to the expiration of six months from the filing of his declaratory statement and in time to have allowed his proof to have been made within that period. On April 18, Reed filed a protest against the acceptance of Buffington's proof, and a hearing was duly had which resulted in a decision by the local officers in favor of Reed. Upon appeal that decision was affirmed in your office. That decision was, however, reversed by the departmental decision now under consideration, and the land was awarded to Buffington.

It is strenuously insisted that Reed having taken his first step towards making final proof at a date within the period of six months after filing, and long enough prior to the expiration thereof to enable said proof to have been taken within such period, he should not be deprived of any right because the day for taking such proof was set beyond the expiration of the period of six months. That having been done at the instance and for the convenience of the local officers, and in support of this position, the case of Ramage *v.* Maloney (1 L. D., 461) is cited. In that case, the time within which Maloney was required to make his final proof expired December 22, 1880. On May 2, 1881, he

filed notice of his intention to make final proof, June 3, being fixed therefor. On May 6, 1881, Ramage made timber culture entry for the land claimed by Maloney. It was held that although Maloney was in default in the matter of making final proof, yet that his notice of intention to make complete entry on a certain day operated to save his right for that period and to prevent another from making an entry, thereby defeating his rights, and that the giving of such notice being the initial step in the making of such proof, the whole matter relates back to said initial step.

The case of Ramage *v.* Maloney was referred to in the decision in the case of Steele *v.* Engelman (3 L. D., 92), and it was said that the ruling in the former case was not applicable in the case then under consideration. Engelman filed preemption declaratory statement December 26, 1879, alleging settlement November 1, 1879. Steele made homestead entry March 27, 1882. Engelman, on July 28, 1882, gave notice of his intention to make final proof September 16. The time within which Engelman was required to make final proof expired August 1, 1882, or three days after the date of his notice of intention to make the same. It is said in the decision of the case:

> This case, however, should be distinguished from the one cited (Ramage *v.* Maloney) in that Steele had asserted a rightful claim to the land prior to the issuance of Engelman's notice, subject only to defeat through the pre-emptor's compliance with the law, and as such compliance, through the pre-emptor's default, became impossible, so the right of Steele ripened into a paramount claim for the land. Steele's settlement and entry should have put Engelman on notice that his rights were thereafter in jeopardy if he failed to comply with the law, and his subsequent failure to make proof and payment within the statutory time must there fore entail the forfeiture of his rights when confronted by the adverse claim of the homestead settler.

It is thus seen that this ruling is based upon the theory that the prior claimant had by his own neglect put it beyond his power to comply with the requirements.

The case of Steele *v.* Engelman was referred to in the decision rendered in the case of Laffoon *v.* Artis (9 L. D., 279) in the following words: "The case of Ramage *v.* Maloney was cited in the case of Steele *v.* Engelman (3 L. D., 92), and it was there held that the ruling did not apply where the adverse claim was initiated prior to the filing of the notice". The facts in the case of Laffoon *v.* Artis are not set forth, but it must be presumed that there, as in the case relied upon as authority, the notice was through the neglect of the claimant himself delayed until it was impossible to submit proof within the time prescribed.

An examination of these cases shows that the exact question now to be determined was not in any of them, and I have found no ruling of the Department covering it.

It is urged that the practice of the local officers was to fix the dates for taking final proof at such times as would be convenient for them without regard to the date of the expiration of the period of six months allowed for that purpose, it being held, under the authority of the de-

cision in the case of Ramage *v.* Maloney, that the giving of notice within said period preserved all rights and that the rights of this claimant ought not to be prejudiced by the action of those officers. Whether or not there be merit in this claim, I am not inclined to hold as forfeited the rights of a claimant who commences in ample time the steps necessary to the perfection of his claim, and whose failure is not attributable to neglect on his part.

Under the circumstances of this case, I am of the opinion that Reed's final proof should relate to the date of the initial step in making the same, and be held to have been made in time.

This conclusion makes it unnecessary to consider the other points urged in support of this motion.

The departmental decision of August 8, 1888, is revoked and set aside. Reed will be allowed to complete his entry upon further compliance with the law. The decision of your office appealed from is modified in accordance with the views herein expressed.

HALL *v.* LEVY.

Motion for review of departmental decision rendered in the case above entitled, September 16, 1890, 11 L. D., 284, denied by Secretary Noble, March 11, 1891.

PRACTICE—MOTION FOR REVIEW.

PIKE *v.* ATKINSON.

A motion for review will not be dismissed on the ground of being filed out of time, where the date of the service of the notice of the decision is not affirmatively shown.

A motion for review must be denied where no new question is presented for consideration.

Secretary Noble to the Commissioner of the General Land Office, March 11, 1891.

This is a motion by the attorneys for Daniel Sullivan asking a review, reconsideration and reversal of the departmental decision dated July 18, 1890 (11 L. D., 65), in the case of John C. Pike *v.* William S. Atkinson involving the S. ½ NE. ¼ and S. ½ NW. ¼ of Sec. 30, T. 12 N., R. 15 W., Grand Island, Nebraska.

Said motion was filed September 9, 1890. On October 13, 1890, counsel for Pike alleging the same to be out of time, filed a motion to dismiss. No showing beyond the unsworn statement of counsel to the effect that the records of the local office show that "Mr. Roe," presumably representing Sullivan, was notified of said decision August 2, 1890,

is made in support of said motion. It thus appearing that the date of service of such notice is not affirmatively shown, the motion to dismiss will not be considered.

It appears from said decision and from the statements of your office that Atkinson made homestead entry for the land March 9, 1885, that on March 12, 1886, one James Hunter filed contest against said entry, alleging abandonment; that Hunter agreed to pay one John H. Roe, "a land attorney," $250 for a successful prosecution of said contest; that March 27, 1886, Atkinson executed a relinquishment which for $125, he delivered to Roe; that the hearing was had in May following; that no decision was rendered thereon by the local officers; that on June 2, 1886, Pike filed contest alleging abandonment and that the Hunter contest was speculative; that Hunter, repudiating his agreement with Roe, executed a withdrawal of his said contest, and sold the same to one Carr who transferred it to Pike, by whom it was filed July 1, 1886, when the Hunter contest was dismissed; that Roe appealed from this order of dismissal; that the hearing, on Pike's contest was had November 10, 1886, when after denying a motion by Roe for continuance until final disposition of his (Roe's) said appeal, the local officers passed the case "for decision;" that on February 21, 1887, Sullivan filed the said Atkinson relinquishment; that thereupon the entry in question was canceled and Sullivan made homestead entry for the land, and that March 2, 1887, the local officers considered Pike's contest and found that he was entitled to a preference right of entry.

By letter dated November 18, 1887, your office dismissed Roe's said appeal in the case of Hunter *v.* Atkinson. By the same letter, however, your office found from the evidence therein, to wit, a "stipulation of facts signed by Atkinson" a non-compliance with the law.

On December 4, 1888, your office considered Sullivan's appeal from the said decision of the local office in the case of Pike *v.* Atkinson, and reversing the same, dismissed Pike's contest and allowed Sullivan's entry.

Pike appealed, whereupon the Department by the decision that I am now asked to reconsider, reversed the action of your office.

The pending motion is based mainly upon an allegation to the effect that the Department failing to give "due weight" to the Hunter contest, erred in holding "that the filing of the relinquishment of Atkinson in the local office was the result of the Pike contest instead of finding and holding that it was the result of the case conclusively made and pending in the Hunter contest."

This is understood by counsel to be not "a conclusion drawn from any facts of record, but a legal inference growing out of the mistaken view that the Pike contest was alone subsisting."

The matter of Hunter's contest was before the Department at the time of its said decision, and with the other matters disclosed by the record, was then considered.

That the finding to the effect that Sullivan filed the Atkinson relinquishment as a result of Pike's contest is one of fact, is therefore, I think, too plain for discussion.

This being so, it follows that Pike has been properly held to have procured the cancellation of Atkinson's entry and consequently entitled to the preference right provided by section two, act May 14, 1880 (21 Stat., 140). No facts other than those previously before the Department are presented by the pending motion.

I can, therefore, see no reason for re-opening a matter that the Department has already considered and disposed of.

The motion is denied.

FINDLEY *v.* FORD.

Motion for review of departmental decision rendered in the case above entitled August 6, 1890, 11 L. D., 172, overruled by Secretary Noble, March 11, 1891.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—FORFEITURE.

MCFARLANE *v.* HASTINGS AND DAKOTA RY. CO.

The withdrawal of indemnity lands under the act of July 4, 1866, operated to reserve the lands embraced therein from disposal in any other manner than as indemnity for lands lost within the primary limits of the grant; and settlement on lands so withdrawn is subject to the company's right of selection.

The provision in section 4 of said act that the lands granted, but not patented, shall revert to the United States if the road is not completed within the period specified, does not, in the absence of action to enforce forfeiture, defeat the right to select indemnity, even though the road is not completed within said period.

Secretary Noble to the Commissioner of the General Land Office, March 13, 1891.

With your letter of April 25, 1889, you transmit the appeal of Albert McFarlane from your office decision of October 5, 1888, wherein you reject his application, dated October 11, 1884, to make homestead entry of the SW. ¼ of Sec. 3, T. 118 N., R. 45 W., Benson, Minnesota.

On July 28, 1886, the Hastings and Dakota Railway Company applied to select said tract, together with the SE. ¼ of said section, as indemnity for the SE. ¼ and SW. ¼ of Sec. 35, T. 116 N., R. 33 W., in said land district. This application was rejected by the local office, for the reason that applications to enter said tracts were presented October 11, 1884, by William Fraser and Albert McFarlane, under the homestead laws, which applications were rejected by the local office, and appeals from decisions rejecting them were pending before your office.

The railway company appealed from the decision rejecting its application, and by your said office decision, you affirm the decision of the

local office as to its rejection of said applications to enter said land under the homestead law, and reverse that part of the decision which denied the company the right to select said lands as indemnity for place lands lost from the grant.

The errors assigned upon your said office decision are the following:

1. In deciding that the railroad company had a right to select the lands (describing them) as indemnity for other lands (describing them), after finding that the said line of railway was not constructed within the period prescribed by statute.

2. In deciding that this land was reserved for the sole purpose of supplying deficiencies in the railway grant, and was subject to selection for that purpose whenever such deficiencies may be discovered.

The grant in aid of the construction of the Hastings and Dakota Railway was made by act of Congress, approved July 4, 1866 (14 Stat., 87). The language of the first section of said act is:

> That there be and is hereby granted to the State of Minneso * * * * * every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section or part thereof granted as aforesaid, or the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by odd numbers and sections by the direction of the Secretary of the Interior shall be held by said State of Minnesota for the purposes and uses aforesaid: *Provided*, That the land so selected shall in no case be located more than twenty miles from the lines of said road.

Section four of said act provides, that if said roads are not completed within ten years from the acceptance of this grant, the said lands hereby granted and not patented shall revert to the United States.

Section five provides, that as soon as the governor of said State shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from the market "the lands embraced within the provisions of this act."

On June 26, 1867, the map showing the definite location of the road was accepted by the Secretary of the Interior, giving precision to the grant, and rights thereunder are held to have attached.

The lands applied for as indemnity are within the twenty mile limits of the grant and were embraced in the withdrawal of April 22, and received at the district land office May 11, 1868, and were vacant, unappropriated and unreserved at the latter date. This withdrawal operated to reserve the lands embraced therein from disposal in any other manner than as indemnity for lands lost from the primary limits of the grant.

The act of Congress of July 4, 1866 (*supra*), passed a present interest in the lands to the State of Minnesota. Precision was given to the grant when the map of definite location was filed. The lands were granted for a specific purpose, namely, to "aid in the construction of a railroad." The land in controversy was withdrawn as indemnity for place lands lost from the primary limits of the grant, the withdrawal being in strict accordance with the act making the grant. The withdrawal being in force, the settlement of appellant was subject to the company's right of selection, and his application to make homestead entry upon said tract was properly refused.

The grant to the State in aid of this road still continues in force; the lands granted have not reverted to the United States, although the road was not constructed within the period prescribed—no action having been taken either by legislative or judicial proceeding to enforce a forfeiture of the grant.

No forfeiture having been enforced by or under authority of Congress, the title of the State is unimpaired to the lands described in the grant and to indemnity within the limits withdrawn to make good the deficiency in place.

No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce forfeiture on that ground, the title remains unimpaired in the grantee. Schulenberg *v.* Harriman (21 Wall., 44).

I think the company has the undoubted right to select the lands as indemnity for the place lands lost from the grant, and described in your office decision. This right should continue, until a forfeiture is declared by competent authority.

Your said office decision is affirmed.

PRACTICE—APPLICATION FOR CERTIORARI.

FERGUSON *v.* DALY ET AL.

An application for certiorari will be allowed where it is made to appear by the recitals therein that the record should be reviewed for the consideration of the errors alleged.

Secretary Noble to the Commissioner of the General Land Office, March 13, 1891.

This petition is filed by Wayne Ferguson, praying that the record in the matter of the cash entry of Isaac S. Daly, for lot 5 and the NE. ¼ of the NE. ¼ of Sec. 24, T. 50 N., R. 4 W., Lewiston, Idaho, be certified to the Department under rules 83 and 84 of Rules of Practice.

From the petition and accompanying exhibits, it appears that Daly made cash entry of the tract above described, on September 26, 1884,

having alleged and shown by his final proof settlement on December 12, 1883, said proof showing continuous residence, and improvements of the value of $500.

A hearing was had upon the report of Special Agent Ferguson, charging that the entry was made for speculative purposes; that the claimant had failed to comply with the law as to residence, and that he had sold the land to John Powers by warranty deed four months before the submission of final proof, and upon the testimony offered on hearing, at which John Powers appeared as transferee and intervenor, the local officers recommended the entry for cancellation. Upon appeal therefrom your office, by letter of October 2, 1890, held that the government had failed to sustain its charges, the preponderance of evidence being "in favor of the bona fides of the entry," and the decision of the local officers was accordingly reversed.

Subsequent to the rendering of this decision, Ferguson, whose official connection with the government had ceased, applied to contest said entry and to make homestead entry of the land.

By letter of October 22, 1890, a hearing was ordered upon the charges of Ferguson, but on November 14, 1890, upon the ex-parte application of counsel for Daly, your office held that the order for a hearing was improvidently granted, for the reason that the investigation as to the validity of this entry was vigorously prosecuted through the instrumentality of Ferguson as special agent, and your office having dismissed the case upon the evidence submitted at said hearing, it would be unjust to put the defendant to the expense of another trial. The order for a hearing was therefore rescinded.

From this action Ferguson filed an appeal, which your office declined to transmit, upon the ground that "no right had been denied to Ferguson, for while it is true his allegations constituted a cause of action, nevertheless he is not now in a position to make these allegations, because of the fact that he has already, as an agent for the government attempted to prove their truth and has failed, and I know of no rule of law or equity which would give him the right to have a hearing now, and further harass this defendant."

While there may be no error in the refusal of your office to order a hearing upon the contest of Ferguson after the entry had been fairly investigated by the government, through the agency of Ferguson, and a decision rendered in favor of the entryman, yet, if upon an investigation of the case as presented by the application for certiorari it appears that the decision in favor of the entryman was erroneous, the Department will direct the record to be certified that the errors alleged therein may be considered and corrected, and to make such other disposition of the case as may seem proper. If the testimony submitted at the hearing is correctly stated in the alleged copy of the decision of your office of October 2, 1890, exhibited with the application, it does not in my opinion show a preponderance of evidence "in favor of the bona

fides of the entry," but, on the contrary, shows that the government at said hearing sustained its charges.

The record will therefore be certified to the Department for its consideration.

RAILROAD GRANT—PRE-EMPTION CLAIM.

OREGON & CALIFORNIA R. R. CO. *v.* BARRETT.

Under the provisions of the grant to this company, land covered by a prima facie valid pre-emption filing, at the date when said grant becomes effective is excepted therefrom; and the failure of the pre-emptor to comply with the terms of the pre-emption law does not operate to defeat the exception.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 13, 1891.

I have considered the case of The Oregon and California Railroad Company *v.* Charles F. Barrett on appeal by the former from your decision of November 27, 1889, rejecting its claim and accepting the final proof of the latter for lots 2 and 3 of Sec. 31, T. 3 S., R. 2 W., Oregon City Land Office.

Your decision states the record fully and fairly, and upon a review of the same, I see no reason for disturbing your conclusions. Counsel for appellant insists that a pre-emption filing does not segregate the land from the public domain; that it is only a notice to the United States and to settlers that the pre-emptor intends to do certain things and thereby acquire rights; that one filing does not prevent another, or a half a dozen, for the same tract. And he claims that as Frazer did not follow up his filing, but abandoned the same, that the land was open to settlement when the railroad company filed its map, and that its right to the land attached, as though no pre-emption filing had been made.

The argument of counsel is met by the act creating The Oregon and California Railroad Company, and granting land for the construction of its railroad. (14 Stat., 239). The second section of the act contains the grant, and the following is one of its provisions:

> 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 land, designated as aforesaid shall be selected by said companies etc.

Land upon which a qualified pre-emptor has made a legal settlement and filed a valid pre-emption declaratory statement is "pre-empted" land. The fact that the words "sold"—"disposed of" are used in the same clause of the Statute precludes the idea that land is not "pre-empted" within the meaning of this statute, until the pre-emptor has made final proof and purchase of the tract.

Frazer made his filing on July 30, alleging settlement July 6, 1864. He was a qualified pre-emptor as shown at the hearing, and his filing is presumed in law to have been valid. The law presumes the officers

did their duty when they allowed the filing, and as the settlement and filing were prior to July 14, 1870, the date of the act (16 Stat., 279) limiting the time for making final proof, and upon "unoffered" land, it (the filing) had not expired by limitation, on January 29, 1870, the time the right of the Railroad Company attached under its grant, by reason of the pre-emptor's neglect to make proof and payment. See Randall *v.* St. Paul and Sioux City R. R. Co. (10 L. D., 54). Malone *v.* Union Pacific Ry. Co. (7 L. D., 13).

This land being pre-empted did not pass under the grant.

As to the matter of Frazer's abandonment, and his failure to comply with the law relating to pre-emption filings, it is sufficient to say that it has been frequently held by the Department that where a filing or entry has been made of record, the subsequent acts of the pre-emptor or entryman are matters between him and the government alone, and that the corporation whose rights would have attached but for such filing or entry will not be heard to complain of the failure of such pre-emptor or entryman to comply with the law. In the case of the Kansas Pacific Railway Company *v.* Dunmeyer, 113 U. S., 629, it is said, "with the performance of these conditions, the company has nothing to do."

See Northern Pac. R. R. Co. *v.* Stovenour (10 L. D., 645), also Northern Pacific R. R. Co. *v.* Fugelli (10 L. D., 288) and cases there cited, and same *v.* Kerry (ibid., 290).

The decision appealed from is affirmed.

PRACTICE—REHEARING—CUMULATIVE EVIDENCE.

TUCKER *v.* NELSON. 13210562

A rehearing will not be granted to introduce cumulative evidence, or additional evidence of the same kind to the same point.

It is not sufficient ground for a rehearing that the applicant's attorney in the original proceedings was incompetent.

Secretary Noble to the Commissioner of the General Land Office, March 16, 1891.

I have considered the application of Peter B. Nelson for a rehearing in the contest of Wm. H. Tucker *v.* Peter B. Nelson, involving timber culture entry for the NW. ¼ of Sec. 14, T. 33 N., R. 48 W., Chadron, Nebraska.

This case was decided adverse to Nelson on October 26, 1889 (9 L. D., 520). A motion for review was denied January 3, 1890 (10 L. D., 3). During the pendency of this last motion an application for a rehearing was filed, which was denied January 18, 1890. On February 26, 1890, Nelson filed another application for a rehearing, which was denied September 11, 1890 (Vol. 206 L. & R., page 5), and the reasons for such action were given at length.

The present application, dated November 26, 1890, is based upon two grounds: first, the statement of a large number of persons to the effect that there is not a sufficient quantity of natural timber in said section 14, to render a timber culture entry therein invalid. This was the very point at issue in the trial and on which evidence was taken, hence the evidence sought to be introduced at the new trial is merely cumulative; and the second ground upon which the application is based, which is, in substance, that at the former trial the attorney who conducted the case for the claimant and present applicant, was incompetent, and gave his client erroneous advice, and acting upon this advice, evidence on the point at issue was not introduced which might have been furnished at that time, does not change the cumulative character of the evidence sought to be introduced. It is a fundamental principle that requires no discussion that a new trial can not be granted to introduce cumulative evidence or "additional evidence of the same kind to the same point."

It cannot be permitted that either party shall produce just so much evidence as he thinks proper, and then stop short, and ultimately obtain a new trial, on the ground that he did not on the first trial, give all the evidence which he then might, and has since found he ought to have given more. (Hilliard on New Trials, 499.)

In his application Nelson does not show or even allege, that his attorney was in collusion with the contestant, Tucker, or that he was guilty of fraud in neglecting the interests of his client, he merely asserts in effect, that the attorney was incompetent and gave him erroneous advice. This does not constitute a sufficient ground for a new trial.

In opposition to the application, an affidavit has been filed, signed by the sheriff, county treasurer, school superintendent, and clerk of Dawes county, a former register of the land office, also, six farmers, who swear that they are well acquainted with the tract in dispute, and to their personal knowledge there are from sixteen to twenty acres of thrifty growing timber in the section, a portion of which has been cleared off since the initiation of the contest for the purpose of raising a crop, also that the claimant Jones, is a wealthy man, while the contestant, Tucker, is a poor man. These statements are corroborated by the county judge of Dawes county.

There is no legal ground upon which to grant the application, and I see no reason why the supervisory authority of the Department should be invoked to that end.

The application is denied.

PRACTICE—APPLICATION RULE 66.

CROSE *v.* FRIES.

The rejection, by the local land office, of an application to file a declaratory statement, and failure to appeal therefrom, will not defeat the right of the applicant to be subsequently heard thereon, where he is not informed by said office of his right to appeal from such action.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 16, 1891.

I have considered the case of Joseph D. Crose *v.* Mary M. Fries, upon the appeal of the former from your office decision of July 16, 1889, holding for cancellation the homestead entry of said Crose for the N. ½ of the NE. ¼ and the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of Sec. 25, T. 31, R. 52 W., Chadron, Nebraska.

The record shows that on March 14, 1887, Mary M. Fries filed her pre-emption declaratory statement for said lands alleging settlement thereon from September 15, 1886. On the 6th day of November, 1886, Joseph D. Crose made homestead entry for said tracts. Notice was given that Fries would make her final proof on the 6th day of June, 1887, before the clerk of the district court of Dawes county, Nebraska. At the time set the claimant appeared and offered her final proof. At the same time Joseph D. Crose appeared and filed a written protest alleging

that the said Mary M. Fries, claimant to the above described tract of land, had not at the time of her alleged settlement, and at no time since, the legal qualifications as a pre-emptor of government land. She being at the date of her alleged settlement, to wit, September 15, 1886, a married woman, being the wife of Jacob R. Fries, and lived as such with her said husband upon said land upon the 15th day of September, 1886, and continued to so do until the — day of November, 1886. That upon November 1, 1884, Jacob R. Fries made declaratory statement No. 2712 upon said tract of land, and continuously resided upon the same until the 6th day of November, 1886. That upon the 6th day of November, 1886, your affiant purchased from said Jacob R. Fries all of the improvements upon said tract of land, paying therefor the sum of two hundred dollars.

At the time said final proof was offered, both parties were present with their witnesses and attorneys, and they then proceeded to take their testimony upon the charges contained in the protest of Crose, which testimony was afterwards returned to the local office.

On the 24th day of October, 1887, the local officers rendered their decision in the case finding "that the claimant was abandoned by her husband Jacob R. Fries, in or about the month of September, 1886." They also found that the protestant's entry, residence and occupancy of the land in question was fraudulent and void as against the claimant Mary M. Fries; and recommended the approval of her final proof, and the cancellation of the homestead entry of said Crose.

Crose appealed.

On the 16th day of July, 1889, your office affirmed the decision of the local officers and held Crose's entry for cancellation.

Crose appeals.

The fourth specification of error is as follows:

> Error in not holding that by reason of the failure of said defendant to file her declarat ory statement for said tract until March 14, 1887, being more than three months from the date of her alleged settlement on September 15, 1886, it worked a forfeiture of her claim for the reason that in the meantime to wit, November 6, 1886, an adverse right had attached by reason of the homestead entry of Crose, made on the last mentioned date, and who has complied with the law and given the required notice, etc.; and Crose was, therefore, the "next settler" upon the tract, such as contemplated by section 2265 of the Revised Statutes of the United States.

This assignment presents a new question which was not raised by the allegations of Crose's contest affidavit, nor was it presented to, or considered by the local officers or your office when the case was there. While the practice of thus presenting new questions is at variance with the general rule of law in cases of appeal that, "a party is not at liberty to rely upon one set of objections before the court below, then seek to reverse their judgment upon grounds which had not been distinctly presented for their adjudication." Hilliard on New Trials, page 722; and while the better practice has been pointed out by the Department in Pollard *v.* Rethke (8 L. D., 294), yet, inasmuch as Mrs. Fries has responded to the question by way of supplemental evidence filed since the question has been raised, I am of the opinion that the case can be properly disposed of upon the whole record.

It appears from the supplemental evidence of Mrs. Fries that about the 15th day of October, 1886, she sent by mail her pre-emption declaratory statement for the land in controversy to the proper local land office; that it was returned to her by the local officers for the reason that no evidence of her abandonment accompanied it. On December 14, 1886, she made another declaratory statement for said land which was rejected for the reason that the abandonment was not long enough to satisfy the local officers that it was permanent. On January 19, 1887, she sent to the local office a third declaratory statement for said land and then it was suggested by the register that the Commissioner be written to, which was done, and on March 11, 1887, your office by letter advised her attorney that

> If she is the head of a family, she might be able to protect her right by filing a declaratory statement alleging settlement as of date of her husband's abandonment and completing title in her own name. This office cannot, however, decide the question until the matter is regularly present ed by offer of proof or contest between Mrs. Fries and the homestead entryman.

Upon the receipt of your office letter by her attorney he inclosed it with the fourth declaratory statement for said land and sent the same to the local office, which declaratory statement was received by the local officers and allowed on the 14th day of March, 1887. It thus appears distinctly that Mrs. Fries made her first application to file her declaratory

statement some twenty days before Crose made his entry, and made her second application about the time that Crose moved upon the land to live.

If Mrs. Fries' rights, under her offers to file, are protected under the facts and circumstances of the case then it follows that she was not only a prior settler but in contemplation of law, entitled to priority in filing.

Rule 66, Rules of Practice, requires the local officers to "promptly advise the party in interest of their action and of his right to appeal to the Commissioner."

The purpose of this rule is to enable parties to take appeals from the rulings, or action of local officers relative to applications to file upon, enter, or locate the public lands. Mrs. Fries was not advised by the local officers of her right to appeal to your office from the actions of the local officers in rejecting her application to file her declaratory statements for the land.

In Turner *v.* Bumgardner (5 L. D., 377), it was held that "Information as to the right of appeal not having been given under Rule 66 of Practice, the right of the rejected applicant to be subsequently heard is recognized." In that case Bumgardner had made homestead entry of the tract in controversy; afterwards Turner made his application to enter the same tract; his application was rejected because of the prior entry of Bumgardner. Turner did not appeal from the decision of the local officers rejecting his application and the matter rested for nearly six months when Turner presented to the local officers, affidavits alleging settlement prior to that of Bumgardner and asking a hearing, which was had and resulted in a decision in favor of Turner by the local officers, which was affirmed upon appeal by your office and upon appeal here was affirmed. The question presented in that case was similar to the fourth assignment of error in the case at bar. In that case it is said, page 379: Bumgardner is not in a position to demand the protection of the Department for an entry knowingly initiated in fraud of the rights of a prior settler, and attempted to be consummated through force and lawlessness."

In view of the findings of the local officers in this case, and the undisputed evidence of lawlessness by which Mrs. Fries was removed from her house at the midnight hour and her house and other buildings burned down the cases present a striking similarity on principle. It is further said, page 380:

> But in the case at bar the local officers, when they rejected Turner's application to enter, neglected to notify him of his right of appeal. He was thus left in ignorance of the proper course to pursue for the protection of his rights. Therefore in my opinion, he ought not to be considered to have lost his right of appeal because of his failure to do so within the time prescribed by the rules of your office.

Without entering into a discussion of the authorities cited in support of the fourth assignment of error it is sufficient to say, that they do not present facts similar to the case at bar.

Counsel for the contestant filed here, with his argument, the affidavits of two persons tending to show that about September, 1886, Mrs. Fries made out and sent to the local land office at Valentine, Nebraska, a declaratory statement for another tract of land, under the name of "Mary Croyle." These affidavits are made by women who are not shown to have personal knowledge of the facts. These affidavits bear date September 13, 1889, and so far as the record shows Mrs. Fries was not notified of them or their contents until the 19th day of January, 1891, then through registered letter. They are meager in their statements of fact and when considered in the light of the evidence, and the circumstances in the case, I do not think they are sufficient to overcome the evidence of good faith upon the part of Mrs. Fries in trying to secure the land in controversy as her home.

I have carefully examined the evidence, which is voluminous and I find that it clearly supports the findings of the local office and your office.

I am of the opinion that the case comes within the rule announced in the case of Turner *v.* Bumgardner, *supra*, which I am content to follow.

I discover no reason for disturbing the decision appealed from and it is accordingly affirmed.

RAILROAD GRANT—DONATION CLAIM.

WHITNEY *v.* NORTHERN PACIFIC R. R. CO.

A donation claim of record prior to the attachment of rights under the railroad grant, and asserted until after said grant becomes effective, excepts the land covered thereby from the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, March 16, 1891.

I have considered the case of George W. Whitney *v.* Northern Pacific R. R. Co. on appeal by the former from your decision of December 19, 1888, holding for cancellation his homestead entry for the S. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of section 19, T. 19 N., R. 1 W., Seattle, Washington land district.

These tracts as stated by you are within the primary limits of the grant to the Northern Pacific R. R. Co., as shown by the map of general route filed August 13, 1870, and the map of definite location, filed May 14, 1874. Whitney was allowed to make homestead entry for said tracts on March 19, 1886, under which he on May 25, 1887, made final commutation proof which was approved by the local officers who issued final certificate thereon the same day.

In the decision appealed from, it is said, referring to the dates of filing map of general route and of definite location, "The records fail to show that said tract was claimed at either of said dates, and it therefore inured to the company under its grant."

In the appeal, it is asserted that the claim of Robert Pattison under the "donation law" was of record at the dates mentioned, and served to except the tracts mentioned, from the operation of the grant to said company.

An examination of the records of your office shows the following:

On November 7, 1853, Pattison filed a notice of a claim under the act of September 27, 1850 (9 Stat., 496), describing the land by metes and bounds, and on January 1, 1870, filed an affidavit touching his claim wherein the land is described by subdivisions, said description including the tracts here involved, which affidavit, on account of certain informalities therein, your office held not entitled to consideration further than as a notice of the tracts claimed according to legal subdivisions. On May 25, 1872, the donee filed yet other affidavits touching the matter of his said claim. In March, 1884, one William E. Bigelow applied to make homestead entry for these tracts, alleging that Pattison had abandoned his claim thereto, as a result of which a hearing was ordered and duly held. At this hearing, both parties appeared, and a large amount of testimony was submitted, after a consideration of which your office, on April 21, 1885, held Pattison's claim for cancellation, and afterwards on July 22, 1885, formally canceled it upon the records.

We have then a claim for this land placed of record long prior to the date the rights of the company attached, which the claimant was still asserting and attempting to perfect in 1870 and 1872 about the time the company's rights attached, and which was only finally canceled in 1885 after an extended contest wherein the claimant strenuously insisted upon the validity of his claim. This certainly constituted such a claim as would and did serve to except the land in question from the operation of the grant. The decision holding that said land inured to the company under its grant, and directing the cancellation of Whitney's homestead entry is reversed.

PRACTICE—SERVICE OF NOTICE—RESIDENCE.

GORE *v.* BREW.

An acknowledgment of service of notice is a waiver of all irregularities in the mode of service.

The failure of a homesteader to establish residence on the land covered by his entry, can not be excused on the ground that it was due to his arrest under a criminal charge and subsequent sentence thereunder.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 16, 1891.

The case of James M. Gore *v.* Thomas W. Brew is before me on appeal of the latter from your office decision of June 3, 1889, canceling his homestead entry for the SW. ¼ of Sec. 26, T. 24, R. 12 E., San Francisco, California.

It appears that he made entry of this land February 4, 1885. Two days thereafter, and before he had established residence thereon, he was arrested for larceny, and within two months thereafter convicted of the charge and sentenced to six and a half years in the penitentiary at San Quentin, California.

Contest was initiated by Gore, April, 1887, charging abandonment.

Brew was not present at the hearing, he being at the time serving his sentence in the penitentiary. The fact that he had not established residence on the land up to the date of the hearing (May 8, 1887), and the fact of his imprisonment were shown in evidence, and the register and receiver recommended that the entry be canceled.

He appealed, and your office affirmed the action of the local officers, and he now further prosecutes his appeal to this Department.

Several causes of error are assigned by counsel for appellant, only two of which need be noticed:

1. That the local office obtained no jurisdiction over the person of claimant, because notice of the contest was not served on the warden of the penitentiary at San Quentin.

2. That the admitted facts do not justify the cancellation of the entry, or, in other words, the fact that claimant was prevented from establishing his residence on the land by compulsion of law ought not to deprive him of his rights under his entry.

There is no force in the first error complained of, because the record bears his own acknowledgment in writing of service of notice of contest. This dispenses with the question as to how the service was obtained, for, after acknowledging that he was properly served with notice, he is estopped from questioning the manner of such service. In other words, an acknowledgment of service is a waiver of all irregularities in the mode of service.

After a somewhat extended examination of the decisions of this Department, I find no precedent that will warrant me in sustaining this entry. It is not parallel with the case of Anderson *v.* Anderson, 5 L. D., 6, for in that case the claimant and his family had resided on the land for many years under a timber culture claim, and for two years under his homestead entry, had made extensive improvements, and after his sentence to the penitentiary his family continued to reside thereon, and so, notwithstanding his sentence, his residence, so far as he had any, was presumptively on the claim where his family resided, and the Department held, properly, that his conviction and sentence did not break the continuity of his residence ; his family being on the land, his residence was there while he was in *custodia legis*.

The case of Kane *et al. v.* Devine, 7 L. D., 532, is similar to that of Anderson *v.* Anderson.

In the case at bar the claimant had never established residence on the land, and after his sentence, in contemplation of law, his residence is presumed to have remained where it was at the time of his arrest and conviction, which was elsewhere than on the claim.

While it may be said, in this case, that his failure to establish residence on the land was not voluntary on his part, still it was in consequence of his own wrongful act, *voluntarily done*, for the commission of which the law inflicted a penalty which rendered him incapable of complying with the requirements of the law necessary to acquire title under his entry—one of which was, that he should establish residence on his claim within six months after entry. To hold that, notwithstanding this failure on his part so, as aforesaid, occasioned by his own guilty act, he could reserve this land from entry until he had answered the claims of violated law, would be to offer a premium for crime and to establish a precedent repugnant to reason and justice.

The decision of your office is affirmed.

DESERT LAND ENTRY—FINAL PROOF—EQUITABLE ACTION.

GEORGE H. GILLAND.

An opportunity to submit further proof, with a view to equitable action, may be accorded a desert entryman who has failed, through no fault of his own, to secure the requisite water supply to effect reclamation within the statutory period.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 24, 1891.

I have considered the appeal of George H. Gilland from your decision of November 6, 1889, rejecting his final proof on his desert land entry for the S½ NE¼, SE¼ NW¼, Lot 2, SE¼, E½ SW¼, Lots 3 and 4 Sec. 18, T. 13 N., R. 62 W., 486.36 acres, Cheyenne, Wyoming, land district.

Gilland made entry for this land under the act of March 3, 1877 (19 Stat., 377), on May 10, 1886, and offered his final proof on September 10, 1889, which was rejected by the local officers because no water had been conducted on to the land, from which action the entryman appealed, and your office affirmed said action and he again appealed.

The testimony is very brief and clear, and shows that the "Beaver Dam Ditch Company," a corporation organized under the laws of Wyoming Territory, built a dam across Crow creek, about five miles from this land, and also constructed a reservoir about one and a half miles from the land, with a ditch from the dam to the reservoir. This reservoir covers about two hundred and seventy-five acres of land. From this reservoir a ditch is constructed so as to pass along the east side of the land in controversy, and eight lateral ditches are cut so as to conduct water across and over the land. It appears that the capital stock of said ditch company was divided into one hundred and fifty shares, and this entryman owns 45 of these shares, and controlled the right to sufficient water to irrigate the land fully. Crow creek appears to have been a stream from which men of ordinary prudence and ex-

perience could reasonably expect water in sufficient quantities to irrigate a large tract of land, but after the organization of said company, and the construction of said dams, reservoir and ditches, the drouth and the lack of snow in the mountains were such that the creek dried up and no water had flowed in the ditches or collected in the reservoir from which the same were constructed, up to date of proof.

The good faith of the entryman and the failure of the enterprise, up to date of proof, are equally apparent. He did not offer proof within three years, and gives as a reason that he hoped that water would flow into the reservoir and ditches; but no rains had fallen up to September, 1889. It is claimed that the drouth is "an act of God," and that, the entryman having done all in his power to comply with the law, and having had reason to depend upon said stream for water, the Department should allow his proof and await the results.

In the case of James A. Hardin (10 L. D., 313), it was held that:

A desert entry should be referred to the board of equitable adjudication when proof and payment are not made within the statutory period, and such failure is due to obstacles which could not be overcome by the entryman.

In the case of George F. Stearns (8 L. D., 573), the land was not shown to have been reclaimed, and your office rejected the proof, and the action of your office was concurred in by the Department. The proof in that case was not offered until after the expiration of the time allowed by statute. The Department, however, after quoting rule 30 of the rules for submitting entries to the board of equitable adjudication (6 L. D., 799), said:

If appellant can bring himself within this rule by making new proof to the satisfaction of your office, he may do so, and then have his entry submitted to the board of equitable adjudication.

In the case at bar, it appears that all has been done by the entryman that he could be expected to do. The drouth and lack of water in the stream where water had before that time flowed and could reasonably be expected to flow each year, was an "obstacle which he could not control," and there being no adverse claim, the case will take the course prescribed in the case of Stearns, *supra*.

You will, if no adverse claim has intervened, allow the entryman to make further proof in support of his claim, to show reclamation, and if satisfactory, the proof will be accepted and referred to the board of equitable adjudication. Ninety days will be allowed for further proof,

COMMUTED ENTRY—CANCELLATION—APPLICATION TO ENTER.

THOMAS *v.* RATHBUN.

The cancellation of a commuted homestead entry carries therewith the original entry, and the cancellation of the latter, in such a case, should be accordingly noted of record.

An application to enter may be received during the time allowed for appeal from a judgment of cancellation rendered in a prior case involving the land in question, subject to such appeal, but should not be made of record until the rights of the former entryman are finally determined.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 13, 1891.

The appeal of Elias M. Thomas, in the case of said Thomas *v.* Sabria A. Rathbun, from your office decision of October 12, 1888, is before me, and the record shows the following facts:

October 16, 1882, Rathbun made homestead entry No. 391, for the NW. ¼ of Sec. 19, T. 111 N., R. 60 W., Huron, Dakota.

July 9, 1884, she offered commutation proof, upon which cash certificate No. 9750 was issued.

March 30, 1885, her said proof was rejected by your office, and on July 18, her cash entry was canceled.

August 17, 1885, Thomas instituted contest against her homestead entry, which, after several continuances, was by the receiver dismissed, April 28, 1886, for "want of prosecution."

May 7th of the same year, a stipulation was filed in the local office, by which it was agreed between the parties thereto that the contest should be re-instated and a decision rendered on an agreed statement of facts contained in said stipulation.

This request was refused, and Thomas appealed, and your office affirmed the action of the local officers and directed them to note upon their records the cancellation of the homestead entry of Rathbun, as of the date the cash entry was canceled.

From this decision of your office Thomas alone has appealed.

It seems that on receipt of your letter of July 18, 1885, ordering her cash entry canceled, the local officers noted the cancellation of that entry alone, and allowed the original homestead entry to stand. This was error, for the homestead entry having been commuted to a cash entry, the cancellation of the latter necessarily carried with it the original homestead entry.

It follows that at the time Thomas filed his contest, there was no entry properly of record to be contested, it having previously been canceled by direction of your office.

Your decision dismissing his contest was therefore right.

So far as Rathbun's rights are affected by your decision, it is sufficient to say that she has not appealed therefrom, and it is therefore affirmed *in toto*.

It appears from the record, however, that subsequent to the rendition of your judgment, and on June 25, 1889, Thomas applied to make homestead entry for the said tract, which application was rejected by the register, because "the right of appeal of Sabria A. Rathbun and E. M. Thomas from action of Hon. Commissioner, in his letter H, October 12, 1888, has not yet expired, as notice was given all parties June 15, 1889."

Letter "H" referred to is your office decision herein appealed from.

Thomas also appealed from the action of the local office rejecting his application.

The action of the register in rejecting his said application was improper, as "an application to enter filed during the time allowed for such appeal should be received subject to the right of appeal, but not made of record until the rights of the former entryman are finally determined, either by the expiration of the time allowed for appeal, or by the judgment of the appellate tribunal." John H. Reed, 6 L. D., 563; Henry Gauger, 10 L. D., 221.

The rejection of Thomas' application to enter has not been acted upon by your office, but has been transmitted to this Department to be considered in connec tion with the other record in the case.

The judgment of this Department is that both entries of Rathbun be canceled, the contest of Thomas dismissed, and his application to enter, made June 25, 1889, admitted to record.

PRE-EMPTION ENTRY—SECTION 2260 R. S.

MICHAEL CAMPBELL.

A pre-emptor who prior to the establishment of actual residence on his claim, has in good faith sold the land on which he formerly resided, is not within the second inhibition of section 2260 of the Revised Statutes.

The validity of a deed made in good faith from the husband to the wife is recognized by the Department, if valid u nder the laws of the State where the land is situated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 16, 1891.

I have considered the case of Michael Campbell, on his appeal from your office decision of September 7, 1888, rejecting his final proof and holding for cancellation his pre-emption declaratory statement for the SE ¼, Sec. 3, T. 7 S., R. 28 W., Oberlin land district, Kansas.

It appears from the record that on February 14, 1879, claimant made timber culture entry for said tract, also homestead entry for the NE ¼, of Sec. 10, in the same township and range. He made final proof on his homestead entry and received final certificate on July 7, 1885. On September 3, same year, he relinquished his timber culture entry and filed pre-emption declaratory statement for the same tract. He made

final proof before S. O. Wanzer, probate judge and *ex officio* clerk of the probate court of Sheridan county, on May 3, 1888. When this was transmitted to the local officers, they (on June 7, 1888,) rejected it, on the ground that he had removed from land of his own to the tract claimed under the pre-emption laws, in violation of the inhibition contained in section 2260 of the Revised Statutes. From their action Campbell appealed to your office, which (September 7, 1888,) sustained the action of the local officers, and held his filing for cancellation. He now appeals to the Department.

In his final proof the entryman alleges that he made settlement upon the land August 20, 1885, when he broke three acres of land and commenced a house; and that he "actually moved on to the land and commenced living permanently thereon" December 8, same year.

In the record appears an affidavit executed by said Campbell on July 23, 1888, in which he states:

> That on the 15th day of August, 1885, he conveyed said land to Mary Campbell, his wife, by a deed of general warranty; that said sale was made in good faith and with no intention to fraudulently obtain the land from the United States, or to evade its laws; and said deed did operate to divest affiant of the title to said land under the statutes of Kansas, which provide that any married woman may hold property in her own right.

Counsel for Campbell contends, in substance, that the sale of the homestead to his wife was in good faith, and being a transaction recognized as legal by the statutes of Kansas, cannot, of itself, be considered an affirmative evidence of fraud (citing case of David Lee, 8 L. D., 502); and that, having made said *bona fide* sale on August 15, 1885, and not making settlement or establishing residence on his pre-emption claim until some time afterward, he did not remove from land of his own to reside upon his pre-emption claim.

The case of David Lee (*supra*) is similar to and would seem to rule the case at bar. Both arose in the State of Kansas; in each the entryman, after making homestead proof, sold the land to his wife. There were these differences, however: Lee, when he initiated his pre emption claim by settlement, was still the actual owner of his homestead claim, while Campbell had legally disposed of his homestead claim five days before settlement upon his pre-emption claim; and while Lee established actual residence on his pre-emption claim two and a half months after conveying his homestead to his wife, Campbell did not establish actual residence upon his pre-emption claim until (December 8) three months and three-quarters after deeding his homestead to his wife (August 15). In the Lee case it was said: "The disqualification under the second clause of section 2260 of the Revised Statutes is of a person who quits or abandons his residence on his own land to *reside* on public land in the same State or Territory;" and it was held that he was not disqualified to make a pre-emption filing.

In the case of Lee, the land in controversy was conveyed to his wife

indirectly by a deed from himself to his mother-in-law, and from the latter to Mrs. Lee; and in the decision, reference is made to the case of Going *v.* Orns (8 Kan., 87), in which it was held that "a wife may, through the intervention of a trustee or third person, buy from her husband, or sell to him, or contract with him, to the same extent that she may buy from, sell to, or contract with, any other person."

In the case at bar, the conveyance was made directly from Campbell to his wife. This, however, in no way invalidates the sale. In the case of Ogden *v.* Walters (12 Kans., 290), the supreme court said: "A married man may convey real estate directly to his wife, where it is right and equitable that he should do so, and where such conveyance does not interfere with the rights and equities of third persons." The doctrine is re-affirmed in Sproul *et al. v.* The Atchison National Bank (22 Kans., 336–9); Lucy Horder *et al. v.* George W. Horder *et al.* (23 Kans., 391); Tootle *v.* Coldwell (30 Kans., 125); Chapman *v.* Summerfield (36 Kans., 610); and numerous other cases cited in those above named.

For the reasons given in the case of Lee (*supra*), your decision of September 7, 1888, in the case of Campbell is hereby reversed, and his entry will pass to patent if his proof is found to be in other respects satisfactory.

Since the date of your decision and while the case has been pending in the Department on appeal, an additional affidavit, executed October 21, 1889, has been filed in the case, which has not been considered in arriving at this decision, but which tends to corroborate Campbell's good faith in the premises.

TIMBER TRESPASS -ACT OF MARCH 3, 1891.

CYRUS B. RAWSON.

Under the proviso to section 4, act of June 3, 1878, there is no liability for timber cut from unsurveyed mountain land and used by one in the necessary improvement of his own land; and under the act of March 3, 1891, the fact of such use may be set up in defense to any civil or criminal action based on the alleged trespass.

Secretary Noble to the Commissioner of the General Land Office, March 17, 1891.

I am in receipt of your letter of the 12th ultimo, transmitting the reports from Special Agent Jay Cummings, relative to a proposition submitted by Cyrus B. Rawson for settlement in the matter of a public timber trespass charged against said Cyrus B. Rawson and Jacob A. Shoemaker, of Bishop, California, to the extent of 747,000 feet of timber cut upon unsurveyed mountain lands in said State.

It appears from the papers submitted with your said letter that this timber was cut by Rawson, and 580,000 feet of it were manufactured into lumber and used by him in improving his ranches, by building

houses, barns, granaries, corrals, fences, bridges, flumes, weirs, headgates, etc., and that 167,000 feet were sold to neighbors at prices varying from nine to twenty dollars per thousand feet.

The special agent reports that the trespass was not maliciously wilful, and that Rawson had been told "that one special agent, cognizant of the circumstances, had said that if men were willing to make lumber under such difficulties, they were entitled to it and should never be molested by any act of his."

You state that the timber involved in this case is reported as of no value in the standing tree without Rawson's mill and flume to carry it some four miles down into the valley, and that the value per thousand feet of said timber in logs is reported at twenty-five cents on the ground where cut, fifty cents at the saw-mill, and nine to twenty dollars at the dump.

Rawson proposes to pay on the basis of $1.75 per thousand feet in settlement for the 167,000 feet sold to the settlers, but makes no proposition to pay for the 580,000 feet used by him in his improvements, the acceptance of which is recommended by the special agent.

You recommend that he be called upon to submit a proposition for the settlement of 747,000 feet of timber, unless I am of the opinion that his ranches being devoid of timber he is not liable under the proviso to section 4 of the act of June 3, 1878 (20 Stat., 89), for that part of the timber which he cut and sold.

I am of the opinion that under the proviso to the 4th section of the act of June 3, 1878, Rawson is not liable for any of said timber that was used by him for building and other necessary improvements made upon his own land, and that under the act of March 3, 1891, entitled "An act to amend section 8 of an act approved March 3, 1891, entitled 'An act to repeal timber culture laws, and for other purposes,'" such fact might be set up in defense to any criminal or civil prosecution brought against him for such alleged trespass.

I therefore direct that a settlement be made with Rawson for the 167,000 feet of timber sold to others, at the rate for which he would be chargeable in cases where it is found that the trespass is not wilful.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

SAMUEL L. CAMPBELL.

The right of purchase under section 5, act of March 3, 1887, is intended for the relief of *bona fide* purchasers from a railroad company, where the title of the company fails by reason of the land being excepted from the grant.

Secretary Noble to the Commissioner of the General Land Office, March 17, 1891.

On January 12, 1886, George F. Robinson's timber culture entry for the SE¼ Sec. 1, T. 102 N., R. 32 W., Worthington, Minnesota, was held for cancellation, and the applications of David M. Montgomery and

Samuel L. Campbell to make homestead and timber culture entries, respectively, of the same tract, were rejected. Campbell only appealed from this judgment. The judgment as to Robinson and Montgomery, therefore, became final. Pending the appeal of Campbell to this Department from said judgment, he filed in the local office, on February 28, 1888, an application to purchase under section five of the act of March 3, 1887 (24 Stats., 556), the land embraced in his application to make timber culture entry, and also the S½ of the SW¼ of the same section. This application was transmitted to this Department for consideration together with the appeal of Campbell from your judgment of January 12, 1886.

On January 8, 1889, this Department suspended action in the matter of the appeal until such time as the application to purchase should be finally disposed of. (Sam'l L. Campbell, 8 L. D., 27.) This Department at that time directed the application and the remaining papers to be returned to the local office, prescribed certain rules of procedure under the fifth section of the act of March 3, 1887, *supra*, and required the application to be passed upon regularly by the register and receiver and your office.

In compliance with departmental decision above referred to, the local officers allowed Campbell to make the purchase applied for, and issued to him certificate and receipt for the land (SE¼ and S½ of SW¼, Sec 1, T. 102 N., R. 32 W.).

Upon examination of the entry and proof made before the register and receiver, your office, on August 28, 1890, required additional proof respecting Campbell's purchase of the land from the railroad company, which was furnished. January 12, 1891, you report proceedings under departmental decision of January 8, 1889, and express the opinion that the cash entry made by Campbell for the tract above described should be approved and passed to patent.

The fifth section of the act of March 3, 1887, is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

This section was intended to afford relief to citizens of the United States, or those who have declared their intention to become such citizens, who have bought lands from any railroad company, which lands being situated in numbered sections prescribed in the grant for the benefit of said company, and being coterminous with the constructed parts of said road, are for any reason excepted from the operation of the grant to said company, the company therefore being unable to convey to the purchaser title to said land.

The passage of this statute was intended to afford relief to all such bona fide purchasers by allowing them to make payment to the United States for said lands at the ordinary government price. The purpose of the statute being to afford relief in such cases, it should be liberally construed so as to grant the relief intended.

The record of the hearing had on the application to purchase, filed by Campbell, shows that in May, 1879, he purchased of the Southern Minnesota Railway Company the whole of section 1 of township 102 N., range 32, which at that time was unoccupied, and entered into possession of the same, placed buildings thereon and caused breaking to be done. The improvements made by him on the section are estimated to be worth $4,000. It clearly appears from an examination of his contract with the railway company that the same was a bona fide transaction, wherein he agreed to pay for said land at the rate of $7 per acre, he to receive a rebate of $3 per acre for each acre of the land he should cause to be cultivated within a certain time. The railroad was built coterminous with the land in question in the fall of 1878.

Section 1, T. 102 N., R. 32 W., is within the ten-mile limits of the Southern Minnesota Railway Company's grant. In 1880 the company acquired title to all of said section except the tracts embraced in Campbell's application to purchase, and conveyed the same to Campbell.

By departmental decision of October 30, 1884, in the case of Southern Minnesota Railway Extension Company *v.* Gallipean (3 L. D., 166), the land sought now to be purchased by Campbell was declared excepted from the operation of the grant to the Southern Minnesota Railway Company, now the Southern Minnesota Railway Extension Company.

It appears from the record that the parties who claimed this land and who were the cause of its being excepted from the operation of the grant, had abandoned it before Campbell placed his improvements thereon. His improvements consist of a house and barn and breaking the whole of the S½ SW¼ and 35 acres of the SE¼ of Sec. 1, T. 102 N., R. 32 W. In the purchase of the other part of said section from the railway company, Campbell received no credit under his contract for breaking done on that portion of the section here in question.

The testimony given at the hearing shows that Campbell has complied with the regulations to purchase as prescribed in departmental decision of January 8, 1889, and in the circular issued from your office February 13, 1889, following. (8 L. D., 348; see also instructions, 11 L. D., 229.)

There are no adverse claimants for the lands in question. I am therefore of the opinion that Campbell's cash entry for the SE¼ and S½ of the SW¼, Sec. 1, T. 102 N., R. 32 W., should be approved for patenting. This action disposes of the tract embraced in Campbell's appeal from your office decision dated January 12, 1886, rejecting his application to make timber culture entry; said appeal is accordingly dismissed.

PRE-EMPTION ENTRY—BONA FIDE PURCHASER.

AXFORD *v.* SHANKS ET AL.

A pre-emption entry, against which there is no adverse claim pending at date of entry, is confirmed by section 7, act of March 3, 1891, where the land after entry, and before March 1, 1888, is sold to a *bona fide* purchaser for a valuable consideration.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March, 18 1891.

I have considered the appeal of A. J. Preston and I. S. Keator, transferees, from your decision dated August 19, 1889, holding for cancellation the pre-emption cash entry of David Shanks for the SW. ¼ of Sec. 34, T. 115 N., R. 52 W., Watertown, South Dakota.

The record shows that he made a pre-emption filing on the land in question May 1, 1879, alleging settlement thereon the same day.

On February 17, 1880, he made cash entry for the same, receiving receipt and final certificate therefor.

May 28, 1887, Richard H. Axford initiated a contest against said entry. In his affidavit of contest he alleges, in substance, that Shanks never established a residence on said land; that there was no house on the land before or at the time he made said entry; that there never were any improvements made on said land, and no breaking done thereon before the time said entry was made.

The affidavits of contest were forwarded to your office by the local officers. A hearing was ordered, which was duly had before the register and receiver on October 26, 1887, at which the contestant appeared in person and by attorney, and the claimant appeared by his attorneys, Seward and Eddy.

Considering the testimony submitted, the local officers, on December 8, 1887, recommended the entry for cancellation.

The matter coming before your office for action, upon appeal you affirmed the decision of the register and receiver, from which an appeal has been taken to this Department, and A. J. Preston and I. S. Keator, claiming to be the transferees of the tract in question, for a valuable consideration, have, by com plying with rule 102 of the Rules of Practice, intervened and become parties to the case.

Said entry was made more than eight years before the hearing was had on said contest. The proof was regular and formal, and was adjudged at the time by the register and receiver to be sufficient. It has

been allowed to stand all these years, and the presumption in favor of its validity should only be overcome by clear and positive testimony.

Contestant's evidence consists of the statements made by two witnesses, Frank Houghton and Leverett C. Smith. Both of these witnesses, as appears from the description of their residences as disclosed in the testimony, lived about four miles from the land in question. Houghton's testimony shows that he did not see the tract until October 27, 1879, when he says he crossed it in the morning and again on his way back at night. Smith was with him that day. It is shown by the cross-examination of both of these witnesses, that neither of them saw the land at any other time from the date of Shank's settlement until his entry was made. They were together and passed over the tract twice the same day.

The burden of proof is on contestant to show the truth of the matters alleged in his affidavit of contest by such a weight of evidence as to carry conviction to the mind that the entry was fraudulently made.

It is shown by an affidavit filed by I. S. Keator, the original transferee in the case, that:

> on the fifth day of March, 1880, he purchased from David Shanks the SW. ¼ of Sec. 34, T. 115 N., R. 52 W., embraced in cash entry No. 2927, in the Watertown land district, Dakota; That said purchase was made in good faith and for a valuable consideration, that since said purchase deponent has transferred an undivided half interest in said land to George C. Preston, and he to A. J. Preston, and that said A. J. Preston and deponent are now the owners thereof.

Proof and payment were made and final certificate was issued to Shanks February 17, 1880. There were no adverse claims prior to or at the time of entry. The tract was purchased by Keator prior to the first day of March, 1888, to wit: March 5, 1880. No fraud is charged or has been found against the good faith of the purchaser. It will, therefore, not be necessary to decide the case as it stood at the time your office passed upon it, since section seven of the act of Congress approved March 3, 1891, among other things provides that,

> All entries made under the pre-emption, homestead, desert land or timber-culture laws, in which final proof and payment have been made and certificate issued, and to which there are no adverse claims originating prior to the final entry and which have been sold and encumbered prior to the 1st day of March, 1888, and after final entry to bona fide purchasers, or encumbrancers, for a valuable consideration, shall, unless upon investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or encumbrance.

and inasmuch as at the time this entry was made, there was no contest pending, and as a sale of the tract was made before the 1st day of March, 1888, for a valuable consideration, and the affidavit of said Keator shows that the purchase was made in good faith, I am satisfied that this entry is protected by said section and should pass to patent, as I am satisfied without further proof on the part of the transferees by way of making profert of their deeds of conveyance that the entryman made sale of the tract as set out in said affidavit.

For these reasons your judgment must be reversed. The papers in the case are returned herewith to your office for appropriate action under the seventh section of the act above referred to.

PUBLICATION AND PROMULGATION OF LAND DECISIONS.

ARY *v.* IDDINGS.

The publication of a departmental decision in the "Land Decisions" is not equivalent to an official promulgation of said decision.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 19, 1891.

I have considered the case of John A. Ary *v.* William T. Iddings involving the SW. ¼ of Sec. 29, T. 25 S., R. 17 W., Larned land district, Kansas.

The tract described is one for which Patrick Sweeney filed pre-emption declaratory statement February 23, 1884, alleging settlement the preceding day. On December 21, 1885, he published notice of intention to make proof February 17, 1886. On January 26, preceding, Iddings filed protest against the acceptance of any proof to be made by Sweeney, alleging that Sweeney was not a qualified pre-emptor, having moved from land of his own (in Kansas) to the land covered by his pre-emption filing. At the same time Iddings made homestead application to enter the tract. The application was held in abeyance pending Sweeney's final proof; and no money was tendered. Iddings being informed (he alleges) by the chief clerk in the local office that it was not necessary; that the filing by Sweeney of notice of final proof "was a part of the final proof, and appropriated the land, and withdrew it from entry for the time being and until February 17, 1886, when if Sweeney did not offer proof affiant could make entry of the land," and could then pay the entry fees and commissions. Sweeney did not make proof February 17; and on that day Iddings again presented his homestead application, which was rejected, on the ground that on February 13, Sweeney had relinquished and one Mary Burns had made entry of the tract.

From this action of the local officers Iddings appealed to your office, which decided against him. (July 2, 1886). He appealed to the Department, which (February 18, 1889—8 L. D., 224), affirmed your decision on the ground that he had complied with only two of the three statutory requirements forming an essential part of the entry, but had failed to comply with the third—i. e., he had not paid or tendered the fees and commissions.

When said departmental decision was sent to your office, before promulgating it you directed the attention of the Department to the fact that, prior to its rendition, said Burns, on October 19, 1887, had re-

linquished her entry, and that on the same day application had been made by John A. Ary to make homestead entry of the same, which application the local officers refused; and you requested instructions what course to pursue in the premises.

The Department, on June 5, 1889 (8 L. D., 559, instructed your office, in substance, that the local officers had acted properly in rejecting Ary's application, inasmuch as "the proceedings in this case were in the nature of a contest, and after the local officers have rendered a judgment in a contest case, they can take no further action affecting the disposal of the land in controversy until instructed by the Commissioner (Rule 53 of Practice)"; that

> The equities in the case are in favor of Iddings, who was the first applicant and whose application was rejected by the local officers when first presented to them; he has ever since earnestly insisted on his right to enter the tract in question; and Burns having relinquished, the tract is now free from any entry of record, and in the record before me I perceive no reason why the homestead application of Iddings, made January 26, 1886, should not be placed of record, upon payment of the fees required by law.

Before the rendition of the decision above quoted from, however, the local officers, on April 23, 1889, allowed said Ary to make homestead entry of the tract. Your office, by letter of October 2, 1889, held that their action "in permitting Ary's claim to become of record under these circumstances was irregular, and should not prejudice the right of Iddings, persistently maintained as it has been by him."

From this decision of your office Ary appealed.

The explanation of the premature allowance of Ary's application to enter appears to be this:

Upon the rendition of the first departmental judgment (adverse to Iddings), it was printed in the Land Decisions (vol. 8, p. 224, *supra*). Ary thereupon renewed his application to enter; and the local officers, upon the authority of said printed decision, accepted the entry. But your office, instead of promulgating said decision, returned it to the Department for instructions, as hereinbefore stated, in view of the changed condition of affairs (Burns' relinquishment). Hence said departmental decision was not promulgated until that of June 5, 1889, was rendered—after which both judgments were sent by your office to the local land office. But long before they reached there, Ary, in view of the printed decision of February 18, 1889, had been allowed to make entry—while the subsequent decision of June 5, 1889, had directed the allowance of Iddings' application.

Ary's appeal is based upon the ground that your office erred (*inter alia*):

> In finding that the action of the register and receiver in permitting appellant's claim to become of record was irregular, as the Department decision of February 18, 1889, denying the right of Iddings to enter the land, had been duly promulgated by publication in the official paper of the Department, upon the correctness of which the said officials had a right to rely.

The publication of the decisions of this Department in the volume above referred to, is not equivalent to their promulgation. In the great majority of cases where decisions are printed therein, they are so printed before your office has found time to promulgate them; not unfrequently they are in print before your office has received a copy, on account of the insufficient force in the Department and in your office necessary to perform the preliminary clerical labor of copying and making the requisite notations on the public records, etc. To hold that such printing is equivalent to an official promulgation would obviously introduce interminable confusion into the practice of the land department.

It is further alleged that your office erred:

In ordering the cancellation of the homestead entry of appellant without granting him a hearing to sustain its validity; thereby depriving him of his home and valuable improvements made by him on said land, without having his day in court.

This point would be well taken if the case were such that a hearing could throw any additional light upon the matter. But all the facts having a bearing thereon are well known. Ary's appeal in this case is practically an appeal to the Department from its own decision of June 5, 1889, holding that he had no rights in the premises. Said decision concluded by directing your office to—

Notify Ary hereof, and inform him that he will be allowed thirty days from notice to show cause, if any he have different from the questions presented by this record, why his application should not be finally rejected.

If the appeal of Ary be considered as a response to the above invitation, it clearly fails to show cause, different from the questions previously presented in the record, why his application should not be rejected—or, as it has been improperly received, why it should not be canceled. Ary had "his day in court" before the rendition of the departmental decision of June 5, 1889.

Your judgment is therefore affirmed.

RAILROAD GRANT—FORFEITURE ACT—INSTRUCTIONS.

TENNESSEE AND COOSA R. R. CO.

The construction of a fractional part of a section of twenty miles, the whole road not being completed, does not entitle the company to any lands under the grant of June 3, 1856.

The failure of the company to construct any portion of the road in accordance with the terms of the grant, renders it subject to the forfeiture act of September 29, 1890, not only as to the uncertified lands, but also as to the one hundred and twenty sections certified in advance of construction, provided such sections are in the possession and control of the State or company, and have not been sold to innocent purchasers for value.

Secretary Noble to the Commissioner of the General Land Office, January 30, 1891.

I am in receipt of your letter of December 12, 1890, relative to the forfeiture of land grants made to aid in the construction of railroads,

declared by the act of September 29, 1890 (26 Stat., 496), calling attention to the grant made under the act of June 3, 1856 (11 Stat., 17), to the State of Alabama, to aid in the construction of a railroad from the Tennessee river, at or near Gunter's Landing, to Gadsden on the Coosa river, which was conferred upon the Tennessee and Coosa Railroad Company, and which was definitely located January 18, 1859, from Gadsden to Guntersville a distance of 36.5 miles.

You also forward the certificate of the governor of Alabama, to the effect that prior to September 29, 1890, the Tennessee and Coosa Railroad

had been constructed and completed, and was in operation from Gadsden northwardly for a distance of ten and twenty-two hundreths miles, as follows: From the Coosa river in section 3, T. 12, R. 6 E., to Littleton in section 20, T. 11, R. 5 E. The completed portion of said railroad passing through sections 3, 4, 5 and 6, T. 12, R. 6 E., sections 1, 2, 3, and 4, T. 12, R. 5 E. and sections 34, 33, 28, 21, 20, T. 11, R. 5 E. This certificate is made so that the government being informed of the facts, may take such action as may be deemed appropriate and lawful in the premises.

The act of June 3, 1856, *supra*, granted to the State of Alabama, to aid in the construction of said road, "Every alternate section of lands designated by odd numbers, for six sections in width on each side of said road," and provided for the selection of indemnity lands within the limit of fifteen miles from the line of said road, in lieu of the odd sections within the six mile limit, which had been sold or to which the right of pre-emption had attached, when the route of the road was definitely fixed.

The granting section also contained the proviso:

That the lands hereby granted for and on account of said roads, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever.

The 4th section of the act provided:

That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold; and so from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

No portion of this road was constructed within the time limited by the grant for the completion of the road (1866), but, on June 27, 1860, 67,784.96 acres of land, as shown by your letter, were certified to the State of Alabama for this grant, in accordance with the fourth section of the granting act, which you say are, with the exception of eight hun-

dred acres, coterminous with twenty miles of said road, beginning at Guntersville and running south, and which, as shown by the map of location of said road, appear to be "included within a continuous length of twenty miles of" the line of definite location.

That part of the road which has been constructed commences at Gadsden and runs in a northerly direction a distance of ten and twenty-two hundredths miles. Hence, the lands certified to the State on account of this grant are opposite to and coterminous with the portion of the road *not* completed, and in operation at the date of the passage of the act of September 29, 1890, *supra*.

Upon these facts, your letter of December 12, 1890, presents the question, as to whether the company is entitled to any portion of the grant, having failed to complete a continuous length of twenty miles of road prior to the forfeiture of the grant, and, also, the further questions, presented by counsel, in their brief, for the alleged purchasers of said lands, to wit:

First. Were the first one hundred and twenty sections of land authorized to be sold before the road was built, by the act of 1856, and sold under such authority, forfeited by the act of September 29, 1890?

Second. As this first one hundred and twenty sections of land is covered by outstanding certified lists, the equivalent in law to patents, can these lands be entered by settlers, etc., or disposed of by the Land Department, until after such outstanding legal titles have been set aside by the judgment of a competent judicial tribunal?

The act of September 29, 1890, provides:

That there is hereby forfeited to the United States and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be part of the public domain.

While this act forfeited the grant and restored to the government the title to all the lands opposite to and coterminous with any portion of the road not completed, and in operation at the date of the act, it did not confirm the grant to the State or corporation as to the lands lying opposite to and coterminous with the completed portions of the road, but the right of the State or corporation to such lands must depend upon whether the terms and conditions of the grant have been so far complied with as to entitle them to any lands. In this case, the grant provided that a quantity of lands, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the State should certify to the Secretary of the Interior that any twenty continuous miles of the road were completed, then another quantity of land granted may be sold, and so on, from time to time, until the road is completed.

The intention of Congress, in providing that one hundred and twenty sections included within a continuous length of twenty miles of the road might be sold in advance of the construction of any part of the road,

was to furnish aid for such preliminary work as would be required before the construction of any part of the road . . . . . , relying on the good faith of the State to see that the proceeds were applied for the purposes contemplated by the act. (Railroad Land Company *v.* Courtright, 21 Wall., 316).

But it was also intended that these one hundred and twenty sections should be in full satisfaction of the grant for the first twenty miles of the road completed, whether the lands were or were not coterminous therewith. As to that part of the road no other or further grant was made. If, therefore, no part of the road has been completed, in accordance with the terms and conditions of the grant, and the time has expired within which the company was required to complete the road, the grant would be subject to forfeiture, not only as to the lands which have not been certified, but also as to the one hundred and twenty sections certified in advance of the construction of any part of the road, provided said sections are in the possession and control of the State or the railroad company, and have not been sold to innocent purchasers for value. A material question, therefore, is, whether this company has constructed any part of its road of such a continuous length as to entitle it to any part of the grant, or, in other words, has the company earned any land by the construction of a fractional part of a section of twenty miles, the whole road not being completed.

This question came before the Department in the case of the Sioux City and St. Paul Railroad Company (6 L. D., 47), involving the construction of the grant of May 12, 1864, to the State of Iowa to aid in the construction of two roads named therein, which provided that when the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed ten consecutive miles as aforesaid, and so on until said roads, or either of them, are completed.

The Sioux City and St. Paul Railroad Company, the beneficiary of the grant for one of said roads, failed to complete its road, but constructed it a distance of fifty-six and a quarter miles, stopping at Le Mars, about twenty-six miles distant from the point to which it should have been constructed. Five sections of ten miles each had been certified to the State for the benefit of the road as completed, and the question that came before the Department was, whether it was entitled to the remaining six and one-quarter miles. Upon this question the Secretary held there was no authority for patenting lands under this grant, except upon the certification of the governor that ten consecutive miles of road had been completed, and that the only provision for the disposition of lands for a fractional part of ten miles is after the road is completed, when the whole of the lands granted shall be patented. The failure of the company to secure title to lands for the fractional

section of ten miles was the legal consequence of its own act in establishing a terminus short of the point to which under the grant it should have been constructed. The case now under consideration is controlled by this ruling.

The purpose in making the grant to the State of Alabama to aid in the construction of this road was to open up an important highway by making a railroad connection of the Tennessee river with the Coosa river, between Gadsden and Gunter's Landing, now Guntersville, which could not be accomplished by building part of the road; but Congress, relying upon the good faith of the State to see that the lands were exclusively applied to the construction of the road, and that they would be disposed of for that purpose and no other, authorized the Land Department to certify to the State, in advance of the construction of any part of the road, one hundred and twenty sections for the first twenty miles of the road, and that when twenty continuous miles were completed, another one hundred and twenty sections should be certified, and so on until the road should be completed.

If the twenty continuous miles of road had been completed, the company would have been entitled to the one hundred and twenty sections that had been certified, and if the road had been completed, it would also have been entitled to the additional quantity of six sections per mile for the remaining 16.5 miles of road. This would be the full quantity to which it would have been entitled for the entire road, as the whole length is only 36.5 miles.

As to the points raised in the brief of counsel, I think it is well settled that if the one hundred and twenty sections certified to the State have been sold to bona fide purchasers, under the authority contained in the 4th section of the granting act, these sections are not in any manner affected by the forfeiture act, for the reason that the act of Congress making the grant authorized the sale of said one hundred and twenty sections in advance of the construction of any part of the road, free from any restriction as to what part of the road the lands should be taken, provided they were included in a continuous length of twenty miles on each side of said road, and the purchasers of said sections took a valid title to the property, although no part of the road was constructed at the time, which, if in the hands of bona fide purchasers at the date of the forfeiture act of September 29, 1890, was not in any manner affected by said act forfeiting the grant to the State to aid in the construction of said road. This question was directly decided by the supreme court, in the case of Railroad Land Company *v.* Courtright, *supra*, involving the question as to the right of purchasers of lands certified to the State for the benefit of the railroad company in advance of the construction of any part of the road, made under a grant containing the same provisions as to the disposal of the lands granted.

But if said sections are still in the possession and control of the State

of Alabama or the company, or have not be sold to *bona fide purchasers* in accordance with the terms and conditions of the grant, they are, in my opinion, affected by the forfeiture act of September 29, 1890, as no part of the road has been constructed in accordance with the terms and conditions of the act.

With your letter you transmit a communication from Mr. Willis W. Curry, to the effect that part of the lands was sold to members of the company, with the intention to avoid a forfeiture, and since the matter has been pending before me the Attorney General has referred for my consideration a letter from the United States district attorney for the northern and middle districts of Alabama, stating that the lands are now held by one Carlisle under a fraudulent conveyance, made by the directors of the road, which he is satisfied can be proven. He further states that since the passage of the forfeiture act, Carlisle is endeavoring to sell these lands to some one who can claim to be a purchaser without notice, and suggests that a bill be filed to set aside these conveyances to Carlisle.

Without passing upon the question as to whether the act of September 29, 1890, *proprio vigore*, restored to the United States the title to the lands forfeited thereby, or whether further proceedings in the courts are necessary to perfect the title of the government thereto, or to enable it to dispose of said lands, I deem it proper in the present case, inasmuch as the question depends upon whether these lands have been conveyed to *bona fide* purchasers or not, to submit the entire question to the Attorney-General, that proceedings may be instituted in the courts to determine whether the same is now subject to forfeiture and the rights of all parties in interest. To this end, you will make up a record for the guidance and information of the Attorney-General, containing copies of all papers that may be of assistance in the investigation of the questions and to enable the District Attorney to prepare a bill, if such proceedings should be deemed advisable by the Attorney-General.

RAILROAD LANDS RESTORATION OF SURPLUS LANDS.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RY. CO.

Modification of former directions in the matter of the restoration and disposition of lands heretofore withdrawn and not required in satisfaction of the grant to said company.

Secretary Noble to the Commissioner of the General Land Office, March 11, 1891.

I am in receipt of your letter of February 12, 1891, in relation to the "restoration of lands heretofore withdrawn and not needed in satisfaction of the grant for the Chicago, St. Paul, Minneapolis and Omaha

Railway Company," and the same has been considered. You urge a modification of the former directions given in this matter because—

> it is apparent that unless some rule is devised to guide the local officers in disposing of the lands, that, due to the conflicting advice of attorneys, innumerable conflicts will arise and great confusion prevail, and perhaps bloodshed.

With your letter is sent one from the register and receiver at the district office to the same effect, and this Department has also received information of like import.

It therefore seems proper that the legal status of this land should be made clear, and more specific instructions issued in relation to entry of the same.

The grants, made by the acts of June 3, 1856 (11 Stat., 20), and May 8, 1864 (13 Stat., 66), to the State of Wisconsin to aid in the construction of the road now owned by said railway company in that State, having been finally adjusted, you were directed, on February 12, 1890, to restore to the public domain and throw open to settlement the surplus lands left after said adjustment and theretofore withdrawn for the benefit of that road (10 L. D., 147). On December 19, 1890, said instructions were modified and made more specific; the time was extended so that the restoration should not become effective until after ninety days previous notice thereof had been given through advertisement by the district officers. (11 L. D., 607).

In pursuance of these instructions those officers have given public notice that said lands will be opened on April 17, 1891.

The lands in question are reported to be quite valuable. After it was known that the adjustment of said grant would leave a surplus of lands to be opened to the public, numerous attempts were made to obtain preference rights by settlements thereon, and by applications to make homestead entries or to file declaratory statements therefor. In respect to such settlements, the opinion of this Department was expressed in the case of Shire *et al. v.* Chicago, St. Paul, Minneapolis and Omaha Railway Company (10 L. D., 85–88). In that case the alleged settlements were set up as a reason why certain selections made by the railway company should not be approved, and the rights of the company only being involved, the Department said that settlements made subsequent to the withdrawal of said lands conferred no rights legal or equitable "as against the railroad company." It would seem, *a fortiori*, that, the withdrawal being made by competent authority, as has been repeatedly held, parties locating within the reservation thus established and in defiance of the prohibitions of lawful authority, can acquire no *rights* as against the government. Such parties are occupants, without right, of the public lands, if not intruders upon the reservation. "Mere occupancy and improvements thereon give no vested right therein, as against the United States," says the supreme court in Sparks *v.* Pierce (115 U. S., 408–413). And "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," says the same tribunal in Deffeback *v.* Hawke (ib., p. 392–407). In the case of Riley *v.* Wells, referred to and quoted in the Shire case, it was said by the supreme court that settlement upon and possession of land within the limits of an executive withdrawal were "without right," and that the subsequent recognition by the land officers of such settlement and possession, and the permission to the party to make proof and entry under the pre-emption law, and the issuing patent "were acts in violation of law and void." This case of Riley *v.* Wells has never been overruled or modified, but has been referred to and approved in a number of the decisions of the supreme court, and must therefore be accepted as expressing the opinion of that tribunal as to the absolute invalidity of settlements upon lands withdrawn by executive order. It is not seen how a different view of the law could be taken inasmuch as the pre-emption act of 1841, embodied in section 2258 of the Revised Statutes, in effect says that lands lawfully reserved "shall not be subject to the rights of pre-emption." As only lands "subject to pre-emption" can be entered under the homestead law, (Sec. 2289 R. S.) it follows that settlement and possession, with a view of entering such lands under the homestead laws, comes also within the inhibition of the statute, are "without right," as stated by the supreme court, and should not be recognized as conferring rights or priorities.

It was because of this view of the law that you were directed, in my letter of December 19, 1890 (11 L. D., 607–612), to give notice to parties who had made applications to enter or file upon said lands that their applications conferred upon them no rights whatever and were rejected, and that at the stated time said lands would be thrown open to entry without regard to said applications; and it was because of this view of the law it was also held (ib., p. 611), that the second proviso of section five of the adjustment act of March 3, 1887 (24 Stats., 556) would not protect those

> who, in violation of the law which authorizes the placing of lands in railroad limits under reservation, for the purpose of effectuating the grant, invade the reservation in an effort to obtain precedence over other, and law-abiding, citizens. Such invaders can not be regarded as acting in good faith.

You will therefore instruct the district officers that no priority of right will be recognized as having been initiated or acquired by settlement upon any of said land prior to their formal opening to settlement, as hereinafter prescribed, except so far as such settlements, if any, may come within the purview of the fifth section of the act of March 3, 1887, *supra.*

In view of the recent act of Congress of March 3, 1891, repealing the general laws allowing the pre-emption of the public lands, the restored land herein referred to can only be entered under the homestead laws, as amended by sections five and six of the new act.

From the papers before me, it would seem that the lands to be thrown open, or the greater part thereof, are not perhaps, strictly speaking, agricultural in character, but have great value for the pine timber thereon; and that they will be eagerly sought after by many persons, whereby may result much confusion and perhaps angry conflicts, which, if possible, should be avoided.

In view of this, it seems eminently proper that further instructions be issued to the district officers in relation to the entry and settlement of these surplus lands, in the hope of avoiding confusion and litigation, and especially with the view to prevent those, who, in violation of law, have invaded the reservation under pretense of settlement, from acquiring preferred rights over others who have waited in an orderly manner the action of the officers of the law, and also to give as fair an opportunity as can be afforded, under the circumstances, to all who desire to make entry of said land.

You will therefore instruct the register and receiver to give notice by advertisement that the lands in question *will not be open to settlement until Saturday, April* 18, 1891; but that applications to make homestead entry upon any and all of the lands to be affected by the order of restoration will be received at the proper district offices, after the specified hour of the opening thereof until the close of the same, on April 17, 1891, as heretofore advertised. The officers should take such precautions as will prevent undue crowding and will secure the orderly presentation of but one application at a time, the hour and minute of its reception to be carefully noted as received, so as to avoid the complications likely to grow out of simultaneous applications. The officers must be careful not to entertain more than one application to make entry from the same person.

On and after April 18, the remaining lands will be open to settlement; and such homestead applications as may then or thereafter be presented will be acted on in the usual way.

The right of appeal from the action of the officers in the premises, by parties aggrieved thereby, should be carefully guarded.

You will notify the local officers, as speedily as may be, of this modification of former instructions, to the end that all possible publicity may be given to the same.

PRACTICE—NOTICE—GENERAL APPEARANCE.

TURNER *v.* JOHNSON.

An appearance for the purpose of obtaining a continuance is a general appearance and waives all defects in the service of notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 19, 1891.

John C. Johnson made homestead entry No. 2339 on March 18, 1885, for the SW. ¼ of Sec. 13, T. 5 S., R. 34 W., Oberlin, Kansas.

On November 23, 1886, Joel Turner filed his affidavit of contest, charging abandonment.

Hearing was duly had, and the register and receiver, on September 16, 1887, recommended the cancellation of the entry, and on appeal you, by your office letter of June 25, 1889, affirm that judgment.

Claimant again appeals.

The facts are correctly set forth in your said office letter. The first ground of error assigned thereon is as follows:

"Error in holding that legal service of the contest had ever been made."

The contest was in the first place initiated October 14, 1886, and January 21, 1887, was the day fixed in the notice for the hearing, and, on January 6 of that year, contestant appeared and filed his affidavit, stating that the defendant was a non-resident of the State and that since notice was issued he had made diligent inquiry to find his place of residence or post-office address, and was unable to find the same; he returned the notice then issued, and asked for an alias notice; thereupon, a new notice was issued fixing March 10, 1887, as the day of hearing, at which time both parties appeared, and defendant made a motion to dismiss the contest, for the reason that no legal service thereof had ever been made upon him.

The evidence of the service of this notice is as follows:

STATE OF NEBRASKA, *Red Willow County, ss:*

I, J. B. Meseroe, do solemnly swear that I served John C. Johnson, the within-named defendant, personally, by giving him a true and complete copy of notice of the within-stated contest, at McCook, Nebraska, February 1, 1887.

Subscribed and sworn to before me this 1st day of February, 1887.

T. M. HELM,
Notary Public.

The motion was overruled, and thereupon the defendant filed his affidavit for a continuance of the case until May 20, 1887, on the grounds of absent witnesses, whose attendance "he has used due diligence to procure," but was unable to do because they were engaged in business which they could not leave to come to the hearing.

The continuance was accordingly granted to the time so fixed by him.

It thus appears that defendant was really served with the notice and

had no cause to complain. Moreover, he asked and obtained his continuance to enable him to make his defense; and, whether served or not, he could not thereafter be heard to complain of the service in the first instance. An appearance for the purpose of obtaining a continuance is a general appearance and waives all defects in the service of notice.

On a careful review of the testimony, I am satisfied the conclusion reached in your said office decision is in harmony with the law and existing regulations.

The judgment appealed from is accordingly affirmed.

[RIGHT OF WAY ACT—STATION GROUNDS.

DAKOTA CENTRAL RY. CO.

Land embraced within a prima facie valid entry is not subject to selection for station purposes under the act of March 3, 1875.

Secretary Noble to the Commissioner of the General Land Office, March 20, 1891.

This record involves the right of the Dakota Central Railway company to file pending the final disposition of an existing entry a plat showing its selection of twenty acres for station purposes in the NE. ¼, Sec. 31, T. 117 N., R. 66 W., Huron, Dakota.

Said quarter section is embraced in the pre-emption cash entry of Anders G. Opperud made July 28, 1883, and held for cancellation by your office October 1, 1888.

Pending appeal by the Western Town Lot Company from this action an affidavit of contest against said entry was filed by one Nelson R. Satterlee.

Thereupon the Department by decision (not reported) dated November 23, 1889, modifying the judgment of your office, returned the record with instructions to give Satterlee an opportunity to present proof of his allegations.

Affidavits outlined in said departmental decision show that the Western Town Lot Company acquired the land in 1886, and during that year caused the same to be platted as a town-site now known as Rockham and that the "Dakota railway company" had located its side tracks and station buildings thereon.

The company filed the pending plat in the local office August 28, 1889.

By letter dated September 25, 1889, your office submitted it to the Department, whence it was returned without approval.

This action of the Department is shown by the following endorsement upon the said letter of transmittal:

DEPT. OF THE INTERIOR, *Sept.* 27, 1889.

Respectfully returned to the Comr. of the Genl. Land Office for filing. The map is not approved as the tract is covered by an uncanceled homestead entry and not subject to right of way act.

GEO. CHANDLER,
First Asst. Secretary.

Thereupon your office October 7, 1889, returned it to the local officers for delivery to the proper officers of the railway company.

On November 7, 1889, the attorneys for the company filed in your office a letter protesting against such action, and enclosing the said plat with the request that it be retained in your files.

By letter dated November 15, 1889, to said attorneys (Messrs. Britton and Gray) your office declined such request and again returned the plat.

Appeal from this action brings the case here.

Section 1, of the act of March 3, 1875, (18 Stats., 482), "granting to railroads the right of way through the public lands of the United States" grants also "ground adjacent to such right of way for station buildings, depots, machine shops side-tracks, turn-outs, 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."

Counsel insist that as the railway company purchased its right of way and station grounds from the town lot company, it should be given the first right to enter the same under the act of 1875, *supra*, and that the pending plat must remain on file to insure the attachment of the company's rights should the Opperud entry be finally cancelled.

This contention is without force.

The grant for station purposes is of public land. The said quarter section is, and has been, since 1883 embraced in an existing entry *prima facie* valid. It is, therefore, not public land, consequently no part thereof can be properly selected under the act of 1875, *supra*, during the existence of such entry.

The decision appealed from is affirmed.

CONTEST—PREFERENCE RIGHT OF ENTRY.

MOORE *v.* LYON.

The fact that the contestant filed a request for the dismissal of a contest will not defeat his preference right of entry thereunder, where he subsequently, in good faith, prosecutes the same to a successful termination.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 21, 1891.

I have considered the case of Wesley Moore *v.* William F. Lyon, on the appeal of the latter from your decision of June 18, 1889, in which you hold for cancellation his pre-emption declaratory statement, made

March 15, 1886, for the NE. ¼ of Sec. 14, T. 107 N., R. 58 W., Mitchell, Dakota.

You affirm the action of the receiver of the local office, awarding the land to Moore.

It is necessary, in order to properly dispose of this case, to review the history of the litigation between these two parties over this tract of land.

Lyon made homestead entry thereon July 31, 1882; about May, 1883, Moore filed his affidavit of contest against said entry, charging abandonment; hearing was duly had, and, on December 27, 1883, the register and receiver recommended the cancellation of the entry. From this finding, and on January 26, 1884, Lyon filed his appeal.

Two days thereafter, and on January 28, 1884, Moore, the contestant, appeared at the local land office, and finding that Lyon had appealed, and being desirous of obtaining government land to make a home at once, having just married, and believing he could not contest the entry and at the same time settle upon other lands with a view to entry thereon, and fearing it would be a long time before the controversy would be finally settled, decided to withdraw his contest, and requested the local officers to modify their decision and give the land to Lyon.

He was informed by the register that the case was already decided, and an appeal filed from their decision, and that he could not then withdraw the contest. Mr. Hitchcock, Lyon's attorney, being present, wrote a statement and requested Moore to sign it, which he did. That statement is as follows:

> I, Wesley Moore, contestant, etc., hereby withdraw the above named contest, and ask that it be dismissed. I do this for the reason that I think Lyon should have the entry, and that he made further improvements subsequent to the trial, and that he has shown evidence of good faith in the matter of residence; dated January 28, 1884.

Mr. Hitchcock at same time made an affidavit, stating that the withdrawal was made without the procurement of Lyon; that Moore made it voluntarily and without consideration. He is corroborated in this statement by Moore, who several months after this transaction swore he voluntarily made the withdrawal or request, and was paid nothing for it.

The only reason he offered to withdraw his contest, to use his own words, was "that when he commenced this contest he had sworn that he wanted to enter it for a homestead, and did not know, being ignorant in regard to the land laws, but that his application, filed at the commencement of the contest, would debar him from entering any other land."

On December 9, 1884, your office affirmed the action of the local officers canceling Lyon's entry, but you also decided that by Moore's action in attempting to withdraw his contest he forfeited his preference right of entry.

From this judgment Lyon appealed, and Moore also appealed from that part of the decision which held that he had forfeited his preference right.

The case thus came by appeal to this Department, and, on February 18, 1886 (see Moore *v.* Lyon, 4 L. D., 393), the judgment of cancellation was affirmed. But it was there held that the ruling of your office, holding that Moore had forfeited his preference right (for reasons above given) was premature, and the same was overruled.

In conformity to the departmental decision, Lyon's homestead entry was canceled on the records, March 13, 1886, and on the morning of March 15, two days thereafter, Moore made homestead entry of the land, and on the afternoon of the same day Lyon filed his declaratory statement, which was held for cancellation by your letter of June 18, 1889.

The principal inquiry in this case is, whether Moore had a preference right of entry, or whether he forfeited the same.

The reasons which he gives, as above set forth, for his so-called withdrawal are such as in my judgment do not imply bad faith.

When his request for a withdrawal of the contest, or a modification of the register and receiver's finding was denied by the local officers, he appears to have immediately employed attorneys to answer Lyon's appeal. He also employed counsel resident in this city. After the so-called withdrawal, he spent $175, besides much of his own time in contesting Lyon's entry.

Section 2 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 lands.

A preference right can not be transferred to another. Welch *v.* Duncan *et al.*, 7 L. D., 186. But it may be waived. Ayers *v.* Buell, 2 L. D., 257; Kellem *v.* Ludlow, 10 L. D., 560.

There is no such a thing as a preference right prior to the cancellation of the entry. The preference right is given by statute "in all cases," when one has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry.

The law favors contests, and rewards the contestant. Webb *v.* Loughrey, 9 L. D., 440.

It is not claimed that Moore's contest was speculative, or that it was brought for any other purpose than to secure the cancellation of the entry and procure the preference right thereto.

I think the evidence shows that Lyon made a continuous residence on the land, after he filed his declaratory statement (March 15, 1886); but I do not regard that question as the controlling one. Moore obtained his preference right by procuring the cancellation of Lyon's entry, and

having placed his entry of record, within the statutory period given him, I think his right is clearly superior and that Lyon's filing should be canceled. It is so ordered; and your said office decision is affirmed.

HOMESTEAD ENTRY—AMENDMENT—SECOND ENTRY.

THOMAS FITZPATRICK.

A homestead entry can not be amended so as to embrace land not originally intended to be entered, but the applicant in such a case may make a second entry under section 2, act of March 2, 1889, on relinquishment of the first.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 21, 1891.

I am in receipt of the appeal of Thomas Fitzpatrick from your office decision of October 2, 1889, denying his application to amend his homestead entry No. 12,505, made June 14, 1888, so as to embrace the NE. ¼ of Sec. 25, T. 4 S., R. 50 W., Denver, Colorado.

The land described in his original entry is the SE. ¼ of Sec. 25, T. 5 S., R. 50 W.

In his application to amend, he says he had no intention to enter this land, but intended to enter and thought he had entered the SE. ¼ of Sec. 25, T. "4" of said range; that the error in describing the township was through the mistake of his lawyer, who drew the papers. His lawyer corroborates this statement by his own affidavit; that the land actually covered by his entry (that is, in township 5) is wholly unsuited to affiant, etc.

He further shows that the land he intended to enter (namely, in township 4) has since been appropriated by another entryman, which precludes him from now obtaining the same, and he therefore asks that he may be allowed to amend or change his entry so as to embrace the land herein first described—a different tract from the one he claims to have intended to enter.

There is no statute or regulation of this Department that will allow this amendment.

The cases in which amendments or changes of entry are allowed, where mistakes in description have been made, are fully discussed in Homer C. Stebbins, 11 L. D., 45, and they only go so far as to allow the entryman to change his entry so as to embrace the land originally *intended* to be entered, where there is no adverse claim thereto.

The applicant in this case asks to amend his entry so as to embrace land not originally intended to be entered.

The only relief the applicant is entitled to is under the act of March 2, 1889 (25 Stat., 854), as held in your office decision.

Under the 2d section of said act, he may relinquish his original entry, and make a homestead entry of the tract desired.

Your decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—WITHDRAWAL.

GULF AND SHIP ISLAND R. R. CO.

The right of the company under the last clause of section 7, act of September 29, 1890, to select indemnity is restricted to even numbered sections within the original indemnity limits, "nearest to and opposite" that portion of the road which may be constructed at date of selection.

Directions given for indemnity withdrawal on the line of definite location south of Hattiesburgh.

Secretary Noble to the Commissioner of the General Land Office, March 20, 1891.

August 11, 1856 (11 Stat., 30), Congress granted to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, every alternate section of land designated by even numbers, for six sections in width, on each side of said road, with the right to select within the larger limit of fifteen miles other lands in alternate sections in lieu of lands found on definite location of the line of the road to have been sold or to which the right of pre emption has attached.

The State of Mississippi, by act of its legislature approved February 2, 1857, accepted said grant, and on December 3, 1858, conferred the same upon the Gulf and Ship Island Railroad Company.

By section four of the granting act it was required that said road should be completed within ten years, or by August 11, 1866. Whatever work in the way of constructing the road was entered upon was stopped by the civil war, which commenced in 1861, and it does not appear that any effort towards resuming work was made afterwards within the time limited for completing the road, possibly because of the prostrate condition in which the disaster of the war had left that section of the country. Thereafter the Land Department, holding the grant to be forfeited, and the land therein to have reverted to the United States, disposed of a quantity thereof along the line of the proposed road, and within the limits of and without regard to the withdrawals theretofore made for the benefit thereof.

The supreme court having held, in the case of Schulenberg *v.* Harriman (21 Wall., 44), that lands in a similar condition had not reverted to the United States, afterwards, in 1884, the Secretary of the Interior renewed the order of withdrawal, which continued in force until August 15, 1887, when the order as to the lands in the indemnity limits was revoked and the same were thrown open to entry and settlement. It does not appear that the road has been constructed, up to the present time.

By section one of the act of September 29, 1890 (26 Stats., 496), Congress declares forfeited and resumes the title to all land heretofore granted for railroad purposes, opposite to and coterminous with any such railroad not now completed and in operation.

And in section seven said act provides as follows:

That in all cases where lands included in a grant of lands to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf and Ship Island Railroad, have heretofore been sold by the officers of the United States for cash, or with the allowance or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or upon which there were bona fide pre-emption or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed and persons claiming the right to enter as aforesaid may perfect their entry under the law. And on condition that the Gulf and Ship Island Railroad Company within ninety days from the passage of this act shall, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title, and claim in and to all such lands as have been sold, entered, or claimed as aforesaid, then the forfeiture declared in the first section of this act shall not apply to or in anywise affect so much and such parts of said grant of lands to the State of Mississippi as lie south of a line drawn east and west through the point where the Gulf and Ship Island railroad may cross the New Orleans and Northeastern Railroad in said State, until one year after the passage of this act. And there may be selected and certified to or in behalf of said company lands in lieu of those hereinbefore required to be surrendered to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

By your letter of March 17, 1891, you state that the point where this company's road will cross the New Orleans and Northeastern Railroad in said State "is in the NW¼ of the SW¼ of the NE¼ of section 10, Tp. 4 N., R. 13 W., in Percy county, Mississippi, said point being within the limits of the town of Hattiesburgh."

It appears that within the required time the company filed its relinquishment of the lands described, in accordance with the requirements of said section; an application is now made in behalf of the company and the State of Mississippi to have withdrawn from entry and settlement "the lands within the indemnity limits lying south of Hattiesburgh.

The language of the last clause of section seven authorizes the selection of lieu lands "within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection." In your letter of December 20, 1890, in relation to said application, you express the opinion that under said clause the company will be entitled to select lieu land anywhere within the indemnity limits of the "original grant," including "the indemnity limits opposite the forfeited portion of the grant."

In this view I do not concur. Congress postpones for one year the forfeiture of that portion of the grant south of Hattiesburgh on condition that portion of the road is built within that time. To aid in the construction of this portion of the road, the company is to have the place lands which may be left within the original granted limits south

of Hattiesburgh and is authorized to make up deficiencies by selecting other lands within the original indemnity limits "nearest to and opposite" to that part of the line of the road which may be constructed at the date of selection. This is my reading of the law, and I have no doubt about it whatever. Whilst lands north of the east and west line, drawn through Hattiesburgh, might be the "nearest," free and unincumbered land, to the aided portion of the road south of that line, if selection of them were permissible, it is not understood how, even then, such lands could be "opposite," either in fact or in law, to the aided portion of the road.

In the case of the United States *v.* Burlington and Missouri R. R. Co. (98 U. S., 334–339), the grant was of certain sections of land on each side of the road and "on the line thereof," and the supreme court said the land was to be taken along the general direction or course of the road, and "within lines perpendicular to it at each end." Surely the word "opposite" is more positive and restrictive in its meaning than the words "along the line" which are comparatively vague and uncertain; and if the court held that the latter words restricted the grant to lands within lines drawn at right angles with the designated termini, it would seem to be a most elastic construction in the present case to authorize the company to go for its indemnity beyond lines drawn in the same way at the end of the line of the road to aid in the construction of which the forfeiture is extended by Congress.

I am therefore of opinion that the said indemnity selection must be restricted to the original limits south of Hattiesburgh.

I concur in your view that there is nothing in the said seventh section of the forfeiture act which will justify the implication that Congress intended to enlarge the indemnity privilege by authorizing lieu lands to be selected from both the odd and even sections along the line of constructed road. This last act, so far as it relates to this company, may be construed *in pari materia* with the original granting act of 1856, which restricted the indemnity selections to "alternate" sections, and the fact that the forfeiture act does not repeat the language of the former act, but says there may be certified to the company "lands in lieu" of those lost, means that such "lands" are to be selected in accordance with the provisions of the original grant, the forfeiture of which the seventh section only suspended without enlarging in any way.

With regard to the claim of the company for the one hundred and twenty sections of land north of Hattiesburgh, I can express no definite opinion, as there is nothing to show the validity of said claim beyond assertion. The rule laid down in the matter of the Tennessee and Coosa Railroad, January 30, 1891, seems to be the correct one, and will be adhered to.

Upon a review of all the circumstances of the case I am disposed to deal in a spirit of liberality with the application. As the aided portion

of the road is required to be constructed by September 29, 1891, it would seem to be right to extend all proper facilities to aid in producing that result.

The building of the road will induce people to settle upon and claim the lands within the indemnity limits so that when the company are able to make selections of lieu lands it will find the greater part thereof claimed by settlers.

In your letter of December 20, 1890, you state substantially that, if the company are required to select their indemnity lands within the fifteen miles limit south of Hattiesburgh nearest to and opposite such constructed line at the date of selection, "It will perhaps be found impossible to fully satisfy the grant coterminous with constructed road, even should the lands to that extent be now withdrawn."

In saving this company from the operation of the forfeiture act for one year, Congress indicated its willingness to aid said company in building its road, and in view of the peculiar circumstances surrounding it and the shortness of the time in which the company have to build, it would seem to justify this Department in making an exception to its settled policy, in favor of the withdrawal. Therefore, on receipt hereof, you will direct a withdrawal from settlement and entry of the even-numbered sections within the original indemnity limits of said grant, opposite the line of the definite location of said road south of Hattiesburgh.

RAILROAD GRANT—RES JUDICATA—PRE-EMPTION CLAIM.

ORR *v.* CENTRAL PACIFIC R. R. CO.

The doctrine of *res judicata* will not prevent the Secretary of the Interior from considing an application to enter, finally rejected by his predecessor, if such matter comes within section 3, act of March 3, 1887, which makes it the duty of the Secretary to re-instate the settler in all his rights to lands upon which he may have settled, and for which his application was erroneously rejected on account of a railroad grant, if such settler has not abandoned the land and located another claim in lieu thereof.

The pre-emption right on unoffered land, as defined by the act of September 4, 1841, and extended to lands in California by the act of March 3, 1853, is not defeated by the failure of the settler to make proof and payment prior to a day appointed for the public offering of the land covered by his claim, where said land is subsequently withheld from such sale.

The existence of a valid pre-emption filing at date of definite location, excepts the land covered thereby from the operation of this grant.

Secretary Noble to the Commissioner of the General Land Office, March 20, 1891.

By letter of October 22, 1890, you transmitted for the consideration of the Department the appeal of Michael Orr from the action of the register and receiver rejecting his application to make homestead entry of the W. ½ of the SE. ¼ and S. ½ of the SW. ¼, Sec. 5, T. 12 N., R. 8 E., M. D. M., Sacramento, California.

You transmitted said appeal without taking action thereon, in view of the fact that the Department, by its decision of September 21, 1883, in the case of Central Pacific Railroad Company *v.* Michael Orr (2 L. D., 525), decided, upon the application of Orr to make homestead entry of said tract, that the land was not excepted from the operation of the grant, and Orr's application was therefore finally rejected. The Department, by letter of November 25, 1890, directed that a copy of said appeal be served upon the Central Pacific Railroad Company, and that it be required to show cause within thirty days why the homestead application of Orr should not be granted, and that upon the coming in of the answer of the railroad company, you re-transmit all the papers to the Department for consideration.

By letter of January 8, 1891, you forwarded all the papers, including the answer of the railroad company, which are now before me.

From the record in this case it appears that the land in controversy is within the limits of the grant to the Central Pacific Railroad Company. On January 25, 1877, Orr applied at the local office to make homestead entry of said tract, claiming that it was excepted from the operation of the grant to the railroad company by reason of the declaratory statement of W. B. Wilson, filed therefor June 15, 1856, existing at date of definite location.

A hearing was ordered, and from the testimony taken thereat the local officers found in favor of the company and rejected the application of Orr.

The case finally came before the Department on appeal, and Orr's application was rejected by the Secretary, upon the ground that the pre-emption right of Wilson, which Orr claimed excepted the land from the operation of the grant, was extinguished by reason of his failure to make proof and payment before the day appointed by the proclamation of the President for the sale of said lands. (2 L. D., 525).

On September 8, 1890, he again made application to enter said lands under the homestead law, which was rejected by the local officers, from which action he appealed, and which was transmitted to the Department by your office, for the reasons before stated. The case now comes before the Department upon said appeal and the answer of the railroad company thereto.

In his appeal he sets forth, substantially, the following facts: That ever since the decision of the Department of September 21, 1883, he has with his family continued to reside upon, cultivate and improve said land; that the company has taken no steps to secure title thereto, and he renews his application and asks that he be allowed to enter said land, under the recent ruling of the Department in the case of the Central Pacific Railway *v.* Edward L. Taylor (11 L. D., 445), in which the decision in the case of Central Pacific Railroad Company *v.* Orr was overruled.

In answer to the rule to show cause why the applica'ion of Orr should not be allowed, the railroad company urge the following objections to the granting of said application:

1. Because the application presents exactly the same case that was decided by Secretary Teller, September 21, 1883 (2 L. D., 526), between the same parties, involving the same subject matter, and the nature of Orr's claim is the same now as it was then; that a motion to reconsider said decision was refused November 8, 1883, and Secretary Lamar, on July 6, 1886, declined to re-open the case; that it has therefore been finally decided, and the present Secretary can not make another and different decision.

2. Because the decision of Secretary Teller is correct, upon the law and facts.

But for the act of March 3, 1887 (24 Stat., 556), I would have no authority to re-open the case, and to make a different adjudication from that of my predecessor. But the third section of said act makes it the duty of the Secretary to correct all decisions made by the Department or the General Land Office where it shall appear, in the examination of any unadjusted land grant, that the homestead or pre-emption entry of a bona-fide settler has been erroneously canceled.

In such a case a final decision of a former or the present Secretary is not only no longer a bar to the further consideration of the question decided, but it is made the duty of the Secretary to re-adjudicate the case, notwithstanding the former decision, whenever it appears that the pre-emption or homestead entry of any bona fide settler has been erroneously canceled on account of any railroad grant or of withdrawal of public lands from market. (Circular Instructions, 6 L. D., 277).

It was not only the intention of this act to require the Secretary to correct all decisions made by the Department or General Land Office erroneously canceling the homestead or pre-emption entry of any bona fide settler,

but also to re-instate the settler in all his rights to lands upon which he may have settled, and for which his application to file or enter may have been rejected by the local office, provided it be shown that said application to file or enter was erroneously rejected, and that the settler had not located another claim or made entry in lieu of the land for which his application to file or enter had been so erroneously rejected. (Michael Donovan, 8 L. D., 382.)

The material question to be determined under this act is, whether the application of Orr was erroneously rejected, and whether he has abandoned the land and located another claim in lieu thereof, which involves the second objection urged by the railroad company in its answer.

Upon the question as to whether this application was erroneously rejected, the facts are briefly these:

The land is within the primary limits of the grant to said road as definitely located, March 26, 1864. At the date of said location, there was of record the declaratory statement of W. B. Wilson, filed for said

tract June 15, 1856, alleging settlement July 1, 1852. This land was then unoffered land, but it was proclaimed for sale under date of June 30, 1858, with other land to be offered at public sale, at Marysville, on February 14, 1859. While this land was included in said proclamation, it was not in fact *actually offered*, because section 5, in township 12 north, range 8 east, embracing the land in controversy, was alleged to be mineral in character, and it was therefore withheld from sale by the local officers, in accordance with the instructions contained in the President's proclamation, that:

> No "*mineral lands*," or tracts containing mineral deposits, are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal, pursuant to the requirements of the act of Congress approved March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes."

It is contended by counsel for the railroad company that, as to the lands withheld from sale, the evidence or information of its supposed mineral character was not filed before the morning of the first day's sales, but at sundry times thereafter, and that there was not, at any time prior to the day of offering, any obstacle in the local office to Wilson making proof and payment, as required by law and the regulations of the office.

It is unnecessary to discuss this question, in view of the construction placed upon the act of September 4, 1841, in the decision of the Department in the case of Central Pacific Railroad *v.* Edward L. Taylor, 11 L. D., 445, and I have seen no good reason urged against the soundness of this construction.

The act of Congress of March 3, 1853 (10 Stat., 244), extending the pre-emption laws to California, contained, substantially, the same provision as to the time when settlers upon unoffered lands shall make proof and payment under their filings as is contained in the pre-emption act of September 4, 1841.

The 14th section of the act of September 4, 1841 (5 Stat., 453), provides:

> That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

The 6th section of the act of March 3, 1853 (10 Stat., 244), provides:

> That where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of survey to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale, including such lands.

The spirit and intent of both acts was simply to require the pre-emptor to make proof and payment prior to the day appointed for the sale, so that the mere filing or claim of the settler should not be available to hinder or delay the sale of any lands by the government. But

it was not intended by either act to forfeit the claim or right of the settler to make proof and payment thereafter, if the land should be withdrawn from sale, although a day had been appointed for its sale.

Under the pre-emption act of 1841 a settler upon offered land was required to make proof and payment within twelve months from the date of his settlement, and upon failure to make such proof and payment within that period, the land so settled upon was then subject to the entry of any other purchaser. So a settler upon unoffered land was required to make proof and payment before the day appointed by the President for the sale of such land, and upon failure to make proof and payment within such time, the land was subject to be offered at public sale on the day appointed. If in the case of offered lands no other purchaser applied to make entry, it would not affect the right of the pre-emptor to prove up and make cash entry at any time after the expiration of the statutory period, or if in the case of a filing upon unoffered land, the land was afterwards offered at public sale according to law and remained unsold at the close of such public sale, it would be subject to the private cash entry of any other purchaser, but if no such purchaser applied to make entry, the pre-emptor would still have the right to prove up and make cash entry under his filing.

The pre-emption filing of Wilson being a valid claim, subsisting at date of definite location, excepted the tract from the operation of the grant, and the application of Orr was therefore erroneously rejected. It also appears that he has not abandoned said claim, or located another claim, or made an entry in lieu thereof, and the facts set forth in his appeal, not being controverted by the railroad company in its answer, I am satisfied that it is my duty, under the act of March 3, 1887, to direct that this application be allowed, and it is so ordered.

SWAMP LAND—WAIVER BY STATE AGENT.

STATE OF IOWA (WOODBURY COUNTY).

A waiver of the right to submit testimony in support of the claim of the State to swamp land, by one authorized to examine witnesses on behalf of the State, is conclusive in such matter as against the State, and it will not be heard thereafter to complain that it did not have full opportunity to offer such testimony.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 21, 1891.

I have considered the case arising upon the appeal of the State of Iowa, through its agent, Isaac R. Hitt, from your office decision of January 9, 1889, rejecting the application of the said State for cash indemnity under the act of March 2, 1855 (10 Stat., 634), for certain tracts of land situate in Woodbury county, in said State, described in your said office letter of January 9, 1889, alleged to be swamp.

The facts of the case, briefly stated, are these: The State presented a claim for indemnity for swamp-lands in Woodbury county, sold by the United States, amounting in the aggregate to 4,178.42 acres. Your office furnished a list of these lands to its special agent, Charles Shackleford, with instructions to investigate the character of the land. Mr. Shackleford went to Woodbury county, stopping on the way at Chicago, for the purpose of making arrangements with Mr. Isaac R. Hitt, the State agent for Iowa, for the taking of testimony in the matter of said lands. The arrangements finally concluded were that the Deputy State Agent, Mr. F. A. Wheeler, should act in the matter.

The plan of investigation pursued was this: Mr. Shackleford, as agent of your office, made a personal examination of the tracts in controversy. In cases where, from such personal examination, he became satisfied that the land was actually swamp-land within the meaning of the law, and was prepared, upon the basis of facts which he had thus personally observed, and incorporated in his report to your office, to recommend for the allowance of indemnity, it would seem unnecessary to go to the delay, trouble, and expense of taking testimony. Equally so in cases where, upon the same basis, the State swamp-land agent should acknowledge that the land was not swampy in character, and waive the claim of the State thereto. It was only in cases where the agent of your office and of the State should disagree that the necessity arose for the taking of testimony.

Of the 4,178.42 acres claimed by the State, the special agent of your office, after personal examination, considered 3285.32 acres to be "fit for cultivation," but conceded that 893.10 acres were "swamp or overflowed." Your office decision of January 9, 1889, does not dispute the State's claim to indemnity for the latter; and they are not in question here.

It appears from the record that no testimony was taken as to the character of the 3,285.32 acres of land reported by the special agent as being fit for cultivation, except as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 27, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 88 N., R. 47 W. Testimony was taken as to the character of these one hundred and sixty acres upon which the special agent reported that they are "not within the scope of the swamp land grant."

With reference to the land in section 27, the testimony of two witnesses, one of whom is a surveyor who has been well acquainted with it shows that "during the spring months it is well covered with high water, from one to two inches; sometimes a month, sometimes for two; the overflow is caused by creeks running out of the bluffs near by; to reclaim the land would require a ditch about twelve miles long, for outlet; the land is all used for hay purposes;" that, although it is good timothy land, it is not fit for cultivation, except for hay.

The plats on file in your office show the greater part of this tract to be swamp, and, considering the field notes and testimony together, I

think it is sufficiently shown by the evidence that this tract is swamp and overflowed and unfit for cultivation within the meaning of the swamp land grant.

The evidence is substantially the same as to the land in section 35, which, while it produces grass and is not swampy or miry to such an extent as to prevent a team from being driven over it, yet is shown by the witnesses to be swamp and overflowed and could not be cultivated to agricultural crops.

I think the testimony sufficiently shows that all of these last mentioned tracts, aggregating one hundred and sixty acres, are swamp and overflowed, within the meaning of the act, and that the State is entitled to indemnity therefor.

As to the remaining 3,125.32 acres, no testimony was taken to impeach the report of the special agent that said lands were fit for cultivation, and upon the list is attached the following waiver:

Chicago, Ills., Nov. 8, 1888.

I hereby waive and decline to offer testimony on the foregoing tracts of lands, and relinquish claim of the State of Iowa to indemnity on account thereof.

ISAAC R. HITT, *State Agent.*
by F. A. WHEELER.

In the appeal of the State from the decision of your office, Mr. Hitt, the agent of the State, simply says: "The waiver of the State is denied." He offers no evidence, however, to disprove the fact that Wheeler did make the waiver, or that he signed the paper, and states no ground upon which he challenges its validity, except that Wheeler had no authority to make such waiver for the State, never being so instructed, and that all waivers are made over his own signature. He states, however, that "Mr. Wheeler's instructions, I think, were verbal and went so far as to the examination of witnesses and no farther."

If Wheeler had the authority to examine witnesses, he certainly had the authority to decline to examine them, or to offer testimony. Conceding that he had no authority to file a relinquishment of the claim of the State to indemnity if the testimony showed the land to be swamp and overflowed, yet he did have the authority to determine whether he would introduce testimony, and if the accredited agent of the State invested him with the authority to examine the witnesses, and he waived or declined to offer testimony as to certain tracts, the State is bound and can not complain that it had not had full opportunity to offer testimony in support of its claim.

The State has shown no sufficient reason why the government should be put to the expense of another investigation, or that further opportunity should be allowed the State to offer testimony as to the character of these lands, and it appearing from the report of the special agent that at the date of the swamp land grant, the greater part of each smallest legal subdivision was not swamp or overflowed so as to render them unfit for cultivation, the claim of the State to indemnity for the same is denied.

PRE-EMPTION ENTRY—TRANSFEREE—ACT OF MARCH 3, 1891.

CHARLES C. CRANSON ET AL.

A pre-emption entry, made in the absence of any adverse claim to the land, is confirmed by section 7, act of March 3, 1891, where it is shown that the land was subsequently, and prior to March 1, 1888, sold to a *bona fide* purchaser for a valuable consideration, and no fraud on the part of such purchaser has been found.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 21, 1891.

This is an appeal by George I. Harry, from your office decision of December 6, 1888, in the case of the United States *v.* Charles C. Cranson and said Harry, involving the N. ½ SW. ¼, Sec. 12, T. 112 N., R. 78 W., Huron, Dakota.

Cranson filed pre-emption declaratory statement November 20, alleging settlement on said tract November 16, 1883, and made cash entry therefor, May 28, 1884.

On August 4, 1886, a special agent of your office reported said entry speculative, and also that May 31, 1884, Cranson conveyed the land to Harry for $300, and at the subsequent hearing testified that such conveyance was shown by the county records

On February 8, 1887, your office held said entry for cancellation with permission to the entryman and his transferee to show cause within sixty days after notice why it should be sustained.

On March 25, 1887, Harry asking an opportunity to sustain the entry filed an application for hearing, and the same was subsequently ordered by your office.

From the evidence adduced at the hearing thus ordered, the local officers found December 24, 1887, that the entry should be canceled.

On appeal by Harry this ruling was affirmed and the entry held for cancellation by the decision appealed from.

The appeal here, as well as that to your office, is based mainly upon the allegation that Cranson was without notice of the proceeding by the government against his entry, and that consequently both the local and your office were without jurisdiction.

For the reasons hereafter set out, I have deemed it unnecessary to discuss the matters thus alleged.

Section 7, of the act of March 3, 1891, provides that

> all entries made under the pre-emption, homestead, desert-land or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry, and which have been sold or incumbered prior to the first day of March, 1888, and after final entry to *bona fide* purchasers or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

So far as the record discloses there was, at the date of Cranson's entry, no adverse claim to the land. The special agent's report, as well as his testimony at the hearing, show that the tract was sold to a *bona fide* purchaser for a valuable consideration long prior to March 1, 1888, and no "fraud on the part of the purchaser has been found."

Thus it appears that the entry in question has all the requisites to confirmation under the act of March 3, 1891, *supra*. The judgment of your office must, therefore, be reversed and the pending entry passed to patent.

PROCEEDINGS TO CANCEL CERTIFICATION—GRADUATION ENTRY.

CLOESSNER *v.* VICKSBURG, SHREVEPORT AND PACIFIC R. R. COMPANY.

The erroneous certification to a railroad company of land previously purchased by an applicant under the graduation act, calls for proceedings under the act of March 3, 1887, to cancel said certification.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 21, 1891.

By letter of August 11, 1890, your office stated that on January 5, 1855, one Charles J. Cloessner made graduation cash entry No. 15394, Monroe series, Louisiana, for the SW. ¼, Sec. 26 and SE. ¼, Sec. 27, T. 17 N., R. 5 W., in said State; that the tracts are within the granted limits of the grant by act of June 3, 1856, to the State, for the Vicksburg, Shreveport and Texas, now Vicksburg, Shreveport and Pacific railroad company, and that said entry having been erroneously posted by your office as in "section 35," same township and range, the SE. ¼ of section 27, was certified to the State, on October 7, 1859, for the railroad company, it then appearing clear upon the records; that the affidavit of Cloessner and the register's certificate forwarded to your office described the tracts first above named, but the receipt described the SW. ¼, Sec. 26 and NW. ¼ Sec. 35, same township and range; that on May 16, 1855, the certificate was returned to the register, with instructions to compare the same with the application to enter, make any correction necessary and return the same to your office; that the local officers failed to respond, and nothing further was done in the premises until April 8, 1874, when your office directed the local officers to make search for the certificate and to comply with the instructions of 1855.

These officers reported on the 30th of the same month, that the papers could not be found. On June 18, 1874, the register then in office made a certificate to the effect that Cloessner, on January 5, 1855, had purchased the tract first above described.

On August 7, 1874, the case was suspended and the local officers were directed to call upon the claimant for his affidavit "as to the land he intended to enter."

Nothing further was done in the matter until January 3, 1890, when the attorney for Cloessner requested that patent be issued on the entry, stating that as the SE. ¼, Sec. 27, had been conveyed to the railroad company, the entryman to avoid controversy, would release all right thereto, if a patent would issue to him for the NW. ¼, Sec. 35, instead.

Your office states that the E. ½ of said NW. ¼ of Sec. 35, was sold to R. L. Myrick on May 2, 1855, and the W. ½ thereof was sold to W. L. Myrick on the 15th of the same month, and that patents have issued for the same.

It appears that by letter of April 3, 1890, your office requested the attorney for said company to cause the reconveyance of said tract to the United States, to the end that no cloud may rest upon the title of Cloessner, to which said attorney replied that it was impossible to comply with said demand for the reason that the tract had been sold by the company some years since to Mrs. Annie Penfield Mower, as appeared from a letter of the general attorney of the company.

As it appears that Cloessner has the prior claim to this tract, and that his right has been thus far defeated by the action of your office in causing the erroneous certification for said company, I am of opinion proceedings should be instituted to cancel said certification under the act of March 3, 1887.

You will, accordingly, make demand on the proper officer of said company in accordance with section two of said act, and report the action taken thereunder by the company.

VALENTINE SCRIP—RESERVATION.

CYRUS F. CLAPP.

Land embraced within an existing reservation for townsite purposes is not subject to location with Valentine scrip.

Secretary Noble to the Commissioner of the General Land Office, March 25, 1891.

With your letter of June 25, 1890, you transmit the appeal of Cyrus F. Clapp from the decision of your office of March 15, 1890, affirming the action of the local office in rejecting the application of said Clapp to locate Valentine scrip on three hundred and twenty acres of unsurveyed lands adjacent to the town of Port Angeles, in the State of Washington.

Said application was rejected by the local officers, for the reason that the land upon which he applied to locate said scrip was, as shown by the records of the local office, a United States naval and military reservation.

Upon appeal therefrom, you affirmed the action of the local officers rejecting said application, but upon the ground that the tract in contro-

versy is within the Port Angeles towns ite reservation, and was legally occupied and appropriated as a part of such reservation created by executive order, dated March 10, 1863, under the act of March 3, 1863, authorizing the President to reserve from the public lands townsites on the shores of harbors, important portages, etc.

From this action, the applicant appealed, alleging error substantially as follows: (1) In holding that the tract in controv ersy is within the Port Angeles townsite reservation and was legally occupied and appro priated as a townsite reservation under said executive order of March 10, 1863, or that any valid, legal and effective reservation of said land ever existed, either as a military and naval reservation or as a townsite reservation; and, (2), being public land of the United States not appropriated at the date of said application, and subject to location with Valentine scrip, it was error to reject it.

It appears from the records that on June 18, 1862, Victor E. Smith, a special agent of the Treasury Department, addressed a letter to the Commissioner of the General Land Office, requesting that in anticipation of the passage of a bill then pending before Congress, providing for the reservation of lands for townsites, that certain lands at Port Angeles, to the extent of five and one-half miles in length along the bay, be withdrawn for townsite purposes, and stating that reservations for lighthouse, naval, and revenue purposes might be nec essary at that point.

The Commissioner of the General Land Office submitted this letter to the Secretary of the Interior, which he described as an application for a reservation, "five and one half miles front by one mile deep on the south side of and fronting on Puget Sound, according to the locus indicated on plat 'B' herewith, in township 30, ranges 5 and 6 west, Washinton Territory," and recommen ded that a withdrawal of the land for the purposes of said reservation be approved by the President. This letter was accompanied by a plat designating the land to be embraced in said reservation, and includes the land in controversy.

On June 19, 1862, the President endorsed on said letter: "Let the reservation be made as within recommended," and, on June 20, 1862, the surveyor-general and the local officers were instructed by the Commissioner to note and respect the land designated as a reservation.

On March 3, 1863, the act was approved, authorizing the President to reserve from the public lands, whether surveyed or unsurveyed, townsites on the shores of harbors at the junction of rivers, important portages, or any natural or prospective centers of population, and to cause them to be surveyed into urban or suburban lots of suitable size, and to be offered for sale at public outcry to the highest bidder (Sections 2380, 2381, Revised Statutes). Thereafter the attention of the Commissioner was called to the passage of said act by a communication from Victor Smith, the collector of customs at Puget Sound, who recommended that the Port Angeles reservation be surveyed, and of the thirty six hundred acres, more or less, six hundred acres be laid off in

urban lots, fifty by one hundred and forty feet, and the balance in five and ten acre lots.

This letter was forwarded to the Secretary of the Interior, who favored the proposition with certain modifications as to the quantity of land to be surveyed into urban and suburban lots, and recommended that "five hundred acres of the reservation, contiguous to the bay, a little more or less, according to the specialty of the surface, be surveyed into urban squares, and that two thousand acres be surveyed into suburban lots, leaving one thousand and twenty, or thereabouts, of the most distant part thereof for further disposal."

The Secretary of the Interior submitted this report to the President, calling attention to the reservation made by order of June 19, 1862, and recommended that the President "sanction the relinquishment of the former reservation to the extent proposed, and approve the survey and sale of the land in urban and suburban lots, in conformity with the recommendation of the Commissioner."

Upon this letter the President, on March 10, 1863, made the following endorsement:

> The reservation within named, except in regard to so much of said lands as may be needed for light-house purposes, is revoked in respect to the uses mentioned in my order of June 19, 1862; but is confirmed as a reservation for a townsite, under the provisions of an act of Congress entitled "An act for increasing the revenue by reservation and sale of townsites on public lands,' approved March 3, 1863; and I direct the Secretary of the Interior to cause said land, except so much thereof needed for the purposes aforesaid, to be surveyed in urban and suburban lots, in conformity to the recommendation of the Commissioner of the General Land Office within referred to.

In accordance therewith, instructions were given to the surveyor-general relative to the survey of said reservation, directing him to adopt and close upon the boundary line of the survey and field notes, the plat of which accompanied the letter to the President when the first reservation was made and which included the land in controversy; that five hundred acres (more or less according to conformation of surface), contiguous to the bay, should be surveyed into urban lots, and that one thousand to two thousand acres next adjoining the townsite should be laid off in suburban lots, and to report, subject to instructions, what localities shall be divided into lots of ten acres and what number of lots shall be surveyed, but the whole number of such lots shall not exceed two hundred. He was also directed to consult and co-operate with Collector Smith in making the survey.

In September, 1863, the surveyor-general submitted a plat showing the urban lots on the bay, a tract of three hundred and twenty acres immediately adjoining on the west, designated "U. S. Navy and Military Reservation," and the exterior boundaries of the entire tract as surveyed, and in submitting said report he stated that, under his instructions to co-operate with Collector Smith, "he nominally submitted the whole matter of the survey of the townsite to his judgment and

discretion," who assumed the exercise of a large discretion "in laying off a naval and military reservation in the place of the ten acre lots."

The surveyor-general, considering that there was no authority for laying off such a reservation, declined to approve it, but submitted the whole matter to the Department. The plat submitted with this report was superseded by another plat, approved by the surveyor-general, November 4, 1863, but both plats are alike as to the exterior boundaries of the townsite, and the tract laid off for a naval and military reservation.

In acknowledging the receipt of this report, the Commissioner stated, with regard to the naval and military reservation, that the office did not contemplate such a survey in the instructions, but the question of making such reserve would be submitted to the War Department and their views obtained. The question was submitted to that Department, but it seems that no further action was taken thereon.

Upon these facts it is contended that no reservation was made of this land for naval or military purposes; that it was not included in the reservation for the Port Angeles townsite, and was unappropriated, unoccupied public land at the date of the application to locate it with Valentine scrip.

It will be observed that the original reservation, as shown by the map transmitted to the local officers and the surveyor general, embraced all that portion of the reservation afterwards known as the naval and military reservation, including the sand spit on which is located the light-house.

The order of June 19, 1862, reserved all of said land for light-house purposes and for other public uses. The order of March 10, 1863, did not restore any part of this reservation to the public domain, but stated that "the reservation within named, except in regard to so much of said lands as may be needed for light-house purposes, is revoked in respect to the uses mentioned in my order of June 19, 1862, but is confirmed as a reservation for a townsite." That is, the entire reservation made by the order of June 19, 1862, which included the sand spit and that part of the tract afterwards designated as a naval and military reservation, was reserved for townsite purposes, except so much as may be needed for light-house purposes.

The land reserved by the order of June 19, 1862, was designated on the map submitted with the letter recommending said reservation, and the exterior boundaries appear to be the same as shown by the map of November 4, 1863.

The instructions of the Commissioner for the survey of this land could not have diminished the reservation, nor was it intended, as will be seen from the report of the surveyor-general, who states that the collector assumed authority to lay off a "military and naval reservation in the place of the ten acre lots." That is, the naval and military reservation was intended to be reserved as such from a part of the town-

site, instead of laying off that part into ten acre lots, as instructed, but it did not create or attempt to create a new reservation of the public land other than that reserved by the President, but merely to appropriate a part of the townsite reservation for such purpose.

The mere fact that the question was submitted to the War Department for its views, as to whether that part of the townsite should be appropriated for a "U. S. Naval and Military Reservation," and no action was taken thereon, did not affect the reservation which the President by his order of March 10, 1863, "confirmed as a reservation for a townsite," nor was it in any manner affected by the action of Collector Smith in appropriating that part of the townsite for a naval and military reservation, and so designating it on the plat, instead of subdividing it into ten acre lots, in accordance with the instructions of your office to the surveyor-general.

It remains with the government whether it will continue to appropriate said land to such purposes, or whether it shall be surveyed and sold as townsite lots.

Your decision, holding that said land had been set apart as a reservation at the time of this application, and was not therefore subject to location, is affirmed.

HOMESTEAD CONTEST—PREFERENCE RIGHT OF CONTESTANT.

MATTHEWS *v.* BARBARONIE.

A contest on the ground of abandonment may be properly entertained against a homestead entry though the statutory life of such entry has expired.

The cancellation of such an entry by the General Land Office, on proceedings begun subsequently to such contest, will not defeat the preference right of the contestant who had prior thereto submitted sufficient testimony to sustain the charge, and secured the favorable judgment of the local office thereon.

An entry made subject to the preference right of a successful contestant, should not be canceled without due notice to the entryman, with opportunity to be heard in its defense.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 23, 1891.

October 13, 1879, Patrick Fay made homestead entry for the SE. ¼ of Sec. 9, T. 36 N., R. 1 E., Seattle, Washington.

November 8, 1886, more than seven years subsequent to Fay's entry, John L. Matthews filed a contest against the same, alleging abandonment by Fay for five years prior to contest.

Notice was properly served by publication, and, in pursuance thereof, the testimony was taken before the clerk of the district court of Skagit county, Washington Territory, March 14, 1887.

March 30, the local officers rendered their opinion recommending that the entry be canceled.

The defendant did not appear. The contest papers and evidence were transmitted to your office May 10th of the same year. July 20, 1887, your office canceled the entry, without regard to the contest of Matthews, but by reason of the expiration of the lifetime of the entry.

The register reports that upon such cancellation, Matthews was notified thereof by personal service upon his attorney, John F. Goney.

December 6, 1887, John Barbaronie, defendant herein, was allowed to make homestead entry No. 9363 for said tract.

January 5, 1888, Matthews also was allowed to make homestead entry for the same, upon his statement that he had not received official notice of the cancellation of the Fay entry, until December 1886.

January 26, 1888, your office re-canceled the Fay entry.

This second cancellation was responsive to Matthews' contest, and he was notified of the same, and, prior to the expiration of thirty days from such notice, he again applied to enter the land and accompanied his application with his own and other affidavits, showing that he had purchased the improvements of one Huse (who was a squatter on the land) and had made some improvements of the value of eighty or ninety dollars; that he had lived on it continuously since 1886, and that during a temporary absence in November and December, 1887, Barbaronie had taken possession of the land and made entry thereof, and refused to allow him to come on the land; that he thereupon wrote to the land office at Seattle, inquiring as to his contest, and then (December 1887) for the first time learned of the cancellation of July 20th.

He therefore asked that Barbaronie's entry be canceled, and his application allowed, or a hearing ordered to determine their respective rights.

His petition and accompanying papers were forwarded to the Commissioner of the General Land Office, and on July 28, 1888, your office, by letter of that date, held that its decision of "January 26, 1888, was in error in cancelling Fay's entry (3483), and resulted through the fact being overlooked that the entry had been previously canceled," · · · · · and amended the same "so as to show the closing of the case of Matthews *v.* Fay in favor of Matthews, and the allowance to him of the preference right of entering the land by virtue of his contest proceedings," and held the entry of Barbaronie for cancellation, because in conflict with Matthews' entry of January 5, 1888.

From this decision Barbaronie has appealed to this Department, claiming that Matthews' contest was improperly allowed, because, at the time he began it, Fay's entry had expired by limitation, and that if it was properly allowed, Matthews lost his rights thereunder by failing to exercise his preference right within thirty days from notice of cancellation by the Commissioner of July 20, 1887. He asks therefore that the entry of Barbaronie be allowed to stand, or, "In the event that it is deemed necessary · · · · · that a hearing be ordered, where testimony in relation to the same be given."

The record in this case is a bundle of errors and furnishes no sufficient information upon which to determine the rights of these parties.

The contest was properly allowed, notwithstanding Fay's entry had expired by limitation, for it was properly allowed when made and was intact upon the records when Matthews applied to contest. While it so remained of record, Matthews could not be allowed to make entry of the land, but was compelled first to remove Fay's entry, which he could only do by a contest, and his contest was initiated before any steps had been taken by the government to cancel it.

He was therefore entitled to his preference right when the same was canceled by letter of July 20, 1887, notwithstanding such cancellation was ordered independently of his contest. He had submitted his testimony, which fully sustained the allegations of his contest, and had secured a judgment of the local officers recommending cancellation of the entry—all of which proceedings had been before the Commissioner for two months prior to his order of cancellation.

As to whether he was timely or properly notified through his attorney of such cancellation does not satisfactorily appear from the report of the register. He says: "Upon the cancellation of said entry by your letter 'C' of July 20, 1887, said Matthews, contestant, was notified thereof, notice being served personally upon John F. Goney, his atty."

It does not appear from this when such notice was served. "Upon the cancellation of the entry" is indefinite, and the notice itself does not accompany the record, nor any other evidence as to service.

If he was notified of the cancellation, either by service of notice on himself or his attorney more than thirty days prior to his entry of January 5, 1887, his entry of that date was improperly allowed, because at said date the entry of Barbaronie was of record, and it was entitled to priority by reason of Matthews having failed to avail himself of his preference right within the time allowed by law.

It was error also to cancel the entry of Barbaronie without notice to him, thus giving him an opportunity to be heard in its defense. Russell *v.* Gerrold, 10 L. D., 18.

Again, by the report of the register, as to the appeal of Barboronie from your office decision, it appears that he was notified of said decision July 5, 1889, and his appeal was filed October 2, 1889. If this is true, then, Barbaronie is precluded by reason of failure to appeal within seventy days from notice of decision cancelling his entry.

The equities seem to be with Matthews, but I am unable to decide the case on the incoherent and unintelligible record before me. You will direct a hearing upon the matters hereinbefore pointed out that a decision may be made in conformity with the rights of the parties as shown by such investigation.

The decision of your office is modified accordingly.

ABANDONED MILITARY RESERVATION—FORT ELLIS.

JOHN W. IMES.

The right to enter land embraced within an abandoned military reservation is restricted by the provisions of the act of July 5, 1884, to those who have made in the manner prescribed an actual settlement thereon.

An applicant for such lands can not found any right of entry on the claims of others that were existing at the date the reservation was made, and that have since been extinguished.

The act of February 13, 1891, directing the disposition of Fort Ellis military reservation protects only such settlement rights as were acquired under, and recognized by the act of 1884.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1891.

On September 16, 1889, the local officers at Bozeman, Montana, "suspended" the homestead application of John W. Imes for the SE. ¼, Sec. 14, T. 2 S., R. 6 E., for conflict with the Fort Ellis military reservation.

Imes appealed, whereupon your office, December 10, 1889, affirmed the action of the local office "rejecting" his said application.

Imes appeals here.

It appears from the statements of your office that the tract was embraced in the executive order of March 1, 1870, enlarging the limits of the original reservation as declared by executive order of February 15, 1868. The records of this office show that said reservation was turned over to the Department by executive order, dated July 26, 1886, for disposal under the act of July 5, 1884 (23 Stats., 103), entitled "An act to provide for the disposal of abandoned and useless military reservations."

The applicant alleges that Orlenzo Maltby and Jacob Gum had settled upon the land, then unsurveyed, prior to the original reservation. In support of this allegation he produces certified copies of separate declarations filed by Maltby and Gum, May 1, 1865, among the county records. By these declarations Maltby and Gum each claim "a valid right to the occupation, possession and enjoyment" of a tract of land, not exceeding one hundred and sixty acres, described by metes and bounds.

The applicant asserts that said declarations show "that they settled on lands covering said quarter section in May, 1865." He makes, however, no further showing touching their acts in connection with the land.

He further alleges that although the original reservation included only twenty-three and six-tenths acres of said quarter section, Gum and Maltby were unlawfully ejected by the military authorities.

He accordingly contends in effect, that had Maltby and Gum been allowed to occupy the tract until the abandonment of the reservation, they could, under the act of 1884, *supra*, have made entry when the

survey was filed in 1889, that while they have failed to assert their rights, their settlement excepted the land from the reservation, and that the same should be awarded to him as the first legal applicant.

The act of 1884, *supra*, directs that abandoned military reservations duly returned by the President to the control of this Department shall be sold in the specified manner, with the proviso that—

> any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws and has continued in such occupation to the present time, and is by law entitled to make a homestead entry shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions.

The right to enter any of the lands formerly embraced in the said reservation is thus restricted to one who has made in the manner prescribed, an actual settlement thereon. This the applicant has not done. It follows that his application has been properly rejected.

Whatever might have been the rights of Maltby and Gum they are not now in issue. In any event Imes can found no right on claims existing at the date the reservation was made, that have since been extinguished. Staltz *v.* White Spirit *et al.* (10 L. D., 144); Charles W. Filkins (5 L. D., 49).

Reference is made in a brief recently filed by applicant's counsel to the act of February 13, 1891, under the provision of which it is claimed his application should be allowed. This act after directing the extension of the public surveys over said reservation and granting the section containing the "buildings and improvements thereon" allows (section 3,) the State to select in the manner prescribed the remainder of said reserve or any portion thereof at any time within one year after approval of survey with the proviso: "That no existing lawful rights to any of said lands initiated under any of the laws of the United States shall be invalidated by this act."

It is urged that the applicant had such lawful right.

The only lawful rights to these lands could exist at the date of this grant to the State were those acquired under the act of July 5, 1884, that is by settlers prior to the reserve or to January 1, 1884, who continued occupancy for the purpose of securing a home. That Imes is not such settler seems clear.

In the brief referred to counsel say that the applicant settled upon and improved the land to the value of almost $200. The time of his settlement is not stated nor are his improvements described. The record contains no evidence of such settlement and improvement by him and he appears simply as an applicant. Furthermore it is not shown that he had any rights under the act of July, 1884, consequently the act of February, 1891, has no bearing upon the case at bar and no reason is apparent for the hearing which in the event of the present

record being found insufficient to warrant the applicant's entry, is requested by counsel.

The decision appealed from is accordingly affirmed.

Pending his appeal Imes applied, April 7, 1890, to amend his application so as to embrace other tracts in the same section. Said application to amend is, with the record, transmitted herewith.

OSAGE LAND—RESIDENCE.

JETT *v.* ROGERS.

Six months continuous residence next preceding date of Osage final proof is not required, but after settlement is made the residence should be continuous until proof is submitted, and a home maintained on the land to the exclusion of one elsewhere during such period.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 25, 1891.

On May 12, 1885, Robert W. Rogers filed Osage declaratory statement for the S. ½ of the SE. ¼ of Sec. 5, and the N. ½ of the NE. ¼ of Sec. 8, T. 32 S., R. 21 W., Garden City, Kansas, alleging settlement thereon February 25th, of the same year.

On July 29, 1885, he published notice of his intention to make final proof before Thomas E. Berry, a notary public at Ashland, Kansas, on September 21st, following. Prior to the day upon which his proof was to be made, and on September 2, 1885, he died intestate, and Delany G. Rogers, having been duly appointed his administrator, appeared and made proof.

On July 30, 1885, Henry C. Jett filed Osage declaratory statement, No. 3018, for the NE. ¼ of Sec. 8, in said township, alleging settlement April 29th of that year. He made final proof thereon October 29, 1885.

On the day Rogers appeared to make final proof (September 21st), one Jacob P. Chitwood appeared and filed his protest against the acceptance of Rogers's proof, as to the S. ½ of the SE. ¼ of Sec. 5, in said township, alleging that he had made valuable improvements and a *bona fide* settlement upon the land, May 7th of that year. He also charged, among other things, that the deceased, Robert W. Rogers, abandoned the claim after his alleged settlement.

It appears also that plaintiff, Jett, joined in the protest—the north half of the land covered by his filing being in conflict with the south half of Rogers's filing.

Hearing was duly had, and the register and receiver recommended that Jett's proof be accepted. Among other things, their opinion contains the following statement:

> We think the evidence shows that the defendant never made settlement in fact, although he attempted so to do. The improvements were too meager to suggest good faith, while his residence was almost as barren as his improvements.

Rogers appealed, and, by your office letter of March 25, 1889, you reversed the action of the local officers, dismissed the protest, and held Jett's declaratory statement subject to that of Rogers. You further announce as a matter of law that "all that was required of Rogers was that he make an actual bona fide settlement on the land." From this judgment Jett brings this appeal.

Rogers claimed to have settled on the land February 25, 1885; he dug a hole in the ground, five feet deep by twelve feet long and ten feet wide; he partly covered it with poles and dirt. This hole had no door. He never lived in it, until about May 11th, thereafter, nor did he make his filing until May 12th of that year. During his absence and four days before his return, Chitwood completed this dugout, and moved into it, and Rogers had a cot and his cooking outfit moved into the house with Chitwood. When Rogers first learned that Jett and Chitwood were on the land, he was at Kinsley, Kansas, thirty miles away, at work, and he immediately went to see about it. The season for putting in crops was then far advanced.

Conceding that the settlement of Rogers upon the S. ½ of the SE. ¼ of Sec. 5 was of such a character as to charge every one with notice that said tract had been appropriated, and that such settlement was made with the *bona fide* intention of making the tract a home, and that it was followed by an actual *bona fide* residence, yet the evidence shows that no settlement was made upon the N. ½ of the NE. ¼ of Sec. 8, by any one prior to the settlement of Jett, who went on said tract April 29, 1885, and placed improvements thereon, consisting of a sod house twelve by fourteen feet, sod stable ten by twelve feet, eight acres of breaking—all valued at $225.00.

The improvements claimed by Rogers to be his act of settlement were on the S. ½ of the SE. ¼ of Sec. 5, and no improvements, not even a plow furrow, were placed on the S. ½ of the NE. ¼ of Sec. 8.

The evidence is clear and undisputed that Jett made a *bona fide* settlement upon the land covered by his filing, and has resided thereon continuously.

As between Jett and Rogers, I think the proof shows that Jett was the prior settler upon the NE. ¼ of said Sec. 8, and the filing of Rogers as to the N. ½ of said quarter section should be canceled, and the proof of Jett as to the entire quarter section should be returned to the local officers for proper action thereon.

But I am not satisfied from the evidence in this case that the settlement of Rogers was made with the intention of making the tract a home. On the contrary, I am led to the conclusion that his return to the place and his pretended residence thereon after May 11, 1885, was induced by the action of Chitwood and Jett in moving upon the place and making *bona fide* settlement thereon, and no sufficient reason is given for his failure to maintain a residence thereon.

A settlement on Osage lands not followed by actual, continuous resi-

dence thereafter does not authorize an entry thereon. While six months continuous residence next preceding date of proof is not deemed necessary, as in ordinary pre-emption cases, "in evidence of the genuineness of settlement," yet, after such settlement is made, the residence must be continuous until proof is submitted, and it must be the home of the settler, to the exclusion of a home elsewhere. Dusenberry *v.* Wall, 12 L. D., 12; R. H. Smith, 11 L. D., 268; Finan *v.* Meeker, idem., 319.

It is not pretended that Rogers established a residence upon the tract before May 11, 1885, and he then only remained until July, when he left the tract and did not again return to it. He died in the month of September, following.

It follows, therefore, that your said office decision must be reversed. It is so ordered, and Jett's final proof will be returned to the local office for proper action and Rogers's filing will be canceled.

INDIAN LANDS—ALLOTMENT—ACT OF MARCH 2, 1889.

FLANDREAU SIOUX.

The size of allotments to the Flandreau band of the Sioux Indians, provided for in section 7, act of March 2, 1889, is governed by the provisions regulating allotments to other Indians on the Great Sioux reservation.

Acting Secretary Chandler to the Commissioner of Indian Affairs, March 5, 1891.

I acknowledge the receipt of your communication of December 30th, 1890, requesting the opinion of the Department as to how many acres of land each member of the Flandreau band of Sioux Indians would be entitled to under the provisions of the seventh section of the act of March 2, 1889, (25 Stats., 888).

Your views as to the construction of the act as set forth in said communication are approved.

There is herewith transmitted the opinion of the Assistant Attorney-General for this Department, of 28th ultimo, concurring in your views.

OPINION.

I am in receipt by reference from First Assistant Secretary Chandler of the letter of the Commissioner of Indian Affairs, bearing date December 30, 1890, requesting the opinion of the Department as to how many acres of land each member of the Flandreau band of Sioux Indians would be entitled to under the provisions of the seventh section of the act of March 2, 1889 (25 Stat. 888), and in accordance with the request for an opinion upon the question thus presented, would respectfully submit the following:

By section seven of said act, after providing that "each member of the Santee Sioux tribe of Indians now occupying a reservation in the State of Nebraska not having already taken allotments shall be entitled to allotments upon said reserve in Nebraska," said allotments to be to each head of a family one-quarter of a section, to each single person over eighteen years of age one-eighth of a section, to each orphan child under eighteen years of age one eighth of a section, and to each other person under eighteen years of age one-eighth of a section, it is said:

Provided, That all allotments heretofore made to said Santee Sioux in Nebraska are hereby ratified and confirmed; and each member of the Flandreau band of Sioux Indians is hereby authorized to take allotments on the Great Sioux reservation, or in lieu therefor shall be paid at the rate of one dollar per acre for the land to which they would be entitled, to be paid out of the proceeds of lands relinquished under this act, which shall be used under the direction of the Secretary of the Interior; and said Flandreau band of Sioux Indians is in all other respects entitled to the benefits of this act the same as if receiving rations and annuities at any of the agencies aforesaid.

By the act of August 19, 1890 (26 Stat. 336) it was provided that there should be appropriated (p. 349):

To enable the Secretary of the Interior to pay to the Santee Sioux Indians located at Flandreau, South Dakota, in case they choose to take the money instead of land, the sum of one dollar per acre in lieu of the allotments of lands to which said Indians would be entitled under the provisions of section seven of "An act to divide a portion of the Sioux reservation to Sioux Indians of Dakota into separate reservations and to secure the relinquishment of the Indians to the remainder, and for other purposes" approved March second eighteen hundred and eighty nine, to be re-imbursed to the United States as therein provided, forty five thousand dollars, or so much thereof as may be necessary. The funds appropriated by this paragraph shall not be covered into the Treasury.

It is for the purpose of carrying into execution this provision, that it has become necessary to determine the question presented by the Commissioner of Indian Affairs.

Said section seven of the act of 1889 *supra* refers in the first instance to "members of the Santee Sioux tribe of Indians now occupying a reservation in the State of Nebraska." This limitation excluded entirely the members of the Flandreau band who were living at the Flandreau agency in Moody county, Dakota, and as said in the report of 1889 of the agent in charge (Report of Commissioner of Indian Affairs 1889 p. 241) upon lands patented to them under the general homestead law. The members of this band were, however, "authorized to take allotments on the Great Sioux Reservation." It would seem but just to these Indians that when they were sent to this reservation for their allotments, they should be put upon the same footing with other Indians residing and receiving their allotments there. If it had been the intention to make a distinction between these Indians and others who were to receive allotments in the same territory and side by side with them, apt words to express this intention would surely have been inserted in the act.

After a careful consideration of this matter, I concur with the Commissioner of Indian Affairs that the size of the allotments to these Indians should be governed by the provisions regarding allotments to other Indians on the "Great Sioux Reservation." I concur with him too that it is the provisions found in the body of section eight of said act that apply rather than those in the proviso thereto. This proviso relates to exceptions to the general rule, and these Indians must be held to fall within the general class.

MINING CLAIM—ADVERSE PROCEEDINGS.

SWAIM *v.* CRAVEN.

A hearing should not be had before the local office, on a protest against a mineral application, during the pendency of adverse judicial proceedings.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 25, 1891.

I have considered the case of L. C. Swaim *v.* Ed. Craven on appeal by the latter from the decision of your office, dated December 11, 1889, holding for cancellation his application for patent for the Meadow Placer located in Tp. 7 S., R. 79 W., 6 P. M., Leadville land district, Colorado.

The record shows that the survey in the field was completed October 5, 1883, and the same was approved February 6, 1885, and that the township plat was filed in the local office March 18, 1885, returning the whole of the township as mineral in character.

Craven filed his application No. 3768 for patent December 17, 1888. It was accompanied by plat of survey No. 5564, showing that the claim contained 117.71 acres; and notice of the application was published from December 17, 1888, to February 15, 1889.

Swaim filed his protest Februry 11, 1889, alleging that the tract applied for is surrounded by lode claims some of which extended into the placer claim; that the claim has never been worked as a placer.

and that all the ditching fluming etc. which said applicant claims has been done upon said so-called Meadow placer was done for the purpose of irrigating the surface so as to raise hay, to which purpose said claimant has devoted said so-called placer

and that a great portion of the land had been appropriated as a burying ground, and two railroads had been constructed across the surface of another portion of this placer claim.

February 14, 1889, Swaim filed several affidavits in support of his protest, and on the twentieth of the same month he petitioned for a hearing in the premises. March 9, 1889, three adverse actions were instituted in the district court of Summit county, Colorado, against Craven by the owners of the Henrietta, Detroit and Edward lode mining claims, respectively, most of whom appear to be Swaim's corroborating

witnesses. Notices of the pendency of said actions were filed in the local land office at Leadville, March 11, 1889.

April 4, 1889, the register ordered a hearing to determine the issues raised by Swaim's protest and set the same for June 10, 1889. On the day appointed protestant appeared in person and by attorney; the placer claimant appeared by attorney who filed objections to the jurisdiction of the local officers or of this Department ordering a hearing in the premises; his objections having been overruled, witnesses were sworn and testified for the respective parties, and on August 12, 1889, the register and receiver found that the evidence failed to show the existence of any lodes within the boundaries of the placer; and that the evidence of the mineral claimant failed to show that the tract contained placer mineral deposits that will pay to work, one witness only testifying that he had found in the gravel and sand "colors of gold;" and that as there was no evidence to show that the premises could be successfully worked as a placer by any known process, and as the tract was only used as a hay ranch, they recommended that Craven's mineral application be canceled.

Craven appealed, and on December 11, 1889 your office affirmed the findings of the local office and held the application for cancellation.

February 4, 1890, Craven appealed to this Department alleging the following grounds of error, viz:

1. In holding that there was any jurisdiction to order a hearing on the allegations of the protest.
2. In not holding that the protest should have been dismissed by the register and receiver.
3. In holding that the evidence clearly showed that the land contains no placer mineral deposit.
4. In holding that there is no evidence (showing) or attempt to show that the premises could be successfully worked by any known process.
5. In holding that proof that the placer is or can be worked successfully, as a present fact, is material to the allowance of the entry.
6. In finding that there was no error in the decision of the register and receiver.
7. In rejecting the application.
8. In not allowing additional evidence of the mineral character of the premises, if the official reports of the mineral agent corroborating by the testimony of one of the witnesses were deemed insufficient.

As the record herein clearly shows that adverse claims were pending undetermined in the district court against the mineral claimant's application for patent, the hearing should have been withheld until the final determination of the court had been reached as to the question of the right of possession. Section 2326, Revised Statutes, provides that

When an adverse claim is filed . . . . all proceedings except the publication of notice and making and filing the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived.

It has been held by the courts and by this Department that after the institution of proceedings in the proper court no further steps should

be taken by this Department towards a disposition of the land involved, until after the final determination of the matter in such court. Mining Company *v.* Rose *et al.* (114 U. S., 576); George N. Smith *et al.* (10 L. D., 184); Jamie Lee Lode *v.* Little Forepaugh Lode (11 L. D., 391). The objections made to the jurisdiction of the local officers were well taken and should have been sustained.

The decision appealed from and all proceedings had or actions taken in the matter subsequently to the institution of the suits in the court are hereby set aside. The papers in the case are herewith returned and all proceedings will be held in abeyance until the receipt of notice that the proceedings in the court have terminated. If the decision there shall be in favor of the entryman, then appropriate action may be had to determine the questions raised by this protest.

PRICE OF LAND—RAILROAD LIMITS.

LISTOR R. TILGHMAN.

The price of desert land, within the primary limits of a forfeited railroad grant, remains at double minimum, where said land is also embraced within the primary limits of another grant, not forfeited, although said land may be excepted from the latter grant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 26, 1891.

I have considered the appeal of Listor R. Tilghman from your office decision of November 6, 1889, declining the repayment of twenty-five cents per acre, paid by him October 26, 1889, in making desert land entry No. 770, for all of Sec. 10, T. 5 N., R. 9 W., Los Angeles, California.

The amount paid was $320, at the rate of fifty cents per acre double minimum price, and the application is for the return of $160.

The grounds of error are as follows:

1. Error in holding that the price of said land is $2.50 per acre.

2. In holding that land in granted limits of the Atlantic and Pacific Railroad, by act of July 27, 1866 was not forfeited by the act of July 6, 1886, even though it is in the primary limits (so called) of the grant of March 3, 1871, to the Southern Pacific Railroad.

The land covered by said entry is within the primary limits of the grant of July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company, and was forfeited and restored to the public domain by the act of July 6, 1886 (24 Stat., 123); but it is also within the primary limits of the Southern Pacific Railroad.

At the time this land was entered, November 6, 1889, the act of March 2, 1889, fixing the price of forfeited railroad lands at one dollar and twenty-five cents an acre, was in force. The land was forfeited and

restored to the public domain by the act of July 6, 1886 (*supra*). If the land were found "not to be within the limits of a railroad land grant," under the act of June 16, 1880 (21 Stat. 287), it would be proper to return the excess of twenty-five cents an acre applied for. But, notwithstanding the tract was forfeited by the act of July 6, 1886, yet it is found to be within the limits of the grant to the Southern Pacific Company; and, although it may be excepted from the grant to said road, it was nevertheless double minimum land at date of entry, and rep ayment must be refused. W. D. Baker, 12 L. D., 127.

Your said office decision is accordingly affirmed.

APPLICATION TO ENTER—VACANCY IN REGISTER'S OFFICE.

WILLIAMS *v.* LOEW.

An application to enter, filed during a vacancy in the register's office, is, in contemplation of law, submitted for official action when the vacancy in said office is filled.

An application to enter, made in due compliance with existing regulations, is not prejudiced by a subsequent change of regulations, made prior to action on said application, especially where the applicant complies with the later construction of the law when notified thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 27, 1891.

I have considered the case of William C. Williams *v.* Jacob Loew, on appeal of the former from the decision of your office of September 18, 1888, holding for cancellation his desert land entry No. 1049, of Sec. 25, T. 9 S., R. 24 W., Tucson, Arizona.

It appears from the record that the office of register at the Tucson land district became vacant on the 4th of March, 1887, when the Senate of the United States closed its session without confirming the President's appointee for that position. The land office of that district then became practically closed for such official business as required the joint action of the register and receiver, and so remained until another register was appointed.

By letter from your office dated May 3, 1887, the acting register was informed that his term of office as register had expired; but he was appointed temporary clerk and authorized to take charge of the books and papers, receive applications to enter land as they might be presented, and attend generally to the clerical work of the office until a register should be appointed and qualified, when his duties as clerk were to cease. On the 27th of June, 1887, a package was received by this clerk, who, after endorsing it with its appropriate number and date of reception, placed it on file in the office to await the appointment of a register. This package afterwards was found to contain the application of Jacob Loew to enter the land in contention under the desert

land law, and one hundred and sixty dollars to pay the cash instalment for the land at twenty-five cents per acre. This application remained on file, and, with numerous other papers and applications which accumulated during the vacancy, was presented to the register and receiver on the 5th day of July, 1887, on which day a register, who, prior thereto had been commissioned and qualified, entered upon his official duty.

The land in question was formerly within the limits of the grant to the Texas Pacific Railroad Company under the act of March 3, 1871 (16 Stats., 573), but was forfeited and restored to the public domain by act of February 28, 1885 (23 Stats., 337), which required, however, that the restored lands should be sold at the same price as theretofore fixed for the reserved sections within the grant. The local officers, in the due course of official business, reached the application of Loew on the 9th of August, 1887, and, being of the opinion that the amount tendered was insufficient to pay the cash instalment, as the land was then double minimum, suspended further action on the case, and notified Loew by letter that he would be required to pay an additional sum of one hundred and sixty dollars before his entry would be allowed. He was also notified that he would be allowed until the 6th of September, 1887, to make good the deficiency.

On the 17th of August, 1887, William C. Williams, of California, having no knowledge, as the record states, of the prior application of Loew, applied to enter the same land under the desert land law; he paid a cash instalment of fifty cents per acre, and the local officers, overlooking the pending application of Loew, allowed the entry of Williams.

Within the time prescribed by the notice to Loew, he forwarded by express the amount required, to wit, one hundred and sixty dollars, thus completing the cash payment for the land at the rate of fifty cents per acre. But the register and receiver, having prior thereto allowed the entry of Williams, rejected that of Loew. Thereupon Loew appealed, and your office reversed the ruling of the district officers and held the entry of Williams for cancellation. The case now comes to this Department for consideration on the appeal of Williams.

The law relating to applications for the entry of land during a vacancy in the office of register or receiver is well established. The authorities bearing on the subject are carefully considered in the case of Graham *v.* Carpenter (9 L. D. 365), wherein this Department held that, when a vacancy occurs in the office of register or receiver, the machinery of the office stops from that moment, and cannot be put in motion again until the vacancy is filled, and "any act by the survivor during the vacancy, unless he is acting *de facto*, is an absolute nullity." But when the vacancy is filled, the machinery of the office resumes its work, and the register and receiver, in the exercise of official duty, proceed to adjudicate all cases on file and pending in their office.

The office at Tucson was again in working order July 5, 1887. On that day, the application of Loew, being on file, was, in contemplation of law, submitted to the newly-appointed register and the receiver for offi-

cial action. This application, enclosing the amount required under the rules and regulations of the Department then in force, entitled Loew to entry and certainly reserved the land, until it was considered and disposed of, from other disposition.

Prior to the circular of June 27, 1887 (5 L. D., 708), approved by this Department and promulgated at the Tucson office, as the record shows, about the 20th of July, 1887, desert land, wherever located and whether within railroad limits or not, was rated at $1.25 per acre. (See official letter of September 15, 1887, 6 L. D., 145; and the case of James Bowman, 8 L. D., 408). But this was changed by the circular of 1887.

It appears that the application of Loew, although on file and awaiting official action July 5, 1887, was not, in point of fact, reached and considered until August 9, 1887; by that time the circular of June 27, 1887, had been promulgated, and under its provisions $2.50 per acre were exacted for desert lands within railroad limits. This practice was sustained in the case of Cyrus Wheeler (9 L. D., 271), which, in many of its features, resembles that of Loew. It is also sustained in the case of Annie Knaggs (id., 49). But, in the pending case, there is no controversy as to the cash or final amount to be paid for the land in question. Loew, when notified of the change in practice and requirement of the circular of June 27, 1887, promptly paid the additional amount required.

The record shows that his application was made first. When presented it was accompanied by the proper amount to have entitled him to the entry then, and he should not be prejudiced by a subsequent change in the rulings of the Department, especially as he complied with the new construction of law when notified thereof. His application was under consideration when Williams presented his, August 17, 1887. This last application, pending that of Loew, was allowed in error, and the decision of your office, holding the entry of Williams for cancellation, is hereby affirmed, and the application of Loew should be allowed in the absence of any other showing to the contrary.

RAILROAD GRANT—PRE-EMPTION CLAIM—SETTLEMENT.

NORTHERN PACIFIC R. R. CO. *v.* SALES.

Land occupied and claimed by a qualified pre-emption settler at the date when this grant became effective, is excepted from the operation of said grant.

A pre-emptor is not estopped from proving that his settlement was made at a different and earlier date than that alleged in his declaratory statement.

Secretary Noble to the Commissioner of the General Land Office, March 30, 1891.

The case of the Northern Pacific Railroad Company *v.* Charles Sales is here on appeal of the company from your office decision of November 22, 1889, holding for cancellation the selection of said company of the NE. ¼ of Sec. 35, T. 2 S., R. 4 E., Bozeman, Montana.

From the record it appears that the land is embraced within the limits of the grant to the Northern Pacific Railroad Company, withdrawn upon general route February 21, 1872; also within the limits of definite location, as defined by its map filed with the Secretary July 6, 1882.

April 14, 1872, Henry C. Powers filed his declaratory statement (No. 2450) for this land, alleging settlement on the 8th of the same month.

The Northern Pacific Railroad Company listed this land June 27, 1885, which was embraced in their list of selections No. 6.

October 1, 1888, Charles Sales, defendant herein, applied to make pre-emption filing for the same, alleging settlement in the month of August, 1881.

He, at the same time, filed his affidavit, alleging that Powers was residing upon the land prior to February 21, 1872, date of filing the map of general route.

His application was rejected by the local officers on account of the selection of the company, as aforesaid.

Sales appealed from the rejection of his application, and your office, by letter of January 7, 1889, directed a hearing to ascertain the "true status of the land at the date of filing the map of general route (February 21, 1872,) and at date of definite location (July 6, 1882)."

Hearing was duly had thereon February 26, 1889, and on the testimony submitted the register and receiver recommended the cancellation of the company's selection, and that Sales be allowed to file for the tract.

The company appealed, and your office, by letter of November 22, 1889, affirmed the action of the local officers and held the selection for cancellation, and the company now further prosecutes its appeal to this Department.

The uncontradicted testimony submitted at the hearing conclusively shows that H. C. Powers, a qualified pre-emptor, settled upon the land in the fall of 1871, several months prior to the filing of the map of general route; that he built a house and moved his family into it in the winter of 1871–72, and continued to reside and make improvements upon the land until 1887, when he sold his improvements to one Marion, from whom the claimant Sales purchased, and began his residence thereon in August, 1881, and has resided there, with his family, ever since, and so was residing there on July 6, 1882, at date of definite location, and has had no other home.

Thus, it appears that the land was occupied and claimed by a qualified pre-emptor and settler, both at the date of filing the map of general route and also the map of definite location, and was therefore, according to the repeated rulings of this Department, excepted from the operation of the grant.

Counsel for appellant insists that because Powers in his declaratory statement alleged his settlement as of date April 8, 1872, such date is conclusive upon Powers and those claiming under his settlement, and

claimant should not be allowed to prove settlement by Powers prior thereto.

This position can not be maintained under the decisions of this Department.

A pre-emptor is not estopped from proving that his settlement was made at a different and earlier date than that alleged in his declaratory statement. (Northern Pacific Railroad Company *v.* Stuart, 11 L. D., 143, and cases there cited.)

This saves all question as to the rights secured by a settler subsequent to the filing of the map of general route in the General Land Office, and prior to its reception at the local office.

The selection of the company will be canceled, and Sales' pre-emption filing allowed.

The decision of your office is therefore affirmed.

RAILROAD GRANT—RELINQUISHMENT—SETTLEMENT CLAIM.

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

The relinquishment of the company in favor of *bona fide* settlers is not defeated in its operation by the failure of the settler to place his claim of record; nor will his subsequent purchase of the land from the company defeat his right under the relinquishment.

Secretary Noble to the Commissioner of the General Land Office, March 27, 1891.

The record in the appeal of the Florida Railway and Navigation Company (in the case of George Wigg *v.* said company), from your office decision of October 30, 1889, is before me for consideration.

The tract involved in the appeal is the SW. ¼ of the NE. ¼ and the SE. ¼ of the NW. ¼ of Sec. 11, T. 16 S., R. 22 E., Gainesville, Florida, which is within the primary limits of the grant to the Atlantic Gulf and West India Transit Company, now the Florida Railway and Navigation Company.

This land was listed by the company May 24, 1884.

Prior thereto, to wit, March 26, 1881, the Atlantic Gulf and West India Company executed a relinquishment in favor of all actual *bona fide* settlers who made improvements prior to said date, under which relinquishment Wigg, in February, 1888, applied to enter the tract, alleging continuous residence and cultivation since his settlement thereon in the fall of 1879.

A hearing was ordered, and from the testimony the register and receiver found that Wigg settled upon the land in the fall of 1879, and had continuously resided there up to the time of the hearing, and had made improvements to the amount of about four hundred dollars.

His application embraced the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼ of said section, but, as settlement, occupancy and improvements

did not extend to the two north forties, the local officers recommended that his application be allowed as to the south half of the land applied for, namely: the SW. ¼ of the NE. ¼ and the SE. ¼ of the NW. ¼ of said section.

The company alone appealed, and by your said office decision the action of the register and receiver was affirmed, and the company now further prosecutes its appeal to this Department.

It is not denied by the appellant that Wigg settled upon and improved the land prior to the relinquishment by the company, but it is insisted that his failure to apply for the land under any of the land laws during his long occupancy is presumptive of bad faith, and shows a lack of intent to claim the land under said laws.

At the hearing, appellant showed that some time in 1883 Wigg, through one Agnew, a merchant at Ocala, Florida, purchased from the company the two south forties in dispute, to be paid for in four installments; that Agnew advanced the money for the first payment, and held the certificate of purchase as security therefor, with an understanding that upon acquiring title to the land, Wigg should execute a mortgage to him for whatever he had advanced. Wigg gave his notes to the company for the other three installments of the purchase money.

On account of this purchase the appellant claims that, even though it should be found that Wigg was a *bona fide* settler at the date of relinquishment, by this purchase he abandoned his claim to the land.

Neither of these positions is tenable. He is shown to have been a qualified pre-emptor at the time of his settlement in 1879, and his continued occupancy and improvement of the land is evidence of his good faith, and his failure to make his claim of record can only be asserted by an adverse settler. This has been so repeatedly decided by this Department that no citation is necessary.

He then being a *bona fide* settler at the date of relinquishment, the company's title thereto was extinguished by the relinquishment, and having been once relinquished, it could not "be again claimed by it" (Peninsular R. R. Co. *v.* Carlton and Steele, 2 L. D., 531), and their sale to him thereafter would convey no title, nor protect him against the claim of any other entryman or settler in good faith.

The question, then, is one entirely between the applicant and the government, and there being no adverse claim, the entry will be allowed as to the said SW. ¼ of the NE. ¼ and the SE. ¼ of the NW. ¼ of Sec. 11, T. 16 S., R. 22 E.

The judgment of your office is accordingly affirmed.

PRE-EMPTION FILING—FRAUDULENT CLAIM.

BECKMAN *v.* COLGROVE.

A pre-emption filing made for the benefit of another is illegal and must be canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 27, 1891.

I have considered the case of Jacob Beckman *v.* Alphonso W. Colgrove, involving the pre-emption filing made by the latter for the SW.¼ of the NE.¼ and the W. ½ of the SE. ¼ of Sec. 32, T. 2 N., R. 21 W., Bloomington land district, Nebraska.

Prior to the advent of either of the parties above named into the case, the tract described was filed for under the pre-emption law by one James Goosic. When the time arrived for Goosic to make final proof, it appeared that he was not a qualified pre-emptor—having removed to said pre-emption claim from land of his own (to wit, his homestead).

Thereupon he relinquished his claim to the tract, and Alphonso W. Colgrove filed pre-emption declaratory statement therefore, on May 7, 1883, alleging settlement May 5, same year. Colgrove offered final proof November 11, same year. He was met by the protest of Beckman (who two days before had made homestead entry of the tract), alleging that he had made the filing, not with the intention of making the tract his home, but for speculative purposes, with the understanding that when he received title he was to transfer the same to Goosic. After hearing the testimony adduced on each side, the local officers held that there was no foundation for the charge, and dismissed the protest. Beckman appealed to your office, which decided in his favor, and held Colgrove's filing for cancellation. Colgrove appeals to the Department.

The principal and most tangible evidence in support of the charge of speculative intent is a contract, which reads as follows:

> This article of agreement, made and entered into by and between James E. Goosic, party of the first part, and Alphonso W. Colgrove, party of the second part, witnesseth: That the said party of the first part has this day sold his improvements on the SW. ¼ of the NE. ¼ and the W. ½ of the SE. ¼ of Sec. 32, T. 2 N., R. 21 W., Furnas county, Nebraska (the first party reserving all the wire and posts, granary, lumber, and hog-pens), to Alphonso W. Colgrove, party of the second part, for the sum of five hundred dollars, to be paid by said second party as follows: five hundred dollars on the first day of December, 1887, either in money or *by making the said party of the first part a warranty deed* to the SW. ¼ of the NE. ¼ and the W. ½ of the SE. ¼ of Sec. 32, T. 2 N., R. 21 W., Furnas county, Nebraska; and the said James E. Goosic is to occupy said lands until said sum is paid, as a tenant of the said party of the second part; and the said party of the first part agrees to pay said second party for the use of said premises the sum of seventy dollars.

Both parties deny that there was any intention or understanding between them that the land should be transferred from Colgrove to Goosic, in case the former should obtain title. Nevertheless this trans-

action and the circumstances surrounding the same lead me to believe that they are mistaken. Colgrove had known Goosic and his father for many years; he was living with the elder Goosic's family when the younger Goosic's pre-emption proof was refused; the suggestion (in whatever language couched) that Colgrove should file for the land was made by the senior Goosic; the junior Goosic continued to live on the land after Colgrove filed, as before; Colgrove paid nothing for board, nor was there any agreement between them as to what he should pay; he had no furniture of any kind in the house, and no implements, live-stock, or other property, on the tract; he contracted *either* to pay $500 or deliver title to the tract in eight months, under circumstances such that it was manifestly impossible for him to raise the $500, and during the intervening period made no effort to raise it. From all the evidence I am satisfied that there has been an attempt on the part of Colgrove and the Goosics to obtain one hundred and sixty acres of the public land without complying with the requirements of the law. True, the parties implicated deny it—but the denial is overcome by such a chain of circumstances that I am constrained to believe actions and doings of these parties rather than their sayings. Parties who would enter into such a combination might naturally be expected to deny it.

Being convinced that Colgrove's filing was not made in good faith, for the purpose of securing for himself a home, I affirm your decision holding the same for cancellation.

APPLICATION FOR SURVEY—ISLAND.

JAMES C. MCLAUGHLIN.

An application for the survey of an island will be denied, where it appears that said island is embraced within the limits of a former survey, and that the land as thus surveyed has been disposed of by the government.

Secretary Noble to the Commissioner of the General Land Office, March 27, 1891.

I have considered the appeal of James C. McLaughlin from the decision of your office declining to grant his application for the survey of an island, situate in the Missouri River, in Sec. 22, T. 50 N., R. 33 W., Missouri, for the reason that said island is embraced within the former limits of the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 22, of said township and range, which has already been surveyed and disposed of by the government, and "that any riparian rights the owner or owners of the lands upon the shores of the Missouri River may have in the lands embraced in said island can be ascertained *only* in a court of competent jurisdiction."

It is conceded by the applicant that the island lies wholly within the limits of said section 22, which, as shown by the original survey was

dry land and had been disposed of by the government, and the title of the United States extinguished long prior to the formation of said island; that the river had gradually intruded upon the land until the whole of the land above described was washed away by a change in the course of the river, which became a broad sheet of water where the land once was, with a channel for steamboats on both the eastern and western shores; that afterwards by accretion of alluvial deposits an island was formed on the spot where the land sold by the government once lay.

Upon these facts the applicant contends that the island is unsurveyed land of the United States; that

the United States, in the first instance, surveyed and granted farming land, not any part of the navigable river or its bed. The forces of nature destroyed that agricultural land, the river swept it away and utterly destroyed it, and made its bed where once the land had been. The men who once owned that farming land do not own the navigable river or its bed. The United States, the sovereign, owns it. The river is a public highway.

I see no reason for disturbing the decision of your office. The title of the United States to the land in said section 22, as originally surveyed, has been extinguished, and the supreme court, in the case of St. Louis *v.* Rutz, 138 U. S. 226, has ruled directly contrary to the principle contended for by the applicant.

Your decision is affirmed.

PRACTICE- PROCEEDINGS AGAINST A FINAL ENTRY—TRANSFEREE.

EDWARD BROTHERTON ET AL.

There is no authority for the submission of evidence against a final entry in the absence of due order therefor.

To bring a transferee within the confirmatory provisions of section 7, act of March 3, 1891, satisfactory proof of sale should be furnished the Land Department.

Secretary Noble to the Commissioner of the General Land Office, March 27, 1891.

I have considered the motion by A. L. Tomblin, assignee, for a review of departmental decision of September 20, 1890, cancelling the cash entry of Edward Brotherton for the SE. ¼ of Sec. 18, T. 7 S., R. 33 W., Oberlin, Kansas.

Said entry was suspended by your office letter of December 24, 1888, in which it was stated, that Brotherton "began residence April 6, 1885, and made proof October 6, 1885. His improvements, which are valued at $60, consist of a sod house sixteen by twenty feet, eleven acres broken and cultivated. These meager improvements and cultivation do not conclusively show good faith. Require new proof without publication."

In obedience to these instructions, but without any notice from the local officers designating the day on which, the place where, or the officer before whom, he should appear, Brotherton on February 18, 1889, appeared with two witnesses before the clerk of the district court, and submitted new proof, and at the same time James N. Fike appeared and filed a protest against said proof. He was also permitted to cross examine the entryman and his witnesses and to submit evidence against the proof. The evidence submitted by the protestant was for the purpose of showing that Brotherton has not resided upon the tract and that the proof offered by him was false in that respect, and that his cash entry was fraudulent. Upon this evidence, the decision of which review is asked, was rendered.

The first reason assigned for the motion, is error "in holding that the Commissioner of the General Land Office required Brotherton to submit new proof, and the second is, error "in considering, and basing the decision upon certain evidence submitted by one James N. Fike, when under the ruling of the Department his testimony was inadmissible."

When Brotherton submitted his final proof upon which his cash entry was allowed he gave notice by publication of his intention to do so, as required by law. It was the privilege of any party to file objection to the same and show cause why the entry should not be allowed. No objection was made, and no one called the attention of the Land Department to any defect in the claim. Your office not being satisfied of the good faith of the entryman, called for further or new proof, in order that you might be satisfied on that point. You directed that the same be submitted without publication of notice and it is but a reasonable inference that you expected the evidence called for would be furnished without opposition from third parties, in fact as interference is invited by the publication of notice when the original proof is submitted, it is a just and reasonable presumption that additional proof which is ordered without publication of notice is to be submitted without subjecting a claimant to the expense and delay of a hearing to sustain his claim as is contemplated when notice is given by publication.

It is true that prior to the issue of patent a protestant has a right to show cause why a patent should not issue, but where a final entry has been made, and a final certificate issued, evidence in opposition to the issue of a patent can only be submitted in the manner provided by the rules of practice.

Rule 5, provides,—

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 instruction.

Final certificate having issued to Brotherton, no proceeding against his entry by an adverse party should have been allowed except in the

regular way. The proceedings before the clerk of the court, at least so far as taking the evidence of the protestant was concerned, was not in compliance with any notice or order from your office, or even from the local office, and said proceedings were irregular and unauthorized,

With the motion for review, are filed affidavits by the entryman and others asserting that he complied with the requirements of the law.

Tomblin, the assignee, makes affidavit that he was an entire stranger to Brotherton, that before purchasing the land he made diligent inquiry concerning his residence of parties who knew him and was assured that he had complied with the law as to residence in every respect, he also swears that he visited the land office at Oberlin, and examined the proof and satisfied himself that it was as good as the vast majority of proofs made at that time, the country being new and cultivation being difficult. His purchase would thus appear to have been made in good faith, and while the exact date of the alleged purchase is not given the record indicates that it was prior to November 8, 1885.

Section 7 of the act of March 3, 1891, among other things provides that

> All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers or incumbrancers, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

In the case under consideration there appears to have been no adverse claim originating prior to the date of final proof, and if the alleged purchase was prior to March 1, 1888, the entry is confirmed by said section.

The statute requires that satisfactory proof of sale be presented to the Land Department, and while it is not the intention of the law or of the Department to subject claimants under said section to unnecessary delay or expense, still the requirements of the statute must be complied with.

In my opinion in this case a certified copy of the instrument of transfer or an abstract of the records of the county showing said transfer, should be filed with the application, and if the same is found to be satisfactory, a patent should issue, and departmental decision of September 20, 1890, is modified accordingly.

The case is herewith returned to your office for proper action.

RULE REGARDING CASES CONFIRMED BY THE ACT OF MARCH 3, 1891.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 8, 1891.

All *ex parte* cases, or cases in which the United States is a party, in which the entries are confirmed by the act of March 3, 1891, will be disposed of on written motion, without regard to their places on the docket.

All other cases in which the entries are confirmed by said act will be disposed of on motion when it appears that a copy of the motion has been served on the opposing counsel.

Parties will be allowed five days from service within which to file objections to the motion if served in the city of Washington, D. C., and fifteen days when served elsewhere.

JOHN W. NOBLE,
Secretary.

RAILROAD LANDS—FORFEITURE ACT—RIGHT OF PURCHASE.

INSTRUCTIONS.

Notice of intention to assert the right of purchase accorded under section 3, act of September 29, 1890, must be filed in the local office, by persons claiming such right, within sixty days after due publication by said office of this regulation.

Secretary Noble to the Commissioner of the General Land Office, March 31, 1891.

I am in receipt of your letter of the 12th inst., in which you state that it has come to your knowledge that "numerous persons hold contracts for large bodies" of lands, affected by the land-grant forfeiture act of September 29, 1890 (26 Stat., 496), "in some cases covering a thousand or more acres, and in numerous cases a whole section."

You call attention to the third section of said act, which provides that citizens, or those who have declared their intention to become such, in possession of any of the lands so forfeited, under deed, written contract with or license from, the State or corporation to which the grant had been made, or its assignees, executed prior to January 1, 1888, or who had settled said lands with *bona fide* intent to secure title thereto by purchase from the State or corporation, shall be entitled to purchase the same from the United States in quantities not exceeding three hundred and twenty acres to any one such person, at any time within two years from the passage of said act, or as amended, within two years from the promulgation of instructions thereunder, and you recommend that persons having such right be required to come forward within sixty days and file in the local office a "notice of the right of purchase intended to be claimed within the period named."

You state that "it would perhaps be extremely hazardous for a settler to make entry for and improve" a piece of land so held or contracted for, "for fear that the other party might elect some time within two years, to purchase the land embracing his (the settler's) improvements," and that you

> might cite numerous cases, where, if disposed, this right of purchase for such period might be used as a menace to settlement, and as preventing a full enjoyment of the privileges intended to be granted homestead settlers, unless such intending purchaser shall be required, in some manner, to give notice of his claim.

You further state that the course recommended by you would not bar entry of the land by others, subject to such right as is subsequently shown under such notice, that it would greatly aid the local officers in disposing of the lands, and be productive of good results in avoiding litigation and saving expense to all concerned, and you "cannot see that it restricts any right intended to be granted the purchaser."

Said act provides by said section three, that such persons "shall be entitled to purchase" such lands in quantities not exceeding three hundred and twenty acres to any one such person, "at any time within two years from the passage of this act." By act of February 18, 1891, said provision was amended so that the period within which such purchasers may make application to purchase such lands shall begin to run from the date of the promulgation by the Commissioner of the General Office of the instructions to the officers of the local land offices, for their direction in the disposition of said lands.

While the statute gives to such persons the right to purchase three hundred and twenty acres of such forfeited lands within said two years, it also opens all such lands to settlement and entry. This right to purchase within the time specified, when properly presented and maintained, is fully secured by the statute, but there is not super-added thereto the right to withhold from settlement for two years large tracts of land under such contracts, to the detriment of the rights of others. The right of purchase should be exercised with reference to the rights of others given by the same statute. It is incumbent on the Department to make such regulations as will operate to carry out the law in all its parts, and I have concluded that in the exercise of this duty, it is competent for the department to require such persons to indicate in a reasonable time and manner the tracts which they propose to purchase within said two years. This in no manner interferes with the right as given of securing three hundred and twenty acres of such lands.

Your suggestion is accordingly approved, and you will cause public notice to be given in newspapers having a general circulation in the district in which the forfeited lands are situated, as proposed by you.

RAILROAD GRANT—HOMESTEAD—ACT OF JUNE 15, 1880.

QUINLAN *v.* NORTHERN PACIFIC R. R. CO.

The right of purchase under section 2, act of June 15, 1880, existing at date of definite location, excepts the land covered thereby from the grant, and can be exercised, as against the grant, at any time prior to the issuance of patent.

The cancellation of the original entry, and subsequent improvident entry of the land under the timber culture law, by the claimant, will not defeat his right of purchase under said act.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1891.

The tract in controversy, to wit: the E. ½ of the NW. ¼ and Lots 1 and 2 of Sec. 7, T. 6 N., R. 9 W., Helena, Montana, is within the primary limits of the grant of the Northern Pacific Railroad Company, as shown by map of general route, filed February 21, 1872, and as definitely located July 6, 1882.

John Quinlan made homestead entry of said tract July 4, 1871, which was canceled February 8, 1879, for failure to make proof within the legal period. On May 23, 1883, he made timber-culture entry of said tract, and, on May 20, 1886, he was allowed to make cash entry of the tract under the second section of the act of June 15, 1880 (21 Stat., 237). Your office canceled the timber-culture entry of Quinlan for the tract and approved for patent his cash entry, from which decision the railroad company appealed, assigning the following grounds of error:

1. Error to rule that Quinlan has a right to purchase the land under act of June 15, 1880, at the date of definite location, which excepted the tract from the grant to the company.

2. Error not to have ruled that the right of purchase under the said act does not arise until exercised in accordance with its provision, and that there is no reservation of the land for an indefinite or for any period of time to enable the party to exercise the right.

3. Error not to have ruled that (if such right existed) Quinlan discarded and abandoned said right when he attempted to make a timber culture entry of the land May 23, 1883.

4. Error not to have canceled Quinlan's cash entry and not to have awarded the land to the company.

This case is controlled by the decisions of the Department in the case of Northern Pacific Railroad Company *v.* Burt, 3 L. D., 490, and of Northern Pacific Railroad Company *v.* McLean, 5 L. D., 529, in which it was held that the right of purchase was given by the act of June 15, 1880, although the entry had been canceled prior to the definite location of the road, and although the application to purchase was made subsequent thereto. The only difference between the cases cited and the case at bar is that in the latter case the entryman had made a timber-culture entry of the tract subsequent to definite location and made the cash entry while the timber culture entry remained of record.

But the irregularity in the allowance of the cash entry by the local officers before the cancellation of the timber culture entry cannot prejudice his right. The land was not subject to the timber-culture entry of Quinlan, and such entry should have been canceled. But the improvident allowance of this entry did not defeat or impair his right to purchase the land under the act of June 15, 1880, and that right which existed at the date of definite location could have been exercised by the homesteader as against the railroad company at any time until the land was certified or patented.

I find no reason to overrule a long line of authorities, commencing with the case of Northern Pacific Railroad Company *v.* Burt, 3 L. D., 490, and ending with the recent case of Northern Pacific Railroad Company *v.* Killian, 11 L. D., 596, in which the rule, that any right or claim existing at date of definite location excepts the tract from the operation of this grant, was re-affirmed.

Your decision is affirmed.

PRACTICE—SERVICE OF NOTICE—PUBLICATION.

NOBLE *v.* MELVIN.

Service by publication is not authorized, where failure to secure personal service is due to the contestant's neglect or refusal to advance the fees required by the officer for such service.

There is no provision in the law, or the regulations thereunder, authorizing service of contest notice by registered letter.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 1, 1891.

I have considered the case of Charles D. Noble *v.* Calvin A. Melvin, involving the homestead entry made by the latter for the SE. ¼ of section 26, T. 6 N., R. 32 W., McCook land district, Nebraska.

He made this entry July 3, 1884, and Noble filed contest against the same August 13, 1886. Hearing was set for October 15, same year. On that day, on affidavit being filed that personal service could not be procured, the hearing was continued until December 15, same year. Meantime, notice was published by advertisement in a newspaper, for the purpose of securing service by publication.

On the day set for hearing, counsel for defendant appeared specially, and moved the dismissal of the contest on the ground that defendant was, and during the pendency of the proceedings had been in the State, and that it was not true that diligent effort had been made to discover his whereabouts, prior to publication of notice. In support of this allegation, the following affidavit of the officer to whom said notice was sent for service was filed in the case:

Robert H. Stewart, being first duly sworn, says that he was the constable to whom notice was sent for service in the contest case of Charles D. Noble *v.* C. A. Melvin; that the usual fee for service did not accompany the notice, which fact was brought to the notice of the contestant by letter; that he held the notice awaiting the receipt of the fee until it was too late for service. Under the laws of this State affiant had a right to demand fee before service, and it was for that reason the service was not made by him upon the defendant. And further deponent saith not.

Upon this showing, the local officers being of the opinion that personal service could, with due diligence, have been secured, dismissed the contest. The contestant appealed to your office, which (September 17, 1888) held the service to have been sufficient and remanded the case for a hearing.

Notice of the hearing thus ordered was given by registered letter, addressed to and received by defendant's attorney on November 19, 1888—as shown by the return registry receipt. The hearing was set for December 21, same year. On December 3, the claimant filed a motion for an appeal from the action of your office in ordering such hearing; but when the day set for hearing arrived (December 21, *supra*,) the local officers dismissed the motion on the ground that the order for a hearing was interlocutory, and not subject to appeal.

Counsel for defendant then filed a special appearance for the purpose of reiterating his denial that jurisdiction of the person of the claimant had been obtained, and appeared no further. Contestant submitted his testimony and that of his witnesses.

On January 22, 1889, the local officers recommended the entry for cancellation. The entryman appealed to your office, which, by letter of June 15, 1889, affirmed the judgment of the local officers, and held the entry for cancellation. To counsel's contention that proper service had never been made, and jurisdiction of his client never obtained, your office replied:

The claimant in this case has been contesting this proceeding from its very inception, it appears upon purely technical grounds, and has not offered, at either hearing, a single word of evidence in defense of his claim, although twice having an opportunity to do so. The service of notice on the claimant's attorney, or the receipt by him of the notice given by registered mail to the defendant, as such attorney, in the name of or in lieu of his client, is notice to his client (7 L. D., 252), and he is estopped thereby from objecting to the jurisdiction of the local office.

Whatever we may think of the objections of the defendant so far as the merits of the case are concerned, they were legal, and he was under no obligation to submit himself to the jurisdiction of the court until he was brought in by proper process. If he could be personally served, it was error to obtain service by publication, and "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 upon him to defend his claim; for the local office has no right to cancel his claim without first obtaining jurisdiction over him; and that it can only obtain in the manner pointed out by the law or the regulations" (Milne *v.* Dowling, 4 L. D., 378).

In the law or the regulations "there is no provision for service by registered letter" (Driscoll *v.* Johnson, 11 L. D., 604).

It is clear that jurisdiction was not obtained by publication, under the circumstances hereinbefore set forth (Ludwig *v.* Faulkner, 11 L. D., 315, and cases therein cited).

Your decision is reversed. The proceedings heretofore had are set aside, and the case is remanded for a rehearing, after due service of notice upon all parties interested.

HOMESTEAD ENTRY—ACT OF MARCH 3, 1891.

LOUIS SCHAUER.

Homestead entries are confirmed by the proviso to section 7, act of March 3, 1891, where two years have elapsed since the issuance of final receipt, and no contest or protest against the validity of such entries was pending at the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 1, 1891.

I have considered the appeal of Louis Schauer, from your office decision, dated August 7, 1889, rejecting his commutation proof for the NE. ¼, Sec. 31, T. 106 N., R. 59 W., Mitchell, South Dakota.

I have examined your office decision and the record in this case. Said decision contains a fair statement of the facts as they appear in said record.

It is shown by the record that claimant received a receipt and final certificate for said land on September 27, 1884. More than two years have therefore elapsed since the date of the issuance of said receipt. There was no pending contest or protest against the validity of said entry at the time of the passage of the act of March 3, 1891, entitled "An act to repeal the timber culture law, and for other purposes." Under the proviso to the seventh section of this act claimant is entitled to have the land described in his receipt patented to him.

For this reason your office decision is reversed.

TIMBER LAND ENTRY—TRANSFEREE.

CHARLES F. GLASS.

A transferee, holding under a timber land entry, is not entitled to the protection extended to an innocent purchaser, where the entry is fraudulently made, and the transferee is a party to such fraud.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 2, 1891.

I have considered the record in the case of United States *v.* Charles F. Glass, on appeal from your decision, of October 4, 1889, holding for cancellation timber land entry No. 1717, embracing the SE. ¼ of SE. ¼,

Sec. 21, SE. ¼ of NW. ¼ and NE. ¼ of SW. ¼, Sec. 27, and NE. ¼ of NE. ¼, Sec. 28, T. 3 S., R. 36 E., La Grande land district, Oregon.

On November 30, 1883, Charles F. Glass made entry of the land in question, and, on the 15th of December following, sold and conveyed the same to S. F. Richardson and H. C. Putnam.

The entry was held for cancellation by your office January 19, 1887, as fraudulent, upon the report of Special Agent McCormick, and, subsequently a hearing was ordered and held before the district land officers, the entryman and transferees being present.

Upon the testimony taken at the hearing, the local officers found that said entry was fraudulent and recommended that it be canceled. From this decision an appeal was taken and on the 4th of October, 1889, your office affirmed the decision below.

December 13, 1889, defendant appealed, from the judgment of your office, to this Department, and assigns as error:

1st. Commissioner erred in holding said entry of Charles F. Glass for cancellation and finding for the United States.

2nd. The said decision is contrary to law and decisions of the Department, in this:

The 20 U. S. Stats., 89, provides that any grant, or conveyance of lands, entered under this act in the hands of *bona fide* purchasers, shall be protected.

3rd. That said decision is contrary to the testimony in this: That said testimony nowhere shows that said transferees H. C. Putnam and S. F. Richardson are parties to any fraud against the United States, or are not *bona fide* transferees or innocent purchasers for value, without notice of any fraud upon the part of the entryman.

4th. That said decision is contrary to the testimony in this: That said testimony nowhere proves that said entryman, Charles F. Glass, did not act in entire good faith, in his said entry, or that he fully complied with the laws of the United States.

It appears, from the testimony adduced at said hearing, that S. F. Richardson, one of the transferees in this case, employed J. H. Hunter and J. L. Curtis to assist him in the examination of certain timber tracts in the vicinity of and embracing the timber entry of Charles F. Glass; that Richardson was a man of considerable means and made a business, *inter alia*, of loaning money secured generally upon timber land entries; that he made special arrangements for a number of parties in the neighborhood, including the entryman in this case, to pay for publishing notices of making proof and final entry and that he had a special understanding with the defendant, prior to making entry, that he would furnish the money to pay for the land. Furthermore it is shown that the defendant admitted to Agent Brockenbrough, in the presence of J. H. Hunter and J. L. Curtis, that although there was no contract, there was an understood arrangement between them, defendant and his transferee, Richardson, that the entry should be made for the benefit of said transferee. In further support of this charge, the testimony of Geo. J. Quimby and Alex. Jackson, shows, that they heard the defendant state several times that he filed on the land in question, for the benefit of Richardson, and that he received $60, for so doing.

The act of June 3, 1878 (20 Stat., 89), prohibits the entry of lands under its provisions, for speculative purposes, and a party making a timber entry is required to make oath that he has not, *directly* or *indirectly*, made any agreement or contract in any way or manner to enter the land for the benefit of any other person, furthermore should any person taking such oath, swear falsely in the premises, he shall forfeit the money paid and all right and title to the land, covered by his entry; and also, any grant or conveyance which such party may have made shall be null and void.

In the case at bar, the proof shows conclusively that the defendant did make the entry for the benefit of Richardson and Putnam, and that within a few days after the entry was made, he executed to them a deed for the property.

The admission of the defendant, that such an agreement or understanding existed between Richardson and himself, must necessarily place the transferees parties to the fraudulent entry and therefore, they cannot be considered in the light of innocent purchasers of the land.

The defence endeavored to show that the transferee, Richardson, was in no manner connected with the making of timber entries, or had any interest therein, except where he had made a legitimate loan, and that the witnesses for the government including the special agent were influenced in giving their testimony by personal interest. Richardson, in his own testimony, sets forth, that he was a lumberman, that at the time the entry in question was made, he was looking after a large body of timber to start a lumbering enterprise, that he also loaned money on timber entries and occasionally purchased them to save himself from loss.

The evidence in this case would indicate that Richardson was a good business man, and therefore did not loan money on the timber claim of Chas. F. Glass unless he was well secured in some manner, otherwise the party could dispose of the timber, the only value the land possessed, and thus defraud the lender.

The evidence and all the surrounding circumstances connected with the case, point conclusively to a collusion between the party and his transferees to fraudulently secure the land in question and it would seem it was part of a plan to secure control of a large body of valuable lands in an illegal manner.

The defendant in his assignment of error, claims that the transferees are innocent purchasers and as such are exempt from a forfeiture of the land. In this he errs. The doctrine of "*bona fide* purchasers" does not apply to one who purchases before patent issues. The rule "*caveat emptor*" is particularly applicable in this case and as the entry is fraudulent the purchaser acquires no right.

As to the right of the Land Department to cancel entries that were initiated in fraud, prior to the issue of patent, there can be no question. See United States *v.* Montgomery *et al.* (11 L. D., 484), and U. S. supreme court decisions referred to therein.

The question of the character of the land, by common consent of all parties in interest, was not raised at the hearing.

It is unnecessary for me to comment on the evidence more fully, as it is set out in detail in your decision but it is sufficient to say that after a careful examination of the case, I am satisfied that the conclusion reached by your office is correct and it is accordingly affirmed.

LANDS WITHIN RAILROAD LIMITS -REPAYMENT.

GEORGE G. FOSTER.

There is no right to repayment for double minimum excess where the land, lying within the primary limits of the grant to the Northern Pacific, is properly sold at said price, even though that part of the grant opposite the tract in question is subsequently forfeited.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 2, 1891.

I am in receipt of your communication of March 9, 1891, transmitting for my consideration and action the application of George G. Foster for repayment of double minimum excess paid by him December 11, 1886, for the NE. ¼ Sec. 32, T. 1 S., R. 15 E., containing one hundred and sixty acres; The Dalles, Oregon.

It appears from the record that the above-described tract is within the primary limits of the grant to the Northern Pacific Railroad Company (13 Stat., 365).

By the act of September 29, 1890 (26 Stat., 496), that part of the grant to said road opposite the tract in question was forfeited to the United States.

The last clause of section two of the act approved June 16, 1880 (21 Stat., 287), relied upon by applicant to warrant repayment to him, is as follows:

and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns.

It is shown that the land purchased by Foster was double minimum in price at the time it was purchased. The price of this tract was fixed at $2.50 per acre by the sixth section of the act making the grant to the railroad company.

The fourth section of the act of March 2, 1889 (25 Stat., 854), declares—

that the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the acts making such grants or have since been increased to the double minimum

price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and coterminuous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

The purchase in question was made in 1886, when the price was double minimum, and it can not be said that the double minimum was erroneously charged. Such price was properly charged, and there is no authority for repayment of any part of said amount under the act of June 16, 1880, or any other act. (Texas Pacific Grant, 8 L. D., 530; Jacob A. Gilford, 8 L. D., 583.)

This Department has not the power to make repayment, where the money has been paid into the Treasury, unless specially authorized by some statute to do so. (Ambrose W. Grimes, 8 L. D., 462; Opinions of Attorney-General, vol. 4, p. 229)

It is clear that repayment under Foster's application is not authorized by existing laws, and therefore must be refused.

SECOND CONTEST INSUFFICENCY OF CHARGE.

BUSCH *v.* DEVINE.

An issue once tried and determined can not be made the basis of a second contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 2, 1891.

This record presents the appeal of August C. Busch from your office decision of August 14, 1890, in the case of August C. Busch *v.* Thomas Devine, involving the latter's homestead entry for the NE. ¼ of the SE. ¼, Sec. 28, T. 20 N., R. 12 E., Sacramento, California.

The said entry was made in May, 1878, for one hundred and sixty acres. After a hearing had in March, 1879, it was reduced to forty acres, and as thus reduced, it was sustained after hearings had during 1883 and 1886, in different adverse proceedings. The present controversy arose upon a protest by Busch (accompanied by his adjoining farm application) against Devine's homestead proof submitted in July, 1890, alleging Devine's entry fraudulent, for the reason that "said Devine did in the year 1879 enter into a written agreement with this affiant (Busch) and others, agreeing therein to convey, when he should obtain title," a portion of the land, that although said agreement is lost or destroyed he can prove its execution by a witness thereto, and that Devine very recently recognized the same, and asking a hearing.

The local officers found in effect that the charges outlined were considered and held unfounded by the departmental decision of December 18, 1888, in case of Kane *et al. v.* Devine (7 L. D., 532), and denied the hearing.

On appeal by Busch, your office by the decision appealed from, affirmed the ruling below, rejected the pending protest and after denying, November 24, 1890, Devine's motion to dismiss the appeal, transmitted the record.

In the case of Kane *et al. v.* Devine, *supra*, a hearing was commenced September 6, 1886, and proceeded with at different times, until October 27, following to determine sundry allegations of contest, made in 1884, by Kane against the entry in question. Among these allegations was one to the effect that Devine had agreed to sell and convey, after entry, certain portions of the land. In its said decision (7 L.D., 535), the Department discussed the testimony of Kane to the effect that in 1880, Devine had agreed with "one Busch" (presumably the protestant in the pending case) who had appeared at the local office to contest said entry, to convey about one-third of the land, if Busch would allow him to "get a homestead patent," and found that the same was not sustained.

By the decision appealed from your office found that by said departmental decision, "the said agreement alleged in the protest as the ground of fraud against the said entry, was the subject of consideration and of final decision." This finding is in accord with that of the local office and the same is not denied.

The case at bar is, therefore, I think, clearly governed by the rule that an issue once tried and determined can not be made the basis of a second contest. Parker *v.* Gamble (3 L.D., 390); Reeves *v.* Emblen (8 L.D., 444); see also Mead *v.* Cushman (10 L.D., 253).

The judgment of your office rejecting the protest of Busch is accordingly affirmed.

CONTEST—PREFERENCE RIGHT OF ENTRY.

SPENCER *v.* BLEVINS ET AL.

The preference right of a successful contestant is not defeated by a hearing inadvertently ordered on the subsequent contest of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 2, 1891.

I have considered the case of Alvah J. Spencer *v.* George E. Blevins and Benton M. McBride upon appeal by the former from the decision of your office dated August 23, 1889, awarding the preference right of entry to McBride for the W. ½, SW. ¼, NE. ¼, SW. ¼ and NW. ¼, SE. ¼, Sec. 33, Tp. 28, R. 46 W., Chadron land district, Nebraska.

The record shows that George E. Blevins made homestead entry for said tract March 23, 1887, and on March 21, 1888 McBride initiated contest against said entry alleging that he was well acquainted with

the said George E. Blevins and the land covered by his entry; that Blevins "has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making entry; that said tract is not settled upon and cultivated by said party as required by law."

April 23, 1888, Spencer initiated contest against Blevins' entry, alleging abandonment of the tract for more than six months and that Blevins "never built upon nor improved any of said tract, nor cultivated any of the same."

The register ordered a hearing May 28, 1888, on the contest initiated by Alvah J. Spencer and set the same for July 10, 1888, before the local office; testimony of witnesses to be taken before Ed M. Tracy, a notary public, at his office in Box Butte, Nebraska, July 3, 1888.

Hearing was had in accordance with the foregoing order, and the register and receiver found in favor of Spencer and recommended the entry for cancellation.

June 18, 1889, your office notified the local office that Blevins' entry was canceled and Spencer would be allowed thirty days to make entry for the land. July 15, 1889, the register and receiver informed your office that they inadvertently omitted issuing notice, ordering a hearing in the contest initiated by McBride *v.* Blevins

Until December 15, 1888, and that a trial was had in said case April 19, 1889, and decision rendered May 3, 1889, in favor of contestant (McBride) and parties notified June 14, 1889, there being no appeal, papers were transmitted to Department.

And that in view of the status of the case, they suspended further action on your office letter of June 1889, "until the receipt of further instructions."

On August 23, 1889, your office decided that as Spencer's contest was initiated subsequent to McBride's, it was subject to McBride's right of entry; and that the fact of allowing Spencer's contest to first go to trial was merely irregular and premature; and as the charge of abandonment was proven against Blevins and his entry was canceled, McBride was entitled to his preference right to enter said tract under the provisions of the act of May 14, 1880 (21 Stat., 140), and dismissed Spencer's contest.

October 21, 1889, Spencer appealed, alleging the following grounds of error, viz:

1. In not setting aside the complaint and contest of McBride.

2. In not allowing appellant his preference right to file on said tract after his contest canceled Blevins' entry.

3. In not holding the register and receiver responsible for so gross an error.

4. In allowing McBride the preference right to file, whereby the error of the register and receiver serve to defeat an innocent party of his right to file, causing him unnecessary inconvenience and great expense.

The record of the hearing between McBride and Blevins shows that

Spencer was represented by his attorney "Ed. M. Tracy" who then and there cross examined McBride and his several witnesses, but offered no evidence to gainsay their testimony. The evidence adduced shows that McBride's charge of abandonment was fully proven, and that the entryman, Blevins, never in fact resided upon, or cultivated or improved any portion of the tract in dispute.

As there is no evidence in the case at bar tending to show bad faith on the part of the first contestant (McBride) his preference right of entry cannot be defeated by any inadvertence or laches by the local officers in failing to order a hearing after his contest had been properly made of record.

Upon review of the whole record, I am convinced that the decision appealed from is correct, and the same is hereby affirmed.

Since the case has been pending on appeal before this Department, Spencer has filed his own ex parte statement, together with newspaper clippings, which cannot be considered under the Rules of Practice.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880 DESERTED WIFE.

HAVEL *v.* HAVEL.

The right of a homesteader, who has abandoned his land, to make cash entry under section 2, act of June 15, 1880, is defeated by the intervening adverse claim of his deserted wife, who has remained on the land and commenced proceedings in her own right to secure the same.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 2, 1891.

I have considered the appeal of A. C. Blume and C. B. France, transferees, from your office decision dated September 10, 1889, holding for cancellation the homestead entry of John W. Havel, also his cash entry for the E ½ NE ¼ and E ½ SE ¼ of Sec. 24, T. 2 S., R. 33 W., Oberlin, Kansas.

The record shows that John W. Havel made homestead entry for the tract in question March 8, 1880, and together with his wife and children moved thereon soon after and continued to reside there until May, 1882, when he deserted his family and home; since which time he has furnished nothing toward the support of his wife and children. In May, 1885, he obtained a divorce from his wife in the district court of Filmore county, in the State of Nebraska, where it appears he had resided since deserting his family. Early in 1885—the exact date is not disclosed by the record—Mrs. Havel offered final proof on her husband's entry, which was transmitted by the local officers to your office June 4, 1885. If the local officers acted upon this proof before forwarding it to you, it is not shown by the record. September 10, 1885, you notified the register and receiver that Mrs. Havel could not be allowed

to make final proof on her husband's entry, except as his agent, in which case patent would have to be issued in his name, and that if she desired to obtain the property in her own name she could contest and procure the cancellation of her husband's entry and enter the land in her own right. On December 8, 1885, John W. Havel, her divorced husband, purchased the property under the second section of the act of June 15, 1880, and two days later conveyed the same to A. C. Blume. January 25, 1886, Mrs. Havel filed in the land office her application to contest the homestead entry of her late husband, which was transmitted to your office March 3, 1886. In this application she alleges her continuous residence on the land and her improvement thereof, and that John W. Havel abandoned the land in May, 1882, since which time he has never returned, and that she and her husband were divorced by decree of the district court of Filmore county, Nebraska, in May, 1885. She also alleges that John W. Havel made cash entry for the land and sold the same two days afterwards to A. C. Blume, who she asserts had full knowledge of her claim to the land as Havel's deserted wife.

November 18, 1886, acting upon her application, you ordered a hearing for the investigation of the facts. A hearing was had April 4, 1887, at which Mrs. Havel appeared, both in person and by attorney; John W. Havel did not appear. S. W. McElmy, an attorney, filed a paper stating that he appeared for the "assignee of defendant, A. C. Blume," and also for C. B. France, "who has an interest by purchase in said land."

After considering the evidence submitted at the hearing, the local officers decided against Mrs. Havel, and cited the case of George W. Sanford (5 L. D., 535) as sustaining their decision. Contestant appealed to your office, and on September 10, 1889, you reversed the decision of the local officers and held both the homestead and cash entry made by John W. Havel for cancellation. Blume and France have appealed to this Deparment.

After examining the record and your decision based upon it, I have no doubt of the correctness of your conclusions.

Long before John W. Havel's cash entry was made, Mrs. Havel, as his deserted wife, had an adverse claim to the land and was asserting it in the land office. With a view of obtaining title in her own name after she was divorced from her husband, she offered proof on her late husband's homestead entry, alleging that she had resided on the land more than five years, and asked that patent be issued to her. This your office could not do, but, recognizing her claim to be just and equitable, you notified her that she would be allowed to contest and procure the cancellation of her husband's entry, on the ground of abandonment, and enter the land in her own right. To allow the husband, who had deserted her and her four small children to come back quietly and sell their home from them at a time when she was asserting her adverse claim, would be to allow the

perpetration of a great wrong. It appears from an examination of the evidence that at the time John W. Havel made cash entry, Mrs. Havel was asserting an adverse claim to the land, one which originated at the date upon which she became a deserted wife. In view of the existence and assertion of this claim by proceedings already initiated in the local office for the purpose of obtaining title to said land at the time the entry was made, it was irregular for the local officers to have allowed the entry.

It may, however, be contended that the first clause of section 7 of the act of March 3, 1891 (pub. Doc. 162), confirms this entry, but such is not the case, for the reason that under the ruling here made, the wife had an adverse claim at the date of the husband's entry which excepts her case from the provisions of said act.

For these reasons, your judgment, holding for cancellation the homestead and cash entries made by John W. Havel, is affirmed, and said entries are hereby directed to be canceled. Mrs Havel should be allowed a preference right to enter the land in her own name.

RAILROAD GRANT—SETTLEMENT CLAIMS.

NORTHERN PACIFIC R. R. CO. *v.* PILE.

The occupancy of land, by one who holds it with the intention of purchasing from the company, does not constitute a claim that excepts the land from the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, April 3, 1891.

I have considered the appeal of the Northern Pacific Railroad Company from the decision of your office of December 10, 1889, rejecting the claim of the company for the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼ of Sec. 15, T. 5 S., R. 1 W., Bozeman, Montana, and directing that the pre-emption final proof of David C. Pile for said tract be examined, with a view to allowance of his entry.

The tract in controversy is within the primary limits of the grant to said road, which was definitely located opposite the tract in question July 6, 1882, and had previously been withdrawn upon the filing of map of general route, February 21, 1872.

A hearing was had in said case, and from the testimony taken thereon and from the records of your office you found that, at the date of filing of map of general route, the land was covered by the pre-emption declaratory statement of one Henry C. Miller, a qualified pre-emptor, who settled upon the land in the fall of 1871, built a house, and made other improvements, and continued to occupy the tract until the spring of 1873, when he sold his improvements to William Ennis, a qualified

pre-emptor, who hauled the house upon land of his own adjoining, but who continued to hold possession of the land, fenced it, cut hay therefrom, and controlled it until 1884, when he abandoned his claim to the tract, having learned that Lafayette S. Briggs had purchased it from the railroad company.

From these facts, you found that the pre-emption claim of Miller excepted said tract from the operation of the withdrawal, and that the settlement and occupancy of the land at date of definite location by Ennis excepted it from the operation of the grant, and the claim of the company was therefore rejected and the local officers were directed to pass upon the proof of Pile.

From this decision the company appealed, assigning the following grounds of error:

1. Error to rule that the declaratory statement of Henry C. Miller served to except the tract from the withdrawal on general route of February 21, 1872.

2. Error to rule that the occupancy of Wm. Ennis at date of definite location of the road July 6, 1882, excepted the land from the grant.

3. Error not to have found that Ennis made no *claim* to this land, that he simply used it until he learned the company had sold it, when he ceased the use of it, and has never at any time made any claim to it, or alleged any right to it, but has only made use of it for the time being, the company not interfering.

4. Error not to have rejected the application of Pile and not to have awarded the land to the company.

From an examination of this record, I am unable to come to the conclusion that the occupancy of this tract by Ennis at the date of definite location was of such a character as excepted it from the operation of the grant.

While it is true that a claim to land may be acquired by occupancy, improvement and cultivation, which, if existing at date of definite location, will serve to except it from the operation of the grant, yet it must be shown that such occupation and improvement were made with the intention of claiming the land under the settlement laws, or the occupation, improvement and cultivation must be of such a character that the intention to claim the land under the settlement laws will be presumed.

Ennis testifies that in the spring of 1873, he purchased the hay and the improvements of Miller, and hauled the house and fences on the place then occupied by him, for which he made homestead entry in 1869; that when he bought the improvements of Miller he did not consider anything about whether Miller's filing was good as against the claim of the company, nor did he consider anything about it in 1882. He testifies that he

saw a notice in the papers some time in the spring by the Northern Pacific R. R. Co., that parties who had been occupying their land and had improvements on them should have the first right to buy them when they were to be sold; having a good portion of this land in contest fenced and cutting hay on it right away after I saw that notice, I filed with the railroad company; I still kept possession of it; cut hay on it, had the best portion of it fenced from the time I bought Miller's improvements till the time I understood Mr. Briggs had purchased it of the company.

It is shown throughout the entire testimony that Ennis did not occupy said tract intending to claim it under the general land laws; but that his sole occupancy was with the intention of purchasing it from the railroad company under his application, and that when he learned that Briggs had purchased the land from the company, he abandoned it.

The decision of your office is reversed.

Distinguished 53 L. D. 580

APPLICATION TO ENTER—RESIDENCE.

GOODALE *v.* OLNEY.

An application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending, reserves the land from any other disposition.

An applicant for the right of entry is not required to reside on the land embraced within his application, pending final decision thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 3, 1891.

I have considered the appeal of Frank D. Goodale from your office decision dated September 30, 1889, revoking that of August 17, 1889, ordering a hearing and rejecting his application to contest the homestead entry of James Olney for E ½ of SE ¼, Sec. 18, T. 33 S., R. 63 W., Pueblo, Colorado.

The record shows that James Olney applied to enter the tract in dispute together with adjoining land on July 1, 1885. His application was rejected by the local officers because the tract applied for was embraced in the derivative claim of Thomas Leitensdorfer under the Vigil and St. Vrain grant.

Olney appealed to your office from the decision of the local officers rejecting his application for homestead entry, and on May 6, 1887, you reversed the finding of the local officers, and directed them to allow his entry. Accordingly, he made entry for the tract May 28, 1887.

On August 31, 1888, the register and receiver forwarded to your office the application of Frank D. Goodale to contest said entry so far as the E½ of SE¼ Sec. 18 is concerned. It is stated in the application that Goodale "came into possession of said land" on or about the 15th of February 1886, and that he has resided thereon ever since May, 1886, and has improvements valued at $1200; that said Olney never resided upon the tract before May 1887, etc. Upon this application a hearing was ordered August 17, 1889, but on September 30, following, and before the hearing had taken place, you revoked the order of August 17, and refused to order a hearing.

From this decision an appeal has been taken to this Department.

As shown by the record, Olney's application to enter the tract in dispute July 1, 1885, was regular and legal, and was pending in your office in May, 1886, when Goodale began his residence upon the land. It is true that Olney was not permitted to enter the tract until May, 1887, yet his application, made in 1885, was equivalent to an actual entry, so far as his rights were concerned, and withdrew the land embraced therein from any other disposition until final action thereon. (Pfaff *v.* Williams et al., 4 L. D., 455; J. B. Rice, 11 L. D., 213.)

On January 25, 1886, Goodale applied to make homestead entry of the land in question. This was rejected; yet, during the following May, he began his residence on the tract. He was charged with knowledge of the pending application of Olney at the time, and his improvements were made notwithstanding this knowledge. The only claim made in his application for a hearing is that he made actual settlement upon the land in 1886, and that Olney did not begin residence there until 1887. In the face of the records of your office showing that Olney tendered the necessary fees and made all necessary affidavits when he applied to enter the land in 1885, this showing is not sufficient to warrant you in ordering a hearing. Olney was not bound to reside upon the land after the local officers had rejected his application, pending final action thereon in your office. If an applicant were required to reside on the land embraced in his application pending final decision thereon, he would, in case of an adverse decision, lose his labor and improvements placed there.

I am of the opinion that it was a wise use of your discretion to refuse to order a hearing on the showing made by Goodale. Your judgment is accordingly affirmed.

OMAHA LANDS—ADDITIONAL ENTRY.

WACLAV HRUBY.

A purchaser of Omaha lands, who has taken less than one hundred and sixty acres, and has complied with the law as to the payments on his first purchase, may make an additional entry of contiguous land at the appraised price.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 4, 1891.

I am in receipt of the appeal of Waclav Hruby from your decision of January 20, 1890, denying his application to change his Omaha declaratory statement so as to include the NE. ¼ of the NE. ¼, Sec. 25, T. 24 N., R. 5 E., Neligh, Nebraska.

His original filing was made January 12, 1887, and embraced the W. ½ of the NE. ¼ and the SE. ¼ of the NE. ¼ of the same section.

In his application he states that at the time of his original filing he doubted his ability to make the statutory payments for a full quarter

section, and therefore filed for only one hundred and twenty acres; that after his filing the statute was amended, allowing longer time for payments, which extension has made it possible for him to purchase and pay for the forty described in his application.

Since the date of your decision, to wit, on August 19, 1890, Congress passed an act, entitled "An act extending the time of payment to purchasers of land of the Omaha Indians in Nebraska, and for other purposes" (26 Stat., 329), by the 2d section of which it is provided:

> That any entryman who has taken less than one hundred and sixty acres of land on this reservation, and has made payments on the same according to law, may purchase at the appraised price, and, upon the conditions prescribed in the act of August seventh, eighteen hundred and eighty-two, such additional lands lying contiguous to the lands included in his original entry as he may desire: *Provided*, That the land so purchased, together with his original entry, shall in no case exceed one hundred and sixty acres.

This land lies contiguous to the applicant's original entry, and if he has complied with the law (as stated in his affidavit), as to payments on his first purchase, he is entitled, under the act of August 19, 1890, *supra*, to purchase this additional land.

I do not, however, think it necessary for him to amend his original declaratory statement, if that could be lawfully done.

He will be allowed to purchase the same under the application now before me, which may be regarded as an application under the act of 1890, and upon compliance with the law as to payments of interest and installments he will be entitled to patent for the same.

Your decision is accordingly modified.

FOREST RESERVATIONS—ACTS OF SEPTEMBER 25, AND OCTOBER 1, 1890.

KAWEAH CO-OPERATIVE COLONY, ET AL.*

An order suspending public land from disposal, to prevent the fraudulent entry thereof, is within the authority of the Commissioner of the General Land Office.

An application to purchase under the act of June 3, 1878, does not effect a segregation of the land covered thereby; or confer upon the applicant any right in the land that will prevent other disposition thereof by Congress.

Lands embraced within valid homestead entries, or final pre-emption and timber entries, are excepted from the reservations created by the acts of September 25, and October 1, 1890.

Secretary Noble to the Commissioner of the General Land Office, April 6, 1891.

I am in receipt of your letter of February 25, 1891, transmitting various lists of entries upon lands reserved and set apart by acts of Congress approved September 25, and October 1, 1890 (26 Stats., 478

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* See 12 L. D., 83.

and 650), for a public park and for forest reservations, also the reports of special agents, and other papers in relation to said lands.

Among the papers submitted I find a copy of a petition to Congress signed by many of the officials and citizens of Tulare Co., California, asking the repeal of said laws, or at least the repeal of the same so far as they embrace certain townships. This shows that the attention of Congress was called to the subject, but an entire session intervened and no action was taken by that body. Further, since the very inception of certain of these claims to the lands in question in October, 1885, it has been asserted that the same were fraudulent, and it must be assumed that Congress acted with a full knowledge of all the facts in the case; at all events its action in disposing of the lands, is final.

The acts in question contain provisions requiring the Secretary of the Interior to take prompt measures to preserve from injury the timber, mineral deposits, natural curiosities, etc., on the lands thus reserved and set apart and expressly provides that "he shall also cause all persons trespassing upon the lands after the passage of the acts, to be removed therefrom."

The provisions of the acts are not only clearly set forth, but it is mandatory upon the head of the land department to carry these provisions into effect.

It appears that a large number of persons known as the "Kaweah Co-operative Colony," have made application to purchase a portion of the lands thus reserved, under the timber and stone act of June 3, 1878.

It is asserted that the members of that colony are industrious and law-abiding citizens, that they have expended a large sum of money in constructing a road into the mountains, etc., and moreover that they have been instrumental in preserving the large trees from destruction by forest fires, and it is asserted that to deny the right of these persons to the lands thus claimed will work a great hardship.

This was a question for Congress to pass upon, and to afford such relief as it saw fit; it is but reasonable to assume that the attention of that body was called to the facts alleged to exist. It is the duty of the Department to execute the laws according to its best judgment of the provisions and requirements of the same.

In your report you express the opinion that parties who made application to purchase lands under the timber and stone act of June 3, 1878, have initiated claims that should be perfected to patent, when made in good faith.

The facts in relation to these claims are as follows: On October 5, 6, and 30, 1885, the claimants filed with the register at the Visalia land office, the written statements concerning the tracts of land they desired to purchase as required by the second section of the act of June 3, 1878, and immediately published the notice of intention to purchase as required by the third section of said act, and at the expiration of the period of publication appeared at the local office and submitted the proof and

tendered the payment for the lands required by said third section aforesaid.

The payment was refused and the application to purchase rejected by the local officers, for the reason, that by telegram of December 2, 1885, and letter of December 24, 1885, the townships in which said lands were situated were suspended from entry or filing under the land laws, by the Commissioner of the General Land Office. This suspension and withdrawal of the townships, was on account of alleged irregularities and fraud on the part of the claimants who are now asserting a right to these lands.

This order of suspension and withdrawal was not revoked as to the townships in which the claims in question are located, prior to the passage of the acts above cited, by which the lands were finally set apart and reserved.

Counsel for claimant asserts that the Commissioner had no power to issue an order of general suspension such as was issued December 2, 1885, without cause, on mere suspicion, and that such order, when issued, was void.

Section 453, Revised Statutes, provided 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." The supreme court in the case of Bell *v.* Hearne (19 Howard, 262), say,

> The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain.

The power exercised in the case under consideration, was to prevent the consummation of what he had reason to believe, were fraudulent entries of the public domain, and the authority and right of the Commissioner to thus act has, for many years, been recognized by the officers of the government, and by the courts.

The order of suspension, however, did not have a retroactive effect and the question arises, what effect did the applications to purchase have upon the lands, or did said applications constitute *bona fide* entries or reservations of the lands under any law of the United States which exempted them from the operation of the acts under consideration.

It has been the uniform ruling of the land department that an application to purchase under the act of June 3, 1878, does not effect a segregation of the land covered thereby. Smith *v.* Martin (2 L. D., 333); Capprise *v.* White (4 L. D., 176); Henry A. Frederick (8 L. D., 412); Daniel J. Canty (12 L. D., 58), also in the instructions given to the Commissioner (9 L. D., 335). In said letter of instructions it is stated

It is true that as ruled in the Frederick case, the publication of intention to purchase would prevent the land from being entered by another, pending consideration of such application, but until the final allowance of said application, the applicant has no right to or control over the land covered thereby.

In my opinion there can be no doubt as to the correctness of this proposition. The application to purchase confers no right upon the applicant; as against the government said application under the act of June 3, 1878, is certainly of no greater or higher dignity or effect than a claim initiated by settlement and residence upon, and improvement of, public land under the provisions of the late pre-emption law, and no doctrine is more clearly established than the one that

Mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler, for the first time, acquires a vested interest in the premises occupied by him of which he can not be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. . . . . The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use. Yosemite Valley Case (15 Wallace, 77).

Examining the act of June 3, 1878, we find that the first section provides that certain land "may be sold to citizens of the United States etc."

The second section provides that the applicant shall file a written statement designating the land he desires to purchase etc.

The third section provides that upon filing said statement, publishing notice, submitting certain proof, and making payment of the purchase money, "the applicant may be permitted to enter said tract."

Applying the reasoning of the court in the Yosemite case, it must be held that until these prerequisites, viz., submitting proof and making payment of the purchase money, have been complied with, the applicant has acquired no vested interest in the land, he has acquired no right as against the government which deprived Congress of the power to dispose of the same. This view is in accordance with the theory of the entire administration of the land system;—for instance under the homestead law and the late timber culture law it has been uniformly held that when application is made, the proper affidavits filed, and the fees and commissions paid, and an entry allowed, then, and not until then, has an applicant acquired a right which segregates the land entered from the mass of the public domain, and this doctrine is not over-

come by the ruling that an application to enter operates to reserve the land covered thereby, for the application works a reservation only as against other applicants, and not as against the government.

It is contended by the claimants, that they have done all that the law require them to do, viz:, made the required proof and tendered the purchase money for the lands, that they have done all within their power to comply with the law and have thereby acquired a vested right that can not be defeated by a subsequent act of Congress, and in support of this view, they cite numerous decisions of the courts including the case of Lytle *v.* Arkansas (9 Howard, 333).

I do not think this position is well taken. Before the proofs were submitted, and payment tendered, the government had, by its duly qualified officer and agent, the Commissioner of the Land Office, acting within the scope of his authority, withdrawn and reserved these lands from sale, and by the acts of Congress under consideration, this withdrawal and reservation has been made permanent. In other words when proof was submitted and payment tendered the lands were not in a condition, or were not of class, that might "be sold."

The failure of these claimants to perfect their entries was not the result of any fault, refusal, or neglect of the officers of the land department to perform their duties, on the contrary, said officers, acting within the scope of their authority, did perform their duties in refusing said entries, but the reason why these claims can not be perfected to title is that Congress in the exercise of its authority, has made other and final disposal of the land.

It is not necessary to discuss the question of good faith on the part of these claimants, nor the question of their pecuniary loss or gain. It is the duty of the Department to execute the law, and in the performance of that duty, I must direct that these filings be canceled, and the applications to purchase be rejected.

The principles announced above, will apply in the case of pre-emption filings made prior to date of withdrawal, in which final proof and entry had not been made, and said filings must be canceled.

You report a large list of entries made under the homestead, pre-emption, and timber laws wherein final proof and payment were made and final certificate issued prior to date of withdrawal. If these entries were valid at inception, and the final proofs were based upon a due compliance with the law, said entries are excepted from the reservation for park purposes, both by the terms of the act of October 1, 1890, and by the principle of law which prevails,

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

These entries should, therefore, be examined as speedily as possible, and if found to be valid should be passed to patent and if found to be

otherwise, should be canceled, except as may be confirmed by the seventh section of the act of March 3, 1891, but it will be observed that entries under the timber and stone act of June 3, 1878, are not confirmed by said act.

Under the rulings of the Department a valid homestead entry constitutes a segregation of the land, and lands embraced in such entries are excluded from the operation of the acts under consideration.

From a list of entries of this character reported by you, I find that many were made more that five years ago, and final proofs have not been submitted. In all of these cases, I am of the opinion that an investigation should be made by the special agent, and if it is found that the entries were illegal, or that the entrymen have abandoned the land proceedings should be instituted for the cancellation of the entries, but if the entries were valid, and the claimants are still residing thereon, they should be permitted to perfect title to the same.

Among the filings and entries reported are three mineral applications, filed September 19, 1879, but no entries for the lands embraced therein have been made. Without, at this time, discussing the effect of these applications as constituting a reservation of the lands, you are instructed to make an investigation for the purpose of ascertaining whether the applicants have complied with the provisions of the mining law, and if they have not, said applications should be canceled after giving the applicants due notice to show cause why such action should not be taken.

You will take prompt action to carry into effect all the instructions contained in this letter.

WAGON ROAD GRANT—SETTLEMENT CLAIM.

WILLAMETTE VALLEY WAGON ROAD CO. *v.* CASEY.

The case of the Willamette Valley Wagon Road Company *v.* Morton, 10 L. D., 456, cited and followed.

Secretary Noble to the Commissioner of the General Land Office, April 7, 1891.

I have considered the case of the Willamette Valley and Cascade Mountain Wagon Road Company *v.* William T. Casey, upon appeal of the former from your office decision of November 13, 1889, rejecting the claim of said company for the NW. ¼ of section 33, T. 15 S., R. 15 E., Willamette Meridian, The Dalles, Oregon, land district.

The record shows that on the 27th day of June, 1887, William T. Casey made an application to the local officers to enter said tract of land under the homestead law, alleging settlement thereon on the 1st day of October, 1886.

On the 11th day of July, 1887, the local officers rejected Casey's application upon the ground that "the tract applied for is within the limits of the withdrawal in favor of the Northern Pacific Railroad company."

Casey appealed to your office.

On the 13th day of November, 1889, your office found that the local officers erred in their finding that the land in question lies within the limits of the withdrawal in favor of the Northern Pacific Railroad company.

That said land is in no manner affected by the grant to said company, but lies within the limits of the withdrawal for the benefit the Willamette Valley and Cascade Mountain Wagon Road Company and will be so treated.

Your office found that the tract in question was excepted from the operation of the grant under which said wagon road company and its assignee claim it, and directed the local officers to "allow the application of said Casey, subject to all intervening rights." The claim of said wagon road company for said land was, at the same time, rejected by your office.

The Willamette Valley and Cascade Mountain Wagon Road company and Alexander Weill, its assignee, appeal.

It appears that the tract in question lies within the limits of the grant made to the State of Oregon by the act of July 5, 1866 (14 Stat., 89), in aid of a military wagon road from Albany in said State to the eastern boundary of said State. Said grant was conferred by the State upon the Willamette Valley and Cascade Mountain Wagon Road company.

The withdrawal for the benefit of said wagon road company took effect July 3, 1871, and the tract in question was selected by the company April 10, 1879. On the 19th day of June, 1876, James U. Elliott filed a pre-emption declaratory statement for said tract, alleging settlement June 19, 1867. It appears that Elliott had and maintained a valid and subsisting filing and settlement upon said tract at the date of the withdrawal in favor of said wagon road company. This being the case, it is quite clear that the tract was excepted from the operation of the grant.

The specifications of error assigned by appellants are as follows:

1. That the power and jurisdiction of the said Honorable Commissioner of the General Land Office, and of all other executive officers of the government of the United States, over and touching the matter of the said claim of the said Wagon Road Company was and is wholly taken away and suspended, so that the said Commissioner had no power to entertain or take jurisdiction of the matter covered by said decision, by the act approved March 2, 1889 (25 Stats., at Large, p. 850, chap. 37), entitled "An Act providing in certain cases for the forfeiture of wagon road grants in the State of "Oregon"; and the Commissioner erred in assuming and attempting to exercise said jurisdiction.

2. The Honorable Commissioner, in his said decision of November 13, 1889, erred in holding that the words of exception, in the act of July 5, 1866 (14 Stats., 89), which only excepted from the lands granted by said act "any and all lands heretofore reserved to the United States by act of Congress or other competent authority,"

operated to except the said tract in question from said grant, owing to the pretended and alleged homestead entry of James U. Elliott.

3. The Commissioner erred in holding that the exception named in the last paragraph is identical with or as broad as the exception contained in the Union Pacific railroad land grants, and which he, in his said opinion of November 13, 1889, quotes and relies on as the equivalent of the said exception contained in the said act of July 5.

4. The Commissioner erred, in his said decision of November 13, in holding that the facts as to occupation, improvement, etc., established by the evidence in the case as had and done by said James U. Elliott, under his declaratory statement, No. 72, were such as to bring said tract within said exception named in said act of July 5, 1866.

5. The Commissioner erred in holding that even if a valid homestead entry was initiated by the said Elliott, the same had not been abandoned and lapsed so as that it did not operate to exclude the said tract from the grant to Oregon under said act of July 5.

6. The Commissioner erred in other findings of fact and conclusions of law involved in said opinion.

In support of these specifications the appellants have filed an elaborate printed brief, chiefly relying upon the question of jurisdiction of the Department, over lands within this grant. It is contended "that all jurisdiction of the Land Department, as administered by the executive, over and concerning each one of the unpatented six alternate odd-numbered sections within six miles limit of said wagon road, is, by the operation of the act of March 2, 1889, (25 Stat., 850) suspended until after the final decision of the courts, as provided in said act."

This identical question was before the Department and thoroughly considered in the case of Willamette Valley Wagon Road Company *v.* Morton (10 L. D., 456), and a conclusion reached adverse to the contention of counsel. It is not intended to add anything to what is said in that case further than to say that upon a careful examination of the question, I am fully satisfied with the construction there placed upon the act of March 2, 1889. In several respects the case of Morton, *supra*, involves the same questions as are presented by the assigment of error in the case at bar. The same is true of the case of Rinehart *v.* Willamette Valley Wagon Road Co. (5 L. D., 650). Upon the authority of these cases the decision appealed from is affirmed.

CONTEST—WITHDRAWAL OF CONTESTANT—ACT OF MARCH 3, 1891.

CAPPELLI *v.* WALSH.

The withdrawal of a contest after the submission of testimony leaves the case as between the entryman and the government, and a second application to contest the entry can not be considered pending the final disposition of the proceedings initiated by the first contestant.

The government is a party in interest to the extent of requiring the provisions of the law to be complied with in good faith, but is not a contestant or protestant in the sense in which those terms are used in section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 7, 1891.

I have considered the case of John B. Cappelli *v.* Patrick Walsh, involving the latter's homestead entry No. 5728 for the SE. ¼ of Sec. 22, T. 5 S., R 69 W., Denver, Colorado, made June 14, 1884, and commuted to cash February 18, 1885.

On December 15, 1886, Cappelli filed his affidavit of contest against said entry, charging that claimant never established nor maintained a *bona fide* residence on said land for six months, nor for any portion of that time, prior to the date of entry.

Hearing was duly had, and the register and receiver decided that the requirements of the law were not complied with, and sustained the contest.

On June 13, 1889, contestant sent to your office his letter withdrawing from the case, on the ground that "he is satisfied that claimant fully complied with the requirements of the law."

On August 10, 1889, you considered the appeal then pending from the judgment of the local officers and accepted plaintiff's withdrawal, but proceeded to examine the testimony as between the claimant and the government. You affirmed the action of the local officers, and held the cash entry for cancellation.

This appeal is brought to reverse that judgment.

It appears that on August 27, 1889, William S. Wood made application to contest said entry, and, on April 2, 1890, Edward Lynch, who was one of the final proof witnesses of Walsh, made application to enter said land under the homestead law. This was rejected by the local officers, for the reason that the tract was covered by Walsh's entry, "which reserved the land." Lynch appealed and you forward his appeal to be considered in this case.

Before Lynch made his application to enter the land, Walsh had appealed from your judgment of cancellation, and his appeal was then pending. The action of the local officers rejecting Lynch's application to enter the land was correctly taken. Rule of Practice 53; John M. Walker, 5 L. D., 504; Esler *v.* Townsite of Cooke, 4 L. D., 212; Stroud *v.* DeWolf, id., 394.

Nor did Wood secure any advantge by his application to contest Walsh's entry. While Cappelli had withdrawn his contest before Wood filed his application to contest the same entry, yet by Cappelli's withdrawal the case was left between the original entryman and the government. Taylor *v.* Huffman, 5 L. D., 40; Hegranes *v.* Londen, id., 385; Overton *v.* Hoskins, 7 L. D., 394. And Wood's contest, filed during the pendency of the prior suit, was subject to the final disposition thereof. Joseph A. Bullen, 8 L. D., 301; George F. Stearns, id., 573; Gage *v.* Lemieux (on review), 9 L. D., 66; Drury *v.* Shetterly, id., 211; Conly *v.* Price, id., 490.

The proviso to the 7th section of the act of March 3, 1891, is as follows:

> After the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Upon this record I reach the following conclusions:

1. The homestead was commuted to a pre-emption cash entry.

2. Two years have elapsed from the issuance to the entryman of the receiver's receipt.

3. The withdrawal of the contest left the case between the entryman and the government, and no second application to contest the entry could be considered pending the proceedings thus initiated by the first contestant.

4. While the government is always a party in interest, to the extent of requiring the provisions of the law to be complied with in good faith, yet it is not a contestant or a protestant, in the sense in which those terms are used in the act of 1891 (*supra*).

5. There was, therefore, no contest or protest against the validity of this entry at the time of the passage of said act.

I therefore deem this case as governed by the proviso above quoted, and accordingly direct that patent issue.

Your said office decision is reversed.

COAL ENTRY—CONTEST—PREFERENCE RIGHT.

GARNER ET AL. *v.* MULVANE ET AL.

The preference right of entry may be properly awarded to one who has made due application to contest, at his own expense, a coal entry, and furnishes information which leads to the cancellation of said entry on proceedings subsequently instituted by the Land Department.

Secretary Noble to the Commissioner of the General Land Office, April 7, 1891.

I have considered the case of William A. Garner and J. P. Nesbitt *v.* David A. Mulvane and George W. Mulvane on appeal by the former from your decision of November 12, 1889, holding their coal declaratory statement for cancellaton and allowing the coal entry of the latter for the NE. ¼, Sec. 31 and NW. ¼, Sec. 32, T. 33 S., R. 63 W., Pueblo, Colorado Land District.

On January 25, 1888, David A. and George W. Mulvane made application to file coal declaratory statement for these tracts of land, alleging that they were purchasers of certain improvements thereon; that they had been in possession since February 16, 1887, date of purchase; that their grantor had been in possession since June 4, 1883. This application was rejected because of the letter of your office of January 14, 1888, awarding Garner and Nesbitt the preference right of entry for the said tracts.

From this action of the local officers the Mulvanes appealed and on October 8, 1888 your office held that it was error to allow Garner *et al.*, a preference right of entry. The ruling of the local officers was reversed and Mulvanes were allowed to enter the land. In the meantime, on February 2, 1888, Garner and Nesbitt, as an association, filed coal declaratory statement for the land, alleging settlement January 23, 1888.

December 28, 1888, Mulvane *et al.*, filed their application to purchase the tracts covered by their coal declaratory statement filing, and on January 18, 1889, Garner and Nesbitt protested against the same and asked for a hearing which was allowed and set for April 22, 1889, at which the parties appeared and after the testimony had been taken and considered the register and receiver found in favor of Garner and Nesbitt and recommended the cancellation of the coal declaratory statement filing of said David A. and George W. Mulvane and that Garner and Nesbitt be allowed to enter the land. From this decision, Mulvane *et al.* appealed and on November 12, 1889, your office reversed the decision of the register and receiver and held the declaratory statement of Garner *et al.* for cancellation, and allowed Mulvane *et al.* to make entry for the land. From this decision, Garner *et al.* appealed to this Department.

The testimony before the local officers showed that in December 1884, Garner *et al.* began opening a coal mine on the land in controversy; they drove an entry about eighty feet, and a slope about forty-five feet deep; they estimate their improvements at between five and six hundred dollars.

When they went upon the land there was no one in possession, or working or mining there, and there were no improvements on the tract. In September 1885, the Trinidad Coal and Coking Co. began opening a mine on the land, prior to which time it had been mining on an adjoining tract. Garner *et al.* continued working during the year 1885, but in February 1886 the Trinidad Coal and Coking Co. brought suit against them in the district court of Las Animas county, and procured an order restraining them from further operations on the land. They had made application to file coal declaratory statement for the tracts soon after taking possession of them. The application was rejected on account of the entries of Carlson and Peterson being on file.

It appears that Carlson and Peterson had deeded these tracts to the Trinidad Coal and Coking Co. David A. Mulvane resides at Topeka, Kansas. George W. Mulvane resides in Tuscarawas county, Ohio.

The agent of the Trinidad Coal and Coking Co. states that the company had owned the land since October 24, 1881, but had sold it to the Mulvanes February 16, 1887. The company did not intend opening mines on the tract, but expected to take the coal out by way of its mine No. 1, situate on an adjoining tract; but the coal in Mine No. 1 did not prove valuable as they neared this line, and they then determined to sink a slope on the tract in controversy which was done. At the time of the sale to the Mulvanes, they had on the land a hoisting slope and track and an air shaft; the slope was timbered and lagged; they had made preparations to build a tipple, had hoisting engine and machinery for taking out coal.

The coal is over six feet thick and first class. They first discovered Garner *et al.* working on the land in 1884. The mine is not worked now; there is water in the mine and up in the bottom of the slope so that they could not measure the work. It is not abandoned, but the Trinidad Coal and Coking Co. borrowed or leased the boilers and machinery and took them to another mine. Witness does not know that Mulvanes have any interest in the Trinidad Coal and Coking Co. The interest it has in this case is that it is in duty bound to protect Mulvanes' title. When the Mulvanes took the mine they extended the entry some.

David A. Mulvane says that he went onto the land on February 7, 1887, looked it over and went into the mine. He also saw a plat showing the coal veins, "thought it possibly cheap at the price" and immediately thereafter bought the land for eight thousand four hundred dollars ($8,400). (Copy of deed produced).

The deed is a quitclaim; did not make any inquiry about the title; was put on to the scheme by a friend who said that he would "look up

the title"; did not know until some time afterward that the deed was a quitclaim; had left the matter with his brother to attend to. He bought the improvements on the land for nine thousand six hundred and ninety-two dollars and forty-nine cents ($9,692.49). This is the "bill of sale." It shows Mulvanes (D. A. and G. W.) debtor to the Trinidad Coal and Coking Company "for improvements on this land, made March 1, 1886 to April 30, 1887, $9,692.49." "Payment received." Improvements made since purchase cost over $4,300. First learned of contest on the land some time prior to December 20, 1887; have been on the land six or eight times. "I loaned and rented to the Trinidad Coal and Coking Company the majority of the tools and machinery from the mines." "The Trinidad Coal and Coking Company have no interest in the land further than giving me such assistance as I am entitled to as a purchaser."

The verification to the reply of the plaintiffs in the injunction case showed that on April 4, 1888, they were non-residents of and absent from the State.

The primary question in the case is whether or not Garner and Nesbitt were properly accorded a preference right of entry for this land, and to determine this I have found it necessary to examine the papers in the case of Adolph Peterson and John Carlson (6 L. D., 371).

The record of the Trinidad Coal and Coking Company's connection with these lands also becomes important in this case. Its first pretense of ownership began in 1881 by some kind of title from Remon Trujillo and Juan B. Rimber homestead entrymen for these tracts. These entries were canceled in April 1883. The company took no appeal from the decisions canceling these entries, but its agent took Adolph Peterson, John Carlson and six other men, members and employes of the company to Pueblo, on June 4, 1883, and had them make coal entries for lands in the vicinity of its mines. It fell to the lot of Peterson and Carlson to sign the papers and make the necessary affidavits for the two tracts now in controversy. The eight entries thus made covered about twelve hundred and seventy-four (1274) acres of land. The testimony in the case of Peterson *et al.* shows that none of these men were at the land office, but they were taken to a law office in Pueblo where the papers necessary to make the entries were already prepared and deeds were prepared for each entryman to transfer the tracts by them respectively entered, to the Trinidad Coal and Coking Company. These were signed and the affidavits subscribed and sworn to as directed by the company's agent who took the papers to the land office and attended to making the filings. The company paid all expenses including railroad fare and hotel bills and paid Peterson and Carlson eight dollars ($8.00) for their time. These entrymen never pretended to make any settlement on their respective tracts or to give the lands any attention. The Trinidad Coal and Coking Company had opened mines upon some of the tracts which they claimed to own by purchase from homestead

entrymen, but had not entered upon the tracts in controversy. On November 17, 1884, Garner wrote Secretary Teller exposing these fraudulent entries and wrote the Commissioner on December following to same effect, and asked that action be suspended on the entries made by Peterson and Carlson, and asked that he have time to prepare to contest these entries, and on December 9, 1884, he and Nesbitt sent to your office an affidavit of contest (not protest as stated by your office) against said entries, corroborated by two witnesses. They accompanied this with a written offer to deposit such sum of money as your office might direct, for the payment of the expenses of a contest, and they asked that the local officers be directed to allow them a hearing. This affidavit charged fraud in the entries substantially as herein stated. They had made a settlement on the land and begun operation, and they made application to the local officers for leave to file a coal declaratory statement for the tracts, (as an association). This was rejected because the entries of Carlson and Peterson were on file. From this action they appealed.

The contest papers were sent to your office because the entries had been transmitted to it and the local officers declined to act in the matter. They employed counsel at home and also in Washington, D. C. to attend to their contest and appeal, and on January 17, 1888, these attorneys wrote your office assuring it that their clients would deposit money to pay expenses and asking that the local officers be directed to proceed with a hearing.

On February 5, following, they transmitted to your office some additional affidavits, and among them one made by John Carlson, one of the entrymen, in which he corroborates in every particular the charges in the affidavit of contest and says he "was influenced and caused to enter said tract of coal land by the agent of the Trinidad Coal and Coking Company." He gives a full history of the transaction and says that he did not understand the land laws when he made the entry, or he would not have done so, and he wants the government to know the facts in the case.

Upon the statements of Garner and Nesbitt, Special Agent Dill was directed to examine the matter, and on February 13, 1885, he sent to your office reports, on the entries of Peterson and Carlson, similar in all respects. He reported that the entries were each made in the interest of the Trinidad Coal and Coking Company, and transferred to it on June 4, 1883 each for the consideration of four thousand dollars ($4,000).

The remaining six entries made at the same time with these two, and under the same circumstances, all described in Garner's letters and referred to Dill were passed to patent. The frauds, however, became so apparent that suit was instituted to set them aside. They were sustained by the district court and brought to the supreme court of the United States on appeal by the government, where they were held to

be invalid by reason of the frauds committed by the Trinidad Coal and Coking Co. See United States *v.* Trinidad Coal and Coking Company (137 U. S., 160). Notwithstanding the rejection of their application to make entry for the land, Garner and Nesbitt continued to press their contest and remained in possession of the land until February 1886 when they were restrained by order of the court from further operations thereon.

On December 31, 1885, your office decided, upon the evidence before it, that the entries of Carlson and Peterson were fraudulent and they were held for cancellation. Sixty days were allowed for appeal, and in the meantime

> the application of Messrs. Garner and Nesbitt to contest will remain in abeyance pending final action under these proceedings.

Carlson, on February 9, and Peterson, on April 21, 1886, filed, through the attorneys of Garner and Nesbitt, waivers of appeal and disclaimers of any interest in the land, but counsel for the Coal and Coking Company asked to be allowed to appeal for them, which was refused because of their waivers, upon which they made known to your office that they also represented the Trinidad Coal and Coking Company, and they asked to be allowed to appeal for it as transferee of the entryman. This was also refused.

The company had previously applied to the Department for an order, in the nature of a petition for mandamus, and it alleged that it held said land under Trujillo and Rimber homestead entrymen, and that patents for these tracts had been made out and signed but not dated or delivered, and it asked that an order be made upon your office that said patents be delivered to the said company as transferee of said entrymen. This had been refused.

Upon your office refusing to allow the appeal of the Trinidad Coal and Coking Company, it applied for a writ of certiorari, and the papers were thereupon ordered to be sent to the Department, and upon consideration of the case, of Adolph Peterson *et al.* as upon appeal, your office decision cancelling their entries was affirmed. This decision was rendered December 2, 1887 (6 L. D., 371).

On January 14, 1888, your office wrote the register and receiver at Pueblo, Colorado saying

> As the special agent's investigation was instituted upon information furnished by these parties and in view of their application for a hearing to show at their expense the fraudulent character of said entries, you will advise W. A. Garner and J. P. Nesbitt of the action taken and accord them a preference right of entry of said tracts under the coal land laws.

On February 2, following Garner and Nesbitt, as an association, filed coal declaratory statements, as herein before stated, and immediately began work on the land. On the 8th day of same month, one D. R. Benan filed in the district court an affidavit in said injunction case, without disclosing in any way for whom he appeared, or what right he had to

appear therein, charging the defendants with violating the restraining order theretofore issued, by working in a shaft theretofore begun by them on the land. An attachment was issued for them; they were brought into court and each was fined twenty-five dollars ($25.00) and costs and ordered to stand committed to jail until fine and costs should be paid. On February 1, 1888, D. A. Mulvane had placed on file an affidavit alleging that he and George W. Mulvane had purchased the said lands of the Trinidad Coal and Coking Co. and asking to be substituted as party plaintiff in its stead. And on March 20, following, an order of substitution was made accordingly.

On March 27, 1886, Garner *et al.* filed an answer to the petition in the injunction case, denying the company's ownership of the land and denying that its possession was lawful; admitting that they (the defendants) were working on the lands and alleging that they were rightfully in possession. On March 3, 1888, they filed a supplemental answer setting forth the action of your office and this Department in cancelling the entries of Peterson and Carlson and awarding these defendants a preference right of entry. Reply was filed to the answer and this supplemental answer, denying the allegations thereof, and especially denying the authority of your office or this Department to cancel said entries, and upon these issues the cause was heard on October 3, 1888, and the injunction was made perpetual.

The history of the case, as brief as the importance of the case will allow, shows the efforts of the Trinidad Coal and Coking Company to retain possession of these lands until it can get the coal out of them, and it is apparent that the officers and agents of that company have not hesitated to do, and procure to be done, anything that tended toward this objective point.

I do not find that there was any error in according to Garner and Nesbitt the preference right of entry for this land. It is apparent from the foregoing that their affidavit of contest was filed in good faith, that it was sufficient in law and true in fact.

Counsel say they did not offer to pay the expenses of a contest, "but in an unsworn letter." This was entirely sufficient—"No hearing was ordered and no notice served". These were matters over which Garner *et al.* had no control. They procured the testimony of Carlson prior to any action by Agent Dill, and they and their attorneys assisted the Special Agent in such investigation as he saw proper to make.

In the case cited and followed by your office, to wit Perkins *v.* Robson (6 L. D., 828) Robson had not filed any affidavit of contest or offered to defray the expense of a contest, but simply, when called upon by the Special Agent, made an ex parte affidavit. Upon this, it was held that he had not acquired any preference right. In Johnson *v.* Walton (11 L. D., 278) Johnson filed an affidavit of contest and deposited the fees required of him. He attempted to serve contestee with notice, but he not being found in the county, service was not made. No publication

was made and Johnson took no further steps in the matter. The case was referred to a special agent. Johnson's attorney told him (Johnson) he need do nothing further. His attorney, however, it appears assisted the special agent in securing some evidence and the entry was canceled upon the agent's report. It was held that Johnson had acted in good faith, and that as his action was really the basis of the investigation, he should be awarded the preference right of entry, notwithstanding an investigation had been instituted on behalf of the government. It is true he deposited money with the local officers to pay contest fees, and in the case at bar the local officers having no authority to receive such deposit, sent your office the written proposition of these contestants to make such deposit as your office might direct. This was all they could do in the case, and must be held, in the absence of any direction by your office, as the equivalent of a deposit.

Counsel for Mulvanes say:

> The entries were canceled on admitted facts and Garner *et al.* were never recognized as contestants and as such never expended a dime or acquired any rights.

As there is no testimony as to what they paid their attorneys, nor the expense they incurred in securing affidavits to prove the fraudulent character of these entries, counsel are not warranted in their statement.

In the case of Johnson *v.* Walton *supra* Johnson's attorney had the advice and assistance of the special agent, while in the case at bar Garner *et al.* had to cope with a rich and influential corporation, and they do not seem to have had the support of the government special agent, as they should have had.

It does therefore seem that having acted in good faith and having done all that they were permitted by your office to do, they should be allowed in justice and fairness the preference right of entry accorded a successful contestant.

It is said that as the case at bar involves a coal entry the provisions of the act of May 14, 1880 (21 Stat., 140) do not apply. In the case of Ringsdorf *v.* The State of Iowa (4 L. D., 497) it was held that in a swamp land claim the successful contestant was entitled to a preference right of entry. In Bunger *v.* Dawes (9 L. D., 329) it was held that an entry of Kansas Indian trust land was subject to contest, and that the successful contestant was entitled to preference right, and in the case of Frazer *v.* Ringold (3 L. D., 69) it was held that the preference right of entry was applicable to contests of desert land entries. The same principles of construction of the statute and the same reasoning applies, with equal force to contests of coal entries as to either of the above mentioned class, and it seems that it is well that this is so. The person who honestly aids the government in preventing persons and corporations from securing coal lands by fraudulent, illegal and even criminal methods, is as much entitled to reward as are those who aid in preventing fraudulent homestead or other entries. The truth of this proposition is proven and emphasized by the case at bar.

Counsel for Mulvane earnestly claim that the equities of the case are all with their clients. They forget that "Equity follows the law." Their clients are not "innocent purchasers" as claimed. They evidently knew that their grantor had no title to this land, hence they divided up the contract of sale and after taking a deed for the land, they had the shafts, slopes, entries, tracks and stationary machinery, all of which was real estate, and in a straight forward business transaction would have passed with the sale of the land, inventoried as chattels and transferred by a bill of sale as "improvements." Moreover, there was a suit pending in a court of record in the county within which the land was situate, in which the specific land was mentioned and described, the title and right of possession was asserted by the Trinidad Coal and Coking Company, and in Garner's answer the allegations of the petition were denied and he asserted title in himself. The doctrine *lis pendens* is clearly applicable to the case. Counsel say their clients, Mulvanes, were on the land when the prior entries were canceled, that Garner *et al.* were not; that the Mulvanes antedate Garner *et al.* in possession and are therefore superior in right. The force of this proposition is lost in the doubtful legality of the proceeding by which Garner *et al.* were forced off the land and kept out of their prior possession.

They say:

> The work done by Garner *et al.* at a time when the land was covered by an entry, was not done on public lands, and hence is not within the coal land law.

This applies with equal force to the work done by the Trinidad Coal and Coking Company and to the Mulvanes; so no rights can be asserted by them on account of those extensive improvements, made while the land was not public.

I do not find that there are any equities in the case in favor of Mulvanes which even tend to overcome the legal rights of Garner *et al.* to their preference right of entry. The conduct of the Mulvanes outweighs their words. They virtually abandoned this property after securing a perpetual injunction against Garner *et al.* and a filing upon the land, and loaned, leased or rented, the tools and machinery, allowed them to be removed from the mine, allowing it to fill with water, the timbers to rot, the entire improvement to stand idle and neglected, to fall into ruin, while they remain non-residents of and absent from the State. This fact taken in connection with the entire evidence in the case and the circumstances surrounding it satisfy my mind that this pretended sale by the Trinidad Coal and Coking Company was a mere device, in keeping with its previous record, to retain control of these lands.

So finding that the Mulvanes have no equitable or legal right to the premises, their entry will be canceled and W. A. Garner and J. P. Nesbitt will be accorded their preference right of entry. Your decision is accordingly reversed.

PRE-EMPTION ENTRY—ACT OF MARCH 3, 1891.

JOSEPH W. PHILLIPS.

Pre-emption entries are confirmed by section 7, act of March 3, 1891, where two years have elapsed since the issuance of the receiver's final receipt, and there is no pending protest or contest against the validity of such entries.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 7, 1891.

I have considered the case of the United States *v.* Joseph W. Phillips, on appeal of the latter from the decision of your office of August 7, 1888, holding for cancellation his pre-emption cash entry No. 7759 for the SW¼ NW¼ Sec. 25, and the SE¼ NE¼ and lots 1 and 7, Sec. 26, T. 63 N., R. 17 W., Duluth, Minnesota.

The claimant, after notice by publication, made his final proof July 14, 1885, and on the same day received from the local officers his final certificate. About three years thereafter, your office, by letter dated August 7, 1888, held his entry for cancellation on the ground that the residence shown by the claimant was not continuous or conclusive of his good faith. He thereupon appealed to this Department, and contends that he complied in all material respects with the requirements of the pre-emption law.

His final proof shows him to have been a qualified pre-emptor: He therein expressly states that he established residence on the land November 8, 1884, and that his residence thereon has been continuous since that time, except when working by the day for others, which he found necessary to enable him to earn the means of support. He gives the dates and duration of his absences, and states that he had no other home. He bought the improvements of a former occupant, and made other improvements, consisting of a log house fifteen by eighteen feet in size, with window, door, floor, and chimney; he had about two acres of the land cleared, and from half to three-quarters of an acre in cultivation under spade husbandry in garden products. His improvements are estimated in value at three hundred dollars.

In my judgment he has acted in good faith, with the full intent of making this tract his permanent home, and has complied substantially with the requirements of the pre-emption law.

But apart from the merit of his case, the act of March 3, 1891 (Public 162, Sec. 7), provides, that after the lapse of two years from the issuance of the receiver's receipt upon final entry of any tract of land under the homestead, timber-culture, desert-land or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of the entry, the entryman shall be entitled to a patent.

In this case, over six years have elapsed since the date of the final receipt. No contest or protest is pending, and no adverse claim has been filed. The decision of your office, holding the entry of claimant for cancellation, is accordingly reversed, and patent will issue.

MINING CLAIM—ENTRY—PROTESTANT.

LEARY *v.* MANUEL.

A mineral entry made by an alien is not void, but voidable, and while of record, the land covered thereby is segregated from the public domain.

A protestant, who makes a mineral location on land thus segregated acquires no interest thereby, as against the government or the entryman, that will entitle him to be heard on appeal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 7, 1891.

This case comes up on the motion of the attorneys of Moses Manuel to dismiss the appeal of George W. Leary from the decision of your office rendered July 2, 1890, wherein you dismiss the protest of said Leary against mineral entry No. 1708, Helena, Montana.

As the basis of said motion, it is alleged that Leary as a contestant is not entitled to be heard on appeal.

It appears that during the period of publication Leary asserted no right as an adverse claimant, but that after the allowance of the entry he entered a protest against the same, on the ground that the entryman was not qualified in the matter of citizenship to acquire title under the mineral laws. This protest your office dismissed, and from such action the appeal herein was taken, the appellant asserting that he is entitled to be thus heard, for the reason of a conflicting location made by him subsequently to the allowance of the entry herein.

There is nothing to show any irregularity, or want of compliance with law on the part of Manuel, either prior to his application or subsequently thereto.

It is substantially admitted that a protestant, without interest, is not entitled to the right of appeal, but strongly urged that because Manuel did not possess the requisite qualifications at date of entry in the matter of citizenship Leary acquired such an adverse right by his subsequent location on Manuel's claim as to entitle him to be heard on appeal, not as a mere protestant but as one having an adverse interest.

This ground is not well taken. The allowance of Manuel's entry constituted a segregation of the land, and a location thereafter on said land would not confer any interest upon the locator as against the entryman or the government.

The true rule of law governing entries of the public lands, to which mineral lands form no exception, is that when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the au-

thorized agents of the government, the purchaser at once acquires a vested interest in the land, of which he cannot be subsequently deprived, if he has complied with the requirements of law prior to entry; and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. F. P. Harrison, 2 L. D., 770.

See also Moss Rose Lode, 11 L. D., 120; and Mudgett *v.* Dubuque and Sioux City R. R. Co., 8 L. D., 243; James A. Forward, id., 528.

But it is said by the appellant that the entry of Manuel did not work a segregation of the land for the reason that the entryman's want of qualification rendered the entry absolutely void and left the land covered thereby subject to location.

This position cannot be successfully maintained. It has been held by the Department that an entry made by an alien is not void, but voidable only. Ole O. Krogstad, 4 L. D., 564; see also James F. Bright, 6 L. D., 602; Jacob H. Edens; 7 L. D., 229; Paul O. Brewster, id., 471; Lyman *v.* Elling, 10 L. D., 474, Kirkpatrick *v.* Brinkman, 11 L. D., 71.

In the case of the Croesus Co. *v.* Colorado Co., 19 Fed. Rep., 78, in construing section 2319 R. S., which provides that "all valuable mineral deposits . . . . are hereby declared to be 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," the court said "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." See also North Noonday Mining Co. *v.* Orient Mining Company, 1 Fed. Rep., 524.

It is the uniform ruling of the Department that an entry which is voidable only segregates the land covered thereby while it stands of record. St. Paul, Minneapolis and Manitoba Railway Company *v.* Forseth, 3 L. D., 446. In this case it was held that an entry though allowed on an insufficient showing as to the qualifications of the entryman is not void but voidable, and while so of record constitutes an appropriation of the land. See also St. Paul, Minneapolis and Manitoba Railway Company *v.* Leech, id., 506; Hollants *v.* Sullivan, 5 L. D., 118.

It will therefore be seen that Leary's location made on the land covered by Manuel's entry, conferred no interest upon Leary as against the entryman or the government, and that having no interest, he is a mere protestant and not entitled to be heard on appeal. Bright *et al.* *v.* Elkhorn Mining Co., 8 L. D., 122; Lucy B. Hussey Lode, 5 L. D., 93; Dotson *v.* Arnold, 8 L. D., 439.

The motion therefore must be sustained, and the appeal of said Leary is accordingly dismissed.

RAILROAD LANDS--PROCEEDINGS UNDER THE ACT OF MARCH 3, 1887.

DUBUQUE AND PACIFIC R. R. CO.

It is mandatory upon the Secretary of the Interior, under the act of March 3, 1887, to demand a reconveyance of title, where lands have been erroneously certified or patented for the benefit of a railroad company and the grant remains unadjusted.

Secretary Noble to the Commissioner of the General Land Office, April 9, 1891.

By letter of September 23, 1889, your office submitted an adjustment of the grant to the State of Iowa by act of May 15, 1856 (11 Stat., 9), to aid in the construction of a railroad "from the city of Dubuque to a point on the Missouri River near Sioux City, with a branch from the mouth of the Tête Des Morts to the nearest point on said road. The grant was of "every alternate section of land, designated by odd numbers, for six sections in width on each side" of said road, with a provision for indemnity for losses of land which the United States had sold or otherwise appropriated, or to which "the right of pre-emption has attached," to be selected from lands not further than fifteen miles from the line of road.

The map of definite location was filed in your office October 13, 1856.

It appears from said letter that the present owner of the grant is the Iowa Railroad Land Company, successor in interest to the Iowa Falls and Sioux City railroad company, one of the grantees of the State, and to the Dubuque and Sioux City railroad company.

Said letter states that the area of the odd-numbered sections within the six mile or granted limits of the main line, which is the area of the grant for such line, is 1,207,145.51 acres; that there have been certified under this part of the grant as granted lands 455,992.01 acres, and as indemnity 699,174.74 acres, which, with 153.95 acres in the granted limits and subject to "selection," aggregate 1,155,320.70 acres, leaving a balance of 51,824.81 acres due as indemnity on the main line; that the area of the grant for the branch line is 21,142.95 acres, and that but forty acres have been certified for the same, leaving a balance of indemnity due therefor of 21,102.95 acres.

Said letter further states that lists of the lands which under the present rulings of the Department would appear to have been erroneously certified for the company, were prepared and the present owners under the grant, through the local officers at Des Moines, furnished copies thereof, and called upon to show cause why proper steps should not be taken by the government to recover the title, in accordance with the requirements of the act of March 3, 1887 (24 Stat., 556); that answers to the rule to show cause have been submitted by W. J. Knight, president of the Dubuque and Sioux City company, for that company and by Messrs. Curtis and Burdette of this city, for said Iowa Railroad Land Company.

Mr. Knight for the Dubuque and Sioux City railroad company says that said company is a corporation organized and existing under the laws of the State of Iowa; that in 1856 a corporation known as the Dubuque and Pacific railroad company was organized in Iowa, with headquarters at Dubuque, for the purpose of building a railroad from said city westwardly toward the Pacific Ocean; that the State of Iowa granted to said latter company a portion of the lands granted to the State by said act of 1856; that soon after its organization said company made a trust deed to secure certain bonds and that all of the lands granted to it by the State have been sold and conveyed to different parties either by the company or its said trustees; that the titles have since passed through a number of hands and are now held by persons who acquired title in good faith; that on many of these lands "farms have been made and buildings put up," and that all of them are held "by people who have never had their title questioned by any person claiming under a prior entry or pre-emption;" that the Dubuque and Pacific railroad company became insolvent in 1860, and its property was sold at a foreclosure sale; that said Dubuque and Sioux City railroad company was formed in 1860 and acquired title through the foreclosure sale to all the property of the Dubuque and Pacific company; that the Dubuque and Sioux City company built the road only as far west as Iowa Falls but that the Iowa Falls and Sioux City railroad company completed the construction of the line, and received the lands applicable to that portion, that its grantees and their successors have held title to their lands through said company forover twenty years, and that no one is asserting an adverse claim.

The lists of lands submitted to the companies as aforesaid are, list A, embracing lands within the six mile limits of the grant which were covered by unexpired pre-emption filings at the date of definite location of the road, and list B, embracing lands within the same limits, which were covered by pre emption entries at the date of said definite location, but subsequently canceled, "also one tract in the indemnity limits which was covered by a warrant location at the date of the certification under the grant."

It appears from your said letter that prior to the decision in Van Wyck *v.* Knevals (106 U. S., 360), rendered October 1882, filings and entries were allowed or rejected in accordance with the opinion of the Attorney General of December 19, 1856, to the effect that the line of road was "definitely fixed" under this act "when the necessary determinative lines shall be fixed upon the face of the earth." (1 Lester, 512). In said case of Van Wyck the court held, having in view the grant for the St. Joseph and Denver City railroad company, that the right of the company attached when the map designating the route was filed with the Secretary of the Interior and accepted by him. In the case of Prindeville *v.* Dubuque and Pacific railroad company (10 L. D., 575), the Department applied that rule to the road here in question.

This it appears from said letter has been the practice since the Van Wyck decision.

All the lands in list B, and most of those in list A, were certified to the State on December 28, 1858. The remnant was certified shortly thereafter. All the certifications in 1858, your office states, were made in accordance with existing rulings.

Your office recommends on the authority of the case of Atlantic and Pacific railroad company (8 L. D., 165), that the rule against the company should be dissolved as to all lands involved, except two tracts hereinafter mentioned.

In said last mentioned case your office recommended that suit be instituted to restore to the United States, under act of March 3, 1887, the title to certain lands in Missouri alleged to have been erroneously patented to the Atlantic and Pacific company. My predecessor, Secretary Vilas, was of opinion that under the rule in Clements *v.* Warner (24 How., 394), the lands had not been improperly certified, and further that "it would avail little now to inquire whether the certifications to the state were made in nice compliance with exact legal rules," for the lands had been certified in 1854, and 1871, every presumption was in favor of the correctness of the action of the certifying officers, the lands were located in a populous State, the titles, it appears, had passed through several hands and large sums of money had been invested in improvements on the faith of the certification. For these and similar reasons my predecessor held that there was "no equitable ground on which a court could interfere," and declined to request the institution of suit as recommended.

Subsequently upon the receipt of petitions from a large number of citizens of the counties in which said lands lie, the Department, on December 11, 1890, suggested to the Attorney-General that proceedings looking to the cancellation of said patents be instituted at once if in his judgment the suit could be maintained. This action was taken because of the long dispute which had existed between the inhabitants of said counties and the railroad company, relative to the title to said lands, resulting in serious drawbacks to the best interests of all parties concerned, because of the magnitude of the controversy, and for the reason that it appeared the only way to quiet the titles was by a suit in court.

The Attorney-General in his response dated January 8, 1891, after concurring in the view that the lands had not been improperly patented, and stating that he did not understand the views of this Department had undergone any change on that point, continued:

> If the case were simply upon the issues above indicated, I should think it my duty to advise you that in my opinion suit would be unsuccessful and should not be brought, but there are other reasons which seem to me still more cogent. It appears that the lands are almost altogether in the hands of *bona fide* purchasers without notice. We could not recover from them. It would seem to me unjust to attempt it.

In addition to this and as a cumulative reason I cannot refrain from saying that I have a very great hesitation in attacking patents which have been standing for any considerable length of time. In this case, even if there were original error, and I think there was not, no individual has been injured and the theoretical injury to the general public is a much more tolerable calamity than would be the actual, undeniable hardship of a threatening suit which would cast some degree of discredit on these titles and cripple business and dealings on the faith of them. I do not think the local agitation for the cancellation of these certifications has good legal grounds; it does not present doubtful legal questions to be solved. I do not think we should be justified in discrediting due and formal titles from the government in order to set at rest some unwarranted doubts in the minds of individuals who are no further injured than that they lose a hoped for privilege of homestead entry on the lands in question. The injury to them is, that they find it impossible to acquire a right they might have if we should cancel the certifications. It seems to me vested rights have the priority.

My conclusion, therefore, is that the suit should not be attempted and I am further strengthened in this view by the uniform expression of the supreme court within the last few years intended to discourage all actions by the government attacking its own patents. These expressions are unequivocal and would be a cause for hesitation were not the other reasons conclusive.

It should be noted in that case that the Attorney-General concurred in the view of the Department as formerly expressed that the lands in question had not been improperly patented, and did not understand that the views of this Department had in the meantime undergone any change on that point. In this it differs from the case at bar. The Attorney-General has had no opportunity to examine the legal questions here involved, and it is the opinion of this Department that these lands were improperly patented.

Moreover, it was held in the case of Winona and St. Peter R. R. Co., (9 L. D., 649), that under the act of March 3, 1887, it is mandatory upon the Secretary of the Interior to demand a reconveyance of title, if the grant is unadjusted, and lands have been erroneously certified or patented to or for the benefit of the company. This is the present view of the Department.

The tracts in said lists appear to have been excepted from said grants by the filings and entries mentioned, under the repeated rulings of the Department.

You will accordingly make demand on the officers of the company interested for a reconveyance of the tracts in said lists, under said act of 1887, and report the result thereof in accordance with the established practice.

You recommend that suit be brought to set aside the certification of the E. ½ NW. ¼, Sec. 3, T. 90 N., R. 46 W., which was excepted from the operation of the grant by warrant location No. 28329, made September 9, 1856, and canceled May 12, 1859, and which was subsisting at date of definite location. You state that the tract is claimed by Ursule Karley, under homestead final certificate No. 171, Sioux City series, upon which patent issued July 20, 1872.

You further recommend that suit be brought to set aside the certification of the S. ½ SW. ¼, Sec. 21, T. 88 N., R. 17 W. It appears that prior to the date of the grant, to wit, on January 4, 1856, one John Hodgdon applied to locate this tract with warrant No. 11219, but that the local officers erroneously located the same in "range 19," that the error was corrected on July 23, 1858, by authority of your office, and that patent issued on the location July 16, 1860. The tract was certified to the State for the railroad grant on December 27, 1858. This tract it also appears is claimed adversely to the company. I concur in said recommendations.

You will accordingly include these tracts in said demand.

RAILROAD GRANT—PRE-EMPTION—ADDITIONAL HOMESTEAD—FINAL PROOF.

NORTHERN PACIFIC R. R. CO. *v.* ISAAC HARRIS.

The transmutation of a pre-emption filing for one hundred and sixty acres to a homestead entry of a less amount, is an abandonment of the filing, and exhausts the rights of the claimant under the pre-emption law.

The right to make an additional homestead entry under the act of March 3, 1879, can not be exercised where the original entry had not been made at the passage of said act.

The occupancy of public land by one who has formally abandoned his claim thereto under the settlement laws, is without sanction of law, and can not serve to except the land covered thereby from the operation of a railroad grant.

The failure of the company to respond to a published notice of intention to submit final proof, will not defeat its title to land which, on the record, is shown to have passed under the grant.

Secretary Noble to the Commissioner of the General Land Office April 10. 1891.

I have considered the case of Northern Pacific Railroad Company *v.* Isaac Harris, on appeal of the said company from the decison of your office of May 18, 1889, rejecting its claim to the N½ NW¼, Sec. 23, T. 4 N., R. 10 W., Helena, Montana.

The land is within the primary limits of the grant to said railroad company, under the act of July 2, 1864 (13 Stat., 365), as shown by the map of general route of the company's road, filed February 27, 1872, and by the map of definite location of said road, filed July 6, 1882.

It appears from the record that one Benkard H. Dudden, on the 24th of January, 1872, filed pre-emption declaratory statement for the N½ NW¼ Sec. 23, T. 4 N., R. 10 W., the land in contest, and also for the S½ SW¼ of Sec. 14, in the same township and range, alleging settlement thereon January 12, 1872. This filing, being *prima facie* valid and in existence at the time that the railroad company's map of general route was filed in your office, excepted the lands in the odd section from the

statutory withdrawal for the benefit of said road. Northern Pacific R. R. Co. *v.* Stovenour (10 L. D., 645), and same company *v.* Marshall (11 L. D., 443).

After making this filing, Dudden does not seem to have asserted any further claim or right to the land, either before or after the definite location of the railroad; he never made final proof under his filing, nor is there any evidence or allegation that he is now a resident or settler on the land.

On the 16th of April, 1872, Isaac Harris, the present claimant, filed pre-emption declaratory statement for the same tracts or parcels of land. He built a house on the even section in January, 1872, and occupied it continuously with his family from the early spring of that year. He also cultivated portions of the land in both sections, and his improvements thereon are estimated in value at about two thousand dollars.

On the 1st of May, 1880, he changed his pre-emption filing for one hundred and sixty acres, embracing land in both sections, and made application for homestead entry of the eighty acres in the even section, which application was allowed and final certificate issued. On the 21st of May, 1883, he applied to enter the eighty acres in the odd section above described, as an addition to his homestead entry of May 1, 1880. This application was also allowed, and no appeal taken.

On the 5th of September, 1885, after duly published notice, he appeared with his witnesses and made final proof in support of his original and additional homesteads. No objection having been made to this final proof by the railroad company, or other party, it was held to be satisfactory, and on the 9th of the same month he obtained from the local officers the usual final certificate.

The papers in the case, including the evidence taken in final proof, having been transmitted to your office without appeal, the then Commissioner, by letter of May 18, 1889, addressed to the local officers, affirmed their action, and stated that the homestead entries of Harris would be passed to examination for patent.

The railroad company then appealed from that part of this decision of your office which related to the land in the odd section, and its appeal is now before me for consideration. The facts of the case are not contested, and are substantially as above stated.

The railroad company, in presenting its appeal, contends, in effect, hat the land in question, at the time of the definite location of its road in 1882, was public land, "not reserved, sold, granted, or otherwise appropriated, and was free from pre-emptions or other claims or rights," and consequently inured to its grant.

It appears from the record that Harris—May 1, 1880,—changed his pre-emption filing and made homestead entry of that part which embraced the land in the even section. In so doing, he abandoned his filing for the land in the odd as well as that in the even section, and

exhausted his rights and privileges under the pre-emption law. This principle is established by the decision of the supreme court in the case of Nix *v.* Allen (112 U. S., 129), and by this Department in the cases of Orrin C. Rashaw (6 L. D., 570), Cayce *v.* St. Louis and Iron Mountain R. R. Co. (id., 356, and on review in 7 L. D., 205), Neilson *v.* Northern Pacific R. R. Co. (9 L. D., 402), and John C. Hone (10 L. D., 493).

But Harris bases his right to this land on his additional homestead entry, made May 21, 1883, under the act of March 3, 1879 (20 Stats., 472). This act provides that from and after its passage—

> the even sections within the limits of any grant of public lands to any railroad . . . . shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler; and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad, ... and who, by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres, adjoining the land embraced in his original entry, if such additional land be subject to entry.

The case of Harris does not come within the provisions of that part of this law which relates to additional homesteads. At the time of its passage he had no original homestead on which to base an additional. May 1, 1880, he abandoned his pre-emption filing as above stated, and voluntarily made a homestead entry of eighty acres of land in an even section. He could as readily made an entry at that time of a hundred and sixty acres; the act of March 3, 1879, authorized it, and the claimant was not restricted to eighty acres in the even sections. His making a homestead of eighty acres was his own act, and it exhausted his rights under the homestead law as he had previously exhausted those rights under the pre emption law. His application for an additional May 21, 1883, was unlawful and was made after the rights of the railroad company attached by reason of the definite location of its road.

His final proof shows that he continued to occupy and cultivate the land in the odd section, but after May 1, 1880, his actual residence was limited to his original homestead entry of the land in the even section, and if thereafter he continued to occupy the land in the odd section, it was occupation without the sanction of law, and not such as could ripen into title under the recent decisio ns of this Department. In the case of Northern Pacific Railroad Company *v.* Potter *et al.* (11 L. D., 531), was held that—

> where possession or occupation alone at the time the railroad rights attach are relied on to except the land from the grant, it must affirmatively appear that the party in such possession had the right at that time to assert a claim to the lands in question under the settlement laws of the United States.

Your office, in rendering its decision in this case, further held that the railroad company, having asserted no claim to the land in question, and having failed to appear under the published notice and contest the claim of Harris, waived its right to appear and contest now, and in support of this ruling referred to the case of Brady *v.* Southern Pacific Railroad Company (5 L. D., 407).

The land in the Brady case is within the indemnity limits of the grant to the railroad company, and had not been selected by the company at the time that Brady's rights thereto attached. On Brady's giving published notice of his intention to make final proof, the company failed to appear and contest his right to the land, and thereupon, this Department held, in substance, that the failure of the company to appear waived its right to assert its claim, and that the ruling in favor of Brady must be regarded as final and conclusive.

But, in the later case of Randolph *v.* Northern Pacific Railroad Company (9 L. D., 416), the land in contest is within the primary limits of the grant to said company and the title thereto became "vested" in said company on the definite location of its line of road, which was prior, in point of time, to the claim of Randolph. When Randolph gave published notice of his purpose to make final proof, the company failed to appear and contest his right, and it was, in substance, held by this Department that the company in failing to appear waived its right to deny the facts established by the final proof; but, as it appeared from the record that the land passed under the grant to the company by reason of the definite location of its road, and became a "vested right" before Randolph's rights attached, the land should be awarded to the company, notwithstanding the failure of said company to appear and contest.

The case under consideration is very similar to that of Randolph, and, under the ruling of the Department in the Randolph case, the right of the railroad company to the land in question is superior to that of Harris, and being a "vested right" the land inured to the company, notwithstanding its failure to appear and contest the claims of Harris.

The decision of your office is hereby reversed.

RAILROAD GRANT—STATE LEGISLATION—JURISDICTION.

ROWE *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The State act of March 1, 1877, did not take effect upon lands to which title had been perfected, prior thereto, in the company, and a subsequent reconveyance of such lands by the State would not invest the Department with jurisdiction over the same.

Secretary Noble to the Commissioner of the General Land Office, April 10, 1891.

This is an appeal by James Rowe from your office decision of April 6, 1889, in the case of said Rowe *v.* The St. Paul, Minneapolis and Manitoba Railway Company, rejecting his claim to the S. ½ NE. ¼, the NE. ¼ SE. ¼, and lots 8 and 10, Sec. 35, T. 151 N., R. 49 W., Crookston, Minnesota.

It appears that the tracts described are within "the ten mile (granted) limits" of said company, St. Vincent extension, that they were "selected"

November 23, 1873, that "the selection was approved and the lands certified on account of the grant April 30, 1874," that they were patented to the State for the benefit of the company January 14, 1875, and conveyed by the State to the company February 23, 1877, that Rowe, alleging settlement, improvement and continuous residence on the land since 1872, inquired by letter, dated November 30, 1887, to your office "how to proceed to acquire title" thereto, that your office in reply suggested by letter to Rowe, dated January 18, 1888, that he file in the local office, corroborated affidavit setting out the facts respecting his claim, that such affidavit so filed was transmitted, February 16, 1888, to your office whence by letter dated February 25, 1888, it was forwarded "to the Governor of Minnesota with a view to consideration by him of the party's rights under the State law of March 1, 1877, and such action as he might deem proper under the circumstances," that thereupon the executive department of said State by letter dated April 21, 1888, sent to your office a deed dated April 13, 1888, executed by the governor of said State, reconveying the tracts involved to the United States for the benefit of Rowe; that by letter dated January 12, 1889, addressed to the Governor, your office called attention to the said conveyance by the State to the company, prior to the date of the State act of 1877, and inquired if the land had been reconveyed by the company to the State, and that by letter dated January 22, 1889, the auditor of said State replied that—

the relinquishment executed by the State under the provisions of Sec. 10, of Chap. 201, special laws of Minnesota for the year 1877, was made in order that the claimant might obtain a standing in court. It was not expected here that it would determine or terminate the rights of the Manitoba railway, formerly the St. Paul & Pacific, as the federal law will be invoked to adjudicate the differences between the settler tler and the company.

Rowe's affidavit and accompanying papers being returned by the auditor's letter, your office, by the decision appealed from, held in effect that, under the departmental decision of March 15, 1889, in the similar case of Herbranson *v.* St. Paul, Minneapolis and Manitoba railway company, not reported, the said conveyance by the State to the company, prior to the State act invalidated its subsequent reconveyance to the United States and divested the Land Department of jurisdiction in the premises.

The said act of the State Legislature provides:

SEC. 10. The Saint Paul and Pacific Railroad Company or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or

entry—not to exceed one hundred and sixty acres to any one actual settler; and the Governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise, and 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; and in deeding to the United States such lands, the Governor shall receive as *prima facie* evidence, of actual settlement on said lands, the testimony and evidence or copies thereof, heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

The record, as heretofore outlined, shows that by the State's conveyance to the company, title to the tracts in question had been prior to its passage "perfected" within the meaning of the act referred to. Said title having so passed the subsequent reconveyance by the State, was without effect. It follows that for want of jurisdiction the claim of Rowe can not be considered. The decision appealed from is affirmed.

HOMESTEAD ENTRY—APPROXIMATION.

JAMES HANNA.

An entry containing an excess over one hundred and sixty acres may stand, where it approximates such area as nearly as may be without destroying the contiguity of the tracts embraced therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 10, 1891.

I have considered the case of James Hanna on appeal from the decision of your office of August 8, 1889, suspending his homestead entry No. 2261, of the W ½ SW ¼, the SW ¼ NW ¼ Sec. 9, lot 4 Sec. 8, and lot 1 Sec. 17, T. 159 N., R. 70 W., Devil's Lake land district, North Dakota.

It appears from the record that he filed pre-emption declaratory statement No. 1523 for this land, November 26, 1884, alleging settlement August 24, 1884, and transmuted his filing to homestead entry No. 2261, February 2, 1888. The W ½ of the SW ¼ Sec. 9 contains the usual eighty, the SW ¼ NW ¼ of same section the usual forty acres; lot 4 Sec. 8 contains 18.20 acres, and lot 1 Sec. 17 34.20 acres: total 172.40 acres, being an excess of 12.40 acres cover a regular quarter section of one hundred and sixty acres.

In view of this excess, your office, by letter "C" dated August 8, 1889, directed the local officers to notify the claimant "that he will be allowed sixty days within which to elect which contiguous tracts he will retain, and approximate his entry to one hundred and sixty acres."

In presenting an appeal from said decision to this Department, the appellant filed an affidavit in which he alleges, in substance, that he settled upon the land in August 1884, where he has resided ever since;

that his improvements thereon are valuable, and that it would operate greatly to his injury if required to relinquish any tract or tracts in his entry; that he is a poor man and has no other land; that he acted in good faith and has paid for the excess; that it is impossible to approximate his entry nearer to the standard of one hundred and sixty acres than it is at present without breaking its contiguity, and therefore asks that said entry be allowed to remain intact.

The rule bearing upon the question involved in this appeal is found in the case of Henry P. Sayles (2 L. D., 88), wherein it was held "that where the excess above one hundred and sixty acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included, and the contrary when the excess is greater than the deficiency." This rule is sustained by the more recent decisions in the cases of J. B. Burns (7 L. D., 20), and Benjamin C. Wilson (10 L. D., 524).

The excess of Hanna's entry above one hundred and sixty acres, as has been stated, is 12.40 acres. To relinquish his smallest subdivision (lot 4 Sec. 8) of 18.20 acres, would reduce his entry to 154.20 acres, or 5.80 acres less than one hundred and sixty acres. But it appears from a diagram filed by the claimant with his appeal that the effect of relinquishing this subdivision would be to cut off lot 1 Sec. 17 from other tracts in his entry, and thus break its contiguity; to relinquish the smallest subdivision is therefore impracticable. The next smallest subdivision (lot 1 Sec. 17) contains 34.20 acres. To relinquish this tract would reduce the entry from 172.40 to 138.20 acres, or 21.80 acres less than a regular quarter section; that is, 9.40 acres more below the standard of one hundred and sixty acres than the present excess is above.

From this presentation of the case, the entry as allowed by the local officers, and containing 172.40 acres, approximates as near to one hundred and sixty acres as it can be made to approximate by relinquishing either of the subdivisions in said entry without impairing its contiguity.

The decision of your office is accordingly reversed.

INDIAN LANDS—ALLOTMENT—ACT OF MAY 23, 1872.

CITIZEN BAND OF POTTAWATOMIES.

Allotments to the Citizen band of Pottawatomie Indians, based on selections under the act of 1872, that were made prior to the ratification of the agreement of June 25, 1890, and duly authorized by law and the express authority of the President, may be perfected, notwithstanding the act of March 3, 1891.

Secretary Noble to the Commissioner of Indian Affairs, March 27, 1891.

In reply to your inquiry of the 17th instant, in reference to certain selections of allotments made by the Citizen Band of Pottawatomie Indians, with a request for my opinion upon the questions therein pre-

sented, I have to say that I submitted the subject-matter to the Assistant Attorney-General, and herewith send you copy of his opinion, in which I concur.

The selections already made when the agreement was ratified were authorized by law and the express authority of the President, and may be perfected notwithstanding the act of March 3, 1891.

Your action, therefore, will be in accordance with this determination.

OPINION.

Assistant Attorney-General Shields to the Secretary of the Interior, March 26, 1891.

I have the honor to acknowledge the receipt, by reference of Acting Secretary Chandler, of the letter of the Acting Commissioner of Indian Affairs, of March 17, 1891, in reference to certain selections of allotments made by the members of the Citizen band of Pottawatomie Indians, with a request for my opinion upon the questions therein presented.

The act of May 23, 1872 (17 Stat., 159) provided for the allotment of lands to the members of the Citizen band of Pottawatomie Indians. After the passage of the allotment act of February 8, 1887 (24 Stat., 388) a question arose as to the rights of members of this band of Indians under that act. In an opinion submitted by me on June 11, 1890 (11 L. D., 104) I reached the conclusion that but for an order of the President of July 12, 1889, they might have taken under either of said acts at their election but that "until authority is given by the President to allow said applicants to receive allotments under said act of 1872, in my judgment, they can not be allowed to take allotments thereunder." This opinion was adopted by the Department and the matter was, by letter of July 10, 1890 (Ind. Div. 66, p. 77) referred to the President with the request that he give these Indians authority to elect which of said acts they would take allotments under. The President, under date of July 11, 1890, according to the statement of the Commissioner of Indian Affairs, granted such authority. An agreement was made on June 25, 1890, between commissioners on the part of the United States and this band of Indians, whereby said Indians agreed to relinquish all claims to certain tracts of land therein described. In article 2 of this agreement, it was said that certain allotments had been and were then being made to said Indians under the act of February 8, 1887, and it was agreed "that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations as to persons, location and area, as those heretofore made, and when made shall be confirmed," and it was provided that all such allotments should be taken on or before February 8, 1891, at which time any right to allotment should be deemed waived. By section 8 of the Indian appropria-

tion act, approved March 3, 1891, this agreement was ratified and confirmed and by section 11, it was provided:

That any of said Citizen Pottawotamie Indians who have not yet selected allotments may make such selections anywhere within the thirty-mile square tract of land in said agreement described, not already selected or occupied in quantities as therein provided, *And provided further*, That such selections may be made at any time within thirty days after the approval of this act, and not thereafter.

The Acting Commissioner of Indian Affairs, in his letter of March 17, 1891, divides applications for allotments under the act of 1872 into several classes with reference to the progress that had been made towards the issuance of certificates thereunder, but says in conclusion:

In all the foregoing cases selections were made by the parties before the ratification of the agreement.

The question now arises whether their selections can be completed by the issuance of certificates, or whether action in the matter of these selections is prevented by the passage of the act of March 3, 1891, ratifying the agreement with the Pottawatomies.

The selections thus made were, when made, authorized by law and the express authority of the President. The right to these allotments was initiated by the selection and should, in my opinion, be perfected, unless such action be clearly prohibited by said act of March 3, 1891. I find no such inhibition in that act and must therefore conclude that the selections in question should be allowed to be duly completed.

INDIAN LANDS—ALLOTMENT—SCHOOL SECTIONS.

MARY MCCOY.

The right of the Sac and Fox Indians to receive in allotment lands on which they had made valuable improvements prior to the ratification of the agreement of June 12, 1890, extends to lands in sections sixteen and thirty-six.

Secretary Noble to the Commissioner of Indian Affairs, April 8, 1891.

I acknowledge the receipt of your communication of 23rd instant, in which you refer to the case of Mrs. Mary McCoy, who claims to be a member of the Sac and Fox tribe of Indians in Oklahoma, and who states that she has for several years been improving a piece of land on the North Canadian River within the reservation, being in section 16, town 10, range 4, E.

You call my attention to article II of the Sac and Fox agreement, ratified by act of February 13, 1891, which provides for the allotment to these Indians "Anywhere in the tract of country hereinbefore described, except in sections sixteen and thirty-six in each Congressional Township," etc., and to article VI of said agreement which permits any citizen of the Sac and Fox nation who shall have made and owns valuable improvements on any lands in said reservation, he or she shall have the preference over any other citizen of said nation to take his

or her allotments so as to embrace said improvements, provided they shall be limited as hereinbefore provided, as to boundaries and area.

After consideration of the question presented I am of opinion that where a citizen of the Sac and Fox nation has, prior to the ratification of this agreement, made and owns valuable improvements on either sections sixteen and thirty-six in said reservation, he or she shall have the right to take his or her allotments so as to embrace said improvements, provided they shall be limited as to boundaries and area, as defined in article II of said agreement.

You will please instruct the allotting agents accordingly.

RIGHT OF WAY—ACT OF MARCH 3, 1875.

WADENA AND PARK RAPIDS R. R. CO.

The length of each section of road should be stated in the affidavit and certificate accompanying a map submitted for approval under the right of way act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 11, 1891.

With departmental letter of the 3rd ultimo, I returned to you two maps showing the definite location of sections of the Wadena and Park Rapids Railroad Company's line of road, filed under right of way act of March 3, 1875 and submitted with your letter of February 12, last. They were not approved because the length of the sections of road was not given.

The maps re-submitted with your letter of the 7th instant, are again returned herewith without approval as the defects have not been satisfactorily cured.

The length of each section of road, the approval of the map of which is desired under the above act, should be stated in the affidavit and certificate attached to the map in accordance with the form prescribed in the regulations under the act. This has not been done in this case. When the omissions have been supplied, the maps will be considered.

It is not sufficient that the length of the sections is inserted in the body of the map.

PRE-EMPTION—TRANSMUTATION—ACT OF MARCH 2, 1889.

LEWIS JONES.

A pre-emptor whose claim was duly initiated prior to the passage of the act of March 2, 1889, is entitled, under section 2 of said act to transmute his filing to a homestead entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 11, 1891.

I have considered the case of Lewis Jones on appeal from the decision of your office of January 15, 1890, rejecting his application to transmute his pre-emption filing No. 15,012, for the SW¼ Sec. 34, T. 13 S., R. 25 W., Wakeeney land district, Kansas, to homestead entry, under the second section of the act of March 2, 1889 (25 Stat., 854).

This application, made to the local officers December 11, 1889, was rejected by them for the reason that the records and the pre-emption declaratory statement No. 15,012, filed March 27, 1887, show that the applicant settled upon this land March 2, 1889, and not prior thereto.

On appeal, your office affirmed this ruling of the local officers, and the claimant, in appealing to this Department, filed an affidavit, bearing date December 11, 1889, in which he explained that an error had been committed in making out his pre-emption declaratory statement; that he was sick at the time and not able to give the business his personal attention; that a neighbor carried his papers to an attorney to make out the proper application, and, through error, the day of settlement was stated as March 2, 1889, instead of February 27, 1889. In his said affidavit the claimant averred that his improvements on said land, consisting of a house sixteen by twenty feet, a stable, and a well of water, estimated in value at $95, had all been completed prior to February 27, 1889; that he and his family moved into the house built on this land, with their household goods and chattels, on the 27th of February, 1889, and that they had resided there continuously ever since; that in addition to the improvements above mentioned, he had at the time of making his affidavit about forty acres of the land broken. These averments of the claimant are corroborated by two witnesses, and the attorney who prepared the pre-emption papers of claimant filed a separate affidavit, in which he explains how the error in the date of settlement occurred.

On the testimony presented in these affidavits, he asks to have the error corrected and his application to transmute his pre-emption filing to a homestead entry allowed.

No adverse claim has been filed, and the statements made in the above-mentioned affidavits are not controverted. The day of settlement should therefore be corrected and made to date from February 27, 1889.

Under the second section of the act of March 2, 1889 (25 Stat., 854), it is provided:

that all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act, may change such entries to homestead entries, and proceed to perfect their titles to their respective claims under the homestead law, notwithstanding they may have heretofore had the benefit of such law.

In the case of James Barry (10 L. D., 634), this Department, in construing that part of the act of March 2, 1889, referred to, used the following language:

Under the legislation with respect to homesteads and pre-emptions as it stood prior to the passage of the act of March 2, 1889, a settler was entitled to take a claim of one hundred and sixty acres under each law, and thus gain title to three hundred and twenty acres of land. Under the law as it now stands, pre-emptors within the proviso under discussion are entitled to transmute their claims into homestead entries, although they may have perfected one entry under the homestead law.

From the evidence found among the papers in the case, I am of the opinion that Lewis Jones initiated his pre-emption filing for the land in question prior to the passage and approval of the act of March 2, 1889, and should be allowed to transmute his pre-emption filing to homestead entry.

The decision of your office is accordingly reversed.

WAGON ROAD GRANT—SETTLEMENT CLAIM.

OREGON CENTRAL MILITARY WAGON ROAD CO. *v.* CANTER.

A claim based upon settlement and residence, existing when the wagon road grant of July 2, 1864, became effective, excepts the land covered thereby from the operation of said grant.

Secretary Noble to the Commissioner of the General Land Office, April 13, 1891.

This record presents the appeal of the Oregon Central Military Wagon Road Co., from your office decision of October 18, 1889, in the case of said company against Alexander F. Canter, involving the S. ½ SE. ¼ and SE. ¼ SW. ¼, Sec. 3, T. 30 S. R. 46 E., Lakeview, Oregon.

These tracts are, as stated by your office, within "the three mile granted limits of the grant by the act of July 2, 1864 (13 Stat., 355), the right of which attached" February 28, 1870, upon the filing by said company of the map showing the definite location of its road.

On February 28, 1874, Canter, alleging settlement June 15, 1873, filed pre-emption declaratory statement including said tracts, and the NE. ¼ NE. ¼ of Sec. 10, in the said township. He tramsmuted said filing to homestead entry May 15, 1880, and made final proof before the deputy clerk of the county court December 10, 1883, upon which final certificate was issued January 16, 1884.

On October 18, 1889, your office examined the case and rejected the company's claim to the land involved.

The company appeals from this action.

It appears from Canter's proof that he made settlement and established residence on the land July 1, 1864, that with his wife and five children, he has lived thereon continuously and that his improvements, valued at $4000 comprise a house twenty-four by twenty-four feet, "outhouses, corrals, fencing, &c., &c.," and about thirty acres cultivated for fifteen years.

The act of 1874, *supra*, grants to the State of Oregon to aid in the construction of a military wagon road between specified points "alternate sections of public lands designated by odd numbers for three sections in width on each side of said road," with the proviso that "any and all lands heretofore reserved to the United States by act of Congress or other competent authority be and the same are reserved from the operation of this act."

By the act of December 26, 1866 (14 Stat., 374) *supra*, the said grant was amended as follows:

> That there be, and is hereby granted to said State, for the purposes aforesaid, such odd sections or parts of odd sections not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the surveyor-general of said State, as shall be sufficient to supply any deficiency in the quantity of said grant as described, occasioned by any lands sold or reserved, or to which the rights of pre-emption or homestead have attached, or which for any reason were not subject to said grant within the limits designated in said act.

Your office found that when the company's right attached on the definite location of its road, the land was covered by Canter's "pre-emption claim" and that, consequently, under the "terms of the amendatory act of December 26, 1866 (14 Stat., 374)," it was excepted from the grant.

Counsel for the appellant insist that the land passed with the grant under the act of 1864, because that act did not except either the claim or the right of a pre-emptor therefrom, and that it so passed under the act of 1866, because the claim of Canter was not a pre-emptive right, and also, conceding such claim to be a pre-emptive right, because Canter is bound by the date of settlement alleged in his declaratory statement, and such date is subsequent to the attachment of the company's rights on definite location.

In the case of the Willamette Valley Wagon Road company *v.* Morton (10 L. D., 456), involving land in Oregon, the Department considered the wagon road grant to said State by the act of July 5, 1866 (14 Stat., 89). This grant was of "alternate sections of public lands designated by odd numbers three sections per mile, to be selected within six miles of said road," and was made subject to the same words of exception heretofore quoted from the act of 1864, *supra*.

It was held in the case cited that the grant by the act of July 5, 1866,

supra, being one of quantity to be selected within specified limits, the company's right to a specific tract did not attach until selection.

The defendant, Morton, settled on the land involved in that case, February 16, 1880, and made homestead entry, December 14, 1883. After his settlement he continued to reside upon and improve the tract until February 1, 1887, when he made final entry therefor. The tract was within the limits of a withdrawal ordered in June, 1883, for the benefit of the grant and the company applied to select it in June, 1884. The Department in affirming the action of your office rejecting such application ruled expressly that the land being vacant when Morton settled thereon, his settlement right then attached and while such right continued the land was excepted from the withdrawal and the grant.

In this case the land in question was vacant when Canter made his settlement thereon and the record shows that his inhabitancy continued up to and at the time when the company filed its definite location. The excepting clause being the same in the respective grants, the case at bar is, so far as the issue presented is concerned, identical with that cited in that Canter's claim, like that of Morton, was at the time when the grant became effective, based solely upon settlement and residence.

I must accordingly find that this land was excepted from the grant of 1864, *supra*, by Canter's settlement and residence and that his entry, if in other respects regular, should be passed to patent.

This disposition of the case renders it unnecessary to discuss the other questions so ably argued by counsel.

The decision appealed from is affirmed.

NIL DESPERANDUM PLACER.

Motion for the review of the departmental decision rendered, in the case above entitled, February 20, 1890, 10 L. D., 198, denied by Secretary Noble, April 13, 1891.

PRIVATE CLAIM—SURVEY—PRACTICE—REVIEW.

PUEBLO OF MONTEREY.

In determining the boundaries of a private claim the language of the decree of confirmation must be accepted, and followed, unless it is so ambiguous as to require extraneous aid to show its meaning.

The re-review of a departmental decision is only granted under exceptional circumstances, and on special application therefor, and can not be secured indirectly through subsequent proceedings in the case.

Secretary Noble to the Commissioner of the General Land Office, April 13, 1891.

The matter of the survey of the Pueblo lands of Monterey, California, was before this Department for the second time in 1887; and on October 4, of that year the official survey of tracts Nos. 1 and 2, as reported

by Surveyor-General Wagner, was rejected, and a new survey of said tracts ordered to be made in accordance with the views of the Department then expressed. (6 L. D., 179–190.) On review this decision was adhered to. (Ib., 656.)

A resurvey of the two named tracts was made by deputy J. H. Garber, and approved by Surveyor-General Pratt on July 26, 1890. This survey of tract No. 1 seems to be acquiesced in by the parties in interest, and as it appears to be in accordance with the departmental instructions, it should be carried into patent.

Mr. David Jacks, claiming to be the owner of tract No. 2, filed objections before your office against the approval of the survey of that tract. On September 19, 1890, after considering said objections, you approved the survey, and Mr. Jacks has brought the case here on appeal; and the city of Monterey, asserting claim to said lands, asks that the survey be approved.

When this survey was pending before your office, three general objections were filed in behalf of Jacks: (1) that the instructions to deputy Garber were wrong and necessarily led to an erroneous survey; (2) that said survey was not in conformity with the decree confirming the grant to the city of Monterey or the departmental decisions, and (3) that no adequate opportunity was given the claimant, Jacks to file objections in the office of the surveyor-general against the Garber survey of tract No. 2. To sustain the second objection, a number of ex parte affidavits were filed which will be more specifically referred to hereafter. On appeal here, ten errors are specified, all of which really go to the second objection made before your office, except the seventh specification, which goes to the first objection. The third objection is not pressed on appeal.

This seventh specification of error is that you failed to consider the fact shown by the affidavit of Jacks that Deputy Garber was governed in his construction of the instructions given him, by the opinion of a draughtsman in the surveyor-general's office as to the proper place of beginning. If the Garber survey is right, it should stand; if wrong, it should fall; and it seems to me that in this connection it is immaterial whose advice he sought or did not seek as to the proper discharge of his duty in that behalf. Therefore I see no error on your part in failing to express an opinion of an allegation so immaterial.

I proceed to a consideration of the principal question in the case, and in relation to which the other specifications of error are made.

The board of land commissioners confirmed the Pueblo lands of Monterey with the following boundaries:

> From the mouth of the river of Monterey in the sea to the Pilarcitos; thence running all along the cañada to the Laguna Seca, which is in the high road to the Presidio; thence running along the highest ridge of the mountains situated towards the Mission of San Carlos, unto Point Cypress further to the north, etc.

The eighth specification of error on this appeal is that you ignored the affidavit of E. L. Williams, who undertakes to define and translate

the Spanish words, used in the original grant, "Tomando todo la cumbre de la sierra," to mean "to run along the general course of the summit and over the peaks of the highest ridge of the mountain range." This differs, it will be seen, very materially from the language found in the decree of confirmation, behind which this Department has no right to go. The language of the decree has been twice considered and construed by this Department in its two previous decisions in this case. The statement of the proposition of the appellant, on this assignment of error, is sufficient to show that no error was committed in refusing to ignore the decree of the board of land commissioners and accept another translation of the original Spanish, even though it meets the contention of the claimant with singular fitness.

But if it were permissible to adopt another translation of the Spanish, there would be some difficulty in reconciling the translation of Mr. Williams with one made February 3, 1887, by Professor George Davidson, of the United States Coast and Geodetic Survey, at the request of Mr. Jacks, and filed by him in this case when it was pending here before. Professor Davidson translates the same words as Mr. Williams, to mean "taking throughout the crest line of the sierra." This differs materially from the translation of Mr. Williams, and means about the same thing as the official translation, found in the decree of confirmation. We are not permitted, however, to go into any inquiry of this kind, but must accept the language of the decree and follow it, unless it be so ambiguous us to require extraneous aid to show its meaning.

The point of contention now is as to the line from the Laguna Seca "thence running along the highest ridge of the mountains situated towards the Mission of San Carlos unto Point Cypress." In relation to this line it was said, on the former consideration of the case (6 L. D., 189):

> The plain call here to be gratified is the highest ridge of the mountains. . . . . The mountain ridge to be reached is not only the highest, but the main ridge of the mountains, ... and when reached, the main ridge is to be followed throughout its course to Point Cypress.

In running the lines of tract No. 2, it appears, by his field notes, that Deputy Garber ran, from the Laguna Seca, a straight line, a little west of south, to the southern boundary line of the patented rancho of that name, where he established the initial point, and northeast corner of tract No. 2. Thence he continues his line in the same direction to the point where he established the southeast corner of said tract, and he planted a stake marked M. C. No. 2, on the north side, and 2, on the south side. His field notes state, on page 35, that "This stake stands on the 'highest and main' ridge situated towards the Mission San Carlos." Having thus ascertained the highest and main ridge, the field notes show that the line runs thence south of west "along the summit of said ridge," with various mutations in the height of the same, until it encounters the northern line of the patented Meadows tract, when it

leaves the ridge and runs along, due west, with the line of the Meadows tract, until it encounters the ridge again, at station 9, which here runs nearly due north. The line then continues along the ridge, first in a northerly, then in a northwesterly course, until it encounters the south line of the patented Saucito Rancho, where is established the northwestern corner of tract No. 2. The course then turns to the east, and running, a portion of the way, as stated, "along the northern base of the main ridge," goes to the place of beginning.

This is the official and sworn statement of the deputy who made this survey; it shows that he ascended what in his opinion was the highest and main ridge of the mountains situated toward the old Mission of San Carlos, and, at nearly every station, it is stated that the line is continued along the ridge. It is true, the field notes show ascents and descents along this line, making a considerable difference, at points in the altitude of the ridge. But this is to be expected, as it would be rather unusual to find a mountain range of uniform height.

The appellant, Jacks, takes issue with the deputy surveyor, denies that, as matter of fact he located the line on the highest and main ridge of the mountains, and insists on the contrary that he adopted a ridge from one hundred to two hundred and fifty feet lower, which was followed with its sinuosities, while the highest ridge is clearly defined, continuous and nearly straight for the whole length towards Point Cypress.

If the allegations of appellant are sustained, it would seem that the survey should be set aside.

In order to sustain these allegations, he has filed the ex parte affidavits of himself, of A. T. Herrman, and several other parties. The witness Herrman was formerly deputy United States surveyor, but on this occasion was employed by the appellant Jacks to make a survey showing the correctness of his charge. The affidavit sworn to by Herrman is evidently prepared with much care and elaborated with great detail; indeed, the earnest language of portions of it read more like the argument of the skilled advocate than the careful statements of a disinterested witness. It is accompanied by photographs and a map marked "Ex B" specially prepared for the occasion, and intended to illustrate its statements more clearly.

In 1879, Mr. Herrman, then a United States deputy surveyor, by direction of the then surveyor-general of California, made a "Topographical map of the south line of the Monterey Pueblo lands and the location of tract No. 2," which map is referred to and commented upon by my predecessor in 6 L. D., *supra*. The same map is now before me with the field notes thereof by Herrman, and thereon is delineated the "summit line" of the mountain range, with its sinuosities, located almost exactly as it is by deputy Garber in the survey now under consideration. Herrman seeks to explain this co-incidence, in his recent affidavit, by saying that at the time of the former survey he received verbal instructions, on the ground, "to interpret the call of the 'high-

est ridge' as being an unbroken continuous ridge or water divide." In pursuance of these instructions, he now says he then adopted, not the highest ridge, but the water divide, and followed it to Point Cypress. He says he well remembers that in handing his report to Surveyor-General Wagner in 1879 he called his attention to the fact that "the water divide as run did not represent the '*highest ridge*' by any means."

In the official survey of Garber, the line run from the Laguna Seca, on the high road, is made to intersect what he calls the highest ridge at a point where under the former map of Herrman the altitude is 1128 feet, and under his last map—"Ex. B"—is 1130 feet, above the level of the sea, and there is established the southeast corner of tract No. 2. Herrman now says this is wrong, and that Garber should have established the beginning of the ridge line and southeast corner of said tract at a point considerably further to the south and east, marked on "Ex. B" as "A", at the altitude of 1350 feet; that thence, the red line, shown on "Ex. B" and south of the Gerber line, should be followed westward to the "three peaks," marked on said map as having an altitude of 1280, 1240, 1245 feet respectively, to the intersection of the north line of the James Meadows tract, at point marked 1100 feet; thence along the line of the Meadows tract, to the intersection of and with the said red line, where it turns northerly in the direction of the "Seven Pine Point," 950 feet high. This line would change somewhat the shape of tract No. 2, as surveyed in 1879, but would make its area apparently about the same. It is admitted by Herrman that this line will not be upon a continuous ridge, but will run by the shortest line from mountain peak to mountain peak of several mountains, at varying distances, and separated from each other by "deep passes and gaps," etc., but which mountains are claimed, at certain points, to be higher than the so-called "water divide" on which Garber is stated to have located his ridge line; and which mountains, it is also claimed, when viewed from a point to the east, appear to trend in the direction of Point Cypress, to be the highest and a continuous range of mountains. For the purpose of illustrating the truth of this last statement, the photographs are filed; but this, so far as I can see, they fail to do, presenting mostly confused scenes of mountain landscape, amid which the well-defined "highest ridge" is not distinguishable, even with Mr. Herrman's accompanying notes of explanation.

The right to run this ridge line from mountain peak to mountain peak was urged before the decision reported in 6 L. D. was made, and it was repeated on the motion for review of that decision. In both instances the Department declined to accept it as the proper theory upon which the survey of the ridge line should be made.

In response to that contention, it was then said, on page 189 of the reported decision:

> The mountain ridge to be reached is not only the highest but the main ridge of the mountain . . . . and when reached, the main ridge is to be followed throughout its course to Point Cypress.

I observe that instead of following the mountain ridge in its course and curves, the official survey delineates the southern boundary of No. 2 as a straight line, it being sometimes north and sometimes south of the ridge, as laid down by Herrman. This is without any authority whatever, and must not be. The official survey must be in accordance with the line described in the decree; that says 'running along the highest ridge of the mountains . . . . unto Point Cypress; and along the highest ridge the line must run.

And on review this ruling was approved and quoted as holding that the straight line should not be adopted but the survey must follow the sinuosities of the mountain ridge.

It is therefore plain that if a survey be made in accordance with the views of Herrman, as now expressed, the former decisions in the case would necessarily be overruled and a survey adopted now for the same reason that the survey then under consideration was rejected. It is apparent, therefore, that this appeal is in effect an effort to obtain indirectly a re-review of the former judgment of the Department—a proceeding only to be permitted under exceptional circumstances and on special application,—and certainly not to be favored when sought by indirection, as in the present instance.

That there may be no mistake on this point, the following extracts from Hermann's last affidavit are made. After an earnest argument in behalf of the correctness of appellant's contention, he says:

Thus the 'highest ridge' called for in the decree, viewed from point A. on map, altitude 1,350 feet, and as verified by photograph No. 1, looks like an almost unbroken and continuous ridge, ending in the blue haze of the Point Cypress mountains; but by following it from beginning to end, you would soon find your mistake; that deep passes or gaps have to be crossed completely cutting the ridge, and requiring in each a deep descent, and a correspondingly steep and high ascent to get to the ridge. There are five or six such points on our 'highest ridge,' as I know by actually traveling over it a good many times from end to end.

After further arguing the propriety of this proposed line, he states how he would run it, as delineated on his new map, "Ex. B:"

Upon these grounds I should draw the boundary of the Monterey Pueblo differently from the Garber survey. After leaving the Laguna on the Monterey Road, I should first make point A. altitude 1,350. I should then make the 'three peaks,' then the 'highest ridge,' altitude 1,246, then the Seven Pine Point, then the Lomas Atlas, then the peaks near the crossing of the Carmel Road, and then Pt. Cypress.

Confessedly here, without regard to the "highest and main ridge" or the sinuosities thereof, as directed by the Department in its two previous decisions, Herrman proposes to run the line, as shown on his new map, from "Point A" to the "three peaks;" thence to the point marked "highest ridge;" thence to the "Seven Pine Point." Or, in other words, in a straight line from mountain peak to mountain peak, of certain mountains which, because perhaps higher than others, are claimed in this manner to constitute the "highest ridge," without regard to the other and more important requirement that it must also be the "main ridge."

This testimony of Herrman conclusively shows that the line which

he now says is the only true and proper one, and which, because of its existence, makes the Garber line improper, is the line which this Department has twice said can not be accepted.

The testimony, either from memory or as a matter of opinion, as expressed in the affidavits of the other witnesses, does not have much weight, in my judgment, where it conflicts with the field-notes of the surveyor, who ran the lines, and whose actual personal and official ascertainment of the physical features of the country along the line of the survey, are made with an exactitude acquired by experience, aided by professional skill and the appliances of science. Correct statements of these features are not left to memory alone, with its uncertain and often misleading impressions; but are entered at once upon the field-notes at the time of observation or ascertainment, thus presenting to the mind as accurate a picture, taken on the spot, as may be illustrated by words. Besides, testimony of the same character, substantially, as that contained in said affidavits, by some of the same, and other affiants, was before the Department when the former decisions were rendered.

Examining the field notes with care, and accepting the statements therein as those of a sworn officer, it would appear that said survey was made in accordance with the former decisions of this Department, and in strict compliance with the decree of confirmation, and therefore should be approved.

In view of the facts of the case, your judgment is affirmed, and the survey is approved and will be carried into patent.

CONTEST—SUSPENDED ENTRY—DEFECTIVE SURVEY.

EPPS *v.* NEWCOMB.

Contest proceedings should not be entertained against an entry that is suspended pending an investigation of the township survey.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 14, 1891.

I have considered the case of Silas M. Epps *v.* William H. Newcomb, on the appeal of the latter from your decision of September 10, 1889, holding for cancellation his homestead entry for the NE. ¼, Sect. 26, T. 12 N., R. 1 E., Humboldt, California, Land District.

On June 16, 1885, Newcomb made homestead entry for this land, and on February 24, 1887, Epps filed an affidavit of contest against the same, alleging abandonment by the entryman and that he had changed his residence therefrom for more than six months, and that he had not settled upon and cultivated the tract as required by law.

Hearing was, upon notice, duly had and the local officers recommended the entry for cancellation. From this decision, Newcomb ap-

pealed. On September 10, 1889, your office affirmed said decision, from which he appealed to this office.

The records of your office show that the township plat of survey was suspended in February 1886, and that such suspension has not been removed. It further appears that this Department, in a letter of February 15, 1888, directed your office to take no action upon contests against homestead and pre-emption entries situate in certain townships where the surveys were suspended, including this one, where the allegations are simply failure to comply with the laws as regards residence and improvements, until the surveys have been corrected or the suspension removed.

In the case of John Buckley (10 L. D., 297) this matter was discussed, and your action refusing to allow Buckley to contest the homestead entry of Tidenckan was approved; but the application was subsequent to the letter of the Department. In Bond *v.* Watkins (12 L. D., 56) an entry in the same township in which the land in controversy lins, was held for cancellation by your office on June 5, 1889. The hearing before the local officers was, however, on May 31, 1887. Your office decision was reversed, and it was held that :

it was the duty of the local officers upon receipt of your directions "suspending all entries and disposals of any kind," to have refused to act upon the contest proceedings of Bond.

The reasons for this decision are applicable to the case at bar.

Your decision is accordingly reversed.

REGISTERS' AND RECEIVERS' FEES—INDIAN LANDS.

C. C. JONES.

In accordance with the general statutory provision, the fees paid under the act of 1882, on Omaha Indian declaratory statements, must be reported to the General Land Office, as a part of the maximum amount allowed the local officers on account of salary; and the disposition of such fees is not affected by the amendatory act of May 15, 1888.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 17, 1891.

I have considered the appeal of C. C. Jones, ex-register of the district land office at Neligh, Nebraska, from the action of your office under date of February 5, 1890, requiring him to render an account for fees collected on Omaha Indian declaratory statements filed in December, 1889.

It appears in this case that the appellant transmitted to your office his account current and fee statement for December, 1889, as also his account of salaries and commissions for the quarter ending December 31, 1889, which were returned to him, with the statement that he re-

ported fifty-two filings on Omaha Indian lands, but did not report any fees thereon, and, furthermore, required him to correct his statement and report the proper amount received in such corrected statement.

From this action appellant appeals on the ground that, under the act of August 7, 1882 (22 Stat., 341), the local officers are entitled to the fees collected in said cases.

The act above referred to, provides for the sale of a part of the Omaha Indian reservation in Nebraska, and prescribes the manner such sale shall be made.

Section 10, of said act provides:

> That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay $2, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

The act approved August 4, 1886 (24 Stat., 239), regulating the salaries of registers and receivers provides:

> That hereafter all fees collected by registers and receivers from any source whatever, which would increase their salaries beyond three thousand dollars each a year, shall be covered into the Treasury, except only so much as may be necessary to pay the actual cost of clerical services employed exclusively in contest cases; and they shall make report quarterly, under oath, of all expenditures for such clerical services, with vouchers therefor.

This provision was also re-enacted in the act of March 3, 1887 (24 Stat., 526).

By act of May 15, 1888, (25 Stat., 150) Congress provided for the relief of the Omaha Indians in Nebraska, and extended the time of payment to purchasers of said Indian lands. Section two of said act provides: "That the act above mentioned, (August 7, 1882) except as changed and modified by this act shall remain in full force.

The appeal in this case raises the following questions:

1st. Does the act of 1886, above referred to, require the fees paid under the act of 1882, for Omaha Indian lands, to be reported to the General Land Office as a part of the maximum amount allowed the local officers on account of salary?

2nd. If so, does the act of May 15, 1888, in any manner affect the disposition of such fees?

The act of August 7, 1882, was of a special nature passed for a special purpose, and therefore, as there was no general provision of law, whereby the local officers could be compensated for services in cases arising under said act, Congress very properly made provision in the law, whereby said officers would receive compensation.

In accordance with the provisions of act May 15, 1888, the local officers at Neligh reported to this Department, lists of the Omaha Indian lands in which the parties had made default in payment of interest, or to prove up, or which had not heretofore been sold, and on August 31, 1889, this Department directed that the lands be sold. The appellant claims that the fifty-two filings in question were made under

said act of 1888, subsequent to the general acts of 1886 and 1887, and therefore he should not be held to account for the fees paid on said filings.

It will be observed that said acts of 1886 and 1887, provide that *hereafter* all fees collected from *any source* which would increase the salaries of registers and receivers beyond $3,000, per annum shall be covered into the Treasury. There does not seem to be a chance for any doubt on the meaning and intent of the acts last referred to; the language is not ambiguous or doubtful, but full, clear and explicit. It was evidently the intention of Congress to restrict the salaries of local officers to the maximum of $3,000, and to require that all fees received in excess thereof, from any and all sources, be turned into the Treasury.

The act of May 15, 1888, does not, in my opinion, operate in any manner to affect the case. The filings, upon which appellant excepts to the ruling laid down by your office, are, so far as fees are concerned, not unlike any other filings, and therefore come within the purview of the acts of 1886 and 1887.

The decision of your office is therefore affirmed and the record returned herewith.

RAILROAD GRANT—EXTENSION OF LIMITS.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

In accordance with the ruling of the Supreme Court in the case of the St. Paul, Minneapolis, and Manitoba Ry. Co. *v.* Phelps, a withdrawal is directed of the lands granted in aid of the main line of said road, and now lying within the State of North Dakota.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1891.

I am in receipt of your letter of the 23rd inst., forwarding for my approval a diagram showing an extension of the limits of the grant for the St. Paul, Minneapolis and Manitoba railway company, "within the State of North Dakota," in conformity with the decision of the supreme court of the United States in the case of said company against Ransom Phelps, decided December 22, 1890.

You state that the limits heretofore established and shown on the diagrams on file in your office restrict the grant to the State of Minnesota.

The Phelps case, *supra*, involved the E. ½ SE. ¼, Sec. 13, T. 132, R. 48, North Dakota, and was tried on an agreed statement of facts. It was admitted that the tract is within six miles of the line of road as definitely located under the granting acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), but it was contended that the grant did not extend to any lands now in the State of North Dakota, though such lands may have been in the Territory of Minnesota at the date of the grant.

The court failed to concur in this view, but held that lands within the limits of the grant for said road, lying within the territory of Minnesota at the date of the grant, though now in North Dakota, were subject to the operation of the grant, and that the Northern Pacific railroad under which Phelps claimed, never had any title to the land in controversy. The tract lay also within the indemnity limits of the grant for that road.

The diagram submitted shows the lands in North Dakota affected by this decision. You propose to instruct the local officers to withdraw from entry any vacant lands within the granted limits, as shown by the diagram, if any such remain. You state, however, that with the exception of a small portion included within the indemnity limits of the Northern Pacific road, "about all the odd-numbered sections" included within such limits have been disposed of by the United States under the general land laws, and in most cases patents have issued; that the right of the company attached on May 10, 1869, and that the dispositions made are long subsequent thereto.

The terminus of the road is at Breckenridge, Minnesota, a town lying on the Bois de Sioux River, between said State and North Dakota.

The line forming the terminal limit of the grant, formerly established, runs in a north-easterly direction from Breckenridge. By continuing this line through the terminus of the road into North Dakota, you fix the terminal limit now proposed.

The only objection to this line is the suggestion of your office that it is questionable whether the tract actually litigated in the Phelps case, *supra*, would be included within the limits of the grant so fixed. On this point you say that in view of the opinion of the court, you have resolved the doubt "to coincide with the opinion of the court, all parties to the suit having agreed to such a condition." The question seems to be merely whether the terminal line should pass north or south of the land involved in the Phelps case. In view of the decision of the court, I approve your action in that matter.

You suggest that lands within the indemnity limits be not withdrawn "in view of the repeal contained in section 4, of the act of September 29, 1890, commonly known as the forfeiture act." Said section repeals the provisions contained in certain grants (among them the one in question) requiring the Secretary of the Interior to reserve lands within the indemnity limits thereof.

This suggestion is approved and also the withdrawal as proposed.

You state that the settlers within the grant and those claiming under them are "at the mercy of the company," and that "it would seem to be a case calling for legislative action." Should it appear, when all the facts are before you, that such action is necessary you will please submit such suggestions in the premises as may seem proper, together with the facts bearing upon the question.

BRANCH LINE.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 18, 1891.

I am in receipt of your letter of the 28th ult., forwarding for my approval a diagram showing an extension of the limits of the grant for the St. Paul, Minneapolis and Manitoba Railway Company, St. Vincent Extension, into the State of North Dakota, in conformity with the decision of the supreme court in the case of said company against Ransom Phelps, decided December 22, 1890 (137 U. S., 528). You call attention to the fact that you have already withdrawn from entry the odd numbered sections within the ten-mile primary limits of the grant for the main line as extended into the Dakotas, which action was authorized by departmental letter of February 3, 1891, on the authority of said Phelps case. That letter also approved a diagram showing the limits of said grant along the main line of the road as extended under the Phelps case.

That case held that an odd numbered section lying within six miles of the main line of said road though within the State of North Dakota passed to the company under the grant. The St. Vincent Extension or branch line, provided for in the original act of March 3, 1857 (11 Stat., 195), was authorized to adopt its present location by act of March 3, 1871 (16 Stats., 588), which provided:

> That the Saint Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present lines by existing laws.

The decision in the Phelps case seems applicable to the branch as well as the main line.

The diagram is accordingly approved, and you are authorized to order a withdrawal within the primary limits of the branch line, as shown thereon.

The suggestions in said letter as to proposed negotiations with said company, under Senate Resolution of February 28, 1891, looking to an adjustment of the conflicting claims of said company and settlers within said limits, will be considered in another communication.

DESERT LANDS—ENTRY BEFORE SURVEY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 20, 1891.

Registers and Receivers, United States Land Offices.

Your attention is called to Departmental decision of October 31, 1890, (11 L. D., 414) in the case of C. B. Mendenhall.

Final proof must be made on all desert land entries, when sought to be perfected under the act of March 3, 1877, (19 Stat., 377) within three years, and when sought to be perfected under the act of March 3, 1891, within four years from date of entry. Proof on entries made prior to August 1, 1887, can be made without publication of notice to do so. 9 L. D., page 672. Publication of notice of intention to make final proof, must be made in all cases of entries instituted since that time. When the land has not been surveyed, the notice must contain a description of the land as nearly as possible without a survey, by giving, with as much clearness and precision as possible, the locality of the tract, with reference to the already established lines of survey, or to known and conspicuous landmarks, so as to admit of its being readily identified.

When final proof has been submitted on an entry upon unsurveyed land, if no objections exist in your office, you will approve the same and forward it to this office, without collecting the purchase money and without issuing the final papers. When the land shall have been surveyed, you will require the party to make proof, in the form of an affidavit, corroborated, showing the legal subdivisions of his claim. When this has been done you will correct your records to make them describe the land by legal subdivisions, and, if the proof submitted to this office has been found satisfactory, and if no objection exists in your office, you will issue final papers upon payment of the amounts due.

Very respectfully,

F. H. CARTER,
Commissioner.

Approved.
GEO. CHANDLER,
Acting Secretary.

APPLICATION TO ENTER—APPROPRIATION.

WILLIAM C. RUNYON.

An application to enter must be rejected where the land is covered by the prior entry of another and embraced within a pending contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 20, 1891.

I have considered the appeal of William C. Runyon from the decision of your office, dated June 16, 1890, rejecting his application to make homestead entry for lots 11, 12, 13 and 15, Sec. 5, T. 11 N., and lot 4, Sec. 32, T. 12 N., R. 3 W., Guthrie, Oklahoma.

The application was made on January 26, 1890, and rejected by the local officers for the reason that it conflicted with the homestead entry of Colonel Parker, made April 24, 1889, for N. ½ SE. ¼, SE. ¼ SE. ¼, and lots 3 and 4, of said section 32, with the homestead entry of John Gayman made April 25, 1889, for lots 2, 3, 12, 13, 14, 15 and 18, of said section 5, and with the homestead entry of John A. J. Baugness, made April 26, 1889, for lots 4, 5, 6, 7 and 11, of said section 5.

Your office, by said letter, affirmed that action on the ground that "the land in question, being covered by existing entries, was not subject to entry by any other person."

Said letter further states that upon examination it appears that said entries of Parker, Gayman and Baugness, were improperly allowed for the reason that the land entered in each case, lies on both sides of a meandered stream, the North Fork of Canadian River; that Baugness' entry was suspended by your office on February 17, 1800, and that appeal from such action is now pending before the Department.

Said letter then suspends said entries of Parker and Gayman and directs that each of these claimants be notified to elect within thirty days "which portion of his claim he will relinquish, so that the land remaining will be confined to one side of such stream;" and that

should either of the parties desire, he may relinquish his entire entry, in which event an application to make a second entry for a specific tract will receive due consideration. If either of the entrymen fail or refuse to take action within the time specified, his entry will be held for cancellation.

It appears that on July 15, 1890, Parker relinquished said lot 4, being the portion of his entry in conflict with Runyon's application. The entries of Gayman and Baugness are still of record as far as appears from this record. Appellant alleges that on September 29, 1890, your office held for cancellation Gayman's entry but it is not alleged that any finality has been reached in the matter.

It must be apparent that Runyon's application could not have been allowed when made, for the reason that the tracts were covered by other entries. Such entries are not necessarily void; at most the entryman would be allowed to elect what part of his entry, in a compact body, he

would retain. In any event, that question is not presented by this record. The only matter here now is the disposition of the application. The entries may possibly not be disturbed.

It appears from the letter of the local officers transmitting the record that contests were filed against Gayman's entry on June 5, July 23, August 23, and September 2, 1889, and against Baugness's entry on June 6, July 24, and August 7, 1889 and that these contests are pending and undisposed of.

As the tracts in question were covered by prior entries and, moreover, embraced in said contests, said application was properly rejected. See Ryan *v.* Central Pacific R. R. Co. (12 L. D., 11).

Said decision is, accordingly, affirmed.

RAILROAD LANDS—FORFEITURE ACT OF JANUARY 31, 1885—RESIDENCE.

JOHANNES *v.* HOBSON.

The preferred right of an actual settler to enter railroad lands embraced within the forfeiture act of January 31, 1885, is not defeated by the fact that he was not living on the land at the passage of said act, or that he had informally agreed to sell his improvements, in the event that the grant was not forfeited, it appearing that he had resided on said land for a period of ten years, and that his absence therefrom was occasioned by the illness of his wife.

Secretary Noble to the Commissioner of the General Land Office, April 21, 1891.

The case of Charles Johannes *v.* John W. Hobson is here on appeal of the former from your office decision of September 3, 1889, sustaining Hobson's homestead entry for the E. ½ SW. ¼ and S. ½ NW. ¼, Sec. 33, T. 5 N., R. 7 W., Oregon City, Oregon.

The tract was included in a grant by Congress to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon.

The act making the grant was approved May 4, 1870. November 21, 1873, Hobson received a certificate from the railroad company certifying that he should have the first privilege of purchasing when the land was placed on the market by said company.

Under this guaranty he immediately went upon the land and commenced to improve it.

At that time the land was remote from a settlement, and accessible only by means of a trail through a thickly wooded country.

He, however, continued to improve it and in 1877, moved his family to the home which he had hewn out of the wilderness. He continued to reside there with his family until May, 1884, when he was compelled by reason of his wife's failing health to remove from the land to Centralia, W. T., where she could receive medical treatment, there being

no physician within thirty miles of his home, the charge for a medical visit being fifty dollars.

At this time he had cleared and cultivated about a hundred acres of the land, made extensive improvements, and had a very comfortable home.

The land was still claimed by the company, the grant not having been declared forfeited. When he found that his wife's health made it necessary for him to remove from the land he sold his stock and most of his household effects, and proposed to Johannes, the contestant, that he should take the place for three years, and have all he could raise on it during that time.

They went to Astoria to have a contract drawn, containing the various details of their agreement.

The paper was drawn up and signed in duplicate by Hobson, but at the last moment and just as Hobson was compelled to leave on the boat for Centralia, Johannes refused to sign it, but retained a copy which had the signature of Hobson affixed as aforesaid. He, however, took possession of the land and was in possession of it at the time Hobson submitted his final proof, as hereafter stated, and also at the time of the hearing.

Subsequent to this negotiation between Hobson and Johannes, to wit, on January 31, 1885, by an act of Congress (23 Stat., 296), the grant to the company so far as the land in controversy is concerned, was declared forfeited for non-construction of the road within the time limited by the grant.

The forfeiting act also provided

> That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited and 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.

Under this act Hobson on August 20, 1885, published notice of his intention to make homestead proof for the land before the clerk of the county court of Clatsop county, at Astoria, naming Johannes (with three others) as one of his witnesses thereto.

In pursuance of such published notice he submitted his proof October 6, 1885, and received his final certificate October 12, same year.

August 26, 1886, nearly a year subsequent to the date of Hobson's proof Johannes filed a contest against the same alleging that Hobson was not a resident upon the land at date of final proof; that he had abandoned the land in May, 1884, and had never resided thereon since; that he had sold out all his interest to him (Johannes), and that he had been residing on the land and improving it as his own ever since said

24th of May, 1884, and therefore Hobson was not an actual settler in good faith on the land on January 31, 1885, the date of the act of forfeiture.

The material question for consideration in determining the rights of these parties, is the nature of the negotiation, deal or understanding between them when Johannes took possession of the land.

The written contract referred to not having been signed by Johannes, cannot be regarded as binding upon either, but I think it may properly be considered for the purpose of throwing light upon the transaction, and arriving at a correct conclusion as to the real purpose and intent of the parties, in this transaction. That instrument is in evidence and provides as follows:

That for and in consideration of the sum of eight hundred dollars, to be paid as hereinafter set forth the said party of the first part hereby sells, transfers, and assigns and by these presents does sell, transfer and assign unto the said party of the second part, his heirs, administrators or assigns forever, all that certain piece of property lying and being situate in Clatsop county, Oregon, described as follows: to wit, The east ½ of the S. W. quarter and the south ½ of the N. W. quarter of Sec. 33, T. 5 N., R. 7 W., Willamette meridian, containing 160 acres. The same being known as the J. W. Hobson claim. The conditions of this agreement are such that if the said party of the second part shall well and truly pay to the said party of the first part the said sum of eight hundred dollars within three years from the date of this instrument, with interest thereon at the rate of ten per cent per annum, then the said party of the second part shall have all the improvements now upon said claim and all of the right, title and interest of the said party of the first part in and to said claim, and it is expressly understood and agreed that the said party of the first part, shall have the privilege of proving up on said claim at any time prior to the expiration of said agreement, and in event of which this instrument to be null and void, and if the said party of the first part shall prove up on said claim at any time before the expiration of this agreement, he shall give the said party of the second part sixty days written notice thereof. And it is expressly understood and agreed, that if the said party of the second part, his heirs, executors or assigns shall fail to pay unto the said party of the first part, his heirs or assigns said sum of money or the interest thereon then the said party of the first part his administrators, executors, heirs, or assigns are empowered to enter upon and take said land without recourse. But if the said party of the second part shall well and truly fulfill all the requirements and conditions of this agreement, then he, his heirs, executors, administrators or assigns shall be entitled to full enjoyment and possession of said claim and the improvements thereon, together with all the right, title and interest in and to said property, belonging to the said party of the first part.

The evidence taken at the hearing shows that this agreement was originally drawn by the parties themselves, that after several interviews, they both went before a lawyer in Astoria, and employed him to embody their contract in legal phraseology, which was done as above set forth, and signed by Hobson. That he had only barely time to catch the steamboat on which his goods were loaded, after signing the same. That at the last moment Johannes refused to sign it because, as he said he didn't propose to be caught in a trap. Johannes in his testimony says the claim he objected to was that which allowed Hobson to

submit proof on this land at any time within three years from the date of the instrument.

The evidence also shows (and this is admitted by Hobson to be true) that he, Hobson, told several of his neighbors, that he had sold out to Johannes.

His explanation of this is, that he expected the grant to the railroad to be forfeited, and in order that the land might not be jumped by some claimant in his absence he, through an understanding with Johannes, gave out that he had sold to him, thinking that thereby he might escape the expense and annoyance of a contest with some unforeseen adverse claimant or "jumper". Johannes denies this and insists that he bought his improvements and all his rights in the land by a *bona fide* purchase. He admits that he has never paid anything on the land because by this agreement payment is not due until three years after May 27, 1884.

Upon a careful consideration of all the evidence in the case I am clearly of the opinion that Hobson's version of the transaction is the true one.

The written contract, which though not signed by Johannes is about the only guide I have by which to arrive at their understanding, clearly shows that Hobson only designed to part with the land in the event the company's title thereto was not forfeited within three years, for he expressly stipulates therein that he shall at any time be allowed to make proof on sixty days' notice to Johannes. Now he could only make proof in the event of the forfeiture by the company, for the land was within the limits of their grant and became the absolute property of the company upon compliance with the conditions of the granting act. Believing that the company might forfeit their rights, he provided that he might in that event, make proof and receive title to the land from the government. Johannes was present when he made his proof and though not called upon as a witness thereto, he does not appear to have made any objection to the same, but waits until nearly a year thereafter to charge Hobson with what, if true, he had full knowledge of at the time Hobson submitted his proof.

Such action on his part is not, in my judgment, consistent with good faith and fair, straightforward dealing.

The improvements are shown in the evidence to be worth from twice to four times as much as the price named in the contract signed by Hobson, and it is clearly shown that the health and perhaps life, of Hobson's wife, depended upon his going where she might receive medical treatment.

In his dire necessity he takes his friend and neighbor into his confidence, offers him the use of his farm free for three years, if he should not in the meantime wish to make proof, and at the end of that time allows him, in the event the land is then claimed by the railroad, to purchase his improvements at a price greatly below their real value.

All the evidence in my judgment, goes to show that Hobson never intended to abandon the land should the same become forfeited and open to settlement.

By the terms of the act of forfeiture he is allowed credit for his residence and improvements while on the land, by agreement with the company, and when he left it for the benefit of his wife's health, he had been in possession and made his residence thereon for ten years, double the number required by the homestead law.

I am of the opinion that he had not abandoned the land, nor disposed of his rights therein, at the time of submitting his proof, and that his absence therefrom, as shown in the proof, is excusable, and that Johannes' contest was an afterthought prompted mainly by the knowledge that his neighbors would testify that Hobson had admitted that he had sold out to him.

Entertaining this view of the evidence, every consideration of justice and right demands that the contest should be dismissed, and Hobson's entry sustained, which is accordingly ordered.

The decision of your office is affirmed.

UNLAWFUL ENCLOSURE—SETTLEMENT RIGHTS.

STOVALL *v.* HEENAN.

A settlement made without violence within the unlawful and unauthorized inclosure of another, is valid and will not be defeated by such unlawful occupancy.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 22, 1891.

I have considered the case of Francis M. Stovall *v.* Morris J. Heenan, on appeal by the former from your decision of July 18, 1889, suspending his proof and holding his homestead entry subject to the right of the latter to make proof on his pre-emption declaratory statement for lots 3 and 4, and S. ½ NW. ¼, Sec. 1, T. 26 S., R. 12 E., San Francisco, California, land district.

On March 30, 1886, Heenan filed pre-emption declaratory statement for this land, alleging settlement on the 25th of said month.

On May following, Stovall made homestead entry for the same land, and on November 25, 1886, offered final proof, upon due notice, and Heenan having been specifically notified, appeared and protested against the same and offered evidence as to his own settlement and residence.

The local officers decided in favor of Stovall and recommended the cancellation of Heenan's pre-emption filing.

From this decision he appealed and you reversed the same and decided the case as before stated.

From this decision Stovall appealed to this Department.

The testimony shows that he occupied a pre-emption claim adjoining

this land, and while residing there, he fenced a portion of the land in controversy, cultivated a part of it, erected a house on it in May, 1885, and tried to prevent the same from being entered or filed upon until he could make proof in support of his pre-emption claim which he could not do until April 6, 1886. On that day he submitted his proof and immediately began making preparations to move upon the land in controversy. He claims to have moved on this tract in April, but the testimony tends to show that he did not locate there until May 1886, since which time he has lived thereon with his family and cultivated a portion of the land.

Heenan went upon the land on March 25, 1886, and arranged some timbers for the foundation of a house. On the 5th of April, following, he moved a house, that he had bought, on the land, and put in it a stove and cooking utensils, a bed, chair, bench, table, dishes, etc., and began his residence. Soon thereafter this house was burned. He rebuilt immediately and has, although absent during short intervals on business and to work for the neighbors, maintained a continuous residence thereon. He has erected a stable for his horses, which he has kept there much of the time, has fenced a portion of the land, broken and cultivated a few acres, and given evidence at all times of good faith, and an honest effort to comply with the requirements of the law.

Counsel for Stovall earnestly insist that because their client had placed a fence around this land, that Heenan was a trespasser when he went upon it, and thus being a wrongdoer, could acquire no settlement rights. Furthermore, that the land had been withdrawn in 1872 for the benefit of the Atlantic and Pacific Railroad company and so remained until the order of March 23, 1886, promulgated April 8, 1886, revoked the withdrawal; that Stovall enclosed the land with a view to purchasing it of the railroad company, when it should get title, and counsel seriously claim that such improvements, claimed to be of the value of $500 to $750, gave him some advantage over Heenan.

Unfortunately for this argument, there is no testimony tending to show that their client fenced the land with any such thought or purpose. He says that in May, 1885, he built a small house on the land, and says it was done because he thought of putting a "chicken ranch" on the land and when asked if it was not a fact that he built the house in 1885 with a view to taking the land as a homestead after he had proven up on his pre-emption, he answered—

> I calculated to take it as a homestead after I made final proof on pre-emption.

The preponderence of the evidence shows that Stovall fenced this land and built the cabin on it, not under any permit from the railroad company or with intention of buying it of the company, but solely to prevent it being settled upon and entered by other persons, until such time as he could take it. His acts were in violation of the law, (Act of February 25, 1885, 23 Stats., 321), and in disregard of the President's

proclamation of August 7, 1885. In this proclamation the President refers to the act above cited, and says, inter alia:

I . . . do hereby order and direct that any and every unlawful inclosure of the public lands maintained by any person, association or corporation, be immediately removed, and I do hereby forbid any person, association or corporation from preventing or obstructing by means of such inclosure . . . any person entitled there to from peaceably entering upon and establishing a settlement or residence on any part of such public land which is subject to entry and settlement under the laws of the United States, &c.

Stovall was a wrongdoer and acquired no right by his fencing, breaking or cultivation.

Heenan went upon the land without any violence,—he made a settlement, built a house and established his residence within an enclosure erected in violation of law. In the case of Horton *v.* Westbrook (9 L. D., 455), the case of Stoddard *v.* Neigle (7 L. D., 340), was followed, and it was said,—

A settlement made without violence within the unlawful and unauthorized enclosure of another, is valid and will not be defeated by such unlawful occupancy.

It is quite clearly shown that Heenan was prior in time as to the matter of settlement and he is superior in right.

Your decision is affirmed.

RAILROAD GRANT—EXPIRED FILING—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* KRANICH ET AL.

On the expiration of a pre-emption filing, without proof and payment, the presumption arises that the claim under such filing has been abandoned.

A bare allegation of settlement at a date prior to the definite location of the road, is not sufficient to work an exception under the grant, where the declaratory statement containing such allegation is not filed until after the rights of the road have attached.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1891.

The record in the case of the Northern Pacific Railroad *v.* Ernest Kranich and William Hogan is before me, and shows that, on September 1, 1868, Edward Jordan filed pre-emption declaratory statement, alleging settlement the day before, for the SE. ¼ of the NE. ¼, Sec. 23, T. 10 N., R. 4 W., Helena, Montana.

September 6, 1869, Josephus L. Patterson made similar filing for the same tract, alleging settlement as of date of filing.

Andrew W. Johnson also filed declaratory statement for the same April 26, 1872, alleging settlement the day before.

Ernest Kranich, one of the claimants herein, made pre-emption filing for the same July 24, 1885, alleging settlement thereon in April, 1879.

William Hogan, the other defendant, filed for the same April 14, 1886, alleging settlement the same date.

April 6, 1886, Kranich gave notice that he intended to make proof before the local officers at Helena, on May 14, of the same year, at which date Hogan appeared and contested Kranich's claim.

Testimony of witnesses was taken on both sides, and the local officers rejected Kranich's proof for non-compliance with the pre-emption law and for the reason that he had left land of his own to settle on the tract in controversy.

Kranich duly appealed to the Commissioner of the General Land Office.

The tract in controversy is within the granted limits of the Northern Pacific Railroad Company, and, while the appeal was pending before you, to wit, on April 20, 1888, the said company applied to file list of selections No. 141, which embraced this tract. The register and receiver refused to allow this land to be selected, because it was covered by the pre-emption filing of Andrew W. Johnson, which was made April 26, 1872.

Thereupon, the company appealed, and your office, by letter of December 5, 1889, affirmed the action of the local officers in their rejection of the company's claim, but rendered no judgment as to the respective claims of Hogan and Kranich.

From this decision of your office the company now further prosecutes its appeal to this Department.

The map of general route was filed in your office February 21, 1872. At that date the pre-emption filings of Jordan and Patterson were of record.

Patterson's filing had not then expired and was presumptively valid. It therefore excepted the tract from the operation of the withdrawal on general route. Malone *v.* Union Pacific Railway Company, 7 L. D., 13; Northern Pacific Railroad Company *v.* Stovenour, 10 L. D., 645.

At the date of the definite location of the road (July 6, 1882), however, the filings of Jordan, Patterson, and Johnson had all expired by limitation, thus raising the presumption that whatever claims had previously attached to the land thereunder had been abandoned. (See last case cited.)

Kranich, in his declaratory statement made July 24, 1885, alleges settlement April 1, 1879, prior to date of definite location. This fact, if properly established, would except the land from the operation of the grant.

The fact of such settlement, however, is not sufficiently established by the bare allegation thereof in his declaratory statement. Barr *v.* Northern Pacific Railroad Company, 7 L. D., 235; Northern Pacific Railroad Company *v.* Beck, 11 L. D., 584; same *v.* Wilder, 11 L. D., 444.

While the case of Barr *v.* the Northern Pacific Railroad Company, above cited, had reference to an allegation of settlement prior to withdrawal on general route and its effect on such withdrawal, no reason is

perceived why the same principle will not apply when it is sought thereby to except the land from the operation of the grant, which attaches upon filing the map of definite location.

The local officers, upon the application of the company to list the tract in controversy, should have ordered a hearing (with notice to all parties in interest) to determine the actual status of the land on the 6th of July, 1882, when the line of the road was definitely located.

You will now direct the register and receiver to order such hearing, when Kranich will be allowed, if he can, to show that he was in the actual possession and occupancy of the land at the date of definite location of the road, and transmit the evidence, with their conclusions thereon, to your office for your further action, and, if, on examination of such evidence and proceedings, you find adversely to the company, you will also in your decision pass upon the conflicting claims of Kranich and Hogan, so that all matters in dispute may be determined by one judgment.

Your decision is accordingly modified.

RAILROAD INDEMNITY SELECTION—APPLICATION TO ENTER.

SIMSER *v.* SOUTHERN MINNESOTA RY. CO.

A timber culture application can not be accepted for land embraced within a prior railroad indemnity selection.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1891.

I have considered the appeal of Sidney P. Simser from your office decision dated October 2, 1889, rejecting his application to make timber culture entry for the SW. ¼ Sec. 17, T. 101 N., R. 28 W., Marshall, Minnesota.

The record shows that Mads C. Monson, made homestead entry for the tract in question December 2, 1864; his entry was canceled June 21, 1869. The land is within the indemnity limits of the Southern Minnesota Railway Extension Company, but was exempted from the withdrawal ordered August 22, 1866, on account of said grant, by reason of the existence of Monson's entry. After said entry had been canceled and before any applications for said land were filed, to wit, November 29, 1870, the Railway Company selected this land. Again on January 6, 1877, this tract was included in another selection made by the company.

On July 20, 1883, Valentine Wiegand made application to enter the tract as a homestead. It was rejected by the local officers for conflict with the railway selections He appealed to your office.

On April 7, 1884, Sidney P. Simser applied for the land under the timber-culture law. His application was rejected by the register and

receiver because of conflict with the railway's selection and the prior application and pending appeal of Wiegand. He appealed, alleging that he had been in "the actual possession and occupation and improvement of said tract as a squatter since the 2nd day of May, 1869." He also averred that "Wiegand had abandoned his entry and appeal."

In view of the facts alleged in this appeal, a hearing was ordered for the purpose of ascertaining the condition of the land at the dates of selection by the railway company. The hearing was had December 17, 1884, at which Wiegand and Simser appeared in person and by attorneys.

After considering the testimony submitted, the local officers rejected Simser's application and recommended that Wiegand be allowed to make entry under his homestead application. Simser appealed from the action taken by the register and receiver. The railway company did not appeal.

On October 2, 1889, your office, acting upon the appeal taken by Simser, held the railway company's selection of the tract in question valid, and rejected all pending applications to enter said land. All parties in interest were notified of said decision, and Sidney P. Simser appealed therefrom. There is no evidence accompanying the appeal to show that notice of the same was served upon the railway company, but that such service appears to have been made upon Wiegand alone.

Your decision appealed from was adverse to Wiegand, and by failing to appeal therefrom he abandoned all his interest in the conflict. Simser's application for timber-culture entry was rejected because of the right of the railway company to hold said land; his notice of appeal should therefore have been served upon the railway company.

This irregularity, however, might yet be cured by the service of a new notice upon the Railway Company, if the record disclosed sufficient merit in Simser's application to warrant it. The evidence submitted at the hearing shows that Simser

did not make settlement upon or take possession of a tract with a view of acquiring title to it, but merely as a matter of convenience.

It appears from his testimony that, although he cultivated four or five acres of the land in 1869, and has done so almost every season since that time, still he never intended to enter the tract or even thought of doing so until 1875, more than four years after the railroad selection of 1870 had been admitted. He made no application for the land until 1884. It is shown that he had a homestead adjoining this tract and merely used a small portion of the land in question for the profit there was in it.

The tract was selected by the railroad company November 29, 1870, and re-selected January 6, 1877. The second selection may have been unnecessary, but as no other claim except the prior selection on account of the same grant then appeared upon the records, no one was injured by its admission.

I am of opinion that it was incumbent upon the applicants for this land to show that the tract was not subject to selection by the railway company November 29, 1870, and January 6, 1877, the dates upon which said selections were made. This was not done.

Your decision is accordingly affirmed.

CERTIORARI—APPEAL—ATTORNEY.

NICHOLS *v.* GILLETTE.

Notice of a decision served upon the attorney is notice to the client, and certiorari will not be granted where the right of appeal is lost through the attorney's negligence.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1891.

Charles H. Nichols has made application for a writ of certiorari directing your office to transmit to the Department the record in the case of said Nichols *v.* Charles M. Gillette, involving lots 1 and 2 and the S. ½ of the NE. ¼ of Sec. 4, T. 30 N., R. 48 W., Chadron land district, Nebraska.

The ground of application is that notice of your decision of October 21, 1890 was duly sent to applicant's attorney; that said attorney had, in the meantime, been appointed register of the land office at Alliance, Nebraska, and had removed thither; that as the result of such appointment and removal, said attorney failed either to appeal from your decision or to notify his client that decision had been rendered against him; that as the result of such neglect on the part of his attorney, the client received no notice of your decision adverse to him, until more than sixty days after his attorney had received and accepted notice of the same; and that when he did file his appeal, your office refused to allow it, on the ground that the time prescribed by the Rules of Practice had expired.

The purpose of the writ of certiorari is not the correction of errors resulting from the laches of the party applying therefor (Tomay *et al. v.* Stewart, 1 L. D., 570, and numerous decisions since). In the present case the applicant insists that the fault is not his own, but that of his attorney; but it has been repeatedly held that notice to an attorney is notice to his client, and that a writ of certiorari will not be granted where the right of appeal is lost through the attorney's negligence. (Ariel C. Harris, 6 L. D., 122; Asher *v.* Holmes, 8 L. D., 396). This rule has been rigidly adhered to, even where the attorney had absconded, and his whereabouts were unknown (Thos. C. Cook, 10 L. D., 324). True it has been intimated that even where the applicant may have failed to appeal within the time prescribed by the Rules of Practice, and hence is not entitled to the writ on the ground of the wrongful

denial of his appeal, yet if it is made to appear that he is justly entitled to relief, it may be granted under the Secretary's supervisory authority (Oscar T. Roberts, 8 L. D., 423); but in the case at bar, no showing is made. The application must therefore be denied.

M'KEE SCRIP—LOCATIO .

EVAN T. WARNER.

Land within the corporate limits of the city of Chi cago is not vacant public land, and as such, subject to location with McKee scrip.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 22, 1891.

I am in receipt of the appeal of Evan T. Warner from your office letter of January 29, 1890, refusing his application to locate, within the corporate limits of Chicago, certificate No. 2 C, issued to George E. Billingsly, one of the heirs of William R. McKee, under the provisions of the act of Congress of March 1, 1889 (25 Stat., 1307).

The original act granting to each of the orphan children of William R. McKee a quarter section of land was passed January 25, 1853 (10 Stat., 745), and provided that the same should be "located upon any vacant land of the United States, and to be located when and in such manner as the President of the United States shall direct.

The scrip not having been located under this act, the act of March 1, 1889, *supra*, was passed to carry into effect the original grant, and provided that other certificates for those held by them should be issued to the surviving children and grandchildren of said McKee, "which new certificates they may enter and locate for themselves upon any lands in satisfaction of said grant of the class described in the act to which this is an amendment."

The class of land described in the granting act was "any vacant land of the United States."

By several decisions of this Department, it has been held that land within the corporate limits of the city of Chicago was not vacant public land, subject to "any scrip location whatever." John Farson, 2 L. D., 338; Thomas B. Valentine *v.* City of Chicago, Copp's Public Land Laws, Vol. 2, page 1024.

Your decision is therefore right, and is affirmed.

PRACTICE—APPEAL—JURISDICTION.

HENRY *v.* STANTON ET AL.

An appeal from the Commissioner's decision removes the case from the jurisdiction of the General Land Office, and no authority exists in said office thereafter to consider a motion asking the dismissal of said appeal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 20, 1891.

I have considered the case of Charles S. Henry *v.* John W. Stanton, Geo. H. Stanton, Wm. W. Stanton, Wm. F. Dean and Sarah A. McBrine, on appeal by the former from your decision of September 4, 1889, directing a hearing to determine his rights as against McBrine and John W. Stanton and refusing to suspend the entries of the remaining defendants on certain parts of Sec. 25, T. 21 N., R. 3 E., Helena, Montana land district.

* * * * * * *

On December 4, 1889, counsel for J. W. Stanton, George H. Stanton and W. W. Stanton filed in your office a motion in which they ask, "The Commissioner to dismiss the appeal from his decision of September 4, 1889." They set forth certain reasons therefor and support the motion by an affidavit. I will not consider the grounds of the motion, because your office had no jurisdiction to pass upon such a motion. The appeal removed the case to the appellate court, and only the appellate court can pass upon the sufficiency of an appeal to it.

You passed upon the motion, however, and overruled it: This was *extra judicial.*

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SCHOOL LAND—INDEMNITY SELECTION.

HENDERSON *v.* MOORE.

The State by accepting indemnity in lieu of a deficiency shown by the existing survey is divested thereby of all right to the basis thus used, and is not entitled to assert any claim thereto, where by a later survey the school section is found in place, and the rights of third parties have intervened.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 23, 1891.

Under certain instructions in your office letter "K" of April 3, 1889, to the register and receiver at Lakeview, Oregon, C. A. Moore was allowed to make homestead entry, No. 1240, for the NW. $\frac{1}{4}$ of Sec. 36, T. 39 S., R. 24 E., in said land district.

On April 29, 1889, F. A. Henderson filed a protest against the allowance of said entry, claiming the land by purchase; in evidence of his

title, he subsequently filed a copy of a deed, dated January 16, 1889, by which the board of commissioners for the sale of school, university and other State lands of the State of Oregon, convey to him the said quarter section and certain other tracts in Sec. 36, T. 39 S., R. 24 E., as school lands.

This protest was duly forwarded to your office, and, on October 29, 1889, you rendered your decision, holding that the State's conveyance to Henderson was inoperative, and that the land was properly subject to the entry of Moore, whose entry should stand, subject to his compliance with the law. From this judgment Henderson appeals.

This township was originally surveyed in 1875. By this survey subdivisions, to the extent of 5,477.69 acres, were thereon made. More than half of its contents were represented as covered by Lake Warner, in the eastern part, and about 5,500 acres in the northwestern part were left unsurveyed and described on the plat as "very high, rough and mountainous, and therefore unfit to be surveyed."

This survey was approved January 3, 1876, by Surveyor-General Sampson of Oregon, and the map of the subdivisions was represented as strictly conformable to the original field notes. It was filed in the local office February 24, thereafter.

On April 29, 1885, Z. F. Moody, governor and ex-officio land commissioner for Oregon, recommended and agreed to accept the north half of Sec. 10, T. 34 S., R. 34 E., said land district (320 acres), in lieu of the deficiency in school land caused by all of Sec. 36, in T. 39 S., R. 24 E., being taken up by Warner Lake. This list No. 3 was filed in the local office May 11, 1885. The township (39) was alleged to contain more than one half and less than three-fourths of a full township, and by section 2276 of the Revised Statutes the State was thus entitled to nine-hundred and sixty acres as a basis for school land.

It was alleged that all of Sec. 16, with the exception of about fifty acres, was in place. This list was approved May 4, 1886, in approved list No. 2, conveying the title to the selected lands to the State. (R. S. 2449.)

In the latter part of the year 1886, Special Agent Shackleford reported to your office that much of the so-called Warner Lake is dry land, upon which were settlers who desired to claim under the public land laws, while other portions of it are marsh. He reported that there was no lake to be found as located by the original survey; that the settlers charged that the survey as made was fraudulent. Accordingly, your office recommended, and this Department concurred therein (see Lake Warner, 5 L. D., 369), that a new survey be made to extend "throughout the length and breadth of what is termed Lake Warner."

The new survey was accordingly made and approved June 1, 1888. By this resurvey the land, formerly returned as covered by Lake Warner, is shown to be swampy or subject to annual overflow, only four hundred acres thereof being covered by water.

The area of the surveyed portion of the township by the new survey is shown to be 15,832.46; Sec. 16 contains 320 acres; Sec. 36 is subject to overflow, but contains 342.85 acres—being made fractional by the eastern boundary of the township. Including the land discovered by the new survey and the manifest area of the unsurveyed northwest, the township contains evidently more than 17,280 (three-fourths of a township), and this is shown to be of that class for which the State is entitled to claim 1280 acres of school lands, or two sections. (Sec. 2276 R. S.)

These facts being developed by the new survey and the State having only obtained six hundred acres in place in section 16, and three hundred and twenty acres by selection, it is apparent that there is due the State for school purposes an additional number of acres to make up the amount of two full sections—1280 acres—for the fractional township.

Such being the facts, the State officers executed the above mentioned deed, of January 16, 1889, purporting to convey portions of the recovered section 36 to Henderson, including the land in controversy, and it is insisted that the State has the superior right to section 36, because the new survey increased the area of the township so as to entitle the State to additional school land.

It is further insisted that the State was, in the first place, misled by the return of the United States surveyor as to the character of the land embraced in what is known as Warner Lake and also as to its area; that your office erred in adjudging that any law existed that authorized the State authorities to select indemnity lands for said section 36, it being in place; and in adjudging that there was any law which authorized the approval of such selection; that it was error to adjudge the homestead entry of Moore valid, upon the ground that the State had been permitted to select indemnity for a deficit, which the records show did not exist.

It is seen that by the old survey all of section 36 was covered by Lake Warner; and for this specific section, so lost to the school grant, the State, through the then governor, agreed to accept, and did accept, three hundred and twenty acres of other lands, in lieu of this deficiency.

By this act all right of the State to the basis of the selection (the 36th section) was divested, and the land restored to entry. State *v.* Dent, 18 Mo., 313; Thomas E. Watson, 6 L. D., 71; State of California, 7 L. D., 270; Henry Wilds, 8 L. D., 394; and Thomas F. Talbot, idem, 495.

It is evident that the first survey was erroneous, and but for that error the State would have taken the land in section 36 that was in place, but, having elected to take indemnity in lieu of said section, and the rights of third parties having intervened, it will be bound by its selection.

Moreover, the State does not offer to surrender the land taken in lieu of the section for which the indemnity was granted, but suggests

that "a demand should be made for a reconveyance of any selections made and improperly allowed."

The lieu lands (presumably) have long since passed into the hands of innocent purchasers, so that it is practically out of the question to place the lands *in statu quo*.

The plats of the original survey on their face imported a verity; its correctness was attested by the officers of the government. As such they were acted upon, both by the government and the State of Oregon; the State accepted other lands in lieu of such as were shown to be wanting from "natural causes," and, although a later survey showed such lands in place which before were described as covered by a lake, yet the mistake on the part of both the government and the State was mutual, and it is too late now to correct it—it is wholly impracticable.

The State having received indemnity for the said section 36, the same is open to settlement and entry. After having received the land in lieu of said section, it had no right or title to the basis thus surrendered, and therefore its grantee, Henderson, by his said deed, obtained no title.

It appears that on July 13, 1889, nearly six months after the attempted transfer of the lands in controversy to Henderson, the State authorities filed list No. 31 in the local office, assigning deficits in said township as a basis for 320 acres of indemnity. It is manifest that the State is entitled to additional indemnity for school lands in said township lost from the grant, and the regularity of its selection made July 13, 1889, should be examined with a view to the certification of the proper quantity to the State.

But, having already received 320 acres as indemnity for said section 36, and subsequently applied for the balance on account of the enlarged area as developed by the new survey, the State can not legally claim the basis or any part of the same already surrendered.

The land belonged to the government and was subject to entry, and the entry of Moore will be allowed to stand, subject to his compliance with the law.

Your said office decision is accordingly affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

MATHER *v.* BROWN.

The right of purchase under section 2, act of June 15, 1880, cannot be exercised by an entryman who has sold the land embraced within the original entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 23, 1891.

On October 28, 1879, Mary Brown made homestead entry of the NW. ¼ of Sec. 15, T. 1 S., R. 31 W., Oberlin, Kansas.

On April 17, 1886, she made application to purchase said tract under

the provisions of the second section of the act of June 15, 1880 (21 Stat., 237).

This application was rejected, because R. O. Kindig, who presented the same, stated that Mary Brown had conveyed the land to him, and that the deed of conveyance was of record.

From this decision an appeal was filed May 15, 1886. Two days thereafter, A. L. Duncan, special agent, filed a statement in the local office, saying that he had on that day examined the records of Rawlins county and "find that Mary Brown has made a warranty deed to George W. Keys and I. C. Emahiser for the NW. ¼ Sec. 15, T. 1 S., R. 31 W., January 7, 1885; consideration two hundred dollars."

On May 1, 1886, D. C. Mather filed his affidavit of contest, alleging abandonment. Hearing was had, defendant making default, and the entry held for cancellation and no appeal filed.

On April 28, 1888, you reversed the action of the register and receiver, rejecting claimant's application to purchase; also in ordering the hearing on Mather's contest. You also directed that claimant be allowed to purchase the land under the provisions of the act of June 15, 1880, and on August 9, 1888, cash certificate was issued upon claimant's application.

This appeal is brought to reverse that judgment.

The controlling question in this case is, whether one who has alienated the land covered by his entry can afterwards purchase the same under the 2d section of the act of June 15, 1880.

It is clearly shown by the report of the special agent, and the fact is no where denied, that Miss Brown had conveyed the land by warranty deed before she applied to purchase under said act.

It is insisted by counsel and so held by you that notwithstanding the sale of the land, the entryman subsequently had a right to purchase.

The case of George E. Sandford (5 L. D., 535,) is cited and relied upon as authority for your action.

By reference to that case, it will be found that Sandford had not really conveyed the land prior to his cash entry; but, on the contrary, the conveyance was made nearly a month subsequent to that time, and it is there state that:

> There is nothing in the law . . . . . which prohibits him from making such contract of *future sale* as is here shown to have been made. The fact that he had made a previous agreement to sell can in no way, so far as I can see, in the absence of a prohibition to that effect, impair his right of purchase.

It was also held in the Peter Weber case (10 L. D., 392), that a mere contract of sale, or a power of attorney authorizing a sale, will not necessarily defeat a subsequent purchase under the 2d section of said act.

But in the case at bar, the entryman sold all her interest in the land prior to the cash entry. There was therefore nothing upon which to base the entry, and it was erroneously allowed. Warden *v.* Shumate,

8 L. D., 330; Rice *v.* Bissell, Idem., 606; Andas *v.* Williams, 9 L. D., 311; Watts *v.* Williams, 6 L. D., 94.

In consideration of the views above expressed, Miss Brown's cash entry for the lands above described must be, and it is hereby, canceled.

The judgment appealed from is accordingly reversed.

RAILROAD GRANT—CONFLICTING LIMITS—ADDITIONAL ENTRY.

NORTHERN PACIFIC R. R. CO., ET AL. *v.* AMBERS.

Lands embraced within the withdrawal on general route of the Northern Pacific, and falling within the indemnity limits of said road on the definite location thereof, are excepted from the subsequent operation of the grant to the St. Paul, Minneapolis and Manitoba company.

A homesteader who was restricted to an entry of eighty acres within the limits of a railroad grant, may make an additional entry of land within an odd section, where by his original settlement such land was excepted from said grant, and he has continued to cultivate and improve the same.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 24, 1891.

On November 13, 1883, Ole Ambers applied to make additional homestead entry for the NW. ¼ of the NE. ¼ and the NE. ¼ of the NW. ¼, Sec. 35, T. 136 N., R. 44 W., 5th P. M., Fergus Falls, Minnesota, his original entry having been made January 12, 1871, for the E. ½ of the SW. ¼ of Sec. 26, same township and range, which was patented October 1, 1877.

With said application he filed affidavits, alleging that he settled upon the tract applied for in connection with his original entry in June, 1870, and at that time was denied the right to enter the tract, for the reason that he was restricted in his entry to eighty acres, the land being double minimum. He stated, however, that he continued to cultivate and improve said tract in connection with the land embraced in his homestead entry, from the date of settlement in June, 1870.

The land is within the primary limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, and was listed to said company under its grant December 2, 1873. In view of this fact a hearing was ordered as between said company and the applicant, at which the testimony offered sustained the allegations of the applicant on all material points.

The local officers rejected said application, for the reason that Ambers having made final proof and accepted patent for the land in the even section could acquire no rights by occupancy of other land, and, hence, there was no valid claim to the tract in controversy at date of definite location of said road—to wit, December 19, 1871. From this decision Ambers appealed.

The land in controversy was also embraced within the limits of the

withdrawal made for the benefit of the Northern Pacific Railroad Company upon the filing of the amended map of general route, October 12, 1870, and upon the definite location of said road November 21, 1871, it fell within the indemnity limits of the grant. This company applied to select the tract as indemnity, June 16, 1885, but said application was rejected, because of conflict with the grant to the St. Paul, Minneapolis and Manitoba Railway Company, and because of the pending appeal of Ambers. The Northern Pacific Railroad Company appealed from this action, and the rights of all parties were considered by you in the decision now before me.

Your office denied the application of the Northern Pacific Railroad Company to make selection of said tract, for the reason that it conflicted with the listing of said tract to the St. Paul, Minneapolis and Manitoba Railway Company.

On November 9, 1887, the governor of Minnesota, acting under the authority of the act of the legislature, of March 1, 1877, Special Laws, 1877, page 257, reconveyed said land to the United States for the benefit of Ambers.

Your office held that said reconveyance having extinguished all right and title of the St. Paul, Minneapolis and Manitoba Railway Company to said tract, and Ambers' application having been erroneously rejected, he should be permitted to surrender for cancellation his patent to the land in section 26, and be allowed to amend his entry so as to embrace all the land originally settled upon, with a view to the issuance of patent for the same. From this decision the Northern Pacific Railroad Company appealed.

As between the railroad companies, it has been decided by the supreme court in the case of St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1), that the withdrawal made for the benefit of the Northern Pacific Railroad Company of lands within the forty mile limits of the map of general route filed by said company preserved the lands from the operation of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, and the decision of your office holding that the tracts in controversy were subject to the grant to the last named road is error.

But it appears from the record that the settlement of Ambers was made prior to the date of the withdrawals of August 13, and October 12, 1870, for the benefit of the Northern Pacific Railroad Company, and if the settlement of Ambers was a valid claim, the tract was excepted from the operation of the withdrawal for the benefit of said road.

It is true that at the date of the original entry, a homesteader could only be allowed to enter eighty acres of lands within railroad limits, but his settlement upon the entire tract was a valid claim to the same, and he could have either perfected claim to the eighty acres in the odd section or the eighty acres in the even section. When he presented his application on November 13, 1883, to make additional homestead entry

of the tract in controversy, the law of March 3, 1879 (20 Stat., 472), had been passed, granting to settlers within railroad limits the right to make additional entry of land adjoining the land embraced in their original entry, not exceeding one hundred and sixty acres, where such settler had been restricted to an entry of eighty acres, and at that time the Northern Pacific Railroad Company had not applied to select said tract. The land being subject to entry by any legal applicant, at the date of Ambers' application, it was error to reject it, and the decision of your office holding for approval said application, if there is no other adverse claim to the land other than that of the railroad company, is affirmed. (Northern Pacific Railroad Company *v.* Bowman, 7 L. D., 238; Northern Pacific Railroad Company *v.* Potter, 11 L. D., 531; Holmes *v.* Northern Pacific Railroad Company, 5 L. D., 333; Elwell *v.* Northern Pacific Railroad Company, ib., 566.

ORDER OF SALE—ISOLATED TRACT—ISLAND.

LUTHER K. MADISON.

An order directing the sale of an island as an isolated tract, after the survey thereof, excludes such land from subsequent settlement or filing.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 23, 1891.

I am in receipt of your communication of March 11, 1891, asking instructions as to the sale of an island containing about two and a half acres, situated in Pine Island Lake, Sec. 3, T. 8 N., R. 9 W., Michigan, the survey of which was ordered by letter of this Department of March 3, 1890, in which it was directed that when said island shall have been surveyed, it shall be disposed of under section 2455 of the Revised Statutes, authorizing the sale of isolated and disconnected tracts at public sale.

You ask for said instructions, in view of the fact that Luther K. Madison, who requested the survey, made pre-emption filing for said tract November 15, 1890, alleging settlement April 15, 1890, and you ask whether a sale should be made, notwithstanding the existence of such filing.

The land was not subject to such filing or settlement, it having been directed prior to the survey that said tract should be disposed of at public sale.

You will therefore carry out the instructions of the Department contained in said letter of March 3, 1890.

RAILROAD GRANTS—CONFLICTING RIGHTS—WITHDRAWAL.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL. *v.* LUND.

Land embraced within the withdrawal on general route of the Northern Pacific, and subsequently within the indemnity limits of said road, on the definite location thereof, and also within the granted limits of the St. Paul, Minneapolis and Manitoba Ry. Co., is excluded by said withdrawal on general route from the subsequent operation of the grant to the latter company.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 24, 1891.

This appeal involves the right to the N. ½ of the NE. ¼, Sec. 17, T. 135 N., R. 43 W., 5th P. M., Fergus Falls, Minnesota, which is within the primary limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent Extension), as definitely located December 19, 1871, and was listed by said road on account of its grant December 2, 1873.

It is also within the limits of the withdrawal made for the benefit of the Northern Pacific Railroad Company upon the filing of its map of general route August 13, 1870, and also within the limits of the withdrawal made upon the amended map of general route of October 12, 1870, and upon the definite location of the road November 21, 1871, it fell within the thirty mile indemnity limits of said road.

On November 10, 1883, Einar Lund applied to enter the tract, under the act of March 3, 1879 (20 Stat., 472), as additional to his homestead entry made for the S. ½ of the SE. ¼ of Sec. 8, the same township and range, claiming the right to enter said tract as against the claim of the St. Paul, Minneapolis and Manitoba Railway Company under the act of the legislature of Minnesota, approved March 1, 1877 (Special Laws, Minnesota, 1877, page 257).

A hearing was ordered to determine the rights of the respective claimants to said tract, and upon the testimony submitted thereon it was shown that Lund settled upon the tract in controversy and the land embraced in his original entry in June, 1871, and had continuously resided thereon and improved the tract from that date.

On June 30, 1871, Lund applied to make homestead entry of the entire tract, but his application was rejected as to that part in Sec. 17, for the reason that it was an odd section, reserved for the Northern Pacific Railroad Company, and for the further reason that the land in Sec. 8 being double minimum land, he was only entitled to enter eighty acres. He therefore made entry of the eighty acres in Sec. 8, for which patent issued November 20, 1877.

The Northern Pacific Railroad Company applied to select the tract June 16, 1885, and said application was rejected by the local officers because of conflict with the grant to the St. Paul, Minneapolis and Manitoba Railway Company.

Upon appeal therefrom, your office held that the land "having been released from reservation on account of the Northern Pacific Railroad grant by the filing of map of definite location," and Lund having waived his right to enter by making homestead entry for land in the even section, the land in controversy was subject to the grant to the St. Paul, Minneapolis and Manitoba Railway Company, whose right attached December 19, 1871, and it was therefore not subject to Lund's application to make additional homestead entry, nor to selection by the Northern Pacific Railroad Company. But you held that the governor of Minnesota, in pursuance of the laws of that State, having reconveyed the land in controversy to the United States, the claim of the St. Paul, Minneapolis and Manitoba Railway Company was thereby extinguished and the listing of said land by said company was held for cancellation, and Lund's application was allowed subject to appeal.

From this decision both companies appealed, the St. Paul, Minneapolis and Manitoba Railroad Company assigning error in holding that it was not competent for the governor of the State of Minnesota to defeat the purposes of the grant to said road by making a reconveyance of the land to the United States, and the Northern Pacific Railroad Company assigned error thereon in holding that the land was not in reservation for the benefit of the Northern Pacific Railroad Company at the date of Lund's application, and was at that date subject to the grant to the St. Paul, Minneapolis and Manitoba Railway Company.

Your decision was based upon the theory that the right of the St. Paul, Minneapolis and Manitoba Railway Company was superior to that of the Northern Pacific Railroad Company, and that the rights of Lund could therefore be protected under the act of the State of Minnesota of March 1, 1877 (see St. Paul, Minneapolis and Manitoba Railway Company *v.* Chadwick, 6 L. D., 128).

Since this case has been pending before the Department, the supreme court in the case of St. Paul and Pacific Railroad Company *et al. v.* Northern Pacific Railroad Company (139 U. S., 1), which involved the right of the Northern Pacific Railroad Company to lands embraced within the withdrawals for the benefit of the Northern Pacific Railroad Company upon the filing of the maps of general route of August 13, and October 12, 1870, and which fell within the indemnity limits upon the definite location of said road, and are also within the granted limits of the St. Paul, Minneapolis and Manitoba Railway Company, held that the withdrawal made upon the filing of the map of general route of the Northern Pacific Railroad preserved the odd numbered sections of land within said limits for the benefit of said road from the operation of any subsequent grants to other companies, not specifically declared to cover the premises, and that said lands were not subject to the grant to the St. Paul, Minneapolis and Manitoba Railway Company when its grant attached, to wit: December 19, 1871.

As between the two railroad companies the case at bar is controlled

by the decision above cited, and it was therefore error to hold that the Northern Pacific Railroad Company had no right to select said tract, for the reason that it was in conflict with the grant to the St. Paul, Minneapolis and Manitoba Railway Company.

If the selection of the Northern Pacific Railroad Company is in all other respects valid, it will be approved and the application of Lund will be rejected.

Your decision is reversed.

SCHOOL LAND—INDEMNITY—ACTS OF FEBRUARY 22, 1889, AND FEBRUARY 28, 1891.

INSTRUCTIONS.

The provisions of the act of February 22, 1889, in so far as they are in conflict with sections 2275 and 2276, R. S., as amended by the act of February 28, 1891, are superseded by the provisions of said amended sections, and the grant of school lands provided for in the act of 1889, should be administered and adjusted in accordance with the later legislation.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1891.

I have considered the questions presented by your letter of March 31, 1891 calling attention to the act of Congress approved February 28, 1891 (Public—No. 106) entitled

An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes,

asking instructions in regard thereto, and requesting that the matter be referred to the Attorney General for his opinion.

The act of February 22, 1889 (25 Stat., 676) providing for the admission of North Dakota, South Dakota, Montana and Washington into the Union, by sections 10 and 11 granted to those States for the support of common schools sections numbered sixteen and thirty-six in each township and provided for indemnity under certain conditions. Those sections read as follows:

That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, mili-

tary, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school-fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

By section 18, mineral lands were excepted from this grant and the States were allowed indemnity for any lands thus excepted.

Your office prepared regulations for making school indemnity and other selections under said act, holding that in determining the rights of these States to indemnity not only the provisions of this act, but also sections 2275 and 2276 of the Revised Statutes should be invoked. Upon consideration of the matter in this Department, it was held on February 20, 1890 (L. and R., 84, p. 209) that the provisions of the general law as declared in the sections of the Revised Statutes, above referred to, and those of the act having reference to these particular States, were in direct conflict with each other, and that the grants to these States were to be found in and governed by the later specific act.

By the act of February 28, 1891, *supra*, said sections of the Revised Statutes were amended in several material respects. It is now provided in substance: that where settlements are made before survey which are found to have been made upon sections sixteen or thirty-six, those sections shall be subject to the claim of such settlers and that the State or Territory shall have indemnity for such lands. Indemnity is also provided where such sections "are mineral land or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States" and also where such sections are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. It is as to the effect of this amendatory act upon the rights of the States mentioned in the act of February 22, 1889, that you inquire.

The general rule of construction is that an earlier special act is not repealed by a later general act. In discussing this rule, it is said in Endlich on the Interpretation of Statutes, section 223:

Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one, making it unlikely that an exception was intended as regards the special act.

And again in the same work in section 231, it is said:

An intention to supersede local and special acts may, indeed, as is apparent from the illustrations afforded by this and the preceding sections, be gathered from the design of an act to regulate, by one general system or provision, the entire subject-matter thereof, and to substitute for a number of detached and varying enactments, one universal and uniform rule applicable throughout the state.

All the circumstances tend to show that it was intended by this act of February 28, 1891 to provide a uniform rule applicable to all the States and Territories having grants of school lands for the selection of indemnity lands. In speaking of the objects of this bill, Mr. Payson said:

The bill simply covers that condition which has been found to exist in the Department by which certain of the States or Territories suffer the loss of these lands which happen to be in fractional townships and where no adequate provision for indemnity selection is made in their stead. (Congressional Record, February 28, 1891, Vol. 22, p. 3631.)

These States admitted under the act of February 22, 1889 would fall in the list of States thus suffering, and, in this particular at least, it is quite certain that the later general act was intended to take the place of the prior special act. The attention of Congress having been directed to the prior act and its defect in one particular, it is but fair to presume that all its provisions were held in mind in the further consideration of the later act.

The report of the Committee on the Public Lands, of the House of Representatives, upon this bill, found on page 3632, Vol. 22 of the Congressional Record, recites and adopts the report previously made to the Senate. In that report, the following is found:

In the administration of the law, it has been found by the Land Department that the statute does not meet a variety of conditions, whereby the States and Territories suffer loss of these sections without adequate provision for indemnity selection in lieu thereof. Special laws have been enacted in a few instances to cover in part these defects with respect to particular States or Territories, but as the school grant is intended to have equal operation and equal benefit in all the public land States and Territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded. . . . . The bill as now framed will cure all inequalities in legislation; place the States and Territories in a position where the school grant can be applied to good lands, and largest measure of benefit to the school funds be thereby secured.

It would seem difficult to construe this language in any other way than as an explicit statement that it was intended that the provisions of that bill, which afterwards became the law now under consideration, should supersede all prior laws upon the subject, or, in other words, that it was intended to provide one uniform and general system of indemnity under these grants. This intention is quite clearly indicated by language of the act itself, and the substance of this report is recited to show that the object of the legislation was clearly laid before Congress by its committee having such matters in charge.

In view of all the facts and circumstances herein set forth, I have no hesitation in concluding that the provisions of the prior act of February 22, 1889, in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes as amended by the later act of February 28, 1891, are superseded by the provisions of said sections as amended, and that the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

I have not deemed it necessary to present this question to the Attorney General of the United States, as requested by your office letter.

PRACTICE—SERVICE OF NOTICE—CONTEST.

KELLY *v.* MCWILLIAMS.

The refusal of the defendant to receive and open a registered letter, known by him to contain a notice of contest, will not thereby defeat the service of such notice.

An attempt to cure a default before service of notice is inconsistent with good faith, where such action is induced by the impending contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 25, 1891.

I have considered the case of Robert A. Kelly *v.* Mary A. McWilliams, on appeal by the latter from your office decision of September 21, 1889, holding for cancellation her timber culture entry for the NW. ¼, Sec. 27, T. 153 N., R. 59 W., Grand Forks land district, North Dakota.

McWilliams made timber culture entry for this land on February 7, 1883. On February 9, 1887, Kelly filed affidavit of contest against the same, alleging that the entryman had failed to comply with the law by cultivating the first five acres of trees planted, and had wholly failed to plant the second five acres required to be planted.

On February 14, 1887 (not July 12, as you state in your decision,) notice of contest was issued, the hearing being sent for May 10, following. It appears that service of this notice was not made on the entryman, and on the day set for hearing, a continuance was allowed, and new notice issued, the adjourned day being fixed for July 12, 1887.

On this day, she appeared, by counsel, and moved to dismiss the contest, because no service of notice had been obtained upon her. It appeared upon the hearing of this motion that a copy of the notice had been left at the house where she was then residing, the same being placed in the hands of her sister, with whom she boarded, and it further appeared that a copy of notice had been sent to her by registered letter through the mail; that when this was delivered to her, she refused to open it or take it from the office, although it was so marked as to show that it was from the contestant. It further appeared that she had called at the land office, and upon inquiry had been informed that her entry

had been contested, and that she would be served with written notice, and that thereupon she had been going from place to place among her relatives to avoid service. The register and receiver held that she had been served with notice, and over-ruled the motion to dismiss.

Thereupon, a continuance was asked, and this was granted until August 25, following, and out of abundant caution, the contestant took out another notice of contest and served it on contestee. This is the paper you speak of as the notice of contest. Upon the hearing from the evidence submitted the register and receiver held the entry for cancellation, from which action the entryman appealed, and your office, on September 21, 1889, affirmed said decision, from which she appealed to the Department.

The testimony shows that at the time the affidavit was filed, and up to the time notice was served by mail, and also left at her residence, the charge in the affidavit was true; that there had been a total failure to cultivate the first five acres planted to trees, and no effort made to plant the second five acres; but in July she caused the land to be plowed and ten acres planted to tree seeds and cuttings.

She admits in her testimony that she was informed of the contest by the register, and that she was informed that she would be served with notice. She admits getting the registered letter about the last of April or first of May, 1887, which is filed as an exhibit, and that it was plainly written on the envelope that it was from Kelly, the contestant. She says she did not open the letter or take it from the office, because she did not think it was meant for her. She substantially admits that after she was informed by the register that her entry was contested, she went from place to place among her relatives, and it is clear that this was to avoid service of notice. She tried to cure her default before service of written notice could be made upon her. The planting was done before July 13, 1887, but really after she had knowledge of the contest, and, in fact, after the service of the notice of May 10. You were mistaken in your decision in stating that notice of contest issued July 12, 1887, which if true, as stated by you, without any explanation as to her information and conduct and the issuing of the previous notices would render your decision erroneous.

I find that the register and receiver were correct in holding that the notice of May 10 had been served, and her refusal to open and read it was her own fault. I am satisfied that she knew the letter was for her and that she knew substantially what it contained, beside she had information, as stated, and her conduct was inconsistent with good faith, and anything done to cure her default after such information and notice could not be set up to defeat the contest. For this reason, your action affirming the decision of the register and receiver is affirmed. The entry will be canceled.

ACT OF MARCH 3, 1891—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 27, 1891.

Registers and Receivers,
United States District Land Offices.

GENTLEMEN:

Your attention is called to the act of Congress entitled "An act to repeal timber-culture laws and for other purposes," approved March 3, 1891, 26 Stat., 1095, a copy of which is hereto attached.

It will be observed that by the first section the laws providing for the entry of public lands for timber-culture purposes, are repealed so far as regards future entries, but continued with certain prescribed modifications, as regards the adjustment of existing claims, initiated prior to such repealing act. Hence, no further entries of this class will be allowed unless the right to make such entry had accrued or was accruing at the date of said act. In dealing with existing entries the provisions of the first section of the repealing act will be observed. It will be seen that by the fifth proviso of that section the right is extended to persons having certain qualifications to commute their entries in certain cases at the rate of $1.25 per acre. For this purpose it will be necessary—

1. That the person shall have in good faith complied with the provisions of the timber-culture laws, for four years.

2. That he shall be an actual bona fide resident of the State or Territory in which said land is located.

Final proof for the commutation of timber-culture entries under this provision, shall be made as other final timber-culture proof is made, and shall satisfactorily exhibit the facts necessary to entitle the applicant to make purchase thereunder. Returns will be made as in commuted homestead entries under existing practice, but with proper annotations on the returns to indicate the character of the transaction as a commutation of timber-culture entry under said act. For final proof in timber-culture entries, the registers and receivers shall be allowed the same fees and compensation as are allowed under previously existing laws in homestead entries.

The second section amends the desert land law of March 3, 1877 (19 Stat., 377), by adding thereto five sections, numbered from four to eight inclusive, modifying its provisions in the manner following, viz.:

1. The party making entry thereunder is required at the time of filing the declaration, to file also a map of the land which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of

the water to be used for irrigation and reclamation. Provision is made that persons may associate together for purposes defined.

2. Entrymen shall expend, for purposes stated, at least $3 per acre—$1 per acre during each year for three years—and shall file proof thereof during each year, such proof to consist of the affidavits of two or more witnesses, showing that the full sum of $1 per acre has been expended during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of improvements.

3. A failure to file the required proof during any year, shall cause the land to revert to the United States, the money paid to be forfeited, and the entry to be canceled.

4. The limit for making proof is changed from three years to four years from date of filing the declaration. This proof must, in all cases, show the citizenship of the party offering it, and the cultivation of one-eighth of the land in addition to the reclamation to the extent and cost and in the manner hereinbefore noted.

5. The party may make his final entry and receive his patent at any time prior to the expiration of four years, on making the required proof of reclamation of expenditure to the aggregate extent of $3 per acre, and of the cultivation of one-eighth of the land.

6. Entries made prior to the date of said act may, however, be perfected under the old law, or, at the option of the claimant, may be perfected under the law as amended, as far as applicable.

7. Assignments are recognized, but the amount of land that may be held by assignment or otherwise, prior to issue of patent is restricted to 320 acres by the seventh section, which section it is provided, however, shall not apply to entries made prior to the act. Assignees must properly prove their assignments by filing in the local office an affidavit and certified copy of the instrument under which they claim, and must make affidavit of the amount of land held.

8. By the eighth section the provisions of the original act and the amendments are extended to Colorado.

9. By the same section the right to make desert-land entry is restricted to resident citizens of the State or Territory in which the land sought is located, whose citizenship and residence must be duly shown.

The third section of the new act amends section 2288, Revised Statutes, so as to extend its provisions to settlers under other settlement laws in addition to the pre-emption and homestead laws, and so as to admit of transfers for right of way for canals or ditches for irrigation or drainage, as well as for church, cemetery, or school purposes, or for the right of way of railroads, as in the old statute.

The fourth section of the new act repeals all the laws allowing pre-emption of the public lands by individuals, but provides for perfecting claims previously initiated according to the provisions of the laws under which they were initiated; therefore, no filings or entries will be allowed

thereunder, except when necessary to perfect claims of inception prior to the approval of the repealing act, and claims to Indian lands covered by its tenth section.

The fifth section thereof amends section 2289, Revised Statutes, so as to prevent any person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory from acquiring any right under the homestead law, and also section 2290, Revised Statutes, so as to require a different affidavit from that now required to be made by applicants, as preliminary to homestead entries.

In future, a preliminary affidavit will be required to conform to these amendments, proper blank forms for which will be prepared and transmitted as soon as practicable.

The sixth section of the new act amends section 2301, Revised Statutes, so as to require that parties proposing to commute their homestead entries to cash, shall make proof of settlement and of residence and cultivation of the land for a period of fourteen months from the date of the entry, and the provisions of the section as amended are made to apply to lands on the ceded portion of the Sioux Reservation, in South Dakota, without, however, relieving the settlers thereon from any payments now required by law.

This provision must be enforced in all cases of commutation in which the commuted entry was made after the date of said act, but the right to commute in cases in which the entry was made prior to that date is not affected thereby.

It will be necessary to prepare and transmit a number of blank forms for proofs and affidavits, under this act, which will be done without unnecessary delay.

The remainder of the said act is not considered to call for remark in this circular, but will be the subject of future instructions.

Please acknowledge receipt.

Very respectfully,

T. H. CARTER,
Commissioner.

Approved:
GEO. CHANDLER,
Acting Secretary.

AN ACT to repeal timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies,'" approved June fourteenth, eighteen hundred and seventy-eight, and all laws supplementary thereto or amendatory thereof, be, and the same are hereby repealed: *Provided,* That this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all bona fide claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and

conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed: *And provided further*, That the following words of the last clause of section two of said act, namely: "That not less than twenty-seven hundred trees were planted on each acre," are hereby repealed: *And provided further*, That in computing the period of cultivation the time shall run from the date of the entry, if the necessary acts of cultivation were performed within the proper time: *And provided further*, That the preparation of the land and the planting of trees shall be construed as acts of cultivation, and the time authorized to be so employed and actually employed shall be computed as a part of the eight years of cultivation required by statute: *Provided*, That any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with the provisions of said laws and who is an actual bona fide resident of the State or Territory in which said land is located shall be entitled to make final proof thereto, and acquire title to the same, by the payment of one dollar and twenty-five cents per acre for such tract, under such rules and regulations as shall be prescribed by the Secretary of the Interior, and registers and receivers shall be allowed the same fees and compensation for final proofs in timber-culture entries as is now allowed by law in homestead entries: *And provided further*, That no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing to the final certificate therefor.

SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections:

"SEC. 4. That at the time of filing the declaration herein before required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

"SEC. 5. That no land shall be p atented to any person under this act unless he or his assignors shall have expended in the nece ssary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchas e of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid: and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

"SEC. 6. That this act shall not affect any valid rights heretofore acrued under

said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this act. *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor shall be forfeited to the United States.

"SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."

SEC. 3. That section twenty-two hundred and eighty-eight of the Revised Statutes be amended so as to read as follows:

"SEC. 2288. Any bona fide settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

SEC. 4. That chapter four of title thirty-two, excepting sections twenty-two hundred and seventy-five, twenty-two hundred and seventy-six, twenty-two hundred and eighty-six, of the Revised Statutes of the United States, and all other laws allowing pre-emption of the public lands of the United States, are hereby repealed, but all bona fide claims lawfully initiated before the passage of this act, under any of said provisions of law so repealed, may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed.

SEC. 5. That sections twenty-two hundred and eighty-nine and twenty-two hundred and ninety, in said chapter numbered five of the Revised Statutes, be, and the same are hereby, amended, so that they shall read as follows:

"SEC. 2289. 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 a declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this sec-

tion, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

"SEC. 2290. That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified."

SEC. 6. That section twenty-three hundred and one of the Revised Statutes be amended so as to read as follows:

"SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail 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 after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months," and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law.

SEC. 7. That whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of any of the public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

*SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and

suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defence if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same; but nothing herein contained shall apply to operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this section.

SEC. 9. That hereafter no public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application, shall be sold at public sale.

SEC. 10. That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act.

SEC. 11. That until otherwise ordered by Congress lands in Alaska may be entered for townsite purposes, for the several use and benefit of the occupants of such townsites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the townsite, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such townsite and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one townsite entry.

SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre: *Provided*, That in case more than one person, association, or corporation shall claim the same tract of land the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act.

SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, ex officio surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States

marshal, ex officio surveyor-general; and on the receipt of such estimate from the United States marshal, ex officio surveyor-general, the said person, association, or corporation shall deposit the amount in a United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, ex officio surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, ex officio surveyor-general; and the said United States marshal, ex officio surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of such survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same.

SEC. 14. That none of the provisions of the last two preceeding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any townsite, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak for the purpose of establishing fish-culture stations. And all tracts of land not exceeding six hundred and forty acres in any one tract now occupied as missionary stations in said district of Alaska are hereby excepted from the operation of the last three preceding sections of this act. No portions of the islands of Pribylov Group or the Seal Islands of Alaska shall be subject to sale under this act; and the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon.

SEC. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

SEC. 16. That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, that no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirteenth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs, and that the provisions of "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws.

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

SEC. 22. That the section of land reserved for the benefit of the Dakota Central Railroad Company on the west bank of the Missouri River, at the mouth of Bad River, as provided by section sixteen of "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes," approved March second, eighteen hundred and eighty-nine, shall be subject to entry under the townsite law only.

SEC. 23. That in all cases where second entries of land on the Osage Indian trust and diminished reserve lands in Kansas, to which at the time there were no adverse claims, have been made and the law complied with as to residence and improvement, said entries be, and the same are hereby, confirmed, and in all cases where persons were actual settlers and residing upon their claims upon said Osage Indian trust and diminished reserve lands in the State of Kansas on the ninth day of May, eighteen hundred and seventy-two, and who have made subsequent pre-emption entries either upon public or upon said Osage Indian trust and diminished reserve lands, upon which there were no legal prior adverse claims at the time, and the law complied with as to settlement, said subsequent entries be, and the same are hereby, confirmed.

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, (in) any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Approved March 3, 1891.

[PUBLIC—No. 160.]

*AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one; entitled "An act to repeal timber-culture laws and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules

and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

Approved March 3, 1891.

PREEMPTION CONTEST—SETTLEMENT RIGHTS.

BOWMAN *v.* DAVIS.

An act of settlement is complete from the instant the settler goes upon the land with the intention of making it his home, and performs some act indicative of such intent; and such act is sufficient if it tends to disclose a design to appropriate the land in accordance with law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 27, 1891.

The case of Benjamin F. Bowman *v.* Wayland S. Davis is here on appeal of the former from your decision of October 21, 1889, sustaining Davis' homestead entry, No. 6452, for the E. ½ of the NE. ¼, Sec. 21, T. 121, R. 70, Aberdeen, Dakota.

He made his entry November 29, 1886.

The next day, Bowman applied to file his pre-emption declaratory statement for the same, alleging settlement November 26, three days prior to the entry of Davis. His application was held suspended until December 6, when the local officers ordered a hearing to determine the respective rights of the parties as to the priority of claim, which was had March 16, 1887.

On November 27, of the same year, the register and receiver rendered their opinion recommending that the entry of Davis should stand.

Bowman appealed, and by your said decision you affirmed the action of the local officers, and he now further prosecutes his appeal to this Department.

The only question for consideration is, whether Bowman made a *bona fide* settlement on the land prior to the entry of Davis.

The record shows that prior to November 26, 1886, one Dumont had made homestead entry for the tract in controversy, which he had relinquished on said 26th of November, after having excavated thereon a cellar, sixteen by sixteen, and six and a half feet deep, and dug a well—which improvements, together with two hundred and fifty feet of lumber which had been left at the cellar, were purchased by Bowman two days subsequent to the relinquishment and one day prior to Davis' entry, for one hundred and ten dollars.

The acts of settlement on the part of Bowman are substantially stated in your office opinion, and consist in piling up a few stones in the vicinity of the cellar, another pile (variously estimated from twelve to fifty and from the size of a man's fist to that of a bushel basket) at the well, and three small piles on a knoll near the northern boundary of the land. Three witnesses for the defendant testify that, although they passed

along near the said northern boundary on the 28th of November, they did not notice any stone heaps there. Two of these witnesses were not looking for indications of improvements, but passed in the vicinity of the knoll on their way to and from town. The other witness, De Wolf, is a partner in a small store with Davis, the defendant, and claims to have examined or "cast his eye" over the northern boundary for the purpose of seeing whether anything had been done by way of settlement, but did not see any stone heaps. On cross-examination, he admits that there was a rise of ground between where he stood when he cast his eye over the boundary and the knoll where Bowman claimed to have piled the stone, and that there might have been stone heaps there and he not have seen them, but that they could not have been as large as they were when he saw them a short time after Davis had made his entry.

The piling of stones at the cellar and well is confirmed by some of the witnesses for defendant, and I do not think the positive evidence of the plaintiff that he made three piles on the knoll at the northern extremity of the land is overcome by the witnesses for defendant.

These stone piles are the only acts of settlement claimed by plaintiff prior to the filing of Davis, except putting some boards back on the walls of the cellar, which had been blown off or had fallen into the cellar.

It is also shown, as stated in your decision, that he moved a house on to the land a few days subsequent to Davis' entry, and on December 10, moved his family, consisting of a wife and six children, on to it, and has resided there ever since. His house is habitable, and comfortably furnished.

Upon these facts the register and receiver held that Bowman had not performed an act of settlement sufficient to hold the land as against the entry of Davis, in which finding you concur.

I am of the opinion that your judgment is not sustained by the decisions of this Department, the weight of authority being that "an act of settlement is complete from the instant the settler goes upon the land with the intention of making it his home and performs some act indicative of such intent." Franklin *v.* Murch, 10 L. D., 582.

This definition of a settler does not, in my judgment, require that such act should necessarily be done in connection with his residence on the land, such as commencing the erection of a house to reside in, but it may be any visible act tending to disclose a design to appropriate the land under and in accordance with the pre-emption laws.

The fact that Bowman did not intend to use the stones that were piled together for the construction of a house, well, or fence or for any other purpose, except to get them out of the way of the plow, is not material, if it should appear that such acts were done in contemplation of appropriating the land under the settlement laws, and were such as were discoverable by a person examining the land with the view of entering the same.

In the case of Etnier *v.* Zook, 11 L. D., 452, the act of settlement on the part of Etnier, which gave her priority, consisted in surveying the land and "throwing up sod mounds on the boundaries of her claim." This was not a permanent improvement, nor did it relate to the preparation or construction of a home on the land, but was held to be a sufficient act of settlement to hold the claim.

It is sufficient that some act is done denoting an intention to claim the land under the settlement laws, and although such act has no immediate or direct relation to preparing or constructing a residence thereon, it will be presumed that it was done in furtherance of an intent to comply with the law, one of the requisites of which is that he shall make his home on the land.

While it is not shown in this case by direct testimony that Davis had actual notice of Bowman's act of settlement, or his intention to claim the land, yet, I think it may fairly be presumed from the circumstances that when he made his entry on November 29, he at least had reasonable grounds for believing that the land was not free from the claim of some settler.

Another circumstance which we have a right to consider is the fact that Davis did not take the stand at the hearing. It would have been an easy matter for him to have said that he had no knowledge or suspicion of Bowman's settlement or claim. He chooses, however, to remain silent, and leaves the officers of this Department to infer, if they can, that he made his entry without notice of the claim of Bowman. While he was under no legal obligation to testify at the hearing, and while the *onus* of proving settlement was on Bowman, the fact that he remained silent when he could speak is one which may be properly considered in connection with the other facts and circumstances in determining whether he had knowledge of the claim and acts of Bowman.

The evidence leaves no doubt in my mind as to the *bona fides* of the claim of Bowman, for he has constantly resided on the land ever since the 10th of December, 1886, or within two weeks from the date of his said acts of settlement and has erected a comfortable house thereon.

Under all the circumstances, I think that his acts when viewed in the light of all the evidence in this case, were sufficient to constitute an act of settlement, and that the equities of the case are clearly on his side.

The entry of Davis will be canceled and Bowman's filing admitted to record.

The decision of your office is accordingly reversed.

PRE-EMPTION ENTRY—RE-INSTATEMENT—RESIDENCE.

HARMON POMEROY.

Where a pre-emption entry is canceled for the reason that the claimant has failed to comply with the law in the matter of residence, a re-instatement of such entry cannot be secured by subsequent residence on the land, and cultivation thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 28, 1891.

I am in receipt of your communication of January 19, 1891, transmitting the application of Harmon Pomeroy for re-instatement of his pre-emption cash entry No. 6736, embracing the NW. ¼ Sec. 17, T. 15 N., R. 1 E., Humboldt, California, and recommending favorable action thereon, and that your office be authorized to pass the same to patent.

The record history of this case is as follows:

On June 1, 1885, he made pre-emption cash entry for the land described, and received final certificate therefor, he having filed his declaratory statement July 7, 1884.

July 17, 1888, your office rejected his proof for lack of residence and improvements, and directed

that unless he shall within sixty days from service of written notice furnish new proof, without publication, satisfactorily showing full compliance with law in good faith, his entry will be canceled without further delay.

He appealed from this action of your office, September 1, 1888, and on the the 29th of the same month made supplemental proof in support of his claim, which was duly transmitted to your office, October 3d of the same year, and by your office transmitted to this Department, May 7, 1889.

May 17th of the same year, this Department, by its unreported decision of that date, being of the opinion that the claimant had failed to comply with the law as to residence upon the land, ordered his entry canceled, which was accordingly done, June 11, 1890.

January 7, 1891, he filed in your office a petition asking that his entry be re-instated, and for grounds therefor shows by his corroborated affidavit, in addition to the residence, cultivation and improvements as shown by his final and supplemental proof, that he has resided thereon continuously with his family and continued to cultivate and improve the same since June 1, 1890, and is now so residing on and cultivating the same; that his improvements are extensive, amounting to seven hundred dollars, and that there is no adverse claimant for the land.

It is this application that is presented to me for consideration.

The facts stated in his affidavit—namely, residence and cultivation for six months subsequent to the order of cancellation—will not authorize the re-instatement of his entry, for such acts in no manner serve to cure his laches and defaults, upon which the judgment of cancellation

was rendered. That judgment was a finality, and its force and effect, under the rules of practice adopted by the Department, could only be avoided by a successful motion for review.

As the claimant has made extensive improvements on the land and seems desirous of making it his home, you will direct the local officers to reserve the tract from other disposition for ninety days after notice of this decision to allow applicant to make homestead entry for the same, if he so desires, and is qualified. His application to re-instate his entry is denied.

PRACTICE—APPEAL—COAL ENTRY.

KENDALL *v.* HALL.

The Department has no jurisdiction to entertain an appeal that is not taken in the time prescribed by the rules of practice.

A coal entry can not embrace non-contiguous tracts of land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 27, 1891.

Your office letter of January 10, 1891 transmitted to this Department the papers in the case of Augustine Kendall *v.* Milton S. Hall on appeal by the former from your decision of July 10, 1890, holding for cancellation Hall's coal entry for the NW. ¼, SW. ¼ and NE. ¼ of SE. ¼ of section 30, T. 19 N., R. 104 W., Evanston, Wyoming land district, and in declining to recall or modify your decision of May 27, 1889, but in allowing said Hall's coal declaratory statement, No. 366 for the NE. ¼, SE. ¼, NW. ¼, SE. ¼, NE. ¼, SW. ¼ and NW. ¼, SW. ¼ of said section 30 to remain intact.

This controversy involves the NW. ¼, SE. ¼ and NE. ¼, SW. ¼ of said section 30, town and range aforesaid.

On April 11, 1887, Kendall filed coal declaratory statement for the S. ½, NE. ¼, "NW. ¼, SE. ¼ and NE. ¼, SW. ¼" of said section 30, town and range aforesaid, alleging settlement on the 9th day of said month.

On September 9, following, Hall filed coal declaratory statement, No. 366, for the NE. ¼, SE. ¼, "NW. ¼, SE. ¼, NE. ¼, SW. ¼" and NW. ¼, SW. ¼ of same section, alleging settlement on the 6th day of said month.

On December 5, 1887, Kendall, pursuant to notice, offered final proof in support of his filing, and Hall appeared and protested against the same in so far as it involved the NW. ¼ of SE. ¼ and NE. ¼ of SW. ¼ of said section, alleging prior settlement, possession, improvement, etc. Thereupon, a hearing was had and a large amount of testimony was taken, covering nearly five hundred pages, and the record and testimony having been considered by the local officers, they failed to agree, but rendered separate opinions, the receiver holding that Hall had the preference right of entry and purchase, and that Kendall's filing for the two tracts in controversy should be canceled, the register holding

the reverse, and recommending the cancellation of Hall's filing for the two tracts in controversy. From these separate decisions, each claimant appealed.

The official plat of the township was filed in the local office on Janu- 28, 1876.

On May 27, 1889, the case came on for consideration, and your office held Kendall's filing upon said two tracts for cancellation, thus affirming the receiver's decision and reversing the register. From this judgment, Kendall appealed to this Department.

On February 28, 1890, the attorney for Kendall filed in the case, a statement,

> That on Sept. 3rd, 1888, Hall applied to the local officers at Evanston to be allowed to enter the NE. ¼, SE. ¼, and NW. ¼, SW. ¼ of said section, town and range, which application was finally allowed by the local officers as coal entry No. 54—the two tracts being that portion of Hall's claim not in conflict with Kendall's claim.

He accompanied the same with a motion,

> that this case be remanded to the General Land Office with instructions to take action thereon as upon a relinquishment or withdrawal of all his claim to said land by Hall, without passing upon the record of the hearing.

On June 25, 1890, the Department returned the papers in the case to your office, in accordance with said motion and "without considering the questions raised upon the appeal", as requested by counsel, but "for further consideration by your office, in view of said entry by Hall of a portion of the land embraced in his original coal declaratory statement."

On July 10, 1890, you again considered said case "in view of said entry by Hall" and held that the sale was invalid and that it should be canceled without prejudice to Hall's right to make another entry. You allowed his declaratory statement, No. 366, to remain intact pending the final determination of the case, and instructed the local officers that

> should Hall so elect, his entry may be allowed to stand as to either of the forty acre tracts but that such election and entry will constitute a waiver and abandonment of his claim to the land in conflict with Kendall's claim.

You do not modify or recall your former decision.

From this judgment, neither party appealed within the time specified for filing appeals. Hall did not elect to make entry for either forty acre tract, but allowed your decision to become final.

On September 12, following, Kendall filed an appeal from your judgment, assigning as ground of error "that you erred in holding coal entry 54 for cancellation without prejudice to the rights of Hall to make another coal entry for the lands embraced in his original filing." Counsel for Kendall, admitting that an appeal was not taken within the time prescribed by the Rules of Practice, claim

That the Commissioner having acted beyond his authority in holding Hall's coal entry No. 54 for cancellation without prejudice to his rights under his D. S., No. 366, the appeal from such action filed by Kendall must be considered whether filed within sixty days or not.

In support of this proposition, he cites Pearce *v.* Wollscheid (10 L. D., 678) in which the well-known rule is quoted:

"The question of jurisdiction may be raised at any time," and in which it was also said: "Although a court may have jurisdiction over the parties and the subject-matter, yet if it make a decree which is not within the powers granted, it is void."

The difficulty that meets counsel in this case is that his client has nothing before the Department. He is not in court to say that the Commissioner had no jurisdiction, or that he rendered a decision when he had no power to do so.

Had he perfected his appeal and brought his case within the jurisdiction of this Department, he would have had a "standing in court" from which he could have questioned the jurisdiction of the Commissioner. The party who asks an appellate court to review the decision of the court below must bring his case into the appellate court by some mode known to the law. If the rule prescribed for removing cases by error or appeal is not observed, the appellate court does not acquire jurisdiction of the case. In the case of United States *v.* Curry (6 How., 106), it was said:

The power to hear and determine a case, like this, is conferred upon the courts by acts of Congress, and the same authority which gives the jurisdiction, has pointed out the manner in which the case shall be brought before us, ... and as this appeal has not been prosecuted in the manner directed within the time limited by the act of Congress, it must be dismissed for want of jurisdiction.

The right of appeal from the General Land Office to this Department is conferred by acts of Congress, and the regulations of the Department under those acts, having the force and effect of law, "point out the manner in which a case shall be brought before us" as certainly as do the acts of Congress point out the manner in which cases may be carried from a lower to a higher court in the judiciary department of the government. But it is claimed by counsel that the Department can assume jurisdiction of the case, because he claims, the Commissioner made a mistake of law and acted beyond his authority.

By Rule 48, Rules of Practice, it is provided that

In case of 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:

* * * * * * *

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

but there is no such rule applicable to decisions of your office. The reason of the rule quoted does not exist as between your office and this Department, and such a rule would be unreasonable.

Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed. Circular G. L. O. (January 1, 1889, p. 54).

In a brief filed February 24, 1891, counsel claim that the case "is before the Secretary upon the entire record", and he is now asking in effect to have the case passed upon, because the papers are in the files of the Department.

Upon his application, the case was by order of the Department returned to your office for a hearing in the light of new facts—it was in effect Kendall asking and the Department granting a new trial upon newly discovered evidence. The case could not properly be pending in both jurisdictions at the same time. The appeal removed it from your jurisdiction, and only the withdrawal of the appeal or the order of the Department could return it. Had the Department *sua sponte* or upon the motion or suggestion of Hall returned the case to your office, counsel for Kendall might be heard to complain that the action of the Department was a nullity, or that it was erroneous, or that his client was prejudiced thereby, but the action having been taken upon his suggestion and motion, he is estopped from saying that it was not in all respects proper; that the decision upon the "new trial" was adverse to him does not change the case; and that he neglected to appeal within the time prescribed, is his own fault. He insists that the appeal was not dismissed "by the Commissioner". The Commissioner had nothing to do with an appeal pending in this Department, and when the case was sent back to your office, the appeal which brought it here, having served its purpose, became, at the request of Kendall and by the action of the Department, a nullity.

The contention that you exceeded the powers granted you, is untenable. You certainly had ample authority to render the decision of May 27, 1889, and the new question presented as of July 10, 1890 was simply what was or what was not a valid coal entry. Hall had filed a coal declaratory statement upon four forty acre tracts; the year within which entry and payment were to be made was drawing to a close; he desired to comply with the law; the local officers declined to allow entry and payment for the two tracts involved in litigation, but allowed entry for the remaining two; out of abundant caution Hall entered these; they were not contiguous; the question before you was simply whether such entry was legal, and you held very properly that it was not. Counsel say that under the ruling in case of C. P. Masterson (7 L. D., 577) non-contiguous tracts of coal land could be patented prior to said decision, and that the rule was changed by said opinion; that Hall's entry was prior to the decision, and therefore, legal, and that your judgment being therefore erroneous was beyond the "powers granted" and void, hence his right to have the case heard regardless of the time appeal.

Referring to the case of Masterson *supra*, it will be observed that the

original judgment in case of Masterson (7 L. D., 172) was promulgated August 10, 1888, in which it was decided that a coal entry could not be made for non-contiguous tracts, and this ruling was in force when Hall made his entry (Sept. 3, 1888) and the decision on review was not promulgated until December 28 following, so your office did not err; but were it otherwise, it would simply show that your office committed an error in judgment to reverse which, an appeal is necessary. The jurisdiction of your office and the powers granted, are given and authorized by law, and do not depend upon the correctness of your judgment. When the case was returned to your office, you had jurisdiction over the entire case, and could have recalled and modified your decision of May 27, 1889 or reversed it, and in the light of the "newly discovered evidence" rendered the judgment *de novo*, upon the case then before you. That you did not find any reason for doing this does not affect the question of your right to have done it.

I have carefully examined the record in the case, and I find no reason for making this case an exception to the well established Rules of Practice, and I do not find that this Department has any jurisdiction of the case, to review your decision, either of May 27, 1889 or of July 10 1890, unless it can, and should be done under Rule 114, Rules of Practice, which reserves to the Secretary of the Interior "the exercise of the directory and supervisory powers conferred upon him by law."

Notwithstanding the above conclusion, the amount involved in the case and the earnestness of counsel upon both sides have led me to review all the testimony, arguments, and other papers in the record, and I do not find any disregard of law or the regulations, nor any exercise of authority or power not granted your office, nor any injustice done in the case, such as calls for the exercise of the supervisory powers of the Secretary of the Interior.

The appeal of Kendall is dismissed for want of jurisdiction, and the papers accompanying your letter of January 10, 1891 are herewith returned to your office for appropriate action under your decisions.

RIGHT OF WAY—RAILROADS—ACT OF MARCH 3, 1875.

CIRCULAR.*

The following is a copy of an act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands of the United States:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its

* Not heretofore reported.

articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, 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.

SEC. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act [to amend an act entitled An act] to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved March 3, 1875. (18 *Stat.*, 482.)

The regulations under the law are as follows:

I. Any railroad company desiring to obtain the benefits of the law is required to file—

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company, under its corporate seal.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association, or other papers connected with the organization, be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed, to some extent, by the laws of the State or Territory. Under the following regulations proper forms will be found herein.

Fourth. The official statement, under seal, of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory; and that the copy of the articles filed with the Secretary of the Interior is true and correct.

Fifth. A true list, signed by the president, under the seal of the company, showing the names and designation of its respective officers at the date of the presentation of the proofs at the Department.

These may be transmitted directly to the Secretary of the Interior, or through this office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office.

II. Upon the location of any section of the line of route of its road, not exceeding 20 miles in length, the company must file with the register of the land district in which such section of the road, or the greater portion thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys.

The map must be filed within twelve months after the location of such portion of the road, if located upon surveyed lands, and if upon unsurveyed lands, within twelve months of the survey thereof. It must bear—

First. Affidavit of the chief engineer of the company (or person employed to make the survey, if the company has no chief engineer), setting forth that the survey of route of the company's road from —— to ——, a distance of —— miles (giving termini and distance), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed for the purpose, if such be the case), under authority of the company, on or between certain dates (giving the same), and that such survey is accurately represented on the map. If the affidavit is made by the chief engineer of the company, it must be signed by him officially.

Second. Official certificate of the president of the company, attested by its secretary under its corporate seal, regarding the person signing the affidavit, either as to his being the chief engineer of the company or as to his employment by the company for the purpose of making such survey; that the survey was made under authority of the company; that the line of route so surveyed and represented by the map was adopted by the company, by resolution of its board of directors of a certain date (giving the date), as the definite location of the line of route of the company's road from ——

to ———, a distance of ——— miles (giving termini and distance), and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

III. It will be observed that the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone, and timber for its construction, or to occupy them for station or other purposes. It is therefore imperative that proper steps, as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained, prior to the construction of any part of its road or its occupancy of the public lands in any manner.

IV. Should the company desire to construct its road over lands prior to their survey, it may file, in manner as heretofore indicated, a map of its surveyed route, without waiting until the lands are surveyed, and, upon approval thereof, may proceed with construction, but, immediately on the survey of the lands over which the road passes, the company must also file a map showing the line of route of its road over such lands, in order that the proper notes and records for the protection of its rights may be made.

V. Upon construction of any section of the line of its road the company must file with the register of the proper land district, for transmission to this office, a map of such constructed portion of road, bearing—

First. Affidavit of the chief engineer or person under whose supervision the portion of the road was constructed, that its construction was commenced on ——— and finished on ——— (giving dates); that the line of constructed road is accurately represented upon the map, and that it conforms to the line of located route which received the approval of the Secretary of the Interior on ——— (giving date).

Second. Certificate of the president of the company, attested by the secretary under the corporate seal, that the portion of the road indicated by the map was actually constructed at the time as sworn to by the chief engineer of the company (or person making the affidavit), and on the exact route shown on the map; that in its construction the road does not deviate from the line of route approved by the Secretary of the Interior, and that the company has in all respects complied with the requirements of the act of March 3, 1875, granting right of way through the public lands.

Any variation within the limits of 100 feet from the central line of the road as located will not be considered a deviation from such line, but where, upon construction, it is found necessary to transgress the limits within which the company has right of way, the company must at once file proper map of amended route for approval.

VI. If the company desires to avail itself of the provisions of the law which grant the use of "ground adjacent to the right of way for station buildings, depots, machine-shops, side-tracks, turn-outs, 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 must file for

approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the grounds desired. Such plat must bear—

First. Affidavit of the chief engineer or surveyor by whom or under whose supervision the survey was made, to the effect that the plat accurately represents the surveyed limits and area of the grounds required by the company for station or other purposes, under the law (stating the purposes), in ——— (giving section, township, range, and State or Territory); that the company has occupied no other grounds for station or other similar purposes upon public lands within the section of 10 miles for which this selection is made, and that, in his belief, the grounds so represented are actually and to their entire extent required by the company for the necessary uses contemplated by law.

Second. Certificate of the president of the company, attested by the secretary under the corporate seal, that the survey of the tract represented on the plat was made under authority and by direction of the company by or under supervision of its chief engineer (or person making the survey), whose affidavit is attached; that such survey accurately represents the grounds actually and to their entire extent required by the company for station (or other) purpose in ——— (giving section, township, range, State or Territory), allowed by the provisions of the act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands; that the company has no station or other grounds upon public lands within the section of 10 miles for which this selection is made; and that the company, by resolution of its board of directors of a certain date (giving the date), directed the proper officers to present the plat for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds under the law above referred to.

The right of a railroad company does not attach until its map or maps of definite location have been approved by the Secretary of the Interior, and a copy transmitted to the district land office within which the line of road is situated.

When maps of a line of any road have been approved by the Secretary of the Interior a copy of so much thereof as relates to the lands within the boundaries of a given district will be transmitted to the register and receiver.

Immediately upon receipt of such copy, if the same represents surveyed lands, the local officers will mark upon the township plats the line of route of the road as laid down on the map. They will also note, in pencil, on the tract-books opposite each tract of public land cut by said line, that the same is to be disposed of subject to the right of way for the road, giving its name. Thereafter in disposing of any tract cut by the line of route, the claim to which shall have been initiated subsequent to the receipt of the copy of the approved map, the register and receiver will note, in red ink, across the face of the certificate issued upon any entry made, that the same is allowed subject to the right of way of the road, giving its name, and refer to the letter from this office transmitting the map by its initial and date.

When there is received from this office a copy of an approved plat of grounds selected by a company, under the act in question, for station purposes, etc., they will mark the proper township plat accordingly, make the necessary notes on the tract-books, and in disposing of the

tracts which may include the grounds so selected the officers will note on the certificate of entry, in addition to the note concerning the right of way, the entry is permitted subject to the use and occupation of the company (naming it) for station purposes, etc.

When copies of approved maps or plats are sent, showing lines of route through unsurveyed lands, they will be placed on file, awaiting further compliance with the law and instructions by the companies after survey of the lands.

The act of March, 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the "right of way" or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

Each tract selected for station purposes under the act must represent its particular section of 10 miles, and can not be selected in any other section of 10 miles. That is, within the first 10 miles a tract may be selected at any point within said section, and for the next 10 miles another tract may be selected within the limits of that section in the same manner as the first; and other tracts may in like manner be selected for each additional section of 10 miles to represent said section in its particular locality. All selections for station purposes are now adjusted in conformity to the above ruling, as shown by Forms VII and VIII.

All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases.

If a settler has a valid claim to land existing at the date of the approval of the map of definite location of a railroad company, his right is superior, and he is entitled to such reasonable measure of damages for "right of way," etc., as may be determined upon by agreement, or in the courts, the question being one that does not fall within the jurisdiction of this office.

Registers at the various land offices are directed to require that such papers and maps herein referred to as may be filed with them for transmission to this office shall conform to these regulations. Where differences of opinion may arise between themselves and the persons filing papers respecting the proper construction of these requirements, the papers may be transmitted with letter stating the differing opinions.

They are also instructed, in any case where information is received by them of the construction of railroads within their districts, of the rights of which they have no official knowledge, to promptly advise this office of the fact in order that proper information or directions in the matter may be given them.

All maps presented for approval should be drawn on tracing linen, the scale not less than 2,000 feet to the inch, and should be filed in duplicate.

The attention of companies seeking the benefits of this act should be specially directed to this suggestion, as serious delays and embarrassments are often incurred through the inability of this office, owing to its limited clerical force, to prepare the necessary copies for transmission to the district offices.

Very respectfully,

S. M. STOCKSLAGER,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
January 13, 1888.

Approved.
H. L. MULDROW,
Acting Secretary.

RIGHT OF WAY—CANALS—RESERVOIRS—ACT OF MARCH 3, 1891.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 17, 1891.

Registers and Receivers United States Land Offices.

SIRS: The following instructions under the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "an act to repeal timber culture laws, and for other purposes," are forwarded for your guidance:

The eighteenth section of said act provides that the right of way through the public lands and reservations of the United States is hereby granted to any canal, or ditch company, formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which has filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir, and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal, or ditch, material, earth and stone necessary for the construction of such canal, or ditch. The right of way must not interfere with the proper occupation by the government of any reservation, and all maps of location must be subject to the approval of this Department, and of the Department having charge of any reservation in which the right of way is proposed to be located.

The ninteenth section is drawn in the same general terms of section 4, of the right of way act for railroads, approved March 3, 1875 (18 Stat., 482), and directs that any canal, or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and

if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal, or ditch, and reservoir; and, upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. The section further provides that whenever any person, or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury, or damage.

Under this section all maps, or plats, showing the location of canals, ditches, or reservoirs, must first be filed in the proper local land offices. The register will note in red ink on the map or plat over his official signature the date of such filing in his office, and then promptly transmit the same to this office for appropriate action. It is imperatively necessary that all maps or plats submitted under this section should be filed in duplicate.

The twentieth section directs that the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore, or hereafter constructed, whether constructed by corpo rations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been, or shall be constructed by an individual, or association of individuals, it shall be sufficient for such individual, or associatio n of individuals, to file with the Secretary of the Interior and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it. Forfeiture is declared if any section of said canal, or ditch, shall not be completed within five years after the location of said section, to the extent that the same is not completed at the date of the forfeiture.

By the provisions of this section it is obligatory upon all corporations, individuals, or association of individuals, owning, controlling, or operating canals, ditches, or reservoirs, whether the same have been constructed, or are to be hereafter constructed, in order to be admitted to enjoy the benefits provided for in this statute, to file the necessary papers and maps entitling them to recognition under this act; and you are directed to give notice to all such corporations that may be found within your district that the conditions precedent to obtaining rights of way over the public lands, as enumerated by the statute, must be fully complied with before any easement can be secured.

The twenty-first section declares that nothing in this act shall authorize such canal, or ditch company, to occupy such right of way except

for the purpose of said canal, or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal, or ditch.

So far as relates to sections 18, 19, 20 and 21, the duties of register and receiver under the law are identical with those prescribed by circular approved January 13, 1888, (12 L. D., 423) containing the rules and regulations for railroads claiming right of way over the public lands under act of March 3, 1875, and you are directed to proceed in accordance therewith.

Respectfully,

W. M. STONE,
Acting Commissioner.

Approved.
GEO. CHANDLER,
Acting Secretary.

REPAYMENT—TIMBER LAND ENTRY.

JOSEPH HOBART.

In the absence of bad faith on the part of the entryman, repayment may be allowed where a timber land entry is held for cancellation on the ground that the land is not of the character subject to such appropriation, and the entryman thereupon files a relinquishment and applies for return of the purchase money.

Secretary Noble to the Commissioner of the General Land Office, April 29, 1891.

I have considered the case arising upon the appeal of Joseph Hobart from your office decision of January 30, 1890, rejecting his application for repayment of the purchase money paid upon timber land entry No. 1536 for lot 1, the S½, of the NW¼, and the SW¼ of the NE¼, of Sec. 22, T. 4 N., R. 22 W., Los Angeles land district, California.

Your rejection of the application is based on the grounds that the preliminary affidavit requires that the condition of the land must be set forth, and implies a personal knowledge thereof on the part of the entryman; that "at the date of said entry the claimant never saw the land covered thereby," and yet "he swore that said land is unfit for cultivation and valuable for its timber;" and the case is ruled upon that of Falk Steinhardt (7 L. D., 10).

Hobart, in his appeal, states that your decision is in error in stating that he never saw the land; that in fact he had lived for many years in its immediate vicinity and had seen it many times; that he has not changed his opinion that the land is unfit for cultivation, but is essentially timber and stone land; and that he relinquished because it had been held for cancellation on the report of a special agent of your office, and he was not able to bear the expense of a tedious and costly litigation.

The preceding statement is in part corroborated by the report of the special agent, who says "the claimant was acquainted with the character of the timber and the land on which it stood."

Bad faith on the part of the entryman is not shown. The special agent's report as to the character of the land says:

> Mountainous; surface quite broken; is partly covered with live oak trees and walnut bushes; timber is only useful for firewood, and on account of its location not of much value; no stone of any value on the land. Soil is generally good, and covered with dry grass and has the appearance of being good for pasturage. What little level land there is might be cultivated. Was informed by parties living in the neighborhood it could be made valuable for fruit raising and other agricultural purposes.

It is not difficult to understand how Hobart might consider such a tract, apparently of little value for any purpose, worth more for its timber than for agricultural purposes, and enter it under the timber land law accordingly.

When the agent of your office reported that the tract was not timber land, and that its entry as such had been erroneously allowed, and when your office, by letter of November 7, 1889, held the same for cancellation, the entryman, rather than incur the expense of litigation, pursued the course prescribed in section 2 of the act of June 16, 1880 (21 Stat., 287), and in General Circular of your office dated January 1, 1889, (p. 68), relinquishing his entry and applying for repayment.

The second section of the act of June 16, 1880, says:

> In all cases . . . . where, from any cause, the entry has been erroneously allowed, and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs and assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of a duplicate receipt and the execution of a proper relinquishment of all claim to said land.

The General Circular of January 1, 1889, requires:

> In all cases of application for the repayment of fees, commissions, etc., on canceled homestead and other entries under the second section of the act (of June 16, 1880), the duplicate receipt must be surrendered, with a relinquishment of all right, title and claim in and to the land described in the receipt endorsed thereon, etc.

In the case of E. L. Choate (8 L. D., 162), the proof was suspended by your office as unsatisfactory, and he was called on to make new proof showing that he had for a period of six months maintained an actual, *bona fide*, continuous residence on the tract. Before being called upon for such further proof, however, Choate had found employment as a locomotive engineer; and to return and reside upon the tract (if, indeed, your decision could have been interpreted as permitting him to do so,) would have involved the forfeiture of his position on the railroad, and great pecuniary loss. The Department held that he was entitled to a return of his fees, commissions, and purchase money.

The above ruling was followed in the case of J. H. Thompson (10 L. D., 34), and others not reported.

The equities in the case at bar are even stronger than in the cases of

Choate and Thompson (above cited); in those cases repayment was ordered merely because to make the new proof demanded by your office would involve great inconvenience and loss. In this case no opportunity is afforded the entryman to save his entry by making new proof.

In my opinion the repayment requested by Hobart should be allowed.

Your decision of January 30, 1890, rejecting his application, is therefore reversed.

SURVEY—MEANDERED LAKE.

JAMES POPPLE ET AL.

Overruled, 13 L.D. 588

A survey may be allowed of land formerly covered by the waters of a shallow meandered lake, that is subsequently drained by artificial means, and thus rendered valuable for agricultural purposes.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 29, 1891.

In October, 1889, James Popple, Charles A. Desplaine, Andrew J. Finney, George W. Finney, Zachariah Finney, Henry Mitchell, and George Popple, severally, made their applications to the surveyor-general of Washington Territory for a survey of those parcels of land falling within the meandered lines of Crab Lake, being situated in what would be the general subdivisions of sections 7, 8, 9, 10, 11, and 18, in township 22 north, range 30 east, and sections 12 and 13 in same township and range 29 west, Olympia land district, Washington Territory.

The several applicants make affidavit that about the month of March, 1884, George Popple and others commenced the work of draining and reclaiming said lake, and by the expenditure of great labor and large sums of money they have reclaimed a large part of the same, so that the lands formerly covered by the waters thereof are now in a condition to improve and cultivate; that they have constructed a ditch from two and a quarter to two and a half miles in length; that the ditch is ten feet wide at the bottom and from two to nine feet in depth; that the land is now valuable for meadow purposes, and that large parts thereof have been sown to tame grass, and a large part is also prepared for sowing to tame grass in the fall; that large amounts of hay have been cut from said lands; that prior to the reclamation thereof they were worthless; that since their reclamation they are of exceeding great value for meadow purposes; that portions thereof have been fenced, and that the several applications for the survey of the same are made with the intention of entering the same under the public land laws.

Under date of October 25, 1889, the surveyor-general transmitted to your office these several applications, with his recommendation that the survey be made.

By your office letter of November 13, 1889, you refuse to order the sur-

vey of the lands, as being contrary to the present departmental practice.

All of said applicants file their separate appeals from the action of your office refusing to order the survey applied for.

Upon an examination of the official plats of Crab Lake, I find the lake to be about five miles long and extending nearly due east and west. It has an average breadth of about one half mile.

The public survey of the adjacent lands, both on the north and south, extends up to the lake; and subdivisions are thus made in some instances of less than forty acres and in others of more than that quantity. These subdivisions, as is usual in such cases, are marked "lots 1, 2, and 3," etc. They are covered in most cases by filings and timber-culture entries, except where they fall in an odd section and those are claimed by the Northern Pacific Railroad Company.

You reject the applications for the survey of the land formerly covered by the lake, on the authority of the departmental decision in the case of G. W. Holland (6 L. D., 20), and a reversal of your decision is sought on the authority of the case of Peter Meyer (6 L. D., 639).

In the Holland case the application was rejected for the survey of the bed of a dried up lake, because as there said,

> since 1877 it has been the policy of the Department to refuse to survey the beds of meandered lakes for the reasons set forth in the report of the Commissioner of the General Land Office for 1877.

In the Peter Meyer case the application for the survey was made for lands lying within the meandered lines of Sylvan Lake, Washington Territory. Meyer, the applicant, began to work to drain the swamp in the fall of 1876, and dug a ditch, twelve feet wide, four to eight feet deep, and one hundred and sixty rods long. He made his application to survey the land December 29, 1884. This was refused by your office, and on appeal the Department held that the application for survey should be allowed, for the reason that the applicant went on the land (in 1876), under the then existing provisions of the circular of July 13, 1874, and expended a large sum of money, and reclaimed and made valuable the land that was before of no value.

This circular of 1874 (1 C. L. O., 69), held that the beds of lakes (not navigable), sloughs and ponds, which had been meandered in the public surveys, were the property of the United States and as such were subject to survey and sale under the general laws regulating the disposal of the public domain; and the principal reason for allowing Meyer's application for the survey was because he had gone on the land in good faith and reclaimed it in pursuance of the circular of 1874, and before the report of Commissioner Williamson was made (November 1, 1877), in which report the Commissioner stated that it had been determined that such surveys should not further be authorized. It is seen from this that the Meyer case, cited by appellants, is not an authority for granting the survey of such lands. Nor does it appear that it was

intended in that decision to direct a change in the order made by your office in 1877, discontinuing the survey of such lands.

The reasons assigned by Commissioner Williamson in his report of 1877 discontinuing the then existing practice of surveying

> beds of lakes (not navigable), sloughs and ponds over which the lines of the public surveys were not extended at date of the original survey, but which from the presence of water at the date of such survey were meandered,

and which have become dry land sufficiently for agricultural purposes by evaporation or from other causes, were: 1. That there is no specific enactment which authorizes such surveys. 2. There is grave doubt whether the United States has any claim to such dried up lake beds, and whether they do not come under the sovereignty of the States, respectively, within the limits of which they are situated.

The sole inquiry, as it seems to me, is the determination of the question: To whom do such lands belong. If to the United States, then the power already exists for their survey and disposal, and no specific legislation is needed.

The title to the land under water and to the shore below ordinary high water mark in navigable rivers and arms of the sea was by the common law vested in the sovereign for the public use and benefit. Barney *v.* Keokuk, 94 U. S., 324.

Section 9 of the act of Congress, approved May 18, 1796 (1 Stat., 464), provides that

> All navigable rivers . . . . . shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both.

The great lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters. They properly belong to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The Genessee Chief, 12 How., 443.

In the case of streams not navigable, the common law rules of riparian ownership were incorporated into the act of 1796 (*supra*), which provides that in all cases where the opposite banks of any such stream shall belong to different persons, the stream and the bed thereof shall become common to both. (See also Railroad Company *v.* Schurmeir, 7 Wall., 272; Frank Chapman, 6 L. D., 583). But this rule of riparian ownership does not apply to non-navigable lakes and ponds.

In the case of the State of Indiana *v.* Milk, 11th Federal Reporter, page 595, Judge Gresham says:

> Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners

was the thread of the current. The rights of the riparian proprietor in the bed of the stream and the stream itself were thus clearly defined. But when the rule is attempted to be applied to lakes and ponds practical difficulties are encountered. They have no current, and being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of the shore owners in the beds..... I do not think the mere proprietorship of the surrounding lands will in all cases give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim.

While a general grant of land on a river or stream non-navigable extends the line of the grantee to the middle or thread of the stream, a grant to a natural pond or lake extends only to the water's edge. Canal Commissioners *v.* The People (5 Wend., 423); Wheeler *v.* Spinola (54 N. Y., 377); State of Indiana *v.* Milk (*supra*).

The owner of land bounded by any meandered lake or pond takes as such no fee in the bed or soil under the water. Boorman *v.* Sunnuchs 42 Wis., 233).

In the case of Serrin *et al. v.* Grefe (67 Iowa, 197), plaintiff brought an action to recover the value of ice taken from the Des Moines river, opposite his land; when the lands were surveyed and patents issued by the government the river was regarded as navigable, but afterwards, January 20, 1870, it was declared by Congress to be non-navigable. By the government survey the river was "meandered," the lands were described as lots and parts of sections; patent was issued when the river was regarded as navigable, and the lands thus patented extended only to the river, giving the patentee only his riparian rights. When the river was declared to be non-navigable, the owners of the land on the opposite shores claimed the bed of the river, and thus brought suit for the value of the ice taken therefrom. But the supreme court in the case cited held that the meandered lines constituted the boundaries of the lands, and the title of the bed of the stream remained in the government.

In the case at bar, the lake covers about sixteen hundred acres; it can not be claimed as belonging to the State of Washington under the swamp land act, as in the case of Beaver Lake it was so held by Judge Gresham in the Milk case (*supra*), for the reason that while the provisions of the swamp land act applied to Indiana, they do not apply to the State of Washington.

The title to the bed of this lake still remains in the government. Petitioners have asked for its survey, with a view to entering the same under the public land laws. I think the survey, on the showing made, should be ordered, and the land disposed of under the homestead laws.

It is so ordered, and your said office decision is accordingly reversed.

The case of G. W. Holland (6 L. D., 20,) is hereby overruled, and that of Peter Meyer (idem., 639) is modified, in so far as it conflicts with the provisions of this case.

SETTLEMENT RIGHTS—INDIAN RESERVATION.

IRA O. HANCHETT.

Land within an Indian reservation, and reserved by executive order is excluded from settlement and entry, and an entry, embracing, in part, land th is reserved must be corrected, even though it was made in consequence of an erroneous government survey, and valuable improvements have been placed upon the land improperly included therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 29, 1891.

I have considered the appeal of Ira O. Hanchett from your office decision of December 30, 1890, refusing to reconsider its decision of June 1, 1889, suspending final homestead certificate No. 2505, in name of said Hanchett, for the S ½ NE ¼, SE ¼ NW ¼, and NE ¼ SW ¼ of Sec. 25, T. 5 S., R. 9 W., Oregon City land office, Oregon.

He filed pre-emption declaratory statement for said tracts November 29, 1881, and changed his filing to homestead entry No. 5637, August 20, 1884. He made final proof, after giving due notice by publication, and final certificate No. 2505 issued to him March 24, 1888. This entry was suspended by order from your office bearing date June 1, 1889, and the register of the Oregon City land district, Oregon, was instructed to correct the final certificate to read SE ¼ NW ¼, NE ¼ SW ¼, and lot 2, Sec. 25, T. 5 S., R. 9 W., with an area of 112.93 acres, instead of S ½ NE ¼, SE ¼ NW ¼ and NE ¼ SW ¼, same section, with an area of 160 acres.

It appears from the record and official letters among the papers in the case that townships 5 and 6 S., R. 8. W., with other lands, were reserved by executive order of June 30, 1857, for the use of the Grande Ronde Indians, and the lines of said townships, as they existed at that time, form the boundary of the reservation. Upon closing the lines of T. 5 S., R. 9 W., in 1872, an error was made in running the boundary line between townships 5 S., R. 8 W., and 5 S., R. 9 W., such line being located about a quarter of a mile east of the original line, and consequently a portion of T. 5 S., R. 9 W., overlapped a part of T. 5 S., R. 8 W., and included a part of said reservation, although this fact is not shown by the plat.

On the correction of this error in 1887, the original line is taken as the range line between ranges 8 and 9, which leaves all the eastern section of T. 5 S., R. 9 W., fractional and partly includes the section covered by Hanchett's entry. The S ½ of NE ¼ of Sec. 25, T. 5 S., R. 9 W., designated as lot 2 in the corrected survey, contains, according to plat in your office, 32.93 acres, and not 39.93 acres, as stated in your decision of December 30, 1889. This lot 2, containing 32.93 acres, with the SE ¼ of NW ¼ and NE ¼ of SW ¼ of Sec. 25, makes 112.93 acres, and, in that particular, corresponds with the final statement of your office decision as to the area within Hanchett's entry under the corrected

survey. In consequence of the conflicting claim to the land in question under the entry of Hanchett, and the Indian reservation, your office ordered a suspension of the entry and directed certificate No. 2505 to be corrected, as heretofore stated. On being notified of this order or decision, the claimant filed a petition in your office, stating in substance that an official survey of the said township had been made and that a plat of the land in question was on file in the Oregon City land office at the time that he made his settlement in November, 1881; that the land was then subject to entry, and, relying upon the plats and surveys on record, he proceeded with his improvements; that said improvements are estimated in value at over four hundred dollars, and are upon that part of the land it is now proposed to take from him; that he has expended time and labor, as well as money, on said land, and being a poor man he is not able to make such sacrifices, and therefore respectfully asks that the order suspending his entry and directing an amendment of his final certificate should be reconsidered and rescinded.

This petition being refused by your office decision of December 30, 1889, Hanchett appealed to this Department, and, in presenting his appeal, substantially relies upon the statements submitted in his petition.

Under section 2258 of the Revised Statutes, lands included in any reservation or proclamation of the President are not subject to entry. The land in question, being within an Indian reservation, and having been reserved by executive order bearing date long prior to the entry or final certificate of Hanchett, was not subject to his entry at the time he made his settlement thereon, and must be excluded therefrom.

The decision of your office is accordingly affirmed.

PRE-EMPTION CLAIM—WITHDRAWAL—RESERVOIR LANDS.

JOSIAH TUFTS.

A pre-emption settlement, and filing thereunder, do not exclude the land covered thereby from the operation of the act of October 2, 1888, authorizing the withdrawal of land for reservoir purposes.

A pre-emption claim for land withdrawn under said act may be suspended, until it can be determined whether the land is actually necessary for the purpose for which it was withdrawn.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 1, 1891.

I have considered the appeal of Josiah Tufts from your office decision of February 5, 1890, rejecting his final proof in support of his pre-emption filing for the W. ½ SW. ¼, NE. ¼ SW. ¼ and SE. ¼ NW. ¼, Sec. 27, T. 13 N., R. 5 E., Salt Lake City, Utah, land district.

He filed pre-emption declaratory statement for this land on Novem-

ber 9, 1888, and on November 22, 1889, upon due notice he made final proof thereon. The register transmitted the proof to your office on November 8, and in the letter of transmittal says that,

> The land in township 13 north, of range 5 E., S. L. P. M., having been withdrawn for reservoir site by your letter "E" of August 5, 1889, I have the honor to transmit herewith, for the consideration of your office the final proof of Josiah Tufts.

Your office on February 5, 1890, rejected the final proof from which action Tufts appealed. The grounds of appeal are substantially that it was error to hold that the government could withdraw the land for reservoir purposes after it had been settled upon, improved and filed upon.

The claimant, it appears, settled upon the land in July, 1888. The act reserving lands for reservoirs, canals, ditches, etc., for irrigation purposes was passed October 2, 1888 (25 Stat., 526).

Counsel for Tufts claims that the government agreed to sell this land to claimant on condition that he comply with the pre-emption law and he says his client has done so; that he has "carried out his part of the contract under the law, with the government up to making final proof." In his zeal for his client counsel says,

> The great power of the United States, claiming to be a just and beneficent government attempts to break faith with the claimant, under the ruling of the Hon. Commissioner of the General Land Office.

This position is hardly tenable in view of the decisions of the supreme court of the United States on the subject, in the case of Buxton *v.* Traver (130 U. S. 232), it says:

> The United States make no promise to sell him (the pre-emptor) the land, nor do they enter into any contract with him, upon the subject. And

In the Yosemite Valley case (15 Wall., 77), the court, in speaking of payment and entry, use the following language:

> Until such payment and entry, the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event, in preference to others. The United States by those acts enter into no contract with the settler and incur no obligation to any one, that the land occupied by him shall ever be put up for sale.

I take it that when the highest judicial tribunal of the government thus authoritatively disposes of the question, it must be respected by this Department. The act of Congress, approved August 30, 1890, (26 Stat., 391), repealed so much of the act of October 2, 1888, as provided for the withdrawal of the public lands from entry, occupation, and settlement, but it says

> Except, that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law.

This township 13 N., R. 5 E., having been selected for a reservoir site remains, by this act, segregated, and is reserved from sale. It will be noticed that there is no exception of pre-emption claims, and to make such exception would be to enlarge the provisions of the act.

While this is true, the act of March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes." provides:

Sec. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs, etc.

In view of this provision, and the fact that there is no record in your office or this Department showing that this tract of land "is actually necessary for the construction and maintenance of a reservoir", the filing will, until further action is taken, be allowed to remain intact. The final proof will be suspended until it shall be determined that the land is actually necessary for the purpose for which it has been withdrawn.

Your decision rejecting the final proof is modified accordingly.

ACT OF MARCH 3, 1891—PROTEST—TRANSFEREE.

JOHNSON *v.* BURROW.

A pending protest defeats the confirmatory effect of section 7, act of March 3, 1891.
An entry is not confirmed by said section, for the benefit of a transferee, where fraud on the part of such transferee has been found through an investigation by the government.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 1, 1891.

With your letter of April 2, 1890, you transmit the appeal of Elmer L. Johnson from your decision of December 21, 1889, in which you reverse the action of the register and receiver, recommending that Osage cash entry No. 3752, made May 17, 1883, by John H. Burrow, upon the SW. ¼ of Sec. 27, T. 34 S., R. 9 W., Larned, Kansas, be canceled.

From the record I gather the following facts:

Burrow filed on the land August 5, 1882, alleging settlement March 7, of that year. His final proof was made before H. O. Meigs, a notary public, at Anthony, Kansas, April 30, 1883. The improvements were shown to consist of a house, ten by twelve feet—with one door, one window; a well and sixteen acres broken; estimated at $100; residence continuous; no crops. On May 17th thereafter, the proof was accepted, the entry allowed, and the first installment of $50 was paid.

On September 5, 1883, William Y. Drew, special agent reported to your office that the land was inclosed with the balance of the section (27), and used as a pasture by Hezekiah Hale, and that he had examined the county records and found that Burrow had made a warranty

deed for the land to said Hale May 24, 1883—consideration $500; that he found a shanty on the land, but no sign of any residence having ever been made; that he found about one acre of breaking on the land.

On May 15, 1885, you suspended the entry, subject to a final determination, upon a hearing which you then ordered. On December 5, 1885, you rescinded the order for the hearing, and held the entry for cancellation and allowed sixty days for appeal, or to show cause why his entry should be sustained, in default of which the entry would be finally canceled.

On June 25, 1886, no action having been taken by claimant to sustain his entry, you canceled the same, and directed the local officers to note the fact upon their records, and held the land subject to entry by the first legal applicant.

On July 10, 1886, Elmer L. Johnson filed Osage declaratory statement for the same land, alleging settlement July 5, of that year. He made final proof before the clerk of the district court, February 19, 1887, at which time Hezekiah Hale, transferee of Burrow, appeared and filed his protest against the acceptance of the same.

Johnson's proof shows continuous residence, and improvements valued at $175. His entry was allowed by direction of your office letter "G" March 28, 1887, and the first installment of $50 was paid April 12, thereafter.

On May 18, 1887, Hale filed his application for a hearing. This was accompanied by his sworn statement, to the effect that he had purchased the land on May 25, 1883, from Burrow for the consideration of $500; that he had never had notice of the suspension or cancellation of Burrow's entry, and that he had a valid defense to the same.

On February 13, 1888, you ordered a hearing. All parties were notified, including the second entryman, Johnson, whose entry was suspended to wait the final disposition of Burrow's entry. Hearing was duly had. Burrow was not present, his whereabouts being unknown

The register and receiver on July 10, 1888, recommended that the

order cancelling Burrow's entry be made permanent and the entry of Johnson be reinstated.

They also say:

We think the evidence shows that Hale hired Burrow to enter the land, although the negotiations were conducted through third parties.

Hale appealed, and by your decision of December 21, 1889, you reversed that judgment, canceled Johnson's entry, and held that of Burrow intact.

Johnson brings this appeal.

I will be seen that more than two years elapsed from the date of the issuance of the receiver's receipt to Burrow before his cash entry was canceled. The same fact exists in favor of Johnson's entry of the same tract. Hale, the transferee, appears as a protestant against Johnson's entry, and on this application a hearing was ordered. Johnson was

allowed to file on the land when the records showed the same free and open to settlement; and his entry, subsequently allowed, was thus adverse to the application made by Burrow's transferee for a hearing. He was thus a protestant.

It is seen that, while either Burrow's or Johnson's entry, in the absence of the other, might be confirmed under the provisions of the 7th section of the act of March 3, 1891, yet in each case there is a pending protest against the validity of the other entry.

It will also be observed that there was no adverse claim to the land prior to Burrow's transfer to Hale (May 24, 1883); that the land was sold for a valuable consideration after entry and prior to March 1,1888. But the entry was investigated by a government agent, and the local officers on a hearing, the basis of which was the agent's report, found that Hale, the transferee, hired the entryman to enter the land." This hearing was also conducted by a "government agent."

It is thus seen that "fraud on the part of the purchaser has been found," and therefore the entry can not be "confirmed" under said act.

I have carefully reviewed the testimony taken at the hearing. There is no evidence in the record that Burrow ever ate a meal or slept a single night in the shanty that was built on the land. No witness testifies to seeing any furniture in the house, or any evidence of inhabitancy. Mr. Hale, the transferee, although living in plain view of this shanty, could not swear that Burrow ever lived in the house, or that he ever ate a meal there.

Prior to the filing, Burrow was a drug clerk, in Anthony, Kansas. After he filed, he was employed by Hale to herd cattle, and during that time he ate his meals at Hale's and slept in the latter's barn.

Prior to the entry, the whole section, including the land in controversy, was inclosed with a barbed-wire fence by Hale, and the land used for grazing purposes. Instead of there being sixteen acres broken, as shown by the final proof, there were less than two acres. This breaking was done by one Kephart, who swears that he also broke land on twelve or fifteen quarter sections (presumably for proving up purposes), and that he was paid by one Ostrander.

Burrow, the entryman, told witness, Ross Gould, that he (Burrow) was proving up for Hale.

The evidence shows that the entryman did transfer the land to Hale less than one month after the entry. Hale paid the entryman $350, and assumed the deferred payments on the land—$150. Immediately after the sale, Burrow left that part of the county, and could not afterwards be found.

I think these circumstances warrant the conclusion that this entry was not made in good faith. If Burrow was a settler on the land in good faith, the hearing, which was asked by his transferee, should have developed that fact. It wholly fails to show that he was an actual settler, or that he ever lived upon the land. If he stayed about the shanty

any part of his time, it was while he was engaged in herding Hale's cattle within the enclosure.

Entertaining these views of the evidence, I direct that patent be issued to Johnson on his full compliance with the law.

Your said office decision is accordingly reversed.

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

STELLA G. ROBINSON. Overruled 15 L. D. 1

A husband and wife, while living together in such relation, cannot maintain separate residences in a house built across the line between two settlement claims; but a homestead entry allowed on such residence is confirmed by section 7, act of March 3, 1891, if two years have elapsed since the issuance of the final receipt, and no protest or contest has been filed.

First Assistant Secretary Chandler to Commissioner of the General Land Office, May 1, 1891.

I have considered the appeal of Stella G. Robinson from the decision of your office of October 28, 1889, rejecting final proof in support of her homestead entry No. 2231, of the SE¼ Sec. 14, T. 139 N., R. 94 W., Bismarck land district, North Dakota.

It appears from the proof in this case that Stella G. Letts, now Stella G. Robinson, made homestead entry of said land July 16, 1883. On the 25th of the following month, Arthur B. Robinson made homestead entry No. 2306 of the adjoining quarter section, to wit, SW¼ of Sec. 14, T. 139 N., R. 94 W. In October, 1883, the said parties married and soon after built a house on the dividing line between their quarter sections; they claim to have established actual residence on said tracts November 17, 1883, the husband occupying that part of the house built on his quarter section, and the wife that part built on her part of the land. They continued this joint occupation, and, after giving the usual notice by publication of their intention, appeared with their witnesses before the probate judge in and for Stark county, in said State, September 12, 1888, and made their final proof. This proof being satisfactory to the ocal officers, final certificate and receipt, No. 822, issued to the husband for his part of the land September 14, 1888; and a like certificate, No. 823, to the wife on the same day for her part.

Your office, by its decision of October 28, 1889, from which the appeal in this case is taken, rejected the final proof of the wife, the said Stella G. Robinson, on the ground held by this Department in the case of Lydia A. Tavener 9 L. D., 426. The decision in the Tavener case has been sustained by subsequent decisions in the cases of Thomas E. Henderson, 10 L. D., 266, and John O. and Minerva C. Garner, 11 L. D., 207.

These authorities are directly in point, and sustain your office de-

cision; but the seventh section of the act of March 3, 1891 (26 Stat., 1095), provides:

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered.

More than two years have elapsed since the final receipt No. 823 issued to said Stella G. Robinson in this case; no protest or contest has been filed, and, accordingly, the decision of your office is hereby reversed.

DESERT LAND ENTRY—ACT OF MARCH 3, 1891—TRANSFEREE.

JOSEPH S. TAYLOR.

Fraud on the part of the entryman will not defeat the confirmatory provisions of section 7, act of March 3, 1891, where the entry is allowed in the absence of any adverse claim, and the land is subsequently, and prior to March 1, 1888, sold to a *bona fide* purchaser for a valuable consideration, and fraud on the part of such purchaser is not found.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 17, 1891.

I have considered the motion made by attorneys for Joseph S. Taylor, entryman, and J. M. Carey and brother, transferees, for a further consideration of desert land entry by said Taylor final certificate No. 356, for S. ½ of SE. ¼ of Sec. 22, N. ½ of NE. ¼, SW. ¼ of NE. ¼, and NW. ¼ of Sec. 27, E. ½ of NE. ¼ and NE. ¼ of SE. ¼ of Sec. 28, T. 33 N., R. 74 W., Cheyenne, Wyoming.

A further hearing was ordered in this case by my letter of August 5, 1890. The motion now before me is made in view of the legislation contained in the act of March 3, 1891 (26 Stat., 1095), entitled an act to repeal the timber culture law and for other purposes. It is alleged that said entry is confirmed by the seventh section of the act above cited. The record shows that final certificate issued in this case on August 20, 1885, and by warranty deed dated October 23, 1885, said Joseph S. Taylor conveyed the land to J. M. Carey and brother.

The seventh section of the act above mentioned provides that,

> All entries made under the pre-emption, homestead, desert land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry, and which have been sold or incumbered prior to the first day of March eighteen hundred and eighty-eight and after final entry to *bona fide* purchasers or incumbrancers for a valuable consideration, shall unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

The special agent of your office reported May 21, 1886, that said entry was made in the interest of the Carey brothers.

At the hearing which took place on said report it was shown that some time prior to date of final proof, Taylor and his associates, who had become financially embarrassed, borrowed a large sum of money from Carey and Brother, bankers, giving as security possession of their personal property consisting of horses and cattle, implements, etc., also of the lands in question, the entrymen agreeing that they would secure the Carey Brothers on said lands if they ever obtained title to the same. The evidence failed to sustain the charge of fraud against the entrymen but in view of the fact that the witness Taylor refused to answer certain questions on cross examination, and as the other entrymen had not testified, a further hearing was ordered for the purpose of obtaining additional evidence as to the character of the agreement entered into by the entrymen, whether it was in the nature of an agreement for an absolute transfer or whether it was an agreement to furnish security for the money borrowed. No charge of fraud against Carey and Brother was made by the special agent, the charge was that Taylor had made a fraudulent entry, and the additional evidence called for was on the point above indicated.

I am in receipt of an affidavit of J. M. Carey of the firm of Carey and Brother, in which he states that at no time prior to said final entries, did the entrymen agree to make sale of the land; that it was then well understood that the land could not be sold to Carey and Brother; that the possession of the land was a necessary incident to the possession of the cattle, horses, etc., of a stock ranch; that deponent expected that the entrymen would hold the land for his benefit to enable him to realize therefrom what could be so realized in partial payment of the advance made by deponent. That the money advanced by deponent and his firm was advanced in entire good faith with no intent or expectation that they were thereby committing a fraud upon the government or upon any person.

He further states that at any time since the money was loaned they would gladly have reconveyed all the property taken as security, on the repayment of said loan.

From these statements it appears that no fraud was contemplated or committed by Carey and Brother, that the agreement entered into prior to final proof was not an agreement for a transfer of the land but an agreement that the borrower would do all in his power to protect, in the way of furnishing security, the parties who had assisted him in his financial difficulty. Even admitting that this agreement was illegal so far as the entryman was concerned, it did not show fraud on the part of Carey and Brother, who appear to have acted in perfect good faith in the matter of loaning a large sum of money to one in need thereof. The land appears to have been conveyed in good faith for a valuable consideration after issue of final certificate, and whether said convey-

ance was in the nature of a mortgage or incumbrance on the land, or an absolute transfer, the entry is confirmed by said act of March 3, 1891, and patent should issue for the same.

Departmental letter of August 5, 1890, is hereby recalled and the papers in the case are herewith returned.

PRACTICE—RE-REVIEW—SECTION 7, ACT OF MARCH 3, 1891.

JAMES ROSS.

An application for the re-review of a decision will be denied where it does not present any new question of law or fact.

An entry that has been canceled by a decision that became final prior to the passage of the act of March 3, 1891, is not within the confirmatory provisions of section 7, of said act.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1891.

I have before me your office letter of January 14, 1891, transmitting a paper entitled a "motion for stay," filed in your office January 9, 1891, by S. B. Pinney, Esq., attorney in behalf of "the Colonial and United States Mortgage Company, Limited," of London, England, transferee of James Ross, party to commuted cash entry for the NE. ¼ of Sec. 12, T. 135 N., R. 51 W., Fargo, North Dakota, which paper your office deemed to be intended as a petition in accordance with the rule laid down in the case of Neff *v.* Cowhick (8 L. D., 111), reference being had to departmental decision of December 20, 1890, denying motion for review in the case of James Ross.

The decision complained of is published in 11 L. D., 623, wherein the facts and history of the matter in controversy are set forth and need not be repeated herein.

The motion under consideration sets forth four grounds, or more correctly speaking one ground divided into four specifications.

The first specification is to the effect that the departmental decision of December 20, 1890,

is based upon a defect in the application which did not affect the merits and it was error in not granting leave to cure the defect and have the oath made as required by rules of practice within a reasonable time after due notice.

This specification is founded upon a failure, upon the part of counsel, to fully comprehend the departmental decision referred to, for which the department is in nowise responsible. The departmental decision was based upon two grounds, either one of which was sufficient to justify the conclusion reached. The first one was purely and distinctly on the merits as will readily be perceived by the following extract found on pp. 623 and 624:

There is but a single question presented by the motion under consideration, which is stated by the attorneys representing the motion, to be: "Did not the com-

pany by virtue of the mortgage given by Ross to them, acquire some interest in the premises?" This question was passed upon in the opinion sought to be reviewed, at least so far as the same is material. That a transferee or mortgagee is injured by the decision is no ground for review, as his rights are in no sense other or different from those of the entryman. A. A. Joline (5 L. D., 589); Chas. W. McKallor (9 L., D. 580).

If the showing made by the transferee would not entitle the entryman to be heard on review, the application must be denied. The entryman appeared and hotly contested every point therein, and nothing could be gained by going over the same ground at the instance of the transferee.

The only conclusion that could reasonably be deduced from the language used in this extract, would be adverse to the transferee.

The second specification is founded upon the same assumption as the first. The third is based upon the mistaken assumption that Rule of Practice 78, as applied in said departmental decision, in effect deprives the Secretary of the Interior of his supervisory authority conferred by law. Said rule was simply cited in said case, and no construction placed upon it that would or could in any way control, limit, or affect the supervisory authority of the Secretary.

The application of Rule 78 to that case could not have resulted injuriously to the transferee, as fully appears from the fact that the decision would have been the same in any event. I am convinced that the application of said rule to the case was proper. The Rules of Practice are designed to facilitate the business of the Department and further the ends of justice. The wisdom of having rules is too apparent to admit of discussion. The requirement, that a party who is seeking to have a re-hearing, or review, shall furnish evidence that his motion is made in good faith and not for the purpose of delay, seems to be eminently wise and proper.

There is no new question presented by the motion under consideration, either of law or fact, not previously considered or involved in the case, and it must, therefore, be denied. Neff *v.* Cowhick (8 L. D., 111); Spicer *v.* N. P. R. R. Co. (11 L. D., 349); Reeves *v.* Emblen (11 L. D., 480).

On the 8th day of April, 1891, Ross and his transferee filed in your office an application for the issuance of a patent for said tract of land, which was transmitted by your letter of April 13, and has been considered with the motion for stay. The application for a patent is based upon the allegation that Ross' entry is confirmed by the seventh section of the act of March 3, 1891. A duplicate receiver's receipt, dated November 22, 1881, is attached to said application.

In order to pass upon this question, a brief re-statement of the record seems to be necessary.

In August, 1886, your office rejected Ross' final proof, and held his entry for cancellation. August 4, 1888, your office decision was affirmed by the Department. A motion for a review of said departmental decision was filed by Ross and, on the 12th day of February, 1890, it was denied. Afterwards The Colonial and United States Mortgage Com-

pany, Limited, of London, England, transferee of Ross, applied to your office for an order for new publication and submission of new proof by said transferee.

This application your office refused on the ground that as a final decision had been rendered by the Department, and the case closed, your office had no jurisdiction in the premises. Thereupon the transferee made an application for a writ of certiorari which was denied by the Department on the 19th day of February, 1890. In October, 1890, the transferee filed a motion for a review of the departmental decision denying said writ of certiorari, which motion was denied by the Department on the 20th day of December, 1890. On January 9, 1891, the "motion for stay," considered herein and denied, was filed.

The final judgment of the Department against Ross' entry was rendered on the 4th day of August, 1888. The several motions for review and proceedings had with a view of securing a reversal of that judgment have all been decided and disposed of in such a manner as to leave said judgment undisturbed from the date of its rendition to the present time. Said judgment was in full force at the date the act of March 3, 1891, was passed. The only question presented by the motion for a patent is, whether under this state of facts, the entry in question is confirmed by the seventh section of said act. If said entry is confirmed by said act then, as a matter of course, the entryman is entitled to his patent, otherwise his application must be denied.

From a careful examination of section seven of the act of March 3, 1891, I am convinced that it does not in terms or by implication, confirm an entry so canceled prior to its passage. The application for a patent is, therefore, denied.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHTS.

SAWYER *v.* NORTHERN PACIFIC R. R. CO.

A railroad indemnity selection, made in conformity with the order dispensing with the requirement of a specified loss, is legally made, and while of record excludes the acquisition of settlement rights on the land included therein; and an application to make pre-emption filing for land thus selected at date of settlement, must be rejected, where the company has previously thereto designated the specific loss.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 1, 1891.

The case of Edward C. Sawyer *v.* The Northern Pacific Railroad Company is here on appeal of the former from your office decision of April 17, 1889, rejecting his application to file a declaratory statement for the NW. ¼ of Sec. 11, T. 147 N., R. 53 W., Fargo, Dakota.

From the record it appears that this land is within the fifty mile indemnity limits of the withdrawal upon definite location for the Northern Pacific Railroad Company, ordered June 11, 1873.

The company's list of selections, embracing this tract, was filed March 19, 1883.

October 21, 1887, Sawyer applied to file a declaratory statement for said land, accompanying his application with an affidavit, charging, in effect, that the company's selection of the tract in question was illegal, because no land lost in the primary limits was designated as a basis for such selection. The company replied, asserting the right to selection. Hearing was had, and the register and receiver held the selection illegal and sustained the application of Sawyer.

The company appealed, and your office, by its decision above noted, reversed the action of the local officers, rejected the application of Sawyer, and sustained the selection by the company.

At the hearing Sawyer showed that he settled on the land September 30, 1887, had built a house, and made some other improvements, and had resided there with his family ever since; that he was a qualified pre-emptor, and had no other home.

The record and documentary evidence show, that this land is embraced in the ten mile indemnity belt which was withdrawn from settlement and entry by direction of the Commissioner of the General Land Office, June 11, 1873; that on March 19, 1883, the Northern Pacific Railroad Company filed in the land office at Fargo, Dakota, a certain list of selections, in which this tract was embraced, and specifically described, which list was thereafter, on the 9th day of April of the same year, duly approved by the register and receiver; that no specific list of losses from the original grant was filed with the said list of selections; that on May 28, 1883,* the Secretary of the Interior, "in order to facilitate the work of making selections," and

"to open for settlement as speedily as possible all the lands within the indemnity limits of the grant," directed the Commissioner "to instruct the local officers that when clear lists of selections free from conflict or other objection are filed with the district officers and approved by them, said selections should at once be marked upon their books . . . . . leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore;

that on October 12, 1887, the company filed in the Fargo office a duly verified list of the lands lost to said company elsewhere in its grant, and in lieu of which the other lands described in the list filed March 19, 1883, were so selected and taken, and that all locations, selections and survey fees occasioned by the selection of the tract in controversy, had been paid long prior to the application of Sawyer to file upon and enter the same.

The order of the Secretary of the Interior, of date August 15, 1887, revoking the order of withdrawal from settlement and entry of the ten mile indemnity belt, was also introduced in evidence, and the case closed.

* 12 L. D., 196.

The errors assigned by counsel for Sawyer are in substance:

1st. In holding that the company made legal selection of the tract involved, and performed all legal requirements in connection therewith prior to the application of Sawyer.

2d. In holding that the tract involved had been legally reserved from settlement prior to Sawyer's application to enter.

No argument is filed in support of these specifications of error.

Prior to the order revoking the withdrawal, the company had selected this tract in lieu of a tract not specifically described at the time the selection was made. This selection was made a short time previous to the order of Secretary Teller allowing selection to be made without specification of loss. No adverse claim intervening between the date of the selection and the promulgation of the order of the Secretary, the selection came within the provisions of the order.

The subsequent circular of Secretary Lamar, of August 4, 1885 (4 L. D., 90), requiring a basis of loss for such selection, was not designed to invalidate selections theretofore made, but required the company to designate the losses in lieu of which such prior selections had been made, and directed the district officers not to receive any further selections until such order had been complied with.

In the case at bar this order was complied with, October 12, 1887, prior to Sawyer's application to file for the land.

The selection having been made in conformity with the order dispensing with the necessity of specifying losses, tract for tract, it was legally made, and while it remained on the records of the office it imparted notice to all settlers and entrymen.

It was so of record when Sawyer settled on the land. He could therefore establish no rights as against the company by any act of settlement, and prior to his application to file the company had complied with the order of Secretary Lamar, by designating the specific loss for which this tract was selected.

The application of Sawyer was therefore properly rejected. (Darland *v.* Northern Pacific R. R. Co., 12 L. D., 195.)

The decision of your office is affirmed.

ACT OF MARCH 3, 1891—SECTION SEVEN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, May 8, 1891.

To Chiefs of Divisions.

GENTLEMEN: The 7th section of the act entitled "An act to repeal timber culture laws and for other purposes" approved March 3, 1891 (26 Stat., 1095), reads as follows:

That whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of the public lands such

entry may be suspended upon proper notification to the claimant through the local land office, until the error has been corrected; and all entries made under the pre-emption, homestead, desert-land, or timber culture laws, in which final proof and payment may have been made and certifiates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

In the administration of the law under this section you are directed to recognize, when applicable, the following constructions and rules.

1st. Whenever a clerical error is discovered in the entry of public lands which cannot be accurately corrected by reference to the files, plats and records of the General Land Office, such entry shall be suspended upon notice to the claimant through the local land office, until the error shall have been corrected.

2nd. After final proof has been made, and certificate issued on an entry made under the pre-emption, homestead, desert-land, or timber-culture laws, and where there has been a sale or incumbrance prior to March 1, 1888, patent shall be issued on the following conditions:

1st. Satisfactory proof to the Land Department that the land was sold or encumbered prior to the first day of March, 1888, and after final entry.

2nd. That no adverse claims are shown which originated prior to the date of final entry.

3d. The purchaser, or encumbrancer must have paid a valuable consideration for the land and be a bona fide, and not a pretended purchaser or encumbrancer.

4th. Unless upon an investigation by a government agent fraud has been found.

The proof of sale or encumbrance prior to March 1, 1888, should be clear and satisfactory, and to that end should consist of the original deed or mortgage from the entryman, and also all deeds showing title in the present claimant, or certified copies of such instruments, or a certified abstract of the proper records showing the chain of title back to the entryman, together with satisfactory proof that the encumbrance has not been discharged, or that the land has not been reconveyed to the entryman. Affidavits or secondary evidence showing such sale or encumbrance will be accepted only in cases where the original deed or

mortgage and the record thereof (if any) have been lost or destroyed, so as to render it impossible to furnish either.

An "adverse claim" within the meaning of the statute is one that had its origin in some act on the part of the adverse claimant, done prior to final entry, such as entry, settlement with claim of right or filing on the land. The material question is, did the adverse claim originate prior to final entry?

A bona fide purchaser or encumbrancer within the meaning of said section is one who, relying in good faith upon the receiver's final receipt, has, by way of purchase or encumbrance, acquired an equitable interest in land, and being, at the date of such purchase or encumbrance, without actual notice of fraud or violation of the law on the part of the entryman. If the proof should show that the entry was procured by the entryman, through fraud, but fails to show any participation in such fraud, or actual notice thereof, by the purchaser or encumbrancer, the case will pass to patent, notwithstanding the fraud on the part of the entryman.

Under this clause where it is satisfactorily shown that a sale or encumbrance was made prior to March 1, 1888, such sale or encumbrance will be presumed to have been made in good faith, and unless such presumption be overcome by facts presented by the record or in connection with the sale, such entry should pass to patent. Any facts appearing in the record, which indicate bad faith on the part of the purchaser or encumbrancer or collusion between him and the entryman, should justify an investigation by the proper agents of the government, and this statute will not be construed as prohibiting such investigation for the purpose of determining as to the good faith of the purchaser or encumbrancer.

The evident intent of Congress, in this clause, was to protect bona fide purchasers or encumbrancers who became such prior to March 1, 1888, and where they, their transferees or assigns or parties holding by purchase under a decree of a court in proper proceedings of foreclosure and sale, still claim an interest in the land; hence where it shall be found that a sale or encumbrance was effected prior to March 1, 1888, and by any means the lien has been satisfied or a reconveyance has been made so that the entryman now holds such title as the government has parted with, such case will not be held to fall within this clause of said act, but will be disposed of as if no sale or encumbrance had been shown.

Under the proviso to said section 7, after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the laws mentioned, when there are no proceedings initiated within that time by the government or individuals the entryman shall be entitled to patent; but all "contests" and "protests" against any entries of the classes mentioned, which were pending at the date of the passage of said act are excepted

from this rule and will be considered and disposed of as if said section had not been passed.

The word "contest," as here used, shall be construed to be any adverse proceeding initiated under the Rules of Practice by a claimant for the purpose of securing the cancellation, or defeating the consummation of an entry on the ground of fraud, a failure to comply with the law, or a prior claim, with the intent to secure title in the contestant, or any proceeding by any person, under the provisions of the act of May 14, 1880.

And the word "protest," as here used, shall be interpreted as meaning any proceeding by any person who, under the Rules of Practice, seeks to defeat an entry on the ground that the entryman is guilty of fraud, either actual or constructive, in connection therewith, or has failed to comply with the law or rules of the Department, governing the same, or that there was, at the time he claims that his rights attached, a claimant for the tract desired to be entered, having prior rights or superior equities thereto.

Nothing herein contained shall be construed as to prevent the government from completing proceedings initiated by it within the two years after the issuance of the receiver's receipt.

T. H. CARTER,
Commissioner.

Approved.
JOHN W. NOBLE,
Secretary.

PRACTICE—SERVICE OF NOTICE—MOTION TO DISMISS.

OLSON *v.* ROGERS.

Service by publication, ordered on due showing, can not be defeated by a subsequent allegation under oath that the defendant's residence could have been easily ascertained in the vicinity of the land.

A motion to dismiss should not be entertained if made without notice to the adverse party, and not on the day of hearing.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 2, 1891.

I have considered the case of Ole P. Olson *v.* Lizzie C. Rogers, on appeal by the latter from your decision of June 14, 1889, holding for cancellation her timber culture entry for the SW. ¼, Sect. 4, T. 136, R. 59, Fargo, North Dakota land district.

She made timber culture entry for this land on March 25, 1883, and on March 25, 1887, Olson filed affidavit of contest against the same alleging failure on the part of the entryman during the second and third years to cultivate and plant to tree seeds trees or cuttings, the first five acres, and during the fourth year to plant the second five acres, and

failure to cultivate said land at any time, and that she has failed to grow any timber thereon, and that said failure still exists.

Notice was given by publication, upon the affidavit of contestant,

that he has made diligent search and inquiry for the defendant, at the post offices and throughout the neighborhood in the vicinity of said tract of land for the purpose of serving him (her) with a notice of said contest; that the defendant cannot be found nor her place of residence learned.

The hearing was set for May 24, 1887. On April 23, 1887, as appears by affidavit and the registry receipt, the attorney of Olson mailed to the entryman at Lisbon, D. T., a copy of said notice by registered letter.

On May 23, the attorney for the entryman entered special appearance in the case and filed a motion to dismiss the contest, for the reason that the requirements of Rule 9 of Rules of Practice had not been complied with. This motion was supported by an affidavit of the entryman in which she says *inter alia* that her

residence has been in the counties of Ransom and Sargent in said Territory of Dakota in the vicinity of Lisbon in Ransom county during part of the time and in the vicinity of Harlem in Sargent county during part of the time; that she is now a resident of said Territory, and that her place of residence and post-office address are well known to some of the neighbors living in the vicinity of the land embraced in her aforesaid entry, and hence easily ascertained in such locality.

Upon this showing the motion to dismiss was overruled, and on the day of hearing, upon the affidavit of contestant that the testimony of certain witnesses was material to him, the hearing was continued till June 27, following, and H. L. Lloyd, notary public of La Moure county, Dakota, was appointed to take testimony on the 23d of the said month at his office at La Moure in said county.

The testimony was duly taken and returned. The contestee failed to appear on the day of hearing, or at any time thereafter. The local officers, on consideration of the evidence found that the allegations of the affidavit of contest were true, and recommended the cancellation of the entry. From this action the entryman appealed to your office, where on June 14, 1889, you affirmed said judgment, from which she appealed to the Department.

The grounds of appeal, stated in various forms, are that proper service was not made upon the entryman; that the Rules of Practice were disregarded by your office as well as by the local officers.

Rules 9 to 16, inclusive, govern the mode of obtaining service on parties.

Taking the affidavit of the contestant alone, it would warrant service by publication under Rules 9 and 12; but in addition to this, a copy of the notice was sent to contestee by registered letter, at Lisbon, Dakota, where she swears she sometimes resided. Her affidavit is very carefully guarded, and it is to be noticed that it was filed the day before the day of hearing, and as if to avoid letting her present residence be

known, she says "That she is now a resident of said territory, that her place of residence and post-office address are well known to some of the neighbors," but she does not disclose it.

It looks very much like trifling with the administration of justice to file such an affidavit, and after being served by publication and having knowledge in fact, of the contest, and of the overruling of her motion to dismiss, the same to remain away from a hearing and then come up on the technical ground that she might have been served personally, but was not.

The testimony shows that the entryman has almost wholly failed to comply with the requirements of the law. The local officers did not err in overruling the motion to dismiss—first, because it was made without notice to the adverse party, on a day other than the day of hearing; second, because if made on the day of hearing, it was not well taken. Your decision is affirmed. The entry will be canceled.

PRE-EMPTION CLAIM—SECTION 2260, R. S.

FRANCIS STUDER.

The inhibition contained in the second clause of section 2260 R. S., does not apply to a pre-emptor who, in good faith, has sold the land on which he formerly resided, before establishing actual residence on the pre-emption claim.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 4, 1891.

On July 9, 1885, Francis Studer filed pre-emption declaratory statement alleging settlement the 6th of the same month upon SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SW.$\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 26, T. 2 S., R. 35 W., Oberlin, Kansas. He made pre-emption proof before the probate judge of Rawlins county, on May 19, 1888. Said proof (as shown by endorsement) was rejected at the local office for the reason that Studer's filing was initiated in violation of Sec. 2260 Revised Statutes, the second clause of which prohibits the acquisition of any right of pre-emption under the provisions of the pre-emption laws by any person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory.

Studer appealed and also applied for a cancellation of his said filing with permission to refile for land in question. Thereupon your office by decision dated August 21, 1888, affirmed the action of the local office in rejecting his pre-emption proof and denied his application to refile.

Studer again appeals.

He made final homestead entry for adjoining land in the same township on May 21, 1885. His pre-emption proof and affidavits dated June 12, and July 7, 1888, respectively, show that he sold said homestead land to his wife (Mary J. Studer) in May, 1885; that the deed, duly

recorded, was not executed until the following November and that such sale was made in consideration of certain money (the proceeds of property in the "old country" that had been inherited by his wife) furnished him by said Mary J. Studer from her own individual funds to help him in carrying on his business of stock raising.

Said proof also shows that while Studer's settlement on the tract involved was made July 6, 1885, when he "set a lot of posts for fencing and commenced building my (his) house," he did not move on this land and commence living permanently thereon until April 7, 1886.

The record thus shows that Studer did not establish his actual residence until more than four months after the date of the deed by which he conveyed the said homestead land to his wife.

There is no suggestion of fraud in regard to the said conveyance and Studer expressly avers that it was not made with intent to avoid the statutory inhibition heretofore mentioned.

The effect of this conveyance was to divest Studer of the title to the homestead land. Michael Campbell (12 L. D., 244) and cases cited, page 246. His subsequent removal therefrom to reside on the land in question can not therefore be said to have been from land of his own.

By the decision appealed from your office held that Studer's pre-emption settlement having preceded the conveyance by him of his title to the homestead land, his filing was illegally initiated and that his proof in support thereof must consequently be rejected.

In the similar case of David Lee (8 L. D., 502), involving land in the same State, the Department distinguished the terms "settlement" and "residence" as used in the pre-emption law and held that the inhibition contained in the second clause of section 2260, R. S., does not apply when a pre-emptor had, in good faith, sold the land on which he formerly resided before establishing actual residence on the pre-emption claim.

This ruling was followed in the recent case of Michael Campbell, *supra*, and is now the established doctrine.

Studer's proof shows a complete and substantial compliance with the law in the matter of residence and improvement. It will, therefore, if in other respects regular, be accepted. The application to refile need therefore not be considered. The judgment of your office is reversed.

CIRCULAR.

Rules and regulations governing the use of timber on the public domain.

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891, entitled "An Act to amend Section eight of an Act approved March third, eighteen hundred and ninety-one; entitled 'An Act to repeal timber culture laws, and for other purposes'"—the following rules and regulations are hereby prescribed:

1. The act, so far as it relates to timber on the public land, applies only to the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming and Nevada, the District of Alaska and the Territory of Utah.

2. The right of railroad companies to procure timber for construction purposes, from the public land adjacent to the lines of their roads, authorized by the several granting acts, and the act of March 3, 1875, (18 Stat., 482) is in no way enlarged by this act.

3. The act of June 3, 1878, (20 Stat. 88) authorizing the cutting of timber for building, agricultural, mining and other domestic purposes, from public lands which are known to be mineral, and not subject to entry under existing laws of the United States except for mineral entry, is not repealed by this act, but remains in force subject to the rules and regulations prescribed thereunder by the Secretary of the Interior.

4. Settlers upon the public lands, miners, farmers and other bona fide residents in either of the States, District or Territory named in this act, who have not a sufficient supply of timber on their own claims or lands, for fire wood, fencing or building purposes, or for necessary use in developing the mineral and other natural resources of the lands owned or occupied by them, are permitted to procure timber from the public lands strictly for the purposes enumerated in this section, but not for sale or disposal, or use on other lands or by other persons; but this section shall not be construed to give the right to cut timber on any appropriated or reserved public lands; and the Secretary of the Interior reserves the right to prescribe such further restrictions as he may, at any time, deem necessary, or to revoke the permission granted hereby, in any case or cases wherein he has information that persons are abusing the conceded privileges, or where it is necessary for the public good.

5. Section 2461 U. S. Revised Statutes is still in force in the States, District and Territory named in this act; as well as in all other states and territories of the United States. Its provisions may be enforced as heretofore, against any person who shall cut or remove, or cause or procure to be cut or removed, or aid or assist or be employed in cutting or removing, any timber from public lands of any other character or description, or for any other use or purpose whatever than as above defined in sections 2, 3 and 4 of these rules and regulations, unless special permission is first obtained from the Secretary of the Interior specifically designating the particular section or tracts from which timber may be cut, and under what restrictions and limitations.

6. Persons, firms, or corporations residing in either of the States, District or Territory named in this act, who desire to procure permission to cut or remove timber from public lands for purposes of sale or traffic, or to manufacture same into lumber or other timber product as an article of merchandise, or for any other use whatsoever other than as defined in sections 2, 3 and 4 of these rules and regulations, must first submit an application therefor, in writing, to the Secretary of the

Interior, designating the lands by sections, township and range if surveyed; and, if unsurveyed, describing the lands by natural boundaries and the estimated number of acres therein. They must also define the character of the land and the kinds of trees or timber growing thereon, giving an estimate as to the quantity of each kind, stating which particular kind or kinds they desire authority to cut or remove, and the specific purpose or purposes for which the timber or the product thereof is required. The application must be sworn to, and witnessed by not less than four reliable and responsible citizens of the state, district or territory in which the land is situated, and who reside in the locality of the particular land described.

7. The petitioner, or petitioners, should also submit with the application such evidence as can be procured, to conclusively show that the preservation of the trees or timber on the land described is not required for the public good; but that its use as lumber or other product, and for the purposes named in the application, is a public necessity. Upon receipt of the application, with accompanying papers, it will be duly considered, and if deemed for the public interest, the desired permission will be granted, subject to such restrictions and limitations as may be deemed necessary; but if it shall appear that the cutting of timber in the locality described in the application will be detrimental to the public interests, or infringe upon the rights and privileges of the settlers in that locality, the application will be rejected.

In order that farmers who desire to have the forests preserved in the interest of water supply for irrigation, and all others having adverse interests may have due notice of such applications, the parties making the application, as herein provided, shall cause a notice of such application, describing the lands and timber which it is desired to use, to be published at least once a week for three consecutive weeks, in a newspaper of general circulation in the State, district or territory, and also in a newspaper in the county, or, where there is more than one county, in each of the counties wherein the lands are situated, and a printed copy of the published notices must be submitted with the application, together with the affidavit of the publisher or foreman of each newspaper, attached thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof.

The cutting or removing of any timber from public lands described in an application, by or for the applicant, before authority has been officially granted by the Secretary of the Interior, will render the party so offending liable to prosecution for trespass, and subject his application to rejection.

Saw-mill owners, lumber dealers and others, who in any manner "cause or procure" timber to be cut or removed from any public lands in violation of law or these rules and regulations, whether directly by men in their employ, or indirectly through contract or by purchase, are equally guilty of trespass with the individuals who actually cut or re-

move such timber, and are alike liable to criminal prosecution. The procurer or manufacturer of timber so cut, as well as the purchaser of such timber or its products, is also liable in civil suits for the value thereof.

Special agents will diligently investigate and report all such cases to this office for proper action.

Very respectfully,

T. H. CARTER,
Commissioner.

Approved: May 5, 1891.

JOHN W. NOBLE,
Secretary.

PENDING CONTEST—SECTION 7, ACT OF MARCH 3, 1891.

COON *v.* SIMMONS.

A contest pending at the passage of the act of March 3, 1891, defeats the confirmatory effect of the proviso in section 7, of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 5, 1891.

I have considered the case of E. V. Coon *v.* W. F. Simmons on appeal by the latter from your decision of July 22, 1889, holding for cancellation his cash entry No. 9698 of July 2, 1884 for lots 3 and 4 and SE. ¼ of NW. ¼, Sect. 2, T. 116 N., R. 66 W., Huron, South Dakota land district.

Your opinion states the record and testimony fairly and substantially, and having reviewed the entire case, I find no reason for disturbing your conclusions which accord with the findings of the register and receiver.

As this cash entry was made and final certificate issued on July 2, 1884, and the contest was not initiated until January 12, 1887, more than two years after, it may be suggested that the entryman is entitled to a patent under the proviso of section 7 of the act of March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes."

But such is not the view of this Department. Said act has been considered by the Honorable Secretary with special reference to the proviso of said section 7 of said act and in departmental letter to your office on April 25th, 1891, therein *inter alia* it is said:

> The language of the act is "when there shall be no pending contest or protest against the validity of such entry." There is no sufficient reason to say that this means pending before the lapse of two years. . . . .
>
> They (Congress) used the present participle in this clause and say "when there shall be no pending contest or protest"—meaning thereby clearly, I think, pending then, presently, at the date of the act. It was not intended to be limited to contests

or protests pending within two years after the date of the final receipt, when the case had arisen before the act took effect, and the two years had elapsed. The statute thus becomes one of limitation as to the future without overthrowing the pending contests or protests.

This contest had been initiated and tried by the register and receiver and considered by your office before the passage, and was pending at the date of said act, and under the construction given the same as aforesaid, your decision is affirmed. The entry will be canceled.

ERRONEOUS SURVEY—CONFLICTING CLAIM.

EMILE MOULTRIE.

Parties holding under a location or purchase made in accordance with the original plat of survey may properly claim under the boundary lines thereof, notwithstanding a subsequent survey shows a conflict with a confirmed private claim, and the question of ownership, in such case, must be determined in the courts.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 6, 1891.

I have considered the appeal of Emile Moultrie from the decision of your office, dated January 16, 1890, rejecting his application to relocate indemnity school warrant No. 1481, originally located on lot 2, Sec. 24, T. 11 S., R. 3 W., New Orleans (South-western), Louisiana.

The record in this case shows that on November 4, 1857, Joachim Reveillon and Robert Taylor located said warrant for 78.64 acres on said lot 2, containing by the existing plat of survey 62.73 acres; that subsequently Reveillon purchased Taylor's interest in the land and afterwards sold the whole of the location to the appellant Moultrie.

This township was first surveyed in 1811, then in 1816, and then again in 1829 by Wm. B. Jackson, deputy surveyor: the first plat of the same, upon which said location was made, was approved October 2, 1830. In the eastern part of this township there was laid down the private claim of Joseph Piernass, extending on both sides of the Nementou river, the order of survey calling for 6400 arpents, equal to about 5416 acres, having eighty arpents front by forty arpents in depth on both sides of said river, and the said claim was recommended for confirmation by Congress April 29, 1816 (3 Stat., 328).

Sometime in 1874 John P. Parsons resurveyed that portion of the township north of the river and in the spring of 1884, George E. Elms resurveyed the portion south of the river. The latter survey was examined by a special agent and accepted by your office March 16, 1886. By the resurvey of Elms, the area in section 24, was reduced from 299.62 acres to 151.88 acres and lot 2 in said section reduced from 62.76 to 9.03 acres.

Under date of June 22, 1887, Moultrie made application to locate other lands in lieu of those lost by the resurvey, and October 12, 1887, your office advised him that there was no objection to the State being allowed under the circumstances to select an additional amount of land equal to the deficit in the original selection.

In accordance with said instructions, Moultrie made application to relocate said warrant, on certain tracts aggregating 78.14 acres; which was rejected by your office January 16, 1890, on the ground that the resurvey could not be recognized, or the old line, which had governed the disposal of public lands be disturbed. For the purpose of a better understanding of this case, the field notes of the various surveys in this township have been carefully examined, and it is a matter of surprise to find that it is generally an exception to the rule that the field notes agree with the plat or the resurveys agree in any particular with the original survey. As an illustration of this fact your attention is called to the survey of Piernass' claim south of the river: Jackson gives the back line as 214 chains, course N. 42°, 30′ E, while Elms' resurvey gives the same line as 221.81 chains course N. 42°, 23′ E; furthermore by the Jackson plat the line between Secs. 26 and 27, running north from the section corner to the intersection with the Piernass claim, is given as 74.82 chains, whereas by his own field notes as also by the resurvey, the distance is given as 65.60 chains. This would seem to indicate that the true line of said claim must be farther south than represented by the plat of 1830. I can find no field notes showing the closing of the section lines on the claim in sections 24 and 25, and hence, I am unable to determine whether any discrepancies occur on that part of the line.

An examination of the lines of said claim north of the river, discloses still greater discrepancies. By the Parsons' resurvey the east side line was given as 149.10 chains, whereas the Jackson survey gave the same line as 120.30 chains; also Parsons' survey shows the north tier of sections to be about 110 chains each, from north to south, while the Jackson survey gives the section lines only about 80.10 chains, a difference of 30 chains. Furthermore the line between Secs. 2 and 3, running south from the township line to the intersection of the Piernass claim is as follows:

Jackson plat of survey 1830	80.10 chains
Jackson field notes survey 1830	141.60 chains
Parsons resurvey of 1874	102.22 chains

Thus it is shown that not only does the plat of 1830 disagree in nearly every particular with the Elms resurvey, but that north of the river the same discrepancies exist between the Jackson and Parsons surveys. The discrepancies north of the river would seem to indicate that the true back line of said claim was much farther south than indicated by the original plat of survey, and if so, this would throw the back line of said claim south of the river, a corresponding distance farther south, about equal to that laid down by the resurvey.

After a full consideration of this matter, I find it would be impossible to reconcile the different plats and field notes sufficiently to determine the correctness of the resurvey of 1884; furthermore it is extremely doubtful whether errors of survey, should they exist, when they affect the boundaries of claims confirmed in place for many years, should be corrected, especially at the expense of purchasers of adjoining public lands.

It would seem, therefore, that the Piernass claim must stand, as originally laid down on the plat of 1830, irrespective of the resurvey; furthermore the owners of the claim have acquiesced in this survey since 1830, over fifty years, therefore it is highly improbable that any court would approve a claim to extend the boundaries.

The parties, however, who have located or purchased public lands adjacent to said Piernass grant, under the original plat, may claim to the boundary-line laid down on said plat; therefore in the case at bar the owner of lot 2 is entitled to claim to said line, notwithstanding the resurvey and if any portion of said lot is claimed by parties holding under the Piernass grant or claim, the question of ownership is one to be determined by the courts.

I note further that all of the lands between the old survey of 1830, and the resurvey of 1884, have been disposed of, and patented, and hence the lands in question are outside of the jurisdiction of this Department.

The decision of your office in the case is hereby affirmed.

PRACTICE—NOTICE—CONTEST—TRANSFEREE—REVIEW.

ROBINSON *v.* KNOWLES.

Rule 8 of practice contemplates a notice issued under a contest initiated to secure the preference right of entry accorded the successful contestant by the act of May 14, 1880.

A notice of a hearing directed to determine priorities between adverse claimants is not defective though it may not contain the charges on which the hearing is ordered.

A transferee is not entitled to be heard on rehearing unless he shows that he can furnish further and better evidence than that produced by the entryman; nor can he question the validity of the proceedings against the entryman if notice of his claim was not filed in the local office.

Secretary Noble to the Commissioner of the General Land Office, May 6, 1891.

This is a motion by the attorney for Harvey R. Knowles and John F. McFadin, for a review and reversal of the departmental decision, dated October 24, 1890, in the case of John C. Robinson *v.* said Knowles, involving the N. ½ NE. ¼, Sec. 17, and the SW. ¼ SE. ¼ and SE. ¼ SW. ¼, Sec. 8, T. 33 S., R. 13 W., Larned, Kansas.

It appears that Knowles filed Osage declaratory statement November 20, alleging settlement on the land October 1, 1884; that Robinson filed for the same, February 27, 1885, alleging settlement September 2, 1884; that April 4, 1885, Robinson submitted proof against which Knowles appeared and filed protest; that pending the hearing thereon the local officers permitted Knowles to make final proof and issued to him final certificate for the land; that at said hearing, ordered by the local office and had July 25, 1885, Robinson appeared and Knowles made default, whereupon his said protest was dismissed for want of prosecution; that subsequently on complaint of Robinson, supported by affidavits, your office, by letter dated April 7, 1886, directed a hearing to determine the *bona fides* of the settlement, residence, and final proof of Knowles; that at the hearing thus ordered Knowles appeared specially and moved to dismiss for the reason

(1st) that notice had not been served on him, and (2nd) that the notice did not give the number of the entry, nor how, when or where it was made and that the land was not described in the body of the notice and that it failed to allege any specific charges, and that John McFadin was a *bona fide* purchaser;

that McFadin also moved to dismiss on the ground that he was the owner of the land and had not been made a party defendant, although his deed to the land was of record; that these motions and others to the same effect were overruled by the local officers; that after many continuances and the taking of numerous depositions before many different officers, and in different States, the evidence was all concluded and the hearing closed March 5, 1889; that thereupon the local officers found that Knowles was not an actual *bona fide* settler upon the tract in dispute, and that his entry should be canceled; that this ruling was on appeal reversed by your office decision of May 21, 1889, and that on appeal by Robinson the Department by its said decision of October 24, 1890, reversing the judgment of your office directed the cancellation of the certificate issued to Knowles and the allowance of Robinson's proof.

The material allegations upon which the motion is based are that the Department, in effect, erred,—

1st. In finding sufficient the notice to Knowles of the hearing ordered by your office,—

2nd. In holding that Knowles under his special appearance, was bound by the complaint of Robinson, and that the local officers thereby "acquired jurisdiction of the case and of Knowles,"—

3rd. In refusing to recognize the transferee McFadin as a party in interest,—

4th. In cancelling the entry without giving the transferee his day in court, and,—

5th. In finding that Knowles had acted in bad faith.

The notice to Knowles recites the action of your office in ordering the hearing on Robinson's complaint, cites both parties to appear to

the end that their rights may be determined, and described the land. It does not, however, state the charges against Knowles.

Rule 8 of practice provides that notice of contest and hearing shall *inter alia* "give the name of the contestant and briefly state the grounds and purpose of the contest."

The Department found in effect that this being a proceeding to determine the legality of the final certificate, issued to Knowles, and not a contest under the act of May 14, 1880 (21 Stat., 140), the notice was not defective, by reason of its failure to outline the charges of Robinson.

This is not error. Rule 8, *supra*, clearly contemplates the case of a contest initiated to secure the preference right of entry allowed the successful contestant by the act referred to. Neither of the parties to this record is such contestant, as both claim the land by reason of their respective acts in connection therewith. The final certificate of Knowles constituted a subject matter clearly within the jurisdiction of the Department. Such certificate was issued upon proof improperly allowed during the pendency of the regularly submitted proof of Robinson. The inquiry as to its validity was, therefore, proper to determine the priority of right between the parties.

The matter of such priority being, therefore the issue, Knowles could not be harmed by the omission from the notice of the charges preferred by Robinson.

Concerning the allegation that Knowles was not bound by the complaint of Robinson, it is enough to repeat that his (Knowles') final certificate as well as the proof previously submitted by Robinson were before the Department for adjudication.

The transferee, McFadin, does not show that he can furnish any further or better evidence than that produced by the entryman. That he has not been heard can not, therefore, be urged in behalf of the pending motion. James Ross (11 L. D., 623), and cases cited. Moreover, as it is not shown that McFadin had filed in the local office a notice of his claim, he cannot be permitted to question the validity of the proceedings against the entry of Knowles. John J. Dean (10 L. D., 446), and cases cited.

The findings by the Department touching the merits of the case, except by general allegation of counsel, are not controverted. These findings are specific and show beyond question that Knowles failed to comply with the law in the matter of residence and improvement, and that his acts in connection with the land were fraudulent.

The motion is denied.

RAILROAD GRANT—MILITARY RESERVATION—EXECUTIVE ORDER.

EDMISTON ET AL. *v.* NORTHERN PACIFIC R. R. CO.

The failure of the Commissioner of the General Land Office to inform the local office of an executive order releasing certain land from a military reservation, or the erroneous action of the local office in designating such land as within such reservation will not serve to hold such land in reserve as against the operation of a railroad grant.

Secretary Noble to the Commissioner of the General Land Office, May 6, 1891.

With your letter of April 11, 1890, you transmit the papers in the appeal of C. W. Edmiston and others from the decisions of your office of November 13 and 19, 1889, holding for cancellation the pre-emption and homestead entries made by said appellants, for the following tracts in township 50 N., range 4 W., Cœur d'Alene, Idaho, to wit:

* * * * * * *

All of said tracts of land are within the primary limits of the grant to the Northern Pacific Railroad, as shown by map of definite location of said road, filed August 30 1881, and it appearing that the several claims above mentioned were not initiated until long subsequent to the vesting of the right of the company under its grants, the said entries were held for cancellation, as to the odd sections, from which action the claimants appealed to this Department.

After said decisions were rendered, George B. Wonnacott and Tella Ellis, two of said claimants, relinquished their entries and asked that the "fees and commissions be restored and refunded." Said entries were accordingly canceled.

The claimants assign error in the decision of your office, holding that the tracts in controversy were subject to the grant to the railroad company for the following reasons:

1. That although the land falls within the limits of the grant to the Northern Pacific Railroad Co., that at the date the grant became effective the land in controversy was reserved for military purpose, and was excepted from said grant.

2. That the Commissioner of the General Land Office, on June 10, 1886, held that said land being in reservation at the date when the grant took effect, excepted it from the operation of the grant, and said entries were made under said ruling; That this is *res judicata* so far as these lands are concerned, and that the Commissioner had no power to, in effect, reverse this decision, as he did by his letter "F" of the foregoing enumerated dates, holding they passed to the Northern Pacific Railroad Co., and holding said entries for cancellation.

These several tracts of land are within the limits of the withdrawal upon map of general route, filed February 21, 1872, and also fell within the primary limits of said road upon the filing of the map of definite location, August 30, 1881.

On August 25, 1879, the President, upon the request of the Secretary of War, declared and set apart a certain tract of land at Cœur d'Alene,

in the Territory of Idaho, as a hay reserve, which was part of the military reservation at Fort Cœur d'Alene, and embraced the tracts in controversy.

On April 22, 1880, an executive order was issued, canceling the order creating said reservation, for the reason that the order of August 25, 1879, embraced more land than was allowed by law for military purposes in that part of Idaho Territory, and in lieu thereof the "military reservation" for said post and a reservation for "winter pasturage" in connection therewith, as described in the report of the chief engineer, Department of the Columbia, as shown by an accompanying plat, were made and proclaimed for military purposes.

On June 5, 1880, the Secretary of War addressed the following communication to the Commissioner of the General Land Office:

> I have the honor to transmit herewith copy of general order No. 9, Headquarters Department of Columbia, dated May 17, 1880, defining the boundaries of a military reservation for Fort Cœur d'Alene, Idaho Territory, for file in your office, with President's order declaring said reservation, plat, etc., heretofore transmitted.

The effect of this order was to reduce the size of the original reservation, and exclude from its operation the lands in controversy.

No further action seems to have been taken by the land department as to the land embraced in the hay reservation, created by the order of August 25, 1879, until February 28, 1884, when Commissioner McFarland addressed a communication to Secretary Teller, calling attention to a petition, signed by John H. Bell and others, asking that certain lands in township 50 N., range 4 W., Idaho, represented on the township plat as Coeur d'Alene military hay reserve, be restored to market. In said communication he stated that the files of the General Land Office showed that—

> two reservations of six hundred and forty acres each were declared by the executive order, dated April 22, 1880—one for the Post of Fort Coeur d'Alene, and the other for 'winter pasturage.' The tract intended for the hay reserve has never been declared by the Executive, but the deputy surveyer, in subdividing the township while extending the lines over the hay tract, has noted the boundaries of it as set by the military authorities, and hence the same appears upon the plat as a reservation.

In view of the foregoing, he suggested that the Secretary of War be requested to state whether that Department had any further use for said "hay tract."

This communication was transmitted to the Secretary of War, but no reply was received thereto.

On December 16, 1885, Commissioner Sparks addressed a communication to Secretary Lamar, calling attention to the letter of Commissioner McFarland, and stating that settlers on said lands were alarmed for fear the military authorities were endeavoring to have the reservation enlarged. He also requested that the attention of the War Department be called to the matter, and to state if there was any objection to the disposal of said lands to actual settlers.

On May 3, 1886, the Secretary of War, in reply to this communication, stated that the tract intended for a hay reserve is a part of the public domain, never having been declared by the President, and that the reservation made by the post is all that is needed for military purposes.

Whereupon, Acting Commissioner Stockslager, on May 18, 1886, transmitted a copy of said letter to the register and receiver at Coeur D'Alene, Idaho, stating that the records of the General Land Office showed "that said tract was included within the limits of a larger reservation, set aside by executive order, dated August 25, 1879, which order, however, was considered void and was canceled by a later executive order, dated April 22, 1880;" that there was "no objection to the disposal of said land as public land, the same being situated in sections 1, 2, 11, 12, 13, township 50 N., range 4 W., Boise meridian, and designated upon the plat of that township as "Fort Coeur d'Alene military hay reserve."

On May 26, 1886, the receiver at the Cœur D'Alene office submitted the following question to the Commissioner:

> Does the fact that this 'hay reserve' was once proclaimed by executive order as a reserve take these sections, 1, 11, and 13, or that portion of them covered by the 'hay reserve' out of the railroad grant, so that they may be filed upon and entered as public lands?

To this inquiry Acting Commissioner Stockslager, by letter of June 10, 1886, replied:

> Said tracts also fall within the limits of the grant to the Northern Pacific Railroad Company, the right of which attached upon the filing of map of definite location, August 30, 1881. The reservation of said sections as a portion of the 'military hay reserve excepted the same from the operation of the railroad grant, and there is no objection to the disposal of said land the same as other public land.

From these facts it is contended by the appellants that, while the order of August 25, 1879, reserving these lands for military purposes, was modified by the order of April 22, 1880, yet the "due execution of said modifications of said former orders were not promulgated to be put or to go into effect until a much later date, to wit: May 18, 1886," and that therefore said lands being in reservation at the date of definite location of the Northern Pacific Railroad, August 30, 1881, were excepted from the operation of said grant.

The contention of appellants is not supported by the record. This land was reserved by the order of August 25, 1879, but that order was revoked by the order of April 25, 1880, and the reservation canceled, and in lieu thereof a reservation for the "post" and for "winter pasturage" was proclaimed, and defined, as shown by an accompanying plat, which did not embrace any part of the land in controversy.

The order of April 25, 1880, was promulgated through the Secretary of War, who, on June 5, 1880, transmitted to the Commissioner of the General Land Office the order of the President declaring said reservation,

with the accompanying plat defining its boundaries. The reservation declared by said order was thus completed, and the lands embraced in the former reservation, which was canceled by the order of April 22, 1880, and which were not embraced in the reservation established by said order, were released from reservation and restored to the public domain.

The failure of the Commissioner to notify the local officers of this action, or the erroneous action of the deputy surveyor in designating this land upon the township plat as "Fort Coeur d'Alene hay reserve," did not continue in force the reservation created by the order of August 25, 1879, or in any manner control the force and effect of the order of the President of April 22, 1880, which released this land from reservation. Nor was any further action necessary to carry said order into effect.

This question was decided by the Department, July 9, 1889, in the case of the Northern Pacific Railroad Company *v.* Garritt H. Ferrall (unreported), involving the application of Ferrall to make homestead entry of lands in Sec. 35, T. 51 N., R. 4 W., which occupied the same status as the lands in controversy. In that case it was said:

> By executive order of August 25, 1879, said tracts were included within the Fort Couer D'Alene military reservation. This order was canceled by executive order of April 22, 1880, which materially reduced the extent of said reservation, and excluded the lands in controversy therefrom.

It was therefore held that said tract, which was also within the limits of the Northern Pacific Railroad, was not in reservation at the date when said road was definitely located—to-wit: August 30, 1881—and therefore passed to the company under its grant.

The letter of the Commissioner of June 10, 1886, informing the local officers that the reservation in sections 1, 11, and 13, as a portion of the "military hay reserve," excepted said sections from the operation of the grant to the Northern Pacific Railroad Company, was not an adjudication of this question, and the action of your office in canceling these entries was not the reversal of any decision made by your predecessor, and was warranted by law.

The decision of your office is affirmed.

HOMESTEAD—ACT OF JUNE 15, 1880—TRANSFEREE.

ROBERT L. GARLICHS.

A cash entry made under the act of June 15, 1880, and canceled for failure to furnish the requisite proof, will not be reinstated on the application of one who claims as a transferee, but does not trace his title to the entryman, nor occupy the status of a purchaser without notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 8, 1891.

I have considered the appeal of Robert L. Garlichs from your decision of May 22, 1889, rejecting his right, as transferee of one J. D. Macfarland, involving SW¼, Sec. 27 T. 3 S., R. 23 W., Kirwin, Kansas, land district to intervene in the case of William Hunter, ex parte, homestead entryman for said tract.

It appears from the record and papers before me that William Hunter made homestead entry for this land on October 22, 1878.

On September 3, 1884, one Loomis presented at the local office a paper purporting to be a power of attorney executed by William Hunter to him authorizing him, "to make final proof under second section of the act of June 15, 1880 upon homestead entry No. 8214 for SW.¼, section 27" &c. On presenting this paper, the cash entry was made in the name of Hunter.

On April 18, 1885, the said entry was suspended, for the reason that the required affidavit of entry was made by a person other than the entryman, and Hunter was allowed sixty days to furnish the required affidavit. This he failed to do, and on April 22, 1887, your office, by letter "H," held the entry for cancellation, of all which efforts were made to notify Hunter. No appeal was taken from your action, and on March 22, 1888, the entry was formally canceled, and the case closed.

On June 2d following, Robert L. Garlichs filed in your office an application to have your office reconsider the order of cancellation, and that he be allowed to intervene as a transferee to complete the entry of Hunter. This application was supported by his affidavit in which he says:

> I am the present owner of the (describing the land) by virtue of purchase thereof, and deed thereto from one J. D. Macfarland. · · · I further state that I am informed, and understand, that the said land was entered at the Kirwin, Kansas, U. S. local land office on the 3d day of September, 1884, by one William Hunter, the former homestead clamant thereof, as per cash entry No. 3584 under act of June 15, 1880, and that said entry is suspended by the Hon. Com'r of the Gen'l Land Office for reasons—the exact nature of which affiant is not informed.

He says he encloses his deed therewith, but he failed to do so.

He did not state how Macfarland acquired title to the land, and did not attempt to trace his title to William Hunter, the entryman.

On May 22, 1889, your office passed upon said application and found that Garlichs had not shown any title as transferee under Hunter, nor shown any ground for reinstating said canceled entry; you held that he had not shown any right to be allowed to intervene, and you refused to disturb the present status of the matter. From this action Garlichs appealed.

The power of attorney by Hunter, constituting Loomis his attorney in fact, is with the papers. It purports to be made by William Hunter of Salem, Kenosha county, Wisconsin.

The acknowledgment purports to have been taken by one Charles Haynes as notary public of Lake county, Illinois, but it is not authenticated by a notarial seal.

By the law of Illinois, Section 7, Chapter 99, Illinois Stats., 1883, a notary public "shall authenticate his official act by a seal upon which shall be engraved words descriptive of his office and the name of the place or county in which he resides."

This pretended power of attorney does not pretend to give any authority to Loomis to sell, convey, transfer, or incumber the land, described in it. It was placed on record September 2, 1884—Book "B", page 174.

Hunter, so far as it appears, cannot be found, and has not been heard of since the entry was made.

Hunter, when the purchase (cash entry) was made, through his attorney in fact, took all the title the government parted with when the final proof was allowed by the local officers, and the final certificate issued. On the day preceding the cash entry, this power of attorney was placed on record, and was notice to the world of the authority it conferred. There is nothing to show that Hunter ever attempted to transfer his title to any one. Whoever bought of Loomis, in law, knew he had no authority to sell. Judge Parsons in his work on contracts, in discussing the relations of principal and agent, while speaking of cases wherein the agent exceeds his authority, says: (Vol. 1, p. 43).

> But a principal may well say to one who dealt with an agent for a particular purpose, it was your business, first to ascertain that he was my agent, and then to ascertain for yourself the character and extent of his agency.

Not only was the power of attorney of record, but Garlichs says he understands that the land was entered by Hunter at Kirwin, Kansas. The records of that land office showed the entry suspended on April 18, 1885, held for cancellation April 22, 1887, and canceled and the case closed April 11, 1888. After all this Garlichs claims to be a purchaser for a valuable consideration, but he does not say he was ignorant of the status of the case, or that he was an innocent purchaser. Under such circumstances, he asks to have your office re-instate an entry that had been on the books over ten years, during over three of which your office and the local officers had been trying to secure a compliance with law, and during none of which time has the law been complied with.

Garlichs was bound in law to know the status of this land, and the condition of the title, or rather the want of title. The most ordinary diligence would have ascertained its defects. He could not be considered an innocent purchaser, if he had claimed to be such. He has wholly failed to make such a showing as entitles him to intervene, or as would warrant your office in re-instating a canceled entry.

Your action is approved. The status of the land will remain undisturbed, and his application be dismissed.

RAILROAD GRANT—PRE-EMPTION CLAIM—FILING.

BUCKINGHAM *v.* NORTHERN PACIFIC R. R. Co.

The declaratory statement determines the amount of land covered by a pre-emption claim, and a mere allegation that land not included in the filing was in fact embraced within such claim, will not be accepted as sufficient to impeach the record evidence as to the extent of such claim, and thus defeat the operation of a railroad grant.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 8, 1891.

This appeal is filed by the Northern Pacific Railroad Company from the decision of your office of February 11, 1890, rejecting the claim of the company to the S. ½ of the SW. ¼ of Sec. 23, T. 10 N., R. 5 E., Helena, Montana, and allowing the homestead entry of Abraham Buckingham for said tract.

The land is within the limits of the grant of said road as definitely located July 6, 1882, but was not within the limits of the withdrawal upon map of general route.

Abraham Buckingham filed declaratory statement for the tract in controversy, together with the E. ½ of the NW. ¼ of Sec. 26, same township and range. On November 28, 1888, he transmuted said filing to homestead entry and made final proof thereon January 24, 1889.

The record shows that at date of definite location of said road the SE. ¼ of said SW. ¼ of Sec. 23 was covered by the unexpired pre-emption filing of De Mott Stinson, which also embraced the E. ½ of the NW. ¼ of said Sec. 26.

Stinson, who was one of the witnesses to the final proof of Buckingham, testified that he pre-empted said land and sold the improvements thereon to Buckingham, who went upon it in 1883.

The record shows that Stinson's pre-emption declaratory statement did not embrace the S. ½ of the SW. ¼ of said section, but only the SE. ¼ of said SW. ¼, and hence there is no evidence that the SW. ¼ of the SW. ¼ of said section 23 was claimed at date of definite location, except the testimony of Stinson, who states that "I formerly pre-empted the land and have located same on map and often been upon the same."

From this testimony your office held that "Stinson ought to know best what land was claimed by him as a pre-emption, and if the same was not properly described by the local officers, that was no fault of his, and his testimony must stand."

I find no testimony in the record that warrants the finding that the SW. ¼ of the SW. ¼ of said Sec. 23 was claimed at the date of the filing of map of definite location.

The witness, Stinson, testifies generally that he pre-empted the tract covered by Buckingham's entry, but the record shows that his declaratory statement only covered the land in Sec. 26, and the SE. ¼ of the SW. ¼ of Sec. 23, and there being no testimony showing that he claimed any land except the land pre-empted by him, the record is the best evidence of what land was covered by his pre-emption claim, and it was error to find upon the testimony offered that the SW. ¼ of the SW. ¼ of Sec. 23 was claimed at date of definite location, so as to except it from the operation of the grant.

Your decision is modified accordingly, and the entry of Buckingham will be canceled as to the SW. ¼ of the SW. ¼ of said Sec. 23.

HOMESTEAD CONTEST—RESIDENCE.

FEE *v.* YOUNG.

The failure of the wife and children of the claimant to reside on the land until after initiation of contest does not necessarily impeach the good faith of the claimant.

Assistant Secretary Chandler to the Commissioner of the General Land Office, May 8, 1891.

October 5, 1885, Robert Young made homestead entry for the SW. ¼ of Sec. 13, T. 7 S., R. 28 W., Oberlin, Kansas.

January 10, 1887, Dwight Fee initiated contest against the same, alleging that

defendant has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that defendant has never established or maintained residence on said land as required by law, and defendant has never resided or moved his family to said land, but has resided in Ill., since making said entry.

Hearing was had June 9, 1887, and September 23d following the local officers recommended the cancellation of the entry.

Young duly appealed, and by your letter of June 1, 1889, now before me, you affirm the action of the register and receiver, and the defendant now appeals to this Department.

After a careful examination of the testimony, I am satisfied that your judgment is wrong. I think the evidence shows that the entryman acted in good faith; that he entered the land for the purpose of mak-

ing his home on it, and that all of his conduct in relation thereto goes to show that he designed to remove with his family to the land in controversy, as soon as his wife's health would permit.

The facts as disclosed by the testimony are follows:

Immediately after making his entry, in October, 1885, he constructed a good, comfortable sod house on the tract, sixteen by twenty-two feet in size, with board roof and floor, one door and two windows. His family was then residing in Illinois, and as soon as he had constructed his house, he returned to them, where he remained until March, 1886, five months after making his entry, when he returned to the claim, bringing with him a mule team, wagon, necessary furniture, cooking utensils and provisions, two plows, a cultivator, carpenter tools, feed (oats) for his team, seed corn, 300 pounds of barbed wire for fencing, and set out fifty maple trees near his house. That spring he fenced with oak posts and barbed wire about six or seven acres, and broke and planted to corn about five acres. He remained on the land, living in the house, until about the middle of June, when he was called back to Illinois (where his family still lived on an eighty acre farm he owned there) by the sickness of his wife. She gave birth to a child soon after his arrival, and he remained with her and his family until September, when he returned alone to his claim, his wife being unable to accompany him on account of her ill health, and she needing the care of his family they remained with her. He remained on his homestead from that time until the middle of December, during which time he cut and shocked his corn and cut and stacked about three tons of hay. The occasion of his going back to Illinois in December, 1886, was to be present at a law suit in which he was defendant, and bring out his family. The case was tried in December, and shortly after he was taken down with rheumatism, which confined him to the house. This is clearly shown by the affidavit of himself and a physician, upon which a continuance in the case was had from March to June, 1887.

He returned to the claim with two of his children on the 15th of March, 1887, who were residing with him at the time of the hearing, his wife and the rest of his family (four children) still remaining in Illinois, she still being too ill to be removed. In the meantime, between his return in March, 1887, and the time of the hearing, he had continued his improvements on the land; had sealed and plastered his house, built a stable eighteen by thirty-six feet, with mangers and stalls, a wagon shed eight by eighteen, with good roof on both, a chicken house seven by ten; set out eight hundred ash trees and some fruit trees, apple, plum and cherry; planted thirty acres of corn, and ten acres of millet.

He also swears that when he came to the land in March, 1886, it was arranged that his family should join him in Kansas as soon as his wife was able to travel, and that when he went back in December of the same year, he expected to bring his family back with him the next

month (January, 1887). At the trial he offered in evidence a certificate of the physician attending his wife, showing that she was unable to travel, which was rejected by the local officers as irrelevant.

I am thoroughly convinced from all the testimony in the case that this entryman honestly designed to remove with his family to the claim, and that when he went there in March, 1886, he expected and had arranged for his family soon to follow and make their home with him, and that they were only prevented by the continuing ill health of his wife.

It is true, that, ordinarily, a man's home is where his wife and family reside, but when it is shown that such residence apart from the husband and father is due to temporary inability to follow him to his new home, and all his acts go to show his intention to make his home on the land as soon as his unfortunate surroundings will permit, I do not think that such residence by his family under such circumstances, away from the claim, necessarily impeaches his good faith. See Hoagland *v.* Fairfield, 11 L. D., 543; also B. F. Heaston, 6 L. D., 577.

Since the trial, it has been satisfactorily shown to this Department that his wife and the rest of his family removed to the claim in the summer of 1887, and have ever since been residing there. This fact, and other acts, such as improvements, etc., done since the contest was begun, are only material in so far as they serve to throw light on the acts and intention of the claimant prior to the contest.

I think this case is similar to the case of Hoagland *v.* Fairfield, *supra*, and that the final removal of claimant's wife and family to the land "was in compliance with a previous bona fide intention of claimant to make his home on the land." The contest will therefore be dismissed.

The judgment of your office is reversed.

INDIAN LANDS—ALLOTMENT—SETTLEMENT RIGHTS.

INSTRUCTIONS.

Indian parents are not allowed to select lands for their children within the ceded portion of the Sioux reservation, on which, after February 28, 1891, white settlers have established residence and made valuable improvements prior to such selection.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 9, 1891.

I acknowledge the receipt of your communication of 29th ultimo, and accompanying copy of a telegram from the register of the land office at Pierre, South Dakota, in relation to the selection by Indian parents of lands within the ceded portion of the Sioux reservation, for their children after February 28, 1891.

In response I transmit herewith copy of a communication of 5th instant from the Commissioner of Indian Affairs, and of the opinion of

the Honorable Assistant Attorney General of this Department, to whom the matter was referred.

The conclusion reached by these officers has the concurrence of the Department.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, May 8, 1891.

I have the honor to acknowledge the receipt, by reference from the Honorable Acting Secretary Chandler, of a report from the Indian Office dated the 5th instant upon the follwing question, submitted by the General Land Office, namely:

Are Indian parents allowed to select lands within the ceded portion of Sioux reservation for their children on which, after February 28, 1890, (1891) white settlers had established residence and made valuable improvement, previous to date of such selection. An early answer will prevent serious complications.

By said reference my opinion is requested "upon the question herein presented."

The Indian Office quotes the decision of Acting Secretary Chandler, under date of April 28, 1891, concurring in the recommendations of the Indian Office dated April 27, same year, and holding that—(Press-copy "A," p. 117, Ind. Div.)

As some of the Indians residing on the ceded lands at the date said act took effect may not have had knowledge of the notice of February 15, 1890, and as they under the law may have, within one year after they have been notified of their right of option, the allotment to which they would be otherwise entitled on said separate reservations, I am of the opinion that said Indian who shall satisfy the allotting agent that he was residing on the ceded lands at the date the act took effect, and has continuously lived thereon since that time, and has had no personal notice of his right, may have allotted to him the lands where he has so continued to reside, provided there be no legal adverse claim thereto; and if there should be an adverse claim said Indian may have allotted to him other lands within said ceded tract.

In all such cases you will allow him to exercise his right.

Under said decision, the Indian Office holds that

an Indian could not select tracts for allotment to his minor children after February 28, 1891, to which legal adverse claims had attached, but he could make selections for them upon other land within said ceded tract where no legal adverse claim existed.

There can be no question, I think, that no one, whether Indian or white man, can select or appropriate any part of the public domain "to which legal adverse claims had attached" prior thereto.

In an opinion rendered by me on February 27, 1890, (Press copy, vol. 4, p. 224–242) concurred in by the Attorney-General (19 Op., 511), it was held that it is the duty of the government to protect the Indian allottees in the enjoyment of their allotments under said act of March 2, 1889 (25 Stat., 998), and in the discharge of that duty the military forces of the United States may, if necessary, be employed by the President for their protection.

But it is equally true that it is the duty of the Department to see that the legal adverse claims of bona fide settlers upon the ceded tract shall be protected, and that the selections for the Indian children shall be made upon lands subject thereto, which have not already been legally appropriated. It would seem almost a waste of time to cite authority for so plain a proposition. Reference, however, may be made to the following cases: Wilcox *v.* Jackson, 13 Peters, 498–513; Leavenworth R. R. Co. *v.* United States, 92 U. S., 733–745; Hastings R. R. Co. *v.* Whitney, 132 U. S., 357–360; Opinion of Attorney-General MacVeigh, 17 Op., 160.

No good reason is shown why the treaty obligations and agreements with the Sioux Nation of Indians may not be fully executed without disturbing any "legal adverse claim." I am therefore of the opinion, and so advise you, that said question must be answered in the negative.

PRACTICE—APPEAL—TIMBER CULTURE—AGENT.

ADDIS *v.* BLOWER.

A specification of error on appeal to the Department is sufficient to secure consideration where reference is made therein to the specifications filed on appeal from the local office, as the grounds for the further appeal, and the assignment of error in the first instance is concise and explicit.

The planting of trees should be done when the ground is in such condition as will, under ordinary circumstances, be favorable to their growth.

Sowing tree seeds broad cast cannot be accepted as in compliance with the requirements of the timber culture law.

One who entrusts the care of a timber culture claim to an agent is resposible for the negligence of his representative in failing to comply with the law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 9, 1891.

I have considered the case of Albert E. Addis *v.* John J. Blower, involving the latter's timber culture entry, No. 4224, for the NW. ¼, Sec. 12, T. 25 S., R. 36 W., Garden City, Kansas, land district, on appeal by Blower from your decision of October 18, 1889.

He made entry of above tract November 11, 1881. On the 7th of December, 1886, Addis filed a contest against said entry, setting up failure on the part of the defendant to comply with the timber culture law, in that there were no trees growing on said land at that time.

A hearing was set for July 9, 1887, when the parties appeared, and the trial took place. On the 9th of February, 1888, the local officers considering the evidence held that the defendant's entry should be canceled. February 24, 1888, he appealed from this decision to your office, where you affirmed the judgment of the local officers as aforesaid.

The plaintiff now moves that the defendant's appeal to this Department be dismissed, "because said alleged appeal does not set out or allege that error was made by the Honorable Commissioner in affirming the decision of the local office." It is true that rule 88 requires the appellant, in giving notice of appeal, to file a specification of errors, "which specification shall clearly and concisely designate the errors of which he complains." In his appeal from the local office to your office, the appellant complied with this rule, and in his notice of appeal to this Department, referred to such specification of error as constituting the grounds of his further appeal. I am inclined to hold such reference a sufficient compliance with the rule to entitle the appellant to have his appeal considered on the merits of the case, and I have therefore carefully examined the evidence therein. It shows that the timber culture law has not been complied with, and that five years after the defendant made his entry for the land in question, there were no trees growing thereon.

The testimony of the defendant discloses that he gave instructions and paid for having the timber culture law complied with, but the agents employed by him did not properly perform the work, and not until the summer of 1886 was any effort made to grow trees on any part of said entry. At that time, the land was not in fit condition, and the seed sowing was not properly done.

It has been repeatedly held by this Department that the planting of trees should be done when the ground is in such condition as will, under ordinary circumstances, be favorable to their growth. Caviness *v.* Harrah (4 L. D., 174); Anderson *v.* Hamilton (5 L. D., 363). Sowing tree seeds broadcast, as was done in this case, can not be held in compliance with the law, as it renders cultivation impracticable. Hunter *v.* Orr (5 L. D., 8).

The allegation of the defendant, and his attempt to show that the plaintiff was his agent and had neglected to do that which he was employed to perform, and should not be allowed to succeed in his contest, as that would permit him to take advantage of his own wrong, is not sustained by the evidence. All that the evidence establishes on this point is that the plaintiff was working by the month for the defendant's agent, as an ordinary farm hand, and that he did such work as his employer directed, some of which was performed upon the land in question. This did not constitute him the agent of the defendant under any rule that I am familiar with.

While the defendant may not be personally guilty of any bad faith in the matter, yet he entrusted the care of his claim to an agent and is responsible for the negligence of his representative in failing to comply with the law, and must take the consequences. Davies *v.* Killgore, 11 L. D., 161; Olson *v.* Warford, 11 L. D., 289.

The decision appealed from is, therefore, affirmed.

CONTEST—TAXATION OF COSTS.

CHARLES GANDELL ET AL.

The cost of reducing the testimony to writing in contest cases is legally taxable at fifteen cents per hundred words, except in States and Territories where a higher rate is fixed, and the fact that the actual expense of the clerical service in such matter amounts to less than the rate authorized, does not warrant the local office in taxing such costs at a rate based on the actual expense.

First Assisstant Secretary Chandler to the Commissioner to the General Land Office, May 9, 1891.

I have considered the appeal of Charles Gandell, Guthrie Townsite Companies and others, from your decision of March 7, 1890, sustaining the action of the register and receiver in overruling their several motions for retaxation of costs in certain contest cases.

The costs here complained of were taxed in the contest cases of Gandell *v.* Brown, the townsite settlers of Guthrie, East Guthrie, Capitol Hill and North Guthrie against various homestead settlers on lands situate in the Guthrie, Oklahoma Territory, land district.

The several cases have been consolidated, and come to the Department upon joint appeal. They involve the same issue.

It appears by the record that the local officers taxed to the parties to these contests, the legal fees for reducing the testimony to writing. There is no complaint about the computation. It is admitted to be correct at the rate of fifteen cents per hundred words.

It is shown that the testimony was taken by stenographers, and typewritten, and there is no claim that this was not carefully and faithfully done. It is shown that the salaries of the register and receiver are up to the maximum, and that they are therefore entitled to no part of these fees; that they employed persons to do this work by the day, and that after paying the persons so employed, there was an excess of fees collected over actual cost, amounting to $490.58.

The (nine) attorneys of the parties join in claiming that the amount so collected over and above the actual expense of reducing the testimony to writing is without warrant of law, and they say it "is an extortion of an unjust tax which (is) unauthorized by law and which goes to swell an already dangerous surplus in the treasury of the United States."

The statute (Paragraph 10 of Sect. 2238 R. S.) fixes the rate to be charged at fifteen cents per one hundred words for reducing to writing the testimony "for claimants in establishing pre-emption and homestead rights." The statute does not mention contests, and the fees for reducing testimony to writing in contest cases is not specially provided for by statute, but contest cases often involve homestead and pre-emption rights, and it has been the rule, long established, that contest cases came under this section of the statute.

By act of Congress approved August 4, 1886, (24 Stat., 239)

All fees collected by registers and receivers from any source whatever which would increase their salaries beyond three thousand dollars each year shall be covered into the treasury except only so much as may be necessary to pay actual cost of clerical services employed exclusively in contest cases, etc.

It is quite clear that Congress contemplated a "condition" in which the legal fees would be in excess of the "actual cost of clerical services" in contest cases, as in the case at bar.

In pursuance of this and other acts of Congress relating to fees and costs, a circular letter was issued by your office, on May 14, 1890, to registers and receivers of U. S. land offices, instructing them to charge only fifteen cents per hundred words, except in States and Territories in which by law a higher rate of fees was allowed for reducing testimony to writing. It authorized them to employ competent persons to perform the necessary labor connected with contests. These were to be paid from the fees collected, and registers were directed at the close of each contest to attach to the record a statement showing (1) the amount deposited as security for fees; (2) the amount of fees collected; (3) amount paid for clerical services; (4) the amount returned to the depositor; (5) the amount of fees collected and to be turned into the treasury of the United States.

In obedience to this circular, the officers in the case at bar discharged their duties in a manner to be commended. They secured efficient clerks to reduce the testimony to writing, so that the actual cost was less than the legal fees. This, notwithstanding no part of the excess could inure to their personal benefit, was simply a business transaction which was within the line of their duty, and that they did so is not a matter of concern to the parties to the several contests. Their action in not giving to the parties the money which the law provides shall be covered into the treasury was clearly right. Fifteen cents per hundred words for reducing testimony to writing is not exorbitant. By the statute of Oklahoma Territory, notaries public are allowed, for taking depositions, twenty cents per folio (Laws of Oklahoma, 1890, p. 72).

I find no reason for disturbing your decision. The same is therefore affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM.

SOUTHERN PACIFIC R. R. CO. *v.* JAMES.

A claim of a qualified pre-emptor based on *bona fide* residence and improvements, existing at the date when the grant becomes effective, operates to except the land covered thereby from the effect of the grant.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 9, 1891.

I have considered the appeal of the Southern Pacific Railroad Company from your decision of October 25, 1889, and from your refusal to

reconsider said decision, dated January 21, 1890, in which you allow Evan James to make homestead entry for the N. ½, SW. ¼, NW. ¼, SE. ¼ and SW. ¼, NE. ¼, Sect. 29, T. 17 S., R. 10 E., M. D. M., San Francisco, California, land district.

It appears by the record in this case that the land in controversy is within the twenty miles limit of the grant to the Southern Pacific R. R. Company; that the lands to which the rights of the company attached were withdrawn from settlement and entry on March 22, 1867. The township plat was filed June 3, 1881. No entry or filing covered this land at the date of withdrawal.

On January 9, 1888, Evan James applied to make homestead entry for the land, and supported his application by a number of affidavits tending to show that at the time the company's rights would otherwise have attached to the land in controversy, it was settled upon, improved, and in the occupation of one Samuel Smith who, it was claimed, was a qualified pre-emptor.

On October 15, 1888, your office directed a hearing

for the purpose of determining the status of the land at the date when the company's map of designated route was filed . . . . to wit, Janury 3, 1867.

In pursuance of this direction, a hearing was ordered for May 21, 1889. The railroad company appeared by attorney and filed a protest against the application. Upon hearing the testimony, the local officers held that when the company's map was filed, the land was in the occupation of Samuel Smith; that he was a qualified preemptor; that he had valuable improvements thereon, and they recommended that James be allowed to make entry for the land. From this action, there was no appeal, and when the case came to be passed upon by your office, you affirmed said action. Thereupon the railroad company filed a motion for a review of your decision, and this being overruled, it appealed from your office decision and your ruling in refusing to sustain its motion for review.

The testimony is quite clear and conclusive that Smith went upon the land in 1860 and built a house, fenced, broke and cultivated a portion of the land, planted an orchard of about one hundred trees in 1862. He was an Indianian by birth—a voter—had never exercised his homestead right—was married, and lived on the land until 1875, when he sold his improvements and claim to Evan James, the present claimant.

The case of Buxton *v.* Traver (130 U. S., 232), relied upon by counsel, is inapplicable to the case at bar, and I find no reason for disturbing the well settled principle, that bona fide residence and improvements upon a tract of land by a qualified pre-emptor at the time the company's rights would otherwise have attached except the land from the grant to the railroad.

In Victorine *v.* New Orleans & Pacific R. R. Co. (8 L. D., 377) it was held that settlement, possession and occupancy at the time the rights of the company would otherwise have attached, excepted the land from the grant.

On review of the case (10 L. D., 637) it was claimed that Victorine was not an "actual settler". The wording of the granting clause of the act excepted lands "occupied by actual settlers" at date of definite location, and it was said in the latter decision

> The filing of a homestead application or a pre-emption declaratory statement within the statutory period is not necessary to constitute an 'actual settler' according to any definition of these words heretofore promulgated

While the statute in this case differs somewhat from the act granting land to the Southern Pacific, it is certain that an "actual settler" has a claim and right as against any subsequent applicant to purchase the land.

In the case of the Northern Pacific R. R. Co. *v.* Potter *et al.* (11 L. D., 531) it was held that possession and occupancy would except the land from the grant, if the party so in possession had the right at that time to assert a claim to the land in question, under the settlement laws. In the case at bar, Smith had that right. He was a qualified entryman, as affirmatively appears.

In Boss *v.* Central Pacific R. R. Co. (11 L. D., 571) it was said that

> Richard Hamilton had actually resided on the land nearly five years occupying it as a home . . . . and was both a qualified pre-emptor and homesteader . . . . The land had not been surveyed so as to be open to entry or filing of record. I am therefore of opinion that Hamilton's claim excepted said S. ½ of the NW. ¼ from the grant.

The granting act to the Central Pacific R. R. uses the excepting words "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of." While the exceptions in the case at bar, as we have seen, are "free from pre-emption or other claim or right", the latter is certainly the broader of the two expressions.

It is quite clear that Smith's possession and occupancy excepted the land from the grant. Your decision is therefore affirmed.

RIGHT OF WAY—INDIAN RESERVATION—EXECUTIVE ACTION.

BAYFIELD TRANSFER COMPANY.

The action of the Secretary of the Interior in authorizing a railroad company to proceed with the construction of its road across an Indian reservation, pending the completion of the necessary arrangements, is not final in its character and confers no vested rights.

The proviso contained in section 5, act of March 3, 1875, does not render the provisions of said act generally applicable where a right of way is provided for under treaty stipulation, but only provides that when by prior treaty, or act of Congress, a right of way with definite limits, or other privilege, has been specifically granted, the provisions of said act shall govern so far as applicable.

Conveyances for right of way purposes, executed by Indians holding under patents in which the right of alienation is limited by a requirement that the President's consent thereto shall be obtained, must be submitted to the President for his approval.

Secretary Noble to the Commissioner of Indian Affairs, May 19, 891.

There is herewith transmitted you a copy of opinion of the Assistant Attorney General, in response to reference to him of your report as to right of way and station grounds through Red Cliff Indian reservation, Washington

I approve the conclusions of the Assistant Attorney General, have and to direct that your action shall be in accordance therewith.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, April 20, 1891.

I have the honor to acknowledge the receipt, by reference from the Honorable First Assistant Secretary, of a communication addressed to you by the attorneys of the Bayfield Transfer Company, in Wisconsin, and also the report thereon of the Honorable Assistant Commissioner of Indian Affairs, relative to a right of way and station-grounds through the Red Cliff Indian reservation, in said State, in which are stated the proceedings heretofore had relative to such right of way, and the request of the company "to be advised what further papers, if any, are necessary as evidence of the company's rights."

The reference requests "an expression of opinion on the questions raised in the within communication and accompanying report of the Commissioner of Indian Affairs."

It appears from said report that said company, on January 8, 1884, filed in the Department due proof of its organization under the laws of said State, with a certified copy of a resolution of its board of directors, adopted July 27, 1883, authorizing the extension of the line of its road in a northwesterly direction through the Red Cliff Indian reservation, along the shore of Bayfield Harbor, on Lake Superior, and distant therefrom one hundred feet, to some convenient point on Red Cliff bay for a distance of some three miles. The company, at the same time, filed a certified map showing the definite location of its proposed road, after actual survey, extending 3.5 miles to Red Cliff bay and passing over lands patented to individual Indians. Upon said map was also delineated a selection of twenty acres for station purposes upon land patented to John Buffalo, sr., an Indian, on May 16, 1878, under the treaty of September 30, 1854 (10 Stat., 1109). The company requested that appropriate action be taken by the Department to secure to it the right of way and station-grounds as shown upon said map, through said reservation, in accordance with the provision of said treaty.

On January 14, 1885, the Department authorized the Indian Office to issue the necessary instructions to the agent in charge of the reservation, for the purpose of ascertaining the wishes of the Indians relative to the right of the company. (Records Ind. Div., No. 38, p. 370.)

The Indian agent, on February 6, 1885, reported that the Indians

> agreed to grant the right of way through the portion of the reservation held by them jointly, and also through the tracts patented to them as shown in the memorandums of agreement herewith enclosed;

that the president of said company made a verbal agreement with the Indians that said road should be constructed to a point on said Buffalo's land before the next January, and that it should be completed as surveyed within five years from the completion of the required papers, and, in default thereof, the rights of the company in the lands north of the road actually constructed within the five years as aforesaid should be reconveyed to the parties in interest. This agreement was not inserted in the deed, at the request of the president of the company, but he promised to execute a separate agreement containing said stipulations.

It was further reported by the agent that the boundaries of the right of way had not been clearly defined on account of the depth of the snow, but, according to the statements of the Indians, it would include the government buildings on the reservation, valued by him and a special agent of the Indian Office at $1,645.

The report of the Indian Office further states that said agreement with the Indians stipulated for the sale to said company of a right of way, two hundred feet in width, across the unallotted lands in said reservation, at the rate of $30 per acre for cleared lands, and $5 per acre for lands not cleared, and also that the company should pay in addition for the government improvements thereon; that the "water line" should be the outer line of the right of way; that the company should have the riparian rights along certain lots therein specified, and that said agreement should be subject to approval by the Commissioner of Indian Affairs.

The report also shows that the agreement provided for a sale by the individual Indians of a right of way with riparian rights through their patented lands, and the substance of the stipulations between the company and each Indian is given; that afterwards, to wit: on March 2, 1885, Mr. Secretary Teller advised the Indian Office that:

> Agreeably to your recommendation, authority is hereby granted for the said Bayfield Transfer Railway Company to proceed with the construction of the said road etc. across the said lands, pending the completion of the arrangements, and preparation of the requisite papers in the matter, upon the consent of the Indians being obtained, the filing by said company of a bond with two approved sureties in amount sufficient to indemnify the government and the Indians, according to the terms of agreement set forth in the proceedings of council, and for the protection of the Indians and otherwise, as may be required by your office. (Ib., 39, p. 219.)

The Indian Office was directed to prepare a bond to be executed by the company, which was done, and the bond was returned duly executed and accepted by the Indian Office. Pending the execution and filing of said bond, the company requested the Department to furnish

it "with the proper instrument or document" showing the consent of the Department to said agreements with the Indians. At the same time, the company transmitted the form of a deed to be executed by the Indians, and requested information as to what the Department would consider sufficient evidence that it "recognized the rights of the company under the treaty and acts of Congress granting right of way through the reservation."

The Indian Office, on June 12, 1885, made another report to the Department, giving a full history of the proceedings in said case up to date, and stated that, from the price agreed to be paid for the land and riparian rights, "it was manifest that the acquisition of these Indian lands in fee was desired," and the Indian Office recommended that said agreements with the Indians be disapproved; that said authority for the construction of the road be revoked; that said bond be returned to the company, with the information that agreements for "an easement only, through both allotted and unallotted lands, would be approved," and that only one hundred feet would be allowed for a right of way, the same as allowed over State lands by the laws of Wisconsin.

On June 15, 1885, Mr. Acting Secretary Muldrow considered said report and concurred therein that the company, under the third article of said treaty, was entitled to acquire only an easement, and not the fee to the land; also that the right of way should be limited to one hundred feet; but no reference was made to the recommendation of the Indian Office that the agreements with the Indians be disapproved and the bond returned to the company. The Indian Office, however, was advised that if the company, after notice of the action of the Department, shall make known their further wishes in the premises,

> the question as to the form of relinquishment to be used by the Indians collectively, and by the individuals through whose patented tracts the route of the railroad may pass, in granting the right of way sought, can then be considered and adopted if necessary. (Ib., 40, p. 321-2.)

Notice was given the company on June 18, 1885, and afterwards on October 13, same year, it was advised that when it signified its "willingness to limit its requirements of right of way to the reduced width above specified, the form of instrument to be executed by the Indians would be considered."

No further action appears to have been taken by the company until January 15, 1891, when its attorneys filed the communication upon which the report of the Indian Office dated March 30, was made.

It is claimed by the company that under the provisions of Article III of said treaty, and of the act of Congress approved March 3, 1875 (18 Stat., 482), its right of way for a width of two hundred feet, with riparian rights thereto, became vested, when the Department authorized it to proceed with the construction of its road, and that Acting Secretary Muldrow had no authority to change or modify the action of Secretary Teller so as to limit the right of way to one hundred feet.

The Indian Office expresses the opinion that said act of 1875 has no application to "these Indian lands," but submits the question—

> Whether the right to construct the road through the common tribal lands, according to and under the terms thereof the agreement was secured to the company, and also whether the bond given by the company to guarantee a compliance on its part with the terms of the agreement, was sufficient consideration to fix and retain such right.

The further question is also submitted whether Acting Secretary Muldrow had the authority to reverse or modify the decision of Secretary Teller in the premises.

With reference to individual Indian lands, the Indian Office refers to the treaty stipulation with said Indians, the clause in the patents restricting the right of alienation, and, without expressing any opinion as to the effect thereof, submits the case to the Department with the suggestion that the questions presented be referred to this office "for an opinion thereon."

The rights of the company must be determined by the treaty stipulations with the Indians, the acts of Congress and the executive action had in the premises. (The New York Indians, 5 Wall., 764.)

By Article III of said treaty of September 30, 1854, it was agreed, among other things, that the patents issued to the Indians for their allotted lands should contain "such restrictions of the power of alienation" as the President should see fit to impose, and that "All necessary roads, highways and railroads, the lines of which may run through any reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

It appears that the patents issued to the individual Indians under said article contain the restriction that "the said (patentee) and his heirs shall not sell, lease or in any manner alienate said tract without the consent of the President."

By section 5 of said act of March 3, 1875, "granting to railroads the right of way through the public lands," it is provided:

> That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

The contention of the company that said proviso gives it a right of way through said reservation and the other rights as defined in section 1 of said act, is wholly untenable.

The language of the act does not warrant such construction. It does not say that this act shall apply, if, under a treaty stipulation, a right of way has been provided for through an Indian reservation. On the contrary, the proviso states that the act shall not apply to any lands within the limits of an Indian reservation, "unless such right of way"—not *a* right of way—"shall be provided for by treaty stipulation or by act of Congress heretofore passed." It means no more, in my judgment, than

that when, by a prior treaty or act of Congress, a right of way with definite limits, or other privilege has been specifically granted, the provisions of said act of 1875, so far as applicable, may govern.

It does not appear that the company has entered upon the construction of its road, and the agreements entered into with the Indians have never been approved by the Secretary of the Interior. The fact that Mr. Secretary Teller authorized the company to proceed with the construction of its road, gave it no vested interest in a right of way to the extent claimed.

In the case of Cherokee Nation *v.* Southern Kansas Railway Company (135 U. S., 641), cited by counsel for the company as authority for the right of the United States to take Indian lands for public purposes, which is conceded, the court, in answer to the question what will be the condition of the plaintiff if, upon a new trial, the amount of damages assessed should exceed the amount paid into court by the defendant,—said:

> This question would be more embarrassing than it is, if by the terms of the act of Congress the title to the property appropriated passed from the owner to the defendant, when the latter, having made the required deposit in court, is authorized to enter upon the land, pending the appeal, and to proceed in the construction of its road. But, clearly, the title does not pass until compensation is actually made to the owner.

The compensation provided for in the treaty with the Indians must be made, so far as relates to the unallotted lands, under the direction of the Department, and, until the agreements with the Indians are duly approved, and the compensation paid by the company, it has no vested right to the premises.

In regard to the individual Indian lands, it is apparent that the action of the President must intervene before any valid alienation of any part thereof can be made to the company. By the terms of said treaty the President is authorized to issue patents to the Indians for their allotted lands "with such restrictions of the power of alienation as he may see fit to impose." The patents were issued with the restriction that the land shall not be leased or in any manner alienated without the consent of the President of the United States.

Any agreement with the Indians for the sale of a right of way of any width whatsoever, and their riparian rights, unless with the consent of the President, would be within said restriction, and therefore invalid. (The Kansas Indians, 5 Wall., 737). Neither the action of Mr. Secretary Teller in allowing the company to proceed with the construction of its road through said reservation, "pending the completion of the arrangements and preparation of the requisite papers in the matter," nor the subsequent action of Mr. Acting Secretary Muldrow, limiting the right of way to one hundred feet, can in any wise change the requirements of the treaty.

Besides, the record shows that the proceedings before the Department

were *in fieri* when Mr. Acting Secretary Muldrow made the order limiting the width of right of way, and the company is now before the Department urging that "this transaction (be) closed up under the treaty and agreements." The matter is still before the Department, and the extent of the right of way over the unallotted lands is still subject to the decision of the Secretary of the Interior.

If it be considered by the Department that the public necessity requires that a railroad shall be constructed across said reservation, and that it needs a right of way, to the extent of two hundred feet in width, more or less, there can be no reasonable objection, it seems to me, to allowing the Bayfield Transfer Railway Company to acquire such right of way through the reservation. But for the restriction of alienation in the patents for individual Indian lands, the Indians could dispose of either a right of way or the title to the whole or any part of their lands to said company, upon such terms as the parties could agree to. Myers *v.* Croft (13 Wall., 291.) No question seems to have been raised as to the power of the Indians to convey their riparian rights, and the object of the company in securing the same, as stated in said report, is "to build up a large shipping interest . . . and necessitating the erection of docks." If the restriction of alienation be removed by the President, there would be no question, I think, of the Indians' right to convey all the incidents or rights of ownership which attach to the lands conveyed to them by the United States bordering on the navigable waters.

The ownership of land upon navigable streams is regulated by the State laws, and not the laws of the United States. (Barney *v.* Keokuk, 94 U. S., 324–328; Packer *v.* Bird, 137 U. S., 661; St. Louis *v.* Rutz, 138 U. S., 226–242.) In Wisconsin, the owner of the bank of a navigable stream by purchase from the United States, is conclusively presumed to be the owner of the stream in front of his purchase to the middle or thread thereof. (Norcross *v.* Griffiths, 65 Wis., 599–614.)

Since, however, the relation of the Indian to the government is that of a ward, whose interests the United States are bound to protect, a careful scrutiny should be given to all contracts made with them for the alienation of their property. The agreements already entered into should be carefully examined and if the Department is of the opinion that they have been fairly executed and are not injurious to the best welfare of the Indians, they may be approved and conveyances may be duly executed by the Indians for a right of way and station grounds, of such dimensions as the Department may decide should be granted, and the same may be submitted to the President for his examination. If approved by him, the deeds could be delivered to the company upon the receipt of the compensation stipulated.

I am therefore of the opinion, and so advise you;

That said company has acquired no vested right to construct its road through said reservation;

That the action of Mr. Secretary Teller did not purport to be, and was not, final, and did not deprive Mr. Acting Secretary Muldrow from taking such action as he deemed right and proper in the premises;

That the action heretofore had by the Department will not deprive the Secretary of the Interior of the right to consider the whole question and give such orders as he may deem necessary to protect the interests of the Indians and secure to the company a sufficient right of way and station-grounds with riparian rights through said reservation, upon payment, by the company, of just compensation therefor;

That all conveyances by the individual Indians of any interest in their allotted lands should be submitted to the President for his approval;

That since it appears that the company has not entered upon the construction of its road, and desires to secure the riparian rights along the lands agreed to be conveyed, the whole matter should be resubmitted to the Indians, and if their consent be obtained, and if the compensation agreed upon be fair and reasonable, and no objection appears to allowing a right of way, with station-grounds and riparian rights, to said company, then deeds should be executed by the Indians and submitted to the President for his approval. The company should also be required to pay a reasonable amount for the right of way over the unallotted lands.

FINAL PROOF PROCEEDINGS—PRACTICE—SETTLEMENT RIGHTS.

BRUCE *v.* RIDDLE.

In proceedings on final proof before the local office, where an adverse claimant, who duly discloses his interest, applies to intervene, he should be made a party, even though such action calls for a continuance of the case.

One holding under an entry that has been duly canceled, has no right that can be set up as against the subsequent settlement and entry of another.

A settlement made without violence within the unlawful enclosure of another is valid, and will not be defeated by such unlawful occupancy.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 11, 1891.

I have considered the case of William P. Bruce *v.* George M. Riddle on appeal by the former from your decision of October 2, 1889, dismissing his protest against the proof of the latter, on his homestead entry for the E. ½, NW. ¼ and the W. ½, NE. ¼ section 13, T. 9, R. 37 E., Walla Walla, Washington land district.

On October 24, 1883, Riddle made homestead entry for this land, and on November 15, 1884, he made final proof, against which Bruce filed a protest alleging that he was the owner of the SE. ¼ of NW. ¼ and SW. ¼ of NE. ¼ of said section 13, the same being the south half of the tract claimed by the entryman. He averred in his said protest that he had

purchased the said parcel of the land of one J. J. Bruce who held it by transfer from one James H. Kennedy and it was averred that Kennedy had purchased it of the government in 1872; that he had paid for it and taken from the receiver a receipt for the purchase money.

A hearing was ordered and testimony was taken on December 19 and 20, 1884. The local officers decided on May 9, 1885 in favor of the entryman, and recommended the dismissal of the protest and that the proof be accepted. From this decision, Bruce appealed.

It appears of record that at the hearing one Phillip S. George appeared and asked to be made party to the case, with leave to enter protest, alleging that he was the owner of the north half of the tract upon which proof was being made, his protest being in writing and duly verified. The local officers held that he was too late in applying, and refused to allow him to be made party, notwithstanding this refusal, he joined Bruce in the appeal.

In your decision of October 2, 1889, you say "George did not disclose his interest as required by rule 102 of practice," and his joining in the appeal is treated merely as surplusage. After discussing the testimony at great length, you find: that neither Kennedy nor his assignees have any right, claim or title to the land in question; that the protestant bought the S. ½ of said land with full knowledge of such fact and for the purpose of speculation. You do not pass upon the rights of George, but find that the land was subject to homestead entry; that George M. Riddle's entry was in good faith, and hold it intact and accept his final proof. From this decision, Bruce and George appeal.

When you state that George appeared before the local officers, and alleged "orally that he owned the N. ½ of the claim and offered to prove his claim thereto," I think you are in error; for in the papers before me, which came from your office, I find his written protest, sworn to before the register on December 19, 1884, the day set for hearing. This sets forth in detail the title of George, from Kennedy who, he alleges, was a purchaser from the government. It describes the land specifically, giving dates carefully, and is supported by the deed from Kennedy to George. The ground upon which the local officers refused to make him a party was that he was too late. This was the only ground that could be tenable, as the protest fully complied with rule 102 of practice. But Riddle was there to meet objections to his entry. When George disclosed his interest in the land, he should have been made a party, even if it had worked a continuance of the hearing. Any other course would only result in a multiplicity of suits. This being true, the case would, if such course seemed necessary for the presentation of testimony by George in support of his claim, be returned for a further hearing. George's claim, however, stands on the same basis as Bruce's, and the same facts and no others exist in relation to one as to the other. In view of this and of the further fact that George joined in the appeal to this Department, and without alleging that he could, if afforded an

opportunity, produce other or further testimony, I have considered his claim and will pass upon his rights.

Both Bruce and George claim the respective tracts of land, as grantee of Kennedy, whose cash entry for the land involved was canceled August 26, 1874. Why it was canceled, does not appear in your decision, and it is quite immaterial herein, it being sufficient to say that the question of the validity of the Kennedy entry is *res judicata*.

It is claimed by counsel for Bruce and George, substantially, that your office erred in not holding that their clients were in quiet, peaceable possession of this land under color of title, as assignees of Kennedy, and that George M. Riddle's entry was by a trespass, and that he could thereby acquire no legal settlement rights. Several authorities are cited in support of this proposition. I have examined them, and the strongest case is found in Wirth *v.* Branson (8 Otto, 118–121) in which the court says:

> The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

It will be noticed that in the case at bar the entry of Kennedy had been "vacated and set aside" before George M. Riddle attempted to make entry for the land. When the Kennedy entry was canceled, the land was subject to entry by the first qualified entryman.

Neither Bruce nor George had any settlement or residence upon the land; they had a fence around it and used it for grazing cattle, but were not attempting to acquire any title from the government, but, on the contrary, ignored the laws relating to public lands and relied solely upon their deeds from Kennedy. Their fence was around public land that was open to settlement and entry. This was in violation of law (23 U. S. Stat., 321) and it should have been removed in obedience to the proclamation of the President, of August 7, 1885, in which, referring to the above statute, the President directed the removal of all inclosures which surrounded public lands that were subject to entry.

George M. Riddle went upon the land, without violence, and made settlement and residence in an enclosure unlawfully surrounding public land that was open to entry. He sought to acquire title by compliance with the law.

It was held in case of Stoddard *v.* Neigel (7 L. D., 340), followed in Norton *v.* Westbrook (9 L. D., 455) that,

> A settlement made without violence, within the unlawful and unauthorized enclosure of another, is valid, and will not be defeated by said unlawful occupancy.

In Hudson *v.* Docking, on review, (4 L. D., 501) cited by counsel, Docking's entry was upon the enclosed lands held by Hudson, "with

full knowledge of Hudson's possession and improvements and of his recorded claim" (a preemption). It appears also that the township plat was suspended, so that he was prevented from "proving up" on his pre-emption.

In Christian *v.* Strentzel (7 L. D., 68), also cited by counsel, Strentzel was in possession of the land (lots 5 and 6) and had it enclosed. But he had located Valentine scrip on the tracts. Christian broke his close and attempted to make entry for the land or a portion of it. It was held that he could acquire no settlement rights through such a trespass.

I am unable to see that either of these cases is applicable to the case at bar.

Counsel refer to a proceeding in a Territorial court to foreclose a mortgage on a portion of these premises, and they claim that the title or claim to the land had been sustained by the court in such proceeding. This was an action brought by Philip S. George against R. H. Riddle and wife, to foreclose a mortgage made by the latter to the former. George M. Riddle was not a party to the suit. The record before me is a certified copy of petition, answer and reply, but does not contain any decree or other proceedings by the court. But, assuming that there was a decree, it could only operate upon such title as R. H. Riddle and wife had, and could, in no way, affect the claim of George M. Riddle. It is unnecessary to go into the detail of the pleadings; the decree of the court operated only on such title as the mortgage conveyed, and could not affect the title which was in the government after the cancellation of the Kennedy entry.

It is contended by counsel that the Land Department had no authority to cancel an entry after final certificate and payment of the purchase money, but this contention has been so frequently decided adversely to their claim that it is useless to discuss it here. See Smith *v.* Custer (8 L. D., 269) and cases there cited.

Referring, with due deference to counsel, to the argument filed herein, I may say that it should have been made when the matter of the cancellation of the Kennedy entry was under consideration. It can have no application to the case at bar.

For the reason that the protestants have no interest in the land, their protests are dismissed. The proof appears to be sufficient and will be accepted. Your decision is modified in accordance with the foregoing.

PRE-EMPTION CONTEST—RELINQUISHMENT—PAYMENT.

COFFEY *v.* TRACY ET AL.

An affidavit of contest alleging that a pre-emptor, after the submission of final proof, abandoned the land, does not afford sufficient ground to authorize a hearing, and the relinquishment of the pre-emption claim, during the pendency of such a contest, and independently thereof, leaves the land open to the first legal applicant.

If the record in final proof proceedings does not affirmatively show that the claimant tendered the purchase money, on offer of final proof, it will be presumed, in the absence of any showing to the contrary, that, under the regulations, such tender was duly made.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 12, 1891.

On April 6, 1891, I instructed you to suspend the execution of my decision dated March 14, 1891, in the case of Thomas A. Coffey *v.* Bolivar J. Tracy, *et al.*, and requested you to return the papers, together with said decision, in order that I might give the case further consideration. Under date of April 10, 1891, you re-transmitted the record to this Department.

I have again considered the appeals of Thomas A. Coffey from the decisions of your office dated March 12, and September 30, 1889, rejecting his application to make timber-culture entry for the NE. ¼ Sec. 30, T. 33 N., R. 48 W., Chadron, Nebraska.

The record shows that on February 2, 1885, Andrew Higgins made homestead entry of the tract in question. March 27, 1885, Bolivar J. Tracy filed declaratory statement for the same land, and alleged settlement thereon January 30, 1885. January 4, 1886, he offered final proof upon his filing; Higgins protested against said proof, and a hearing was had before the local office. After considering the evidence, the local officers rendered a decision, March 23, 1888, recommending the allowance of Tracy's entry, and that Higgins' entry be canceled. No appeal was taken by Higgins. The record of said hearing, together with Tracy's final proof, was transmitted to your office.

May 10, 1888, prior to the transmission to your office of the record of hearing on the Higgins protest, Tracy filed an affidavit of contest against Higgins' entry, charging abandonment. The contest was dismissed July 6, 1888, for want of prosecution.

November 8, following, Walter C. Brown initiated a contest against Higgins' entry, alleging abandonment.

March 24, 1888, Thomas A. Coffey filed an affidavit of contest against Tracy's filing, in the following language:

> Tracy has wholly abandoned said tract; that in December, 1885, he offered proof upon said tract, and without waiting for the issuance of the receiver's final receipt, left the claim and has never returned to it since, nor had improvements made, nor the land cultivated by others for his benefit.

May 10, 1889, a hearing was had on said contest, both parties appearing. Tracy moved to dismiss the contest. June 5, 1888, after considering the case, the local officers found for contestant, and recommended Tracy's filing for cancellation. He appealed to your office.

January 21, 1889, Walter C. Brown filed in the local office the relinquishments of both Higgins and Tracy of their entry and filing respectively, and also presented his own application to enter the land under the homestead law, which was allowed. Coffey was notified the same day in writing of the cancellation of the claims of Higgins and Tracy and of the allowance of Brown's homestead entry. The next day, January 22, 1889, he applied to enter the land under the timber culture law. His application was rejected because of Brown's entry, and on January 25, 1889, he appealed to your office, claiming a preference right to enter said tract by reason of his pending contest against Tracy's filing.

February 12, 1889, the relinquishments of Higgins and Tracy coming up for action, your office noted the cancellation of said filing and entry and closed the three contests of Tracy *v.* Higgins, Higgins *v.* Tracy, and Brown *v.* Higgins.

March 12, 1889, your office, considering the case of Coffey *v.* Tracy, dismissed Coffey's contest, and held that he could have no preference right of entry by reason of the same.

September 30, following, your office affirmed the decision of the local officers rejecting his application for timber culture entry of said tract. Coffey appealed from your office decisions of March 12 and September 30, 1889, to this Department.

He says, substantially, that your office erred in not allowing him a preference right of entry by reason of the pendency of his contest, at the time Tracy's relinquishment was filed. The record is complicated by reason of the number of entries, filings, applications and contests. However, since the filing of the relinquishments of Higgins and Tracy, the controversy has narrowed down to a struggle between Coffey and Brown as to who will secure title to the tract in question. Brown made homestead entry January 21, 1889, the very day on which Tracy and Higgins relinquished their claims to the land. It follows, unless Coffey has a preference right, Brown's entry should prevail.

Had Coffey, under his contest against Tracy, a preference right to enter the land when Tracy relinquished his claim?

The second section of the act of May 14, 1880 (21 Stats., 140), provides:

> 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.

At the time of Tracy's relinquishment, Coffey had a pending contest against his filing. It may be asserted as the established rule of the Department that where a contest has been properly brought, a relinquishment will be construed as evidence in the aid of the suit and will not be allowed to bar the preference right. But this is presumptive merely. If the contest is not properly brought, and is for that reason dismissed, no cancellation can result from, and no preference right can be gained by, it. Upon relinquishment after such contest and in no wise connected with it, the land is open to entry by any qualified entryman.

I am of the opinion that the allegations in Coffey's affidavit of contest were not sufficient to justify the local office in ordering a hearing, as it was admitted in said affidavit that claimant had offered final proof, and the record shows that final proof was protested by Higgins, which protest had not yet been disposed of by the General Land Office. The affidavit of contest alleges that Tracy, after submitting final proof, without waiting for the issuance of final receipt, left the claim, etc. Thus it appears that no charge is made that Tracy failed to comply in any manner with the pre-emption law prior to his offer of proof, January 4, 1886.

It is true that it is not affirmatively shown from the register and receiver's decision at the time Tracy made final proof that he tendered the purchase money for the land; yet, as it was his duty to have done so (see instructions, November 18, 1884, 3 L. D., 188), this Department, in the absence of a showing that the tender was not made, will presume that, pursuant to the rules, it was made. Having made his proof and tendered to the local office the purchase money for said land, Tracy was not responsible for the delay of the local office in issuing his final certificate. He was not bound to live on the land after proof and tender of purchase money, and his removing therefrom was not a sufficient cause upon which to base a contest. (Joseph Mitchell, 7 L. D., 455; Beebe *v.* Callahan, 11 L. D., 182.)

I am of the opinion that Coffey's contest proceedings were improperly brought, and that he has no preference right by reason thereof. The land was subject to entry when Brown filed the relinquishments of Tracy and Higgins, and as he was the first to apply, his entry should be allowed, and Coffey's application to enter should be rejected.

The Department therefore adheres to the conclusion reached in its decision of March 14, 1891; but, in view of the elimination of certain matters therefrom, said decision is hereby vacated, and this substituted therefor.

Your decision from which an appeal is taken is affirmed.

APPEAL—JURISDICTION—INTERLOCUTORY ORDER.

STENOIEN *v.* NORTHERN PACIFIC R. R. CO.

An appeal will not lie from an interlocutory order of the General Land Office that deprives the appellant of no right.

An appeal accepted by the General Land Office terminates its jurisdiction over the case; and it does not subsequently acquire jurisdiction, on the withdrawal of such appeal, in the absence of departmental action thereon.

The withdrawal of an appeal will not prevent the Department from considering the record and rendering such judgment as the law and facts require.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 12, 1891.

By your letter of April 17, 1891, you transmit the papers relating to the case of Lars H. Stenoion *v.* Northern Pacific Railroad Company, involving the SE. ¼ NW. ¼, and lots 1 and 2, Sec. 13, T. 128 N., R. 35 W., St. Cloud land district, Minnesota, and request "an expression of opinion by the Department upon this question as well as for such other consideration and action as may be deemed necessary."

The papers transmitted show (*inter alia*) that your office, on August 6, 1890, decided said case adversely to Stenoien, giving him the right to appeal or apply for a hearing within sixty days from due notice thereof; that notice of said decision was given on January 5, 1891, and on January 13, Stenoien applied for a hearing which was ordered by your office on the 17th of the same month; that on January 22, 1891, your office received from the attorney for said Stenoien notice of appeal from said decision; that on January 24, same year, the attorney for said company filed in your office a motion to dismiss said appeal, and also an answer to the same; that on January 28, 1891, your office directed that the hearing ordered be suspended; that on January 31, 1891, the attorney for Stenoien advised your office that his client did not desire that his said appeal should cause him to lose the right to a hearing, and on February 9, 1891, said attorney "filed application to be permitted to withdraw Stenoien's appeal," and your office, being in doubt as to the propriety of action upon said case after the filing of said appeal, submitted the matter for the views of the Department.

The application of Stenoien to withdraw his said appeal was addressed "To the Honorable Secretary of the Interior and Commissioner of the General Land Office." In it, he states that he was misled by the statement in your office decision of August 6, 1890, namely:

> On November 5, 1883, the Northern Pacific Railway Company applied to select said tracts without designating lands lost from its grant in lieu of which the tracts were sought;

that he has now ascertained that said statement is incorrect, which he did not know until after said appeal was filed.

It is quite manifest that, the order for a hearing having been made upon the application of Stenoien, he had no right to appeal therefrom and his said appeal should have been refused by your office. Indeed, the books are full of decisions that an appeal will not lie from an interlocutory order of your office which deprives the applicant of no right. Rule of Practice No. 81, 4 L. D., 46; Bailey *v.* Olson, 2 L. D., 40; Manderfield and O'Connor *v.* McKinsey, id., 580; Florida Railway and Navigation Co. *v.* Miller, 3 L. D., 324; Heitkamp *v.* Halvorson, id., 530; McCabe *v.* Nichols, 4 L. D., 94; James H. Murray, 6 L. D., 124; Jones *v.* Campbell, *et al.*, 7 L. D., 404; Smalley *v.* Hawblits, 8 L. D., 372; Reeves *v.* Emblem, id., 444; State of Oregon (on review), 9 L. D., 360; Olney *v.* Shryock, id., 633; Anderson *v.* The Amador & Sacramento Canal Co., 10 L. D., 572; Bowman *v.* Snipes, 11 L. D., 84.

But while your office would have been fully warranted in rejecting said appeal, yet, having accepted the appeal without objection, your office was ousted of its jurisdiction and could again acquire jurisdiction only by the action of the Department. The government is a party to every contest, and the withdrawal of an appeal by the contestant will not prevent this Department from considering the record and rendering that judgment which the law and facts require. Lee *v.* Johnson, 116 U. S., 48-53; Darragh *v.* Holdman, 11 L. D., 409; Keller *v.* Bullington, id., 140; Sapp *v.* Anderson, 9 L. D., 165; Rudolph Wurlitzer, 6 L. D., 315; Ida M. Taylor, id., 107; John M. Walker, 5 L. D., 504; W. F. Hawes *et al.*, id., 224; same on review, id., 438; St. Paul Minneapolis and Manitoba R'y Co. *et al. v.* Vannest, id., 205; Pederson *v.* Johannessen, 4 L. D., 343; King *v.* Leitensdorfer, 3 L. D., 110; McGovern *v.* Bartels, 2 C. L. L., 241.

In the case at bar, since it appears that the appellant was misled by an erroneous statement of your office upon a material fact relative to the selection of said land by the railroad company, his said appeal should be, and it is hereby dismissed, and the papers remanded with directions that the hearing proceed, after due notice to both parties. Upon receipt of the testimony taken at said hearing, with the report of the local officers thereon, your office will readjudicate the case.

PRIVATE CLAIM—SURVEY UNDER DEPARTMENTAL DECISION.

STATE OF LOUISIANA *v.* MCDONOGH ET AL.

The lowest point of the southern shore of Lake Maurepas, as it now exists, should be taken as the starting point to determine the back line of the grant.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 14, 1891.

I am in receipt of your letter of March 20, 1891, calling attention to the decision of the Department of January 6, 1888, in the case of the State of Louisiana *v.* John McDonogh *et al.* (6 L. D., 473), asking for a specific interpretation of said decision upon the following question:

Did the aforesaid decision fix absolutely the starting point for the determination of the back line of the McDonogh and Fontenot claims at the most southern point of Lake Maurepas, as it existed at the date of the decision?

In the case above referred to, the Department held that the depth of this grant could be ascertained by finding a depth equal to or corresponding with the depth of Lake Maurepas from the river—that is, by drawing a line

through the centre of the grant from front to rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake.

I find nothing in this decision to indicate that it was the intention of the Secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769, but on the contrary it seems to be clearly indicated that the southern shore of the lake as it now exists should be fixed absolutely as the starting point to determine the back line of said grant. You will instruct the surveyor-general accordingly.

PRE-EMPTION CONTEST—RESIDENCE—SECTION 7, ACT OF MARCH 3, 1891.

COLBURN *v.* PITTMAN.

Actual presence on the land is necessary in the first instance to acquire residence, but continuous presence thereafter is not essential to the continuity of such residence.

The confirmatory effect of section 7, act of March 3, 1891, need not be invoked where the contest against the entry is dismissed on the merits.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 14, 1891.

I have considered the appeal of Frank J. Colburn from your office decision of January 3, 1890, dismissing his contest in the case of Frank J. Colburn *v.* E. J. Pittman, involving pre-emption cash entry for the E. ½ of SE. ¼, SW. ¼ of SE. ¼, and lot 9, Sec. 2, T. 25 N., R. 42 E., W. M., Spokane Falls, Washington.

It appears that on August 4, 1885, E. J. Pittman filed pre-emption declaratory statement in the local office for the tracts described above, alleging settlement on the land on the same date, and on November 27, 1886, he presented proof and made payment for the land.

October 8, 1887, Frank J. Colburn initiated a contest against said entry alleging in substance that Pittman failed to comply with the law as to residence upon and cultivation of the entry prior to making proof and payment therefor; and on December 9, following, your office directed a hearing in the case.

The local officers found for the defendant and your office, under date of January 3, 1890, affirmed the decision below.

The record shows that Pittman commenced settlement on the land the same day the filing was made; that he built a box house on the same and lived therein from August, 1885, until a short time before his marriage in January, 1887, sometime after he had proved up and paid for the land; that he is a carpenter and worked at his trade in the town of Spokane Falls, distant about two and a half miles from his entry; that after the erection of the first house, he built an addition thereto, erected a small barn or stable, fenced some four acres of land, set out about one hundred fruit trees and planted a portion of the tract under fence with potatoes. It is further shown that with but few exceptions, the defendant being a single man prepared his own meals, night and morning, on his place, but when at work in Spokane Falls he went to a restaurant and got his dinner; that he paid for the improvements placed upon the land, variously estimated to be worth $300 or $400, by his earnings in working at his trade, and that although he erected and owns two or three houses in Spokane Falls, he borrowed the money to erect the same and kept up his residence and improvement of the entry.

Several witnesses have testified plainly that they visited him quite often at his place prior to his making final entry, and in a number of instances remained over night with him; that his house was furnished with a table, bed, chairs, dishes, stove and cooking utensils necessary for a residence on the land; furthermore, other witnesses testify to the drawing of lumber to build the house and barn, the drawing of rails and building of fence, and the plowing and planting of trees and potatoes.

The evidence submitted by the contestant is of a very negative character, uncertain as to time and very unsatisfactory in other respects. It does not show that the defendant ever spent a single night absent from his entry from the time of filing to the date of making final entry, a period of nearly sixteen months, and although contestant's witnesses claim to have seen the land frequently, yet they testify that they never saw anyone there, notwithstanding the fact that during the time of which they speak, an addition was added to the house, a barn erected, a fence built, fruit trees planted, potatoes planted, a powder-house erected, rails and wood cut, lumber drawn upon the premises, to say nothing of the residence of Pittman on the land and the presence of his visitors.

A preponderance of the testimony adduced shows clearly to my mind that Pittman established a *bona fide* residence upon the land soon after making his filing, and notwithstanding the charge and attempt to prove abandonment on account of the absence of defendant working at his trade, I am of the opinion that such absence is not a failure to comply with the law.

In the case of Patrick Manning (7 L. D., 144), it was held, that actual presence on the land is necessary in the first instance in order to ac-

quire residence, but continuous presence thereafter is not essential to continuity of such residence.

The entryman although not constantly on the land, had no other home, and his improvements were sufficient to demonstrate his good faith.

The record further shows that the land in question, on account of the rapid growth of the town of Spokane Falls, and its near proximity thereto, became very valuable and on or about September 27, 1887, the defendant Pittman sold the property to one E. P. Hogan for $10,000.

April 11, 1891, the transferee, Hogan, by his counsel, filed a motion to dismiss the contest under the provisions of the act of March 3, 1891.

In the case of Levings *v.* Schneider (unreported), under date of April 7, 1891, counsel for entryman filed a motion urging

that the Department is without jurisdiction to consider the case further on its merits, on account of the proviso in section 7, act of March 3, 1891.

The Department, however, finding that Levings' contest should be dismissed on its merits declined to pass on the question presented by the motion and the case was accordingly dismissed.

As I have reached a like conclusion in this case, after an examination of the evidence presented, I do not consider it necessary to consider the motion, but the contest is hereby dismissed on the merits.

The decision of your office is, therefore, affirmed and the record of the case returned.

CIRCULAR OF INSTRUCTIONS RELATING TO TIMBER RESERVATIONS.

WASHINGTON, D. C., *May* 15, 1891.

To Special Agents of the General Land Office.

GENTLEMEN: Your attention is hereby called to section 24 of the act of Congress approved March 3, 1891, entitled "An Act to repeal timber-culture laws and for other purposes," which reads as follows:

Sec. 24. That the President of the United States may from time to time set apart and reserve, in any State or Territory having public lands bearing forests, (in) any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

To carry into effect said provisions it becomes important to reserve all public lands bearing forests, or covered with timber or undergrowth, on which the timber is not absolutely required for the legitimate use and necessities of the residents of the state or territory in which the lands are situated, or for the promotion of settlement or development of the natural resources of the section of the state or territory in the immediate vicinity of the particular lands in question.

In so doing, it is of first importance to reserve all public lands in mountainous and other regions which are covered with timber or under-

growth at the headwaters of rivers and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents, and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.

For the purpose of securing the necessary data upon which to base recommendations for such forest reservations, the following instructions are issued:

Special agents upon being detailed to secure the data in question, will proceed, without undue delay, to make in the districts assigned to them, a thorough and careful personal examination of the public lands bearing forests or covered with timber or undergrowth, and ascertain by personal observation and by interviews with government and state officials in the vicinity of such lands, and with citizens who have an interest in the public welfare, all facts pertaining to the value of said forests or timber lands for all uses, purposes and requirements. The result of such investigations should be duly made the subject of report to this office.

In submitting such reports a recommendation should be made in each case as to whether the lands described should be set apart as a public reservation, setting forth in full the reasons for arriving at the conclusions stated. The agent should also in every instance, so far as practicable, procure and submit with his report, the expression of opinion, in writing, of the officials and citizens interviewed by him relative to the special value of each tract or area of land reported upon.

In recommending reservations of timber lands, special agents should describe such lands by natural drainage basins; and whenever it is in the interest of the industries carried on in the district to except any lands within said basins from reservation, by permitting the timber to be cut to meet the wants of the people, such excepted tracts should be described in Land Office terms, as sections, townships, ranges, etc.; but when surveys have not been extended over the lands thus excepted, the lands should be described by natural boundaries in such a manner that they may be readily distinguished from other lands and that proper provision for their survey by Land Office methods may be made.

After making an examination of the timber lands of any drainage basin and having decided to recommend the same for reservation under the provisions of this circular, before submitting report in the matter, a notice should be prepared by the agent stating that such recommendation will be made to the General Land Office and setting forth a description of the basin, together with a description of any public lands embraced therein which it may be proposed to have excepted therefrom. It should also be stated therein that the object of such publication is to give timely notice of the proposed reservation in order that

all parties interested, who either favor or oppose its establishment, may be afforded due opportunity to submit their views to this office, by petition or otherwise, for the purpose of having the same considered prior to the final establishment of such reservation. This notice should be posted in the Land Office or offices of the district wherein such lands are situated, and a copy of the same should be published at least once a week for three successive weeks in some newspaper published in the county, or each of the counties, wherein such lands are situated; and also in at least one other newspaper of general circulation in the State or Territory. If no newspaper be published in the county or counties in which the lands are situated, then the publication should be made in a newspaper published in the county nearest to such lands.

A printed copy of the notice of publication should be submitted with the agent's report, together with the affidavit of the publisher or foreman of each newspaper attached thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof.

Should knowledge be acquired by the agent that any particular tract or tracts of public timber land are being, or are likely at an early day to be despoiled of the timber which should be preserved for climatic, economic or other public reasons, and that the early reservation thereof is necessary, the agent should report the matter at once to this office, describing, in general, the location of said lands, and stating reasons for believing that necessity exists for early action. Should the services of a surveyor be required to locate and define by proper exterior bounds and lines, any tract or tracts therein which should be excepted from reservation, he should submit an estimate as to the total cost of such survey and the time required to complete same. Upon receipt of such report, proper measures will be promptly taken by this office in the premises.

Very respectfully,

T. H. CARTER,
Commissioner.

Approved:
GEO. CHANDLER,
Acting Secretary.

TIMBER CULTURE CONTEST—BREAKING AND PLANTING.

FRIEL *v.* BARTLETT.

A timber culture contest must fail where it appears that the entryman's failure to secure a growth of trees is not due to his negligence.

The breaking and planting may be legally done in advance of the time fixed by the statute.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 14, 1891.

I have considered the case of John M. Friel *v.* George H. Bartlett, on appeal by the former from the decision of your office of November 4, 1889, involving the latter's timber culture entry No. 7873, for the SW. ¼, Sec. 24, Tp. 125 N., R. 66 W., Aberdeen, Dakota, land district.

Bartlett made his timber culture entry for the land in controversy September 11, 1882, and an affidavit for extension May 12, 1887. On the 6th of June, 1887, Friel filed his affidavit of contest, and after due and proper notice to all parties concerned, the case was heard on the 25th of October, 1887.

On the 15th of February, 1888, the local office rendered a decision holding that the entry should not be canceled. That decision was affirmed by you, as aforesaid, from which Friel appealed to this Department.

From an examination of the evidence produced by the claimant upon the hearing, it appears that about eleven acres of the land in question were broken in June, 1883. In the spring of 1884, a crop of wheat was sown on said land, and after the wheat was harvested, the land was "backset." In May, 1885, the land was worked up with a plow and spring toothed harrow, and twenty-seven thousand, seven hundred and fifty (27,750) cottonwood trees planted thereon, in rows about eight feet apart. The same year, the trees were plowed twice through with a two horse corn plow.

In May, 1886, where trees were missing, three thousand (3,000) ash, box-elder and maple trees were planted, and the whole ten acres were plowed between the rows with a corn cultivator. The summer of 1886 was a very dry one, and a very large number of the trees died in consequence of the drought. After the extension was obtained, and in June, 1887, all of the land, except where trees were growing, was plowed and put in condition for planting again that fall, and at the time of the hearing, it was in good condition for such planting.

Of the contestant's witnesses, none of them, except one, had ever seen the land in question until the spring of 1887. The witness who had known the land for a longer time first saw it in November, 1885. All of them admit that the land showed evidence of cultivation and tree planting, and that there were a few trees growing upon it at the

time of the hearing, but they all claim that at the time of the filing of the affidavit of contest, the land was very grassy and weedy, and that from appearances, it had not been properly plowed and cultivated, either before or after the tree planting.

The timber culture act not only requires good faith, but also good culture. The good faith of the claimant is certified by his acts of plowing, cropping, tree planting, and cultivation. The drought, which destroyed his trees, he could neither guard against or prevent; and from all the facts and circumstances of the case, I think that up to the time of the drought, he had substantially complied with the requirements of the law. After that, he further manifested his good faith by procuring an extension, and putting the ground in order for planting again.

In his specifications of error, in his notice of appeal from the decision of the local office, the appellant insists that better faith is required from a non-resident than from a resident. This position can not be maintained, as the law does not require that the entryman should be an actual resident. Good faith is manifested more by improvements upon the land than by residence upon it.

The appellant also declares that

> the law did not require but on the other hand forbid planting the second five acres the third year.

There is no merit in this point. 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. Clark *v.* Timm (4 L. D., 175.)

Fully concurring in the conclusion reached by your office in this case, I affirm the decision appealed from.

PRACTICE—REVIEW—ACT OF JUNE 3, 1878.

UNITED STATES *v.* MONTGOMERY ET AL. (ON REVIEW).

The consideration at the same time of several cases that embrace similar questions, and the promulgation of one decision covering the several cases, does not in any manner abridge the right of each entryman to have his case separately considered, and is no ground for reconsideration.

A question not raised or determined in the decision will not be considered on review.

In determining the validity of a timber land entry it is the imperative duty of the Department to ascertain whether the tract, with the timber removed, is unfit for cultivation.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 14, 1891.

I have considered the motion by the defendants, for a rehearing and reconsideration of departmental decision of November 24, 1890, in the case of the United States *v.* Montgomery *et al.* (11 L. D., 484), involv-

ing certain timber land entries in the Vancouver, Washington, land district.

The first reason assigned for the motion is,

The decision was improperly made by considering all the cases together, and rendering but one decision for all the entries. An examination of each case should have been separately made from the others because the testimony was so taken, and discloses quite a difference in the character of the soil, its broken surface and the quantity and quality of the timber thereon, as well as the circumstances under which each entry was made.

In reply I have to say, that each case which comes before the Land Department is determined upon its merits. In the present instance each entry was canceled for the reasons stated. The consideration of the various cases at the same time, and the promulgation of one decision embracing the same, was in no way a denial of the rights of each entryman to have his claim considered in the usual manner, hence the decision was not improperly made, but it was a part of the administrative practice of the Department, according to the best judgment of the head thereof.

The second reason alleged for the motion is,

The decision rendered by the Secretary of the Interior is erroneous in this, that he held the lands when cleared would be fit for profitable cultivation by ordinary processes of farming, whereas under the act of June 3, 1878, the true and only question to be considered was this: were the lands at the time they were entered chiefly valuable for timber and were they at that time unfit for cultivation?

The decision of the Department was that the lands in question were not subject to entry under the timber and stone act. Said act provides that lands "valuable chiefly for timber, but unfit for cultivation" may be entered etc. As has been said "all timbered lands are unfit for cultivation in their natural condition" being thus unfit for cultivation by reason of the timber thereon, the logical result of the contention by the defendants would be, that the Department could not inquire into the character of the land, whether it was actually fit for agricultural purposes and cultivation or not, provided there was a sufficient number of trees on the tract to prevent, or render it unfit for cultivation, at the date of entry. Such a construction of the act can not be entertained, as it would be a plain violation of its intention and spirit, as well as of its words.

Two conditions must combine to make timbered land subject to purchase under said act.

1st. It must be valuable chiefly for its timber;

2nd. And unfit for cultivation.

The absence of either of these conditions, excepts the tract from purchase. Then it becomes the imperative duty of the Department, in each case, to ascertain whether the tract with the timber removed, is "unfit for cultivation." If it is not, then the entry can not stand.

It was the evident intent, as gathered by this act, not to allow land fit for agricultural use to be purchased under this act. It is only such

rough, stony or mountainous tracts as are unfit for cultivation *on that account*, that may be so purchased. The act does not read and can not in reason be construed as meaning unfit for cultivation, on account of the timber growing thereon. Some of the most fertile of the public lands are timbered, and when cleared are the most valuable for cultivation. The fact that Congress connected timber lands with stone, is a sufficient expression of intent to allow only such lands as can not be cultivated by the ordinary methods of agriculture, to pass under this act.

The rulings of the Department as to its right and duty to inquire into the character of the land claimed under this act, are too well established to be changed in the absence of some good reason why such change should be made.

The third reason assigned for the motion is,

The decision was erroneous in this that the certificates given to the persons who made the several entries, were directed to be canceled without refunding the money paid for the several tracts of land, when the same were purchased in good faith.

There has been no finding by any branch of the Land Department that these purchases were made in good faith, but as that question was not raised in the decision, of which review is asked, it can not be considered at this time.

The motion is denied.

SURVEY OF PUBLIC LANDS—RESURVEY.

INSTRUCTIONS.

A resurvey is authorized, at rates not in excess of those provided by law, where such action is rendered necessary by the imperfect character of the work done on the original survey.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 14, 1891.

Your letter of May 5, 1891, enclosing a communication from William H. Pratt, surveyor general of California, dated April 21, 1891, transmitting diagrams, field notes and other papers relative to a resurvey of townships 14 and 15 N., R. 10 W., M. D. M., California, has been considered.

It appears that Deputy Surveyor Brown originally surveyed the intermediate or section lines in the eastern part of said townships in 1875, leaving about fifteen sections in the western part of township 14, and five sections in the western part of township 15, unsurveyed.

Under date of October 14 and November 10, 1890, your office authorized the completion of the survey of public lands in the above townships, and on January 15, 1891, the surveyor general of said State addressed a letter to your office, enclosing one from Deputy Surveyor M. S. Sayre, wherein he states that he is willing to enter into a contract to

complete survey of Tp. 15 N., R. 10 W., at the "minimum and intermediate" rates of mileage, but declines to undertake the survey of Tp. 14 N., R. 10 W. at the same rate, alleging that before it can be properly done, the lines run by Brown will have to be done over again "as there is little or no evidence of its ever having been done at all". He further states that he would not care to take the contract to complete the survey of said Tp. 14 at less than $20 per day and be allowed one day for each unsurveyed mile and for each mile resurvey of Brown's work.

Under date of January 29, 1891, your office submitted to the Department the letter or report of the surveyor general, wherein he states that the lines of survey contemplated in the last named township will pass over mountains covered with dense chaparral, difficult to survey, and therefore recommends that the augmented rates named in the act of August 30, 1890, (26 U. S., 389) making appropriation for survey of public lands, be allowed for the survey of said townships, and he further recommended, in order to complete the surveys properly, that the contract include a resurvey of a portion of the original Brown survey.

The letter of Deputy Surveyor Sayre, above referred to, was also submitted with the surveyor general's.

February 10, 1891, this Department, in reply to your office letter of January 29, above mentioned, authorized the survey to be made, but declined to allow a resurvey of any portion of the township on the showing made, suggesting, however, that it would be advisable to examine the old survey and have an official report before any attempt is made to complete said survey.

In accordance with the above instructions, George S. Fawkner, special examiner of surveys, made an examination in the field of a portion of the old survey by Brown, and on a careful examination of the field notes and plat of the retracements submitted by Fawkner in said townships, it appears that with one exception no subdivisional corners could be found, and that the only corners that could be identified are on the township boundaries.

It would seem, therefore, from the examination made by Fawkner, that Sayre's statements in relation to the Brown survey, so far as examined, are true and therefore it will be impossible to secure a correct survey of the unsurveyed part of said township, until a sufficient portion of the Brown survey has been resurveyed to establish corners and lines adjacent to the proposed survey.

The instructions of the Department under date of February 10, 1891, are therefore modified to the extent that a resurvey of such portions of Brown's work or lines as will be necessary for the proper beginning and closing of said surveys may be allowed. Care should be taken, however, to issue the necessary special instructions and restrictions to secure as far as possible a faithful compliance of contract at rates not to exceed those provided by law.

RAILROAD GRANT—PRIVATE CLAIM—SETTLEMENT RIGHT—ALIEN.

SILVA *v.* REES ET AL.

A Mexican grant of quantity, within a tract of larger area, is a float, and the lands within such larger area are subject to the operation of a railroad grant, at the date it becomes effective, except as to the quantity that may be actually required to satisfy the float.

Where it appears that a settler is an alien by nativity, the burden rests on those claiming under him to show that the disqualification in the matter of citizenship was removed during the existence of the alleged settlement.

No rights can be acquired, through the settlement claim of an alien, as against the operation of a railroad grant.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 15, 1891.

I have considered the case of Lauriana L. Silva *v.* Daniel Rees and the Central Pacific R. R. Company on appeal by the former from your decision of November 6, 1889, awarding to the railroad company the NW. ¼ NE. ¼, N. ½ NW. ¼ and SW. ¼, NW. ¼, Sect. 27, T. 1 S., R. 2 W., M. D. M., San Francisco, California, land district.

This land is within the limits of the grant to said railroad company, by act of Congress, July 1, 1862, (12 Stat., 489) as enlarged by act of July 2, 1864 (13 Stat., 356), The Central Pacific Railroad Company being successor to the Western Pacific Railroad Company.

The land in controversy lies opposite a completed portion of said road, which was accepted by the President of the United States January 21, 1870 and it was held in case of Thos. Rees *v.* Central Pacific R. R. Co. (5 L. D., 62) that

> the date on which the president accepted the completed sections of this road between San José and Sacramen to determines the time when the line of said road was definitely fixed.

It appears that at one time, by a survey made by one Higley, a Mexican land grant known as the "Laguna de los Palos Colorados," overlapped a portion of the land in controversy, the line traversing the tract so as to include all of the N. ½ of NW. ¼ and parts of the other two tracts. The township plat was filed in the local office August 10, 1878, and a survey of said Mexican grant which was a "float" calling for a certain amount of land out of a larger area, was also filed August 10, 1878, which showed that the land in controversy was entirely free from said Mexican grant.

On July 30, 1878, Silva offered to file for the land in controversy but his application was rejected.

In April 1883, Rees settled upon the NE. ¼ of the section, and on the 16th day of the month applied to file a preemption declaratory statement therefor. This was rejected, from which action he appealed, and your office sustained the ruling of the local office, from which he ap-

pealed, and the Department, September 9, 1886, sustained your ruling (L. & R., Vol. 58, p. 82).

On May 14, 1883, Silva again applied to file for the land in controversy, and was allowed to do so. He alleged settlement October 16, 1872.

On November 2, 1883, he gave notice that he would make final proof in support of his filing, on the 16th of January 1884. The railroad company appeared and protested against the same, and Rees appeared against both. The testimony being taken, the local officers held that Silva was entitled to make entry for all the land filed upon by him which was within the Higley survey at the time the rights of the railroad company attached, and that the railroad company was entitled to the land lying without such survey; that in law, the private grant reserved the land from the grant to the railroad company.

From this decision, Silva and Rees appealed, and on November 6, 1889, your office held that the entire tract passed to the railroad company under its grant. From this ruling, Silva appealed to the Department. Rees failed to appeal, and the case as to him is closed.

The testimony shows that some time in 1858, one Harry Hiscock called "English Harry" went upon the land and made some improvements. He afterwards sold and transferred his "claim" and after several transfers, it came to Silva, the claimant, and his brother. They occupied a residence near the centre of the NE.¼ of the section, and claimed a rancho, extending to certain indefinite boundaries fixed by themselves or their grantees, embracing about 450 acres of land. After the survey, he and his brother divided their rancho, the claimant retaining the land in controversy.

Harry Hiscock was by birth an Englishman, and there was no evidence tending to show that he ever declared his intention to become a citizen of the United States. He came to the land, remained until 1867 and went away. Counsel say they are unable to find him or show anything as to his naturalization.

In the matter of the Mexican grant, it being for a definite amount of land within a larger area, was what is known as a "float", and the fact that Higley, by an erroneous survey ran a line as the boundary of the grant, could have no effect upon the rights of the railroad company. See United States *v.* McLaughlin, 127 U. S., 428.

In Brady *v.* Central Pacific R. R. Co. (11 L. D., 463) it was held that:

> A Mexican grant of quantity, within a tract of larger area, is a float, and the lands within such larger area are subject to the operation of a railroad grant, at the date it becomes effective, except as to the quantity that may be actually required to satisfy the float.

As it appears that none of Sec. 27 was required to satisfy the "float" in this case, the Mexican grant ceases to be pertinent to the issue.

Counsel for Silva assign as error in your decision that your office erred in making an application of the law to the facts in the case, in

failing to apply the proper law to the facts and in making your decision turn upon an immaterial and irrelevant point.

I have carefully considered his brief. Nothing is claimed from the Mexican grant. It is conceded that the land passed to the railroad under the act of July 2, 1864, unless prevented by the settlement and improvement of Hiscock.

It is virtually admitted that Hiscock was an alien, and if not conceded, I will say that the proof clearly shows that he was such by nativity, and this having been shown, the burden is upon him, or those claiming under him, to show that he had at least declared his intention to become a citizen of the United States. This they have failed to do, and he will be treated as an alien.

In case of the Central Pacific R. R. Co. *v.* Booth *et al.* (11 L. D., 89), it was said:

> It will be observed that the enlarging act expressly provides that the claims which shall not be impaired are, "pre-emption, homestead, swamp land or other lawful claim:" The occupancy of land by an alien can not be considered a "lawful claim," for he knows that an alien can not acquire title to land from the United States under the settlement laws.
>
> It was expressly ruled by this Department, in the case of Southern Pacific R. R. Co. *v.* Saunders (6 L. D., 98), that an alien can acquire no right to public land before filing declaration of his intention to become a citizen. See also Titamore *v.* Southern Pacific R. R. (10 L. D., 463).

In Northern Pacific R. R. Co. *v.* Potter *et al.* (11 L. D., 531) it was said:

> Where possession or occupation alone, at the time the railroad rights attached are relied on to except the land from the grant it must affirmatively appear that the party in such possession ha d the right at that time to assert a claim to the land in question under the settlement laws of the United States.

This principle was substantially laid down in Brady *v.* Central Pacific R. R. Co., (11 L. D., 463). It is useless to multiply authorities on a point so clear.

In the case at bar, Silva's rights depend upon Hiscock's settlement, excepting the land from the railroad grant; without his settlement, the railroad company was prior in time to Silva and his grantors. Hiscock had no color of title, and could not acquire any, and his acts in fencing any part of the public domain were unlawful. There is no evidence that the railroad company went upon the land in fact, or that it broke any close, and I see no application of the Atherton-Fowler case to the case at bar.

There does not seem to be any reason for disturbing your conclusions, nor does it seem that you misapplied the law to the facts. Your decision is affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—NOTICE.

DIXON *v.* BELL.

The sale of the land embraced within a homestead entry renders such entry subject to contest at any time after the fact of sale becomes known.

In case of a contest against the entry of a deceased homesteader service of notice should be made upon the heirs and legal representatives of the decedent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 15, 1891.

On May 26, 1885, Joseph Ball made homestead entry of lots 6 and 7 and the E. ½ of the SW. ¼ of Sec. 6, T. 24 S., R. 26 W., Garden City, Kansas. He died from the accidental discharge of a pistol on November 29, 1885 (not November 27), and on December 5—seven days thereafter—James C. Dixon filed his affidavit of contest against the entry, alleging that claimant "has wholly abandoned the land;" that he died intestate, leaving no widow, no children, nor heirs at law.

Notice was published, directed to the deceased entryman, and on April 9, 1886, ex-parte testimony was taken, and the register and receiver recommended the cancellation of the entry.

On January 3, 1887, you remanded the case for a rehearing, on the grounds that the contest should have been brought against the heirs and legal representatives of Joseph Ball, deceased.

March 24, 1887, was fixed for the second hearing.

On January 19, 1887, plaintiff filed a motion to amend his affidavit, alleging that "Ball, in his lifetime, sold and relinquished said claim for a valuable consideration and voluntarily abandoned the same," and that his heirs and legal representatives have failed to cultivate and improve the land since his death.

Notice was issued; personal service was had upon W. H. French, administrator of Ball's estate. Defendant's attorney appeared specially and moved to dismiss the contest, for the reason that no service had been made on the heir at law, Thomasine Warne. This motion was overruled.

Contestant introduced three witnesses, who were cross-examined at length, and the register and receiver again held the entry for cancellation, and, on appeal, you by your decision of October 1, 1889, reverse that judgment, assigning the following reasons for your action:

You erred in allowing this contest to be initiated before a reasonable time had elapsed after the death of the entryman, in which the heirs or legal representatives might comply with the law as to cultivation, etc.

You erred in refusing to dismiss the case on motion of the attorney for the heir at law for lack of service, which in the absence of any effort on the part of the attorneys of plaintiff to secure, it was your duty to do.

You also erred in holding that the evidence submitted by plaintiff was sufficient to prove his allegations.

Dixon brings this appeal.

The evidence shows that the entryman had neither wife nor children; he was a native of England, and the record fails to show that he had any relative in the United States; he died just six months and three days after he made entry of the land; he had built a small sod house thereon, and broken five acres.

David Kirkendorfer swears that about September, 1885, Ball sold the claim to his (Kirkendorfer's) brother, for $250; that he loaned his brother a part of the purchase money, and he saw it paid over to Ball; that he went with his brother to Dodge City and got a lawyer to make out the papers for a relinquishment, also his brother's filing papers. These papers were left with the lawyer to be filed in the local land office. Ball then removed all his household goods from the land, and went on a trip to California and returned in about three weeks. Nothing had been done with the papers in his absence, and it was agreed that Ball should repurchase the land, which he did—paying $215 for the same. But, in the meantime, Kirkendorfer had taken possession of the place, which he soon thereafter vacated.

Several witnesses testify that Ball told them he had sold the land. He did not move back to it on his return from California, but lived thereafter with Mr. Kirkendorfer, the witness above mentioned, at whose house he died.

After he had bought back the land, he offered to sell again to Mr. Dixon, the contestant, for $300.

I find this statement in your letter:

> The same witnesses who testify for plaintiff on a former trial that he had agreed to sell for $250, now walk up and swear that he did make a bona-fide sale.

In this you err. There were three witnesses in the first hearing—namely, Arthur D. Smith, James C. Dixon (the contestant) and David Kirkendorfer. There were also three in the second—namely, Henry Peterson, M. Naylor, and contestant; and since contestant did not testify in either case to the alleged sale, your error is manifest.

Ball sold his claim; and the fact that he bought it back can not excuse the sale, especially since he moved his effects from the land after the sale, and never thereafter resided in the house.

When an entryman has sold his claim before final certificate has been issued, and soon thereafter dies, no amount of cultivation or improvements by his heirs or legal representatives will cure such entry, and a contest may be commenced at any time after the fact of such sale is known.

I think the evidence amply sufficient to sustain the allegations in the contest; but, inasmuch as it does not appear that any notice was published addressed to the heirs of the deceased entryman, or that due diligence was exercised to ascertain the names and last known addresses of such heirs, if any, that a proper defense might have been interposed, I remand the case, with directions that contestant be required to make proper service by publication to the heirs of Ball, and that personal

service be had, if possible, upon Thomasine Warne and all other known heirs, also the legal representatives, if any, of the deceased entryman. And, if after such service and upon the day of hearing no appearance is made by such heirs, or no defense is interposed, the entry should be canceled on the evidence now of record. If, however, the heirs or legal representatives interpose a defense, the evidence should be taken *de novo*, and again be passed upon.

Your decision is modified accordingly.

RAILROAD GRANTS—CONFLICTING LIMITS.

NORTHERN PAC. R. R. CO. *v.* ST. PAUL, M. & M. Ry. Co.

The right of the St. Paul, Minneapolis, and Manitoba Ry. Co., successors of the St. Paul and Pacific Company, did not attach under the act of March 3, 1871, until the release required by said act was executed.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 16, 1891.

This appeal is filed by the Northern Pacific Railroad Company from the decision of your office of September 25, 1889, involving the question of priority of right between the Northern Pacific Railroad Company and the St. Paul, Minneapolis and Manitoba Railway Company to the SW. ¼ of the SE. ¼ and the SE. ¼ of the SW. ¼ and lots 5 and 6, in Sec. 11, T. 132 N., R. 41 W., St. Cloud, Minnesota.

Said tracts are within the indemnity limits of the Northern Pacific Railroad as definitely located November 21, 1871, and within the granted limits of the St. Paul, Minneapolis and Manitoba Railway, St. Vincent Extension, as definitely located December 19, 1871.

A map designating the general route of the Northern Pacific Railroad was filed with the Commissioner of the General Land Office, and approved August 13, 1870, and thereupon a withdrawal of lands within twenty miles upon each side of the road was made. Subsequently, the general route opposite the tracts in controversy was changed, and a map designating the route as amended was filed in the General Land Office on October 12, 1870, and approved by the Secretary, and a withdrawal was made in conformity therewith and the lands embraced in the former withdrawal and not falling in the latter were restored to settlement and entry.

The tracts in controversy were not within the first withdrawal of August 13, 1870, but fell within the second withdrawal made upon the map of general route filed October 12, 1870, and upon the definite location of the road they fell within the indemnity limits of said grant, and a withdrawal of said lands for indemnity purposes was ordered December 26, 1871.

On December 29, 1883, the Northern Pacific Railroad Company applied to select said land as indemnity for losses occurring within its granted limits, which was rejected by the local officers, and said rejection was affirmed by your office by decision of September 25, 1889, in which decision it was also held that the tracts are subject to the operation of the grants to the St. Paul, Minneapolis and Manitoba Railway Company. From this decision the appeal now before me was taken by the Northern Pacific Railroad Company.

Applications were made by several settlers to enter this land, subsequent to the dates when the rights of both companies attached, but as it does not appear from the record that they are prosecuting any claim to the land before the Department, it is unnecessary to consider said applications.

The only question at issue before the Department is as to the right of the Northern Pacific Railroad Company as to those lands lying within the indemnity limits of said road which were withdrawn upon the filing of the map of general route of October 12, 1870. This question has been settled by the decision of the supreme court, dated March 2, 1891, in the case of St. Paul and Pacific Railroad Company *et al. v.* Northern Pacific Railroad Company (139 U. S., 1), in which it was held that the right of the St. Paul, Minneapolis and Manitoba Railway Company, the successors of the St. Paul and Pacific Railway Company, did not attach under the act of March 3, 1871, until the release required by said act was executed, which was December 19, 1871, and which was subsequent to the date of withdrawal for the benefit of t he Northern Pacific Railroad Company.

Your decision is reversed.

MINERAL LAND—TOWNSITE PATENT—ACT OF MARCH 3, 1891.

PLYMOUTH LODE.

Under an allegation, properly corroborated, that a tract, patented under a townsite entry, includes a mine of valuable ore, and that such mine was well known at the date of entry and issuance of patent, the Department may order a hearing to test the truthfulness of the charge, with a view to subsequent judicial proceedings.

Section 16 of the act of March 3, 1891, is not retrospective in its operation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 16, 1891.

I have considered the appeal of the proprietors of the Plymouth Lode mineral claim, made October 11, 1884, by E. H. Cummings *et al.*, from your decision dated April 29, 1890, holding for cancellation said mineral entry for conflict with the prior patent of the Black Hawk townsite for the same land, Central City, Colorado.

The record shows that all of the tract described in the Plymouth Lode claim was patented to the Black Hawk townsite on the 25th of

April, 1877. The lode claim entry was made on October 11, 1884, and on April 21, 1890, it was held for cancellation. An appeal has been taken to this Department, and the mineral entrymen have submitted an affidavit signed by Oscar L. Peers, another signed by Lewis C. Snyder, and a third by Ezra Rue.

The affidavit of Oscar L. Peers states that he has resided in the vicinity of the land since 1859, and has followed mining and surveying during all of the period of his residence there; that he is well acquainted with the Plymouth Lode claim and that the land embraced therein "contains a gold-bearing mineral vein or lode." He also states that as early as the year 1870 and previous thereto he knew of said vein or lode; that said vein was at that time well defined and had been worked, ore taken therefrom and treated at the stamp mills in the town of Black Hawk.

Lewis C. Snyder swears that he has resided at the town of Black Hawk ever since 1869, and that he is well acquainted with the tract contained in the Plymouth Lode mineral claim,

and that as early as the year 1866 he personally knew said land to contain a well-defined vein or lode bearing gold in paying quantities, having hauled ore therefrom to the stamp mills in Black Hawk for treatment as early as the year 1866; and said affiant further states that said vein was worked as a lode mining claim long prior to the date of the location of the said Plymouth Lode.

The other affidavit, made by Ezra Rue, is based upon the information contained in the foregoing affidavits, and he states that it is his belief that "said Plymouth Lode claim—now located—was known to contain a well-defined mineral-bearing vein—carrying gold in paying quantities long prior to the date of the entry of the Black Hawk townsite and at the time patent issued thereon."

Upon these affidavits the Plymouth Lode claim bases its application

that the proper proceedings be had and instituted to render inoperative so much of the townsite patent . . . . as is in conflict with and embraced in said Plymouth Lode claim.

It is well settled that the issuance of a patent to the townsite company deprives this Department of all further jurisdiction over the land embraced therein, so long as the patent remains outstanding. United States *v.* Schurz, 102 U. S., 378. Since, however, the application for relief and the affidavits upon which it is based charge that the tract patented to the townsite included a mine containing valuable ore and that this mine's existence was well known at the time the townsite entry was made and at the time the patent was issued, it is proper for this Department to inquire into the truthfulness of these charges, with a view of recommending a suit in the proper tribunal to vacate so much of said patent as describes the lode claim. Bullock *et al. v.* Central Pacific R. R. Co. *et al.*, 11 L. D., 590.

In the case of the Colorado Coal and Iron Company *v.* United States (123 U. S., 307–328), a bill was filed to set aside patents issued for agri-

cultural lands, on the ground that it was known at the time of their issue that the lands contained mines of coal. The court said:

A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines," capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed.

There seems to be no reason why the principle announced there may not be applied in this case where the controversy is between a patented townsite and a mineral claimant, for the townsite act, as well as the homestead and pre-emption laws, prohibits the acquiring of land known as mineral land. Thomas J. Laney, 9 L. D., 83; Pikes Peak Lode, 10 L. D., 200.

In the recent case of Davis *v.* Wiebbold, the supreme court cited the case of Thomas J. Laney, *supra*, with approval, and stated that—

Congress only intended to preserve existing rights to known mines of gold, silver, cinnabar or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town site act, and not to leave the titles of purchasers on the townsites to be disturbed by future discoveries.

In your letter of April 9, 1891, you refer to section 16 of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891 (26 Stat., 1095). The section referred to cannot affect the case at bar, for nothing is found in the terms thereof making it retrospective in its operations; besides, the tract in question had already been patented to the townsite of Black Hawk, before the Plymouth Lode claim was located.

I am of the opinion that the showing made is sufficient to warrant a hearing. You are therefore directed to order a hearing, after notice thereof has been served on all parties concerned, at which the Plymouth Lode proprietors will have an opportunity to prove the allegations made in their appeal and affidavits that this particular mine, at the time the tract was entered by the townsite company and at the time patent issued therefor, was an actual known mine, capable, of being profitably worked for its product.

After this hearing has been held, the local officers will re-transmit all the papers to your office together with their opinion on the evidence submitted, after which you will consider the same with a view to recommending a suit to vacate said patent in so far as it describes the alleged known mine.

The entry of the Plymouth Lode claim will be suspended pending the above investigation.

Your decision is accordingly modified.

PRE-EMPTION CLAIM—INDIAN LANDS.

MISSION INDIANS *v.* WALSH.

Land included within the use and occupancy of Indians is not subject to settlement and appropriation under the pre-emption law.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 16, 1891.

I have considered the case of The Mission Indians *v.* John J. Walsh on appeal by the latter from the decision of your office dated September 10, 1889, affirming the action of the local office and holding for cancellation Walsh's preemption declaratory statement for lot 1, NE. ¼, NE. ¼, Sec. 25, SE. ¼, SE. ¼, Sec. 24, Tp. 10 S., R. 3 E., and SW. ¼, SW. ¼, Sec. 19, Tp. 10 S., R. 4 E., Los Angeles land district, California.

Walsh filed his declaratory statement for said tract March 21, 1888, alleging settlement thereon March 1, 1888. April 25, 1888, Indian Agent Preston, on behalf of the Mission Indians, filed a protest against the allowance of said filing, alleging that the Indians were *then* occupying said tract, and had been in uninterrupted possession of the same for many years. In support of his allegations he also filed the joint affidavits of Juan Maria, Pedro Onlinolis, and Adolpho Moro, three Mission Indians.

May 1, 1888, the register referred the case to your office for instructions thereon, and, at the same time, reported

Although our records do not show that this tract was ever included within lands reserved for Indians, it immediately joins lands reserved by executive order of January 17, 1880, as the Agua Caliente Indian Reservation which has since been revoked as to a portion thereof by Commissioner's letter "E" of Feby. 2, 1880. Upon the official plat of Tp. 10 S., R. 3 E., S. B. M., filed in this office May 27, 1885, the U. S. surveyor general has shown that a portion of the SE. ¼ of SE. ¼, Sec. 24, and the NE. ¼ of NE. ¼, Sec. 25, is covered by a vineyard; with these facts in view it is our opinion that the D. S. of Walsh should be canceled.

On May 24, 1888, your office suspended Walsh's filing, allowing him sixty days within which to show cause why the same should not be canceled.

August 10, 1888, Walsh filed his own affidavit corroborated by two other persons in which he alleges

that said land was not within any Indian reservation nor reserved in any manner from disposal under the preemption laws of the United States but was public land and open to entry, and was so marked upon the records of the Land Office, that deponent has settled upon and improved this land in good faith, having hauled lumber forty miles for the purpose of erecting a house, which house and other improvements have cost deponent the sum of two hundred and eighty dollars. Deponent further alleges that the said land has never been in possession of the Indians, and has never been occupied by them, and that the Indians have never claimed said land or any part thereof;

He also alleged that the tract in dispute was more that fifty miles from the local office, and asked that a hearing be ordered and that the testimony be taken in the vicinity of the land so as to avoid expense.

The register ordered a hearing for November 21, 1888; testimony of witnesses to be taken before the Deputy Co. Clerk of San Diego Co., at Julian, on the eighth of the same month.

By stipulation of the respective parties, the taking of testimony was continued to November 21, 1888, at which time testimony was submitted by both parties, and on March 1, 1889, the register and receiver found in favor of protestants and recommended the cancellation of the declaratory statement. Claimant appealed alleging the following grounds of error, viz:

1. That at the time of filing, the records showed the tract to be public land and open to entry under the preemption laws with no reservation for the Mission Indians; and having entered upon said land and having made valuable improvements thereon he was entitled to the benefits of the law as a bona fide settler.

2. That the Indians as a tribe never claimed said land as a reservation; and that the only Indians interested "as shown by the testimony are Juan Maria and Adolpho Moro, both of whom have homes upon the Agua Caliente reservation, and cultivate land there, only using the tract in question as a camping spot in summer."

3. That the improvements of said Indians consist of a few rush houses, scattering fruit trees and vines, and occasionally three or four acres cultivated and that they having homes and lands elsewhere are not dependent upon this tract for support.

4. That the plat introduced by protestants is incorrect and was objected to by claimant.

The foregoing appeal is supported by a lengthy argument, and in response thereto protestants filed an answer reciting therein certain portions of various reports of the Commissioner of Indian Affairs relating to the rights of the Mission Indians and land reserved for their use and benefit; and alleging that although 161,402 acres were reserved by executive orders, there are not more than five thousand acres of tillable land, and that the best portion of that is now held by white trespassers; but that "Nowhere is there any reserve land for the Mission Indians of the villages of Agua Caliente"

September 10, 1889, your office decided that the testimony adduced at the hearing showed that the land in question was used and occupied by said Indians up to the time of Walsh's filing, and that he admitted that the "Indians insisted upon using the land after he had filed thereon." Therefore, and under the provisions of circulars of May 31, 1884, (3 L. D., 371) and October 26, 1887 (6 L. D., 341), respectively, the land was not subject to filing or entry, and held the declaratory statement for cancellation, whereupon Walsh appealed to this Department, alleging the following grounds of error, viz:

1st. That said decision is contrary to and in violation of all laws governing the disposition of the public lands.

2. That it is contrary to the evidence in said case.

3. That it is erroneous in holding that circulars of the General Land Office not authorized by any existing law, have the force and effect of law, and prohibit entries of public lands.

4. That it is erroneous in holding that the circulars of May 31st, 1884, and October 26th, 1887 have any application to the case of Walsh; or that they apply to any reservation Indians, Indians for whom reservations have been provided, or to any Indian who does not inhabit and has made his permanent home, house and family on the land claimed, to the exclusion of a home elsewhere.

5. That it is erroneous in considering any party as a protestant other than the three Indians who made the protest.

6. That it is erroneous in holding the filing of said Walsh for cancellation.

The testimony submitted justifies the conclusion reached by the local officers and in your office, that this land was used and occupied by the Indians at, and for many years prior to, the date of Walsh's settlement thereon and also since that time up to the date of the hearing. I concur also in the conclusion that the land was not, under the circumstances, subject to settlement and appropriation under the pre-emption laws. Walsh's filing should not have been allowed, and your decision holding the same for cancellation is affirmed.

RAILROAD GRANT—INDEMNITY SELECTIONS.

SOUTHERN MINNESOTA RY. EXTENSION CO.

Indemnity selections will not be approved in the absence of due specification of the losses for which the indemnity is asked.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 16, 1891.

With office letter of February 26, 1890, were transmitted here, for my approval, lists 3 and 4 of indemnity selections, for the benefit of the Southern Minnesota Railway Extension Company, made under the act of July 4, 1866 (14 Stat., 87), granting lands to the State of Minnesota to aid in the construction of a railroad from Houston, in the southeastern portion of the State, to the western boundary thereof. In said letter it is stated:

These selections were made prior to the requirement of specification of losses as a basis for the indemnity selections, and no such specification has since been filed; but, as the adjustment shows the grant to be deficit more than 1,000,000 acres, I deem it unnecessary to insist upon such requirement in this case.

So far as my research has gone, the specification of losses has always been required by the authorities of the Land Department since 1879 as preliminary to the approval of lists of indemnity land, except when Secretary Teller, on May 28, 1883, dispensed with that pre-requisite in respect to the Northern Pacific Railroad alone, in the hope of thereby expediting the adjustment of that particular grant. But in authorizing this dispensation, he expressly recognized the existing rule of the Department "requiring preliminary lists of such lost lands, together with

the indemnity lands, tract for tract, from the company as heretofore." (12 L. D., 196).

Whatever may have been the practice theretofore, on August 4, 1885, by circular of the General Land Office, approved by Secretary Lamar, it was directed that such preliminary lists, specifying the particular deficiencies, should be filed in every case. And where indemnity selections had been made theretofore, without such specification of losses, the register and receiver were directed to require the companies to designate their losses, before further selections were allowed. (4 L. D., 90.)

Since the issue of this emphatic circular, there has been abundant opportunity for specifying the losses, on which the lists, now sent me, are based, but this the company has apparently failed to do.

I see no sufficient reason in the present case why the company's compliance with the plain requirement of the law and the rules of the Department should be waived and said lists approved; but many reasons why the law should be adhered to and the rules enforced. (Northern Pacific R. R. *v.* Miller, 11 L. D., pp. 1, 428.)

With these views, I decline to approve the said lists, and herewith return them to you that the losses may be specified.

PRE-EMPTION CLAIM—STATE TITLE.

RITCHEY *v.* STEPHENS.

Failure to file declaratory statement within the statutory period forfeits the settlement right in the presence of an intervening adverse claim.

A pre-emptor who has failed to file within the period fixed by law, can not be permitted to arbitrarily post date his settlement in order to defeat the intervening claim of another.

One holding public land under a quit-claim deed from the State can not set up such title to defeat the entry of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 16, 1891.

I have considered the case of George F. Ritchey *v.* David Stephens, on appeal by the former from your decision of September 24, 1889, in which you hold for cancellation his declaratory statement filed April 23, 1887, for lot No. 1 and the $NE\frac{1}{4}$ $NE\frac{1}{4}$ (not the whole $NE\frac{1}{4}$, as you have it), of Sec. 30, T. 17 S., R. 1 W., Roseburg, Oregon.

I have carefully reviewed the testimony and find the facts substantially set forth in your said office decision. The land in controversy is unoffered. Ritchey swears that he settled thereon December 3, 1886; he did not "make known his claim in writing to the register" by filing thereon, until nearly five months had elapsed from date of his settlement, and on April 4, 1887, nine days before he made his filing, Ste-

phens made homestead entry of the land. He thus forfeited his settlement rights, by his laches. The land belonged to the government, and he knew, or might have known, that the so-called title which he held by quit-claim deed through mesne conveyance from the board of land commissioners of the State, gave him no right to the land. The act approved February 25, 1885, and incorporated into seetion 3613 of the Statutes of Oregon of 1887 (Vol. 2, p. 1569), provides as follows:

All the right 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 confirmed to such claimants respectively.

Section 3614 of said act provides for the issuance of quit-claim deeds without cost to such claimants by the board of land commissioners of the State. So that such a quit-claim deed is not only an evidence that the State does not claim the land, but is a recognition of the title of the United States in the land therein described.

Ritchey obtained a quit-claim deed for the land from one Millicum, who also had a quit-claim deed thereto from one Dodson, and the latter received a quit-claim deed from the State under the statute above quoted.

He went into possession of the land in controversy under this deed, and, admitting that he depended upon that deed for his title, until the land was entered by another, yet the Department is powerless to relieve him from the consequences of his mistake. Nor will he be permitted to take advantage of his own mistake by arbitrarily post-dating his settlement upon the land in order to bring his filing within three months of such date as required by law.

For the reasons above given, his filing must be and the same is hereby canceled, and your said office decision is accordingly affirmed.

SECOND CONTEST—PROCEEDINGS BY THE GOVERNMENT.

MCALLISTER *v.* ARNOLD ET AL.

A contest will not be allowed where the grounds alleged therein have been made the subject of investigation and final decision by the Department.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 16, 1891.

I have considered the appeal of Frank A. McAllister from your office decision dated November 15, 1889, refusing to order a hearing upon his application to contest desert land entry made by Green Arnold for the N½ Sec. 24, and the S½ of Sec. 13, T. 3 S., R. 38 E., La Grande, Oregon.

It is shown that Green Arnold made desert land entry for the above-described tracts May 6, 1880. On August 10, 1883, special agent Mc-

Cormick reported that the tracts described in said entry were not desert in character, and that the entryman had not properly irrigated the same. A hearing was held on this report, commencing September 4, 1885, and continuing nearly two months, during which time thirty-six witnesses were examined and testimony taken, covering about one thousand manuscript pages. After considering the evidence submitted, the local officers found in favor of the entryman. Your office, however, upon a review of the testimony, in its decision dated December 15, 1885, reversed the finding of the local officers and held the entry for cancellation. An appeal was taken to this Department, where, after duly weighing the evidence, under date of August 8, 1888, the judgment of your office was reversed and the Department took occasion to state that—

> The controlling issues in this case are: 1st Is the land desert in character? 2nd Has it been reclaimed as required by law? . . . . It is affirmatively shown by a strong preponderance of evidence that the land is desert in character, and that at the date of final proof the claimant had conducted water on the land in sufficient quantity to irrigate the tract as required by law. (Press-copy book, vol. 160, p. 437.)

On August 27, 1889, Frank A. McAllister filed in the local land office his application to contest said entry, alleging, substantially, that the lands embraced in said entry are good, rich and arable tracts, capable of growing remunerative agricultural crops of grain and hay without irrigation; hence are not desert lands and never were. He further alleged that none of said land was reclaimed or cultivated at the time of or prior to the date of making final proof, etc. This application was duly corroborated and transmitted to your office, and on November 15, 1889, you refused to order a hearing thereon for the reason that the character of this land and the good faith of the entryman were duly considered and finally settled by the decision of the Honorable First Assistant Secretary of the Interior on August 8, 1888, and that this contest raises no new questions for adjudication. An appeal has been taken to this Department.

After an examination of all the questions involved in this case, I am of the opinion that your judgment is correct. The allegations in McAllister's application for contest are substantially the same as were contained in the report on which a hearing was had. That hearing appears to have been an exhaustive one; nothing can therefore be gained by going over the ground again. Besides, it is as much the duty of this Department to protect those shown to have complied with the law, against useless contests and harrassments, as it is to cancel entries in the hands of those shown not to have complied with the law.

Your judgment is affirmed.

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

INSTRUCTIONS.

The proviso to section 7, act of March 3, 1891, is one of limitation upon contests initiated after the passage of said act, but does not relieve entries from the effect of contests that were pending at the date of said enactment.

Secretary Noble to the Commissioner of the General Land Office, April 25, 1891.

By means of a proposed letter to chiefs of divisions formulated by the Acting Commissioner of your bureau and presented before your installment in office; by the several opinions of the Assistant Attorney-General, and First Assistant Secretary, and a letter from yourself dated April 9th, there has come before me a question as to the construction to be given to the proviso of section 7 of the act of Congress, entitled "An act to repeal the timber-culture laws, and for other purposes," approved March 3, 1891, 26 Stat., 1095.

That proviso is in the following words:

Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

That the business of your bureau may be conducted with regularity and uniformity, it is necessary that it should now be determined as to what point of time the words "when there shall be no pending contest or protest against the validity of such entry" apply;—whether the contest or protest, to prevent the issuance of the patent until disposed of, must have been pending before the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry, in cases existing and where the two years had elapsed before the act of March 3d took effect, as well as in those afterwards.

A brief reference to the state of the law and facts existing at the time the present act was passed, will aid the solution of this question.

The second section of the act entitled "An act for the relief of settlers on the public lands," approved May 14, 1880, (21 Stat., 140), is as follows:

In all cases where any person has contested, paid the land office fees and procured the cancellation of any preemption, 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 the date of such notice to enter such lands: *Provided*, that said register shall be entitled to a fee of one dollar for the giving of such notice to be paid by the contestant and not to be recorded.

The right granted by this statute and the reward thereby promised had induced many thousands of contests and protests as to the good

faith and legality of entries for vast numbers of acres of the public domain. Many of these contests and protests had been legally filed under the law and regulations then in force, after more than two years had elapsed from the date of final receipt and were still pending when the act of March 3, 1891, took effect. There was no limit of time within which these might be filed before patent. The contestants had each paid out, for persons in their circumstances, very considerable sums of money, for fees and expenses. Of this general class of contests and protests made against alleged fraudulent or illegal entries very many had been decided before the act of 1891 was passed, and more than fifty per cent. were decided in favor of the contestants and protestants, notwithstanding the most liberal construction of laws and facts in support of the entry.

Contests and protests have, since first allowed by law, been encouraged, and are not now discouraged by the law under discussion. It is true that in many cases these contests or protests have been malicious and inaugurated for the purpose of exacting from honest settlers payments to avoid litigation; but there has been no such development of this evil purpose as has even now convinced either the Department or Congress that such proceeding should be discountenanced. They have resulted in aiding the government to protect its public domain, by the vigilance of those who, desiring the lands, have detected fraudulent entries and brought them to the knowledge of the General Land Office. The contestant if successful must, if he seeks any benefit under the law, enter the tract of land in dispute under the same conditions and limitations as though he were an entryman under any other circumstances; and it has thus resulted, to the extent above specified, that upon bona fide contests or protests lands have been prevented from falling into the hands of the fraudulent. This Congress recognizes by authorizing such proceedings under the present act.

It thus appears that if the statute of March 3d were to be construed to invalidate all contests or protests not filed within two years after the date of the final receipt, and before this statute took effect, the result would be that many fraudulent claims would go to patent without further question being possible, although contests or protests were legally pending at the date of the act; and with a great loss to many citizens who, relying upon the statute of May 14, 1880, have invested their money and spent their time in an honorable purpose to obtain a home against those who had fraudulently seized upon the land.

It is true that if the language of the act clearly and distinctly expressed this purpose there is nothing in the nature of a contest or protest that would protect it from the effect of the law intended to destroy it. It is admitted, as has often been decided in this Department, that the preference right of a contestant rests upon procuring the cancellation of the entry; that after such a preference right is acquired, it cannot be assigned; that it does not operate to reserve the land from control of

Congress during the period allowed for the exercise of such right; that the right is personal, and that it terminates with the death of the contestant. But a contest has been, as it still is, a proceeding not only allowed but invited by Congress. It is statutory means of acquiring a homestead or other claim against an illegal entry, and is thus rewarded, if successful, to preserve the public domain for honest settlers. To so construe the present act as to annul, and as it were wipe out all those contests and protests existing before March 3, 1891, not filed within two years from the issuance of final certificate, would amount substantially to a repeal *pro tanto* of the statute of May 14, 1880. But a statute cannot be legally held to be repealed by implication, and least of all, it may be added, where it would allow patents to issue in so many cases where the experience of the Department leaves no reason to doubt fraud has been practiced upon the laws regulating land entries, and which can be proven if the contests and protests are allowed to proceed to a hearing. If it had been the purpose of Congress to provide that the contest or protest must be pending within two years after the receiver's receipt upon the final entry in all cases before the statute of March 3, 1891, as well as after, it certainly would not have used so ambiguous a term as we here find. Indeed the language is so loose that it requires a liberal construction to give it effect even upon subsequent contests, for saying that after two years from issuance of final certificate, when there shall be no contest pending a patent shall issue, does not declare that the contest must be pending within the two years. Such is not the language of statutes of limitation usually. But no dispute exists, that if there is no pending contest filed within the two years from the date of the receiver's receipt upon the final entry where the limited period expires after the date of the act, the entryman will be entitled to his patent, although a period may elapse within a day after that on which the act was approved. As to such cases it must be held to be a statute of limitation, although carelessly worded. The language is "when there shall be no pending contest or protest against the validity of such entry." There is no sufficient reason to say that this means pending before the lapse of two years. It would affect as we have already seen, many meritorious cases and many innocent parties. It should not be held that as to the past it was intended to be a statute of repose when the records of the Department prove that a vast number of frauds upon the United States would be smothered by the construction. To do so would favor fraud much more than secure repose to honest men. The makers of this law were well acquainted with the situation of affairs; the land laws have been the subject of great discussion for many years in and out of Congress; the committees on the public lands are distinguished for their industry and intelligence and they were fully aware of all of the facts that have been stated here. Had they desired to accomplish the purpose that is claimed by some this act does accomplish as it reads, they should and doubtless would have used language too plain and direct to require construction. On

the contrary, they use the present participle in this clause and say "when there shall be no *pending* contest or protest"—meaning thereby clearly, I think, pending then presently at the date of this act. It was not intended to be limited to contests or protests pending within two years after the date of the final receipt, when the case had arisen before the present act took effect and the two years had elapsed. The statute thus becomes one of limitation as to the future, without overthrowing the pending contests or protests. When the two years did not terminate before the date of the act the contest or protest to be valid must be filed within the two years. There is no force I think, in the point that the statute enumerates cases arising under timber-culture or pre-emption laws, for these laws although repealed by the present act have been efficacious to inaugurate entries which either have proceeded to final entry or may yet do so. No new cases can arise under the timber-culture or pre-emption laws, but it was necessary that this act should notice them to cover the whole ground. Neither does the proposition seem a sound one that by this statute it was intended to expedite the public business and issue of patents long held back by contests. In my judgment, the way Congress must expect to have patents issue is by furnishing a sufficient clerical force to accomplish the work, and not by suddenly rushing great masses of cases to patent, although contests legally instituted are pending and in which experience leaves no reason to doubt fraud exists. To thus reward the fraud and squander the public lands could not have been the purpose of our national legislature.

These are my views upon the law presented and all of the points that I deem it necessary to discuss.

The letter of the Acting Commissioner is returned without my approval and in order that you may have it rewritten, and, if you choose, extended to conform to this opinion.

CONTEST—APPEAL—SECOND CONTESTANT—PREFERENCE RIGHT.

CARLSON *v.* BRADLEE.

An appeal will lie from an order of the local office dismissing a contest for want of prosecution, and refusing to re-instate the same on due showing; and after such action a second contest can only be filed subject to the first in the event the appeal is filed in time.

The preference right of entry may be properly accorded the first contestant, though the judgment of cancellation is rendered on the subsequent contest of another, where the first contestant had, prior thereto, submitted evidence sufficient to warrant cancellation, was at no time in default, and the second contestant is duly charged with notice of the rights of the first.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 19, 1891.

On March 2, 1886, Harry Bradlee made homestead entry No. 8139 of the SW. ¼ of Sec. 12, T. 7 S., R. 39 W., Oberlin, Kansas.

On November 22, 1886, P. A. Carlson filed his affidavit of contest against the entry, alleging that claimant failed to settle upon and cultivate the land as the law requires.

Notice by publication was given, fixing January 22, 1887, as the day of hearing, before George J. Bentley, a notary public of Voltaire, Kansas. Evidence was submitted on that day before Notary George G. Ewing, claimant making default.

It appears that on February 3, 1887, the register and receiver considered the evidence, and prepared an opinion, to the effect "that the land has been wholly abandoned since date of entry," but, before signing it, they discovered the service was defective. A new notice was issued, and again published, fixing August 26, 1887, for the hearing, which was accordingly had before the register and receiver. Claimant again made default, and the entry was recommended for cancellation.

By your letter "H" of April 14, 1888, you reversed the action of the register and receiver, and remanded the case for a rehearing, for the reason that the notice of contest was published for twenty-nine days only.

Notice again was published, fixing July 27, 1888, as the day of hearing, and on the 20th day of that month, the local officers advised that an error had been made in giving the entryman's name. Alias notice was again published, and case continued to August 17, 1888, at which date no appearance was made by either party, and the case was dismissed for want of prosecution.

On September 17, 1888, Carlson was notified of the dismissal of his contest, and, on October 1, 1888, he filed his motion to re-open the case. This was denied, October 31, and on November 20th following, he filed his appeal.

On February 5, 1889, you sustained this appeal, saying "Contestant has furnished a plausible explanation for his failure to appear on August 17, 1888. Carlson's affidavit of contest is again returned to you herewith as the basis of the hearing to be had, provided contestant applies within thirty days from notice hereof for a new summons to the defendant."

On February 14, 1889, Carlson's attorney was notified of your decision of February 5, and on February 15, he applied for a new notice, which was duly issued the following day, fixing April 19, 1889, as the day for another hearing.

In the meantime, and on August 20, 1888, three days after the local officers dismissed the contest for want of prosecution, as above referred to, George T. Wilson filed his affidavit of contest against the same entry, and hearing was ordered for November 9th, following, and notice duly published. The entryman made his usual default; evidence was duly taken, and the entry canceled.

It appears that Carlson had, on August 14, 1888, prepared an amended contest affidavit, by reason of some error in the former one, and duly forwarded it to the local office, with directions for the publish-

ing of a new notice. His hearing, as above shown, was published for August 17, 1888, and he failed to appear on that day, because he supposed his new contest affidavit was on file; but it appears it had not reached the local office on the day of hearing, or if so, it had been overlooked, and his contest was dismissed.

The day following the initiation of Wilson's contest (August 21), the register discovered Carlson's amended contest affidavit, and returned it to him, with the information that Wilson had filed a contest against the entry. Carlson was also advised that his contest could be filed, subject to that of Wilson, and he accordingly returned his affidavit and the same was filed, August 31, 1888.

It appears, however, at this time that Carlson had not been advised of the action of the local officers of August 17, of that year, in dismissing his contest for want of prosecution, and when he was so notified, he filed his motion to re-open the case, and, when this was denied, he appealed to your office, as above set forth.

With this state of facts, the register and receiver on March 23, 1889, reported the case to your office for your action, the only question being that of the preference right as between Carlson and Wilson.

On August 19, 1889, you awarded this preference right to Wilson, and Carlson brings this appeal from that judgment.

The action of the local officers of August 17, 1888, dismissing Carlson's contest, and afterwards refusing to re-open the case on his motion, was appealable; and a second contest should only have been allowed subject to the final determination of the rights of the first contestant, to be determined by his appeal, if filed in due time.

The first contestant duly appealed from the action of the local officers, and your office sustained that appeal and allowed a new notice on the basis of the first affidavit.

Wilson, the second contestant, submitted his proof November 9, 1888, when he knew or might have known that Carlson's right of appeal still existed; and the fact that Carlson filed his amended affidavit after Wilson was allowed to contest the entry did not estop the latter from appealing from the action of the local officers, of which he was not at that time notified.

Carlson's conduct throughout shows he was acting in good faith to secure title to the land. He has expended almost the value of the land in his efforts. While singularly unsuccessful in getting proper service upon the entryman, yet he twice submitted evidence, amply sufficient to cancel the entry. I think the preference right should be awarded to him, since he was first to contest and at no time in default; and, while the judgment of cancellation was given on the contest of Wilson, yet the latter is charged with notice of the rights of Carlson when such judgment was rendered, and it may be said that Carlson "has contested, paid the land office fees, and procured the cancellation" of the entry.

In consideration of these views, I reverse your decision, and award the preference right to Carlson.

REPAYMENT—HOMESTEAD ENTRY.

JOHN B. BLOCK.

Repayment can not be allowed under a homestead entry that is canceled for failure to comply with the requirements of the law.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 20, 1891.

I have examined the appeal of John B. Block from the decision of your office, dated February 27, 1890, declining to recommend the repayment of fee, commissions and excess payment on his homestead entry for SW. ¼, Sec. 33, Tp. 9 S., R. 3 W., New Orleans, Louisiana.

It appears in this case that Block made his homestead entry November 23, 1878; that sometime in December, 1878, he transmitted to your office a sworn statement setting forth that a mistake had been made in describing the land he intended to enter, and therefore, March 6, 1879, the local officers were instructed by your office to allow the party to amend his entry to embrace other land.

March 14, 1886, Block applied to purchase the land embraced by his homestead, under section 2, Act June 15, 1880, (21 Stat., 237) but it appears that a contest against said entry was then pending, and also that no final proof having been made, the entry had expired by limitation. Therefore, on June 4, 1886, the entry was canceled, and on August 14, following, the application of Block to purchase was rejected, and the land was awarded to the contestant. Block now seeks repayment of the fee, commissions and excess paid on said entry, which was denied by your office, as above stated.

The 2d section of the act of June 16, 1880, (21 Stat., 287) provides:

> In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excess paid upon the same.

In the case under consideration, the entry of Block was not erroneously allowed, nor was it in conflict with any prior claim, entry or selection that would in any manner preclude its confirmation, and therefore his failure to secure a patent for his homestead entry was due entirely to his own neglect to comply with the homestead law.

The act above quoted makes no provision for refunding the money paid to the government in such cases. Therefore, this application must be denied, and the decision of your office, affirmed.

PRE-EMPTION- SECTION 2260, R. S.—REVIEW.

ASAHEL RUSSELL.

In determining whether a pre-emptor is disqualified under the second inhibitory clause of section 2260, R. S., his relation to the land formerly owned must be considered with respect to the date of establishing actual residence on the pre-emption claim, and not with reference to the date of settlement thereon.

A motion for review, filed in due time, precludes, while pending, the intervention of adverse claims.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 20, 1891.

I have considered the motion filed by the attorney of Asahel Russell for review of departmental decision of May 6, 1889, affirming the decision of your office rejecting Russell's final proof in support of his pre-emption filing for the N. ½ of the SE. ¼ and the N. ½ of the SW. ¼ of Sec. 2, T. 23 S. R. 57 W. Pueblo, Colorado land district.

Russell filed his declaratory statement for said land June 23, 1884, alleging settlement thereon June 5th. On March 22, 1887, he made final proof in support of said filing. This proof was rejected by the local officers for the reason that it was shown that he removed from land of his own to settle on this land. He applied soon afterwards to make proof anew, and was allowed to do so. This proof made August 29, 1887, was also rejected for the same reason the former had been. Your office approved the action of the local officers and held the filing for cancellation. Upon appeal to this Department that decision was affirmed.

It seems that Russell made homestead entry for the NW. ¼ of Sec. 1 T. 23 S., R. 57 W., said land district, and on May 19, 1884, submitted final proof thereunder upon which final certificate issued June 18, 1884. He testifies that on June 19, 1884, he sold his homestead to his son and files a written contract of sale purporting to have been signed that day. The deed was, according to the testimony, signed July 2, although not acknowledged until the following December. The statement as to the date of the claimant's settlement on this land are contradictory, but it sufficiently appears that soon after making final proof for the homestead tract he moved therefrom to land owned by his mother, and remained there until he established his actual residence on the land here claimed November 20, 1884. At the date he established his actual residence on this pre-emption claim he did not remove from land of his own. In the decision complained of it is said:

> It is probable that when the second witnesses swear that claimant moved from his mother's to the pre-emption claim, they refer to the month of November, when he commenced living upon the tract. But the claim was initiated by *settlement* and the qualifications of the claimant at the date of settlement determine whether the claim was legally initiated. If he was not qualified when the actual settlement was made, the claim was invalid at its inception.

Shortly after the rendition of the decision in this case, this Department held in the case of David Lee (8 L. D, 502) that the disqualification under the second clause of section 2260 R. S., being of a "person who quits or abandons his residence on his own land to reside on the public land in the same State of Territory," must be held as relating to the date of actual residence and not to the date of settlement. In that case it was decided that Lee, who was living on land of his own at the date of his settlement (July 5, 1884) on the land he was claiming under the pre-emption law, but who sold his homestead February 5, 1886, prior to the establishment of actual residence on the pre-emption claim April 20, 1886, did not come within the inhibition of said section 2260. The Lee case is cited, and the doctrine there laid down is re-affirmed in the recent case of Michael Campbell (12 L. D., 244). Under the authority of these decisions, it seems to have been error to hold that Russell came within the inhibition of said section. The sale of his homestead is not disputed and it is sufficiently shown that even if he had not sold that tract, he removed from it some time in May or June 1884 to land belonging to his mother, where he lived until the following November, when he moved to the tract here involved. The said departmental decision of May 6, 1889, is therefore under the authority of the cases cited *supra*, revoked and set aside, the decision of your office is reversed, and it is directed that Russell's final proof, which seems entirely satisfactory as to residence, improvements, and cultivation, showing as it does over two years actual and continuous residence of the claimant and his family, improvements consisting of a dwelling house, out-houses, fencing and ditches of the value of $350 to $575, and eighty acres of land under cultivation, be approved, and that Russell be allowed to complete his entry.

After the filing of the motion for review the attorneys for one Robert Mooneyham, filed in this office a "protest against the re-opening" of this case. In this protest which is verified and corroborated, it is alleged that on May 9, 1889, Mooneyham made homestead entry for the land included in Russell's claim; that afterwards one George Williford, who, it is asserted, is a son-in-law of Russell, applied to make homestead entry for said land, which application was rejected by the local officers because of the entry of Mooneyham; that Williford then filed an affidavit of contest against Mooneyham's entry, alleging prior settlement on said land, upon which a hearing was ordered; but before the day fixed for such hearing, the local officers received from the General Land Office notice of the filing of Russell's motion for review, whereupon further action in said contest was indefinitely postponed; that after Russell had learned of the cancellation of his filing, he told the affiant (Mooneyham) that he had sold his improvements to Williford and had no further interest in the case.

The facts thus above shown do not furnish any sufficient reason for refusing to consider Russell's motion and granting him relief, if he has

shown himself entitled thereto. Mooneyham's interest was acquired while the question of Russell's right to the land was yet not finally determined and with full knowledge of the fact that the land might be awarded to Russell. His claim must therefore remain subject to the final disposition of Russell's case.

FEES OF LOCAL OFFICERS IN CONTEST CASES.

GAY *v.* DICKERSON.

In contest cases the local officers are not allowed to collect fees for reducing testimony to writing, if such service is not performed by them, or by one acting under their employment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 20, 1891.

I have considered the appeal of Eugene Gay from your office decision of November 7, 1889, requiring him to pay $108.00 fees to the register and receiver of the land office at Couer d'Alene, Idaho.

The record shows that on June 11, 1889, he forwarded to your office an affidavit setting forth that the register and receiver at the land office at Couer d'Alene, Idaho, refused to consider testimony in support of his contest until he should pay them the amount of $108.00, claimed by them for reducing said testimony to writing.

It appears that Gay had initiated a contest against the homestead entry of Dickerson. A hearing was had about the last of May, 1889, before the local officers. The first day's testimony was taken down in long-hand by a clerk hired for that purpose by the local officers. On the second day of the hearing it was agreed by the register and the attorneys on both sides of the case that a stenographer was to be employed by contestant to take said testimony in short-hand and reduce the same to writing; this stenographer was to be substituted for the clerk who had acted the first day. She was employed and took said testimony offered before the register and receiver and reduced the same to writing, the contestant paying her therefor at the rate of 22½ cents per hundred words, amounting in all to $108.

It is now claimed by the register and receiver that he engaged the stenographer and agreed to pay her, and also agreed to pay them for examining and passing upon said evidence the same amount as they would have received if they themselves had reduced said testimony to writing. They have filed a number of affidavits showing that it was the understanding of all parties concerned that they should be paid for taking said testimony the same as if they had reduced it to writing instead of the stenographer.

Gay has also filed a number of affidavits showing that no such understanding existed between the parties, and that he understood that the

stenographer was to be substituted for the clerk and to be paid by him for reducing the testimony to writing, and that he was not to pay any further amounts therefor.

November 7, 1889, you directed contestant to pay the fees claimed by the register and receiver, and stated that if the same was not paid his contest would be dismissed.

Gay has appealed from said ruling to this Department.

The only question presented by the record is: Are the register and receiver allowed to collect fees for reducing testimony to writing where they do not do the work themselves or hire others to do it?

The fees for taking testimony are provided for in subdivision ten of section 2238 of the Revised Statutes, which allows fees for testimony reduced to writing by local officers. The writing of testimony is merely clerical work; the purpose of the law relative to fees for "reducing testimony to writing" is to compensate the register and receiver for such work when done by them. In the case at bar the work was not done by them, nor by their employé, but by contestant's agent, who has been paid for doing the same. The local officers were present; the testimony was taken before them, and they need not have agreed to have the testimony written by another if they had desired to do the work themselves.

A law providing for fees cannot be enlarged so as to grant fees by implication or inference; there must be plain authority for such allowance. In this case, the register and receiver have no authority to collect fees from Gay for "reducing testimony to writing," when neither they nor any one employed by them performed the work. (Caldwell *v.* Smith, 3 L. D., 125; Frank W. Hull, 9 L. D., 60.)

It is claimed that there was an understanding or contract entered into by the local officers and contestant by which they were to receive fees for examining said testimony equal to the amount they would have been entitled to if they had reduced the testimony to writing. This is stoutly denied by Gay, and the affidavits are so contradictory that it is difficult to determine whether there was a contract or not. However, that is not important, for the duties and rights of the local officers are fixed by law and must be determined by it.

Under date of September 2, 1884 (3 L. D., 107), Commissioner McFarland instructed the register and receiver at Mitchell, Dakota, as follows:

> You are advised that you have no authority to make two charges for taking testimony. You can charge fifteen cents once for each one hundred words reduced to writing by you or at your individual expense, and transmitted in readable form to this office, and you cannot charge any more.
>
> * * * * * * *
>
> If parties choose to employ stenographers to take down and write out testimony, they may do so. But in such case they make their own contracts, and you can have no interest in such contracts, nor make any charge in connection with work so done. If you cause the testimony to be taken down and written out, you must do the whole for the legal charge of fifteen cents for each one hundred words.

I am of the opinion that the local officers were not authorized to collect said fee in this case, inasmuch as the testimony was not "reduced by them to writing."

Your office decision is accordingly reversed. You will direct the local officers to consider contestant's testimony upon its merits.

SUCCESSFUL CONTESTANT—INTERVENING ENTRY.

NEWBAUR *v.* BUSH.

A successful contestant who resides upon, improves and cultivates the land covered by the canceled entry, but fails, through ignorance, to enter the same within the statutory period, is not precluded from subsequently entering said land by the intervening entry of another, secured through wrongful means, and fraudulent intent, and with notice of the contestant's claim.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 20, 1891.

The case of Mathias Newbaur *v.* William S. Bush is here on appeal of the former from your decision of September 18, 1888(9), dismissing his contest against the homestead entry of Bush for the SE. ¼ of Sec. 18, T. 29, R. 15 W., Niobrara, Nebraska.

The record and evidence present the following facts:

Some time prior to June 30, 1884, Newbaur successfully contested the homestead entry of one Zadina for this land, and on July 12, of the same year, he was notified of his preference right of entry, but failed to exercise the same, until August 14, 1885, when he applied to make homestead entry for the land, but his application was denied, for the reason that Bush had made homestead entry for the same on August 7, a week before his application was received at the local office.

September 14, of the same year, Newbaur subscribed to the following affidavit:

Mathias Newbaur of lawful age, being first duly sworn according to law, deposes and says that he is the identical person who entered a contest against the homestead No. 8216 of James Zadina for the SE. ¼—18—29—15 west, on the 21st day of September 1883, which hearing was had on December 17th, 1883. Claim was canceled June 30, 1884; notified July 12th, 1884, which was received by affiant, but he being an ignorant German he supposed the paper was his homestead receipt, and so believed till about the 5th day of August 1885, at which time he sent his son Joseph to Atkinson Holt county, Nebraska, to consult with some one about what he should do; that his said son Joseph consulted with a firm of attorneys there, to wit: Snow and Harrington, that said Snow and Harrington informed said Joseph Newbaur that he could make the homestead entry for his father, the said affiant, and while said Harrington was taking the number of said land, and as soon as that was done, Snow told him he could not make out the application for less than $100.00. On the 6*th* day of August 1885, said Snow and Harrington sent one Wm. S. Bush out to see the land, and the said Bush sent one Rev. Delos Hale to view said tract, and said Hale reported to said Bush on the same day that it was a fine quarter, but that there is a family living thereon, and that there were valuable improvements, crops growing on it, etc.,

and you will have trouble to get it; that affiant can not speak a word of English; that one Smith on or about the 4th day of August, 1885, notified said affiant that his land was vacant, and that he had no filing thereon; hence, he sent his son as aforesaid to said Snow and Harrington, as aforesaid; that said Bush, in company with said Harrington, came to Niobrara, and on the 7th day of August, 1885, made homestead entry No. 12,122, at the same time well knowing that said affiant was and had been living on said tract with his family continuously for nearly two years last past; that affiant made his homestead application on the 6th day of August, 1885, before the clerk of the district court in O'Neill, Nebraska, and the same was returned to him by said local office, the notice being dated August 10th, 1885, with $14.00; he made settlement in June, 1883, and his improvements consist of one sod house, about thirty acres of breaking, one well, about one acre of forest trees; that he now has the same in crops in good condition, and grain in cribs, and that he and his family have resided there continuously to the present time, and made said settlement and application in good faith for the purpose of making it their home. Affiant further says that said Snow and Harrington sued the said Bush in Holt County, Neb., on the 29th day of August, 1885, for $150.00 for their services to him in assisting him to get said claim after receiving said description as aforesaid from affiant's son, Joseph, fraudulently; that the above testimony as to what Hale said to Bush was elicited at said trial; that afterwards said Bush went to Niobrara, and asked the register and receiver to permit him to withdraw his said application without prejudice.

His affidavit was corroborated by several of his neighbors, and supplemented by the affidavit of Delos Hale, who inspected the land for Bush. This supplemental affidavit is as follows:

Also appeared at the same time and place Delos Hale of lawful age, who being first duly sworn according to law, deposes and says that he is acquainted with the affiant, Mathias Newbaur, and the facts set forth by him as to my visiting the land and reporting to the said Bush are true.

These affidavits, so corroborated, were forwarded to your office, and on inspection of the same a hearing was ordered by your predecessor, "to determine the respective rights of the parties."

Such hearing was duly had on the 26th day of January, 1886, before the register and receiver, who on the same day rendered their joint opinion, recommending the cancellation of Bush's entry, and that Newbaur be allowed to enter the land.

Your office, by its said letter, reversed the action of the local officers, from which decision Newbaur now appeals to this Department.

I can not sustain your decision.

The evidence taken at the hearing fully sustains all the material allegations of the affidavit, upon which it was ordered, and shows to my mind that the entry of Bush was conceived in dishonor.

The information upon which Bush acted was wrongfully imparted to him. It was obtained by Snow and Harrington from Newbaur while he was consulting them as attorneys. It does not appear that they demanded a retainer before consultation. The son confided his father's case to them with the full belief that they would act honorably with him, and whether the relation of attorney and client existed between them or not, they had no moral right to sell the facts which they gleaned from this conversation for a hundred and fifty dollars, or to profit by them in any way.

As I view it, it is immaterial whether any consideration passed between Newbaur and Snow and Harrington, or that any fee had been paid them. Newbaur had stated his case to them, whereupon they demanded a hundred dollars for services, and because he would not or could not pay this large fee, they use the information thus confidentially imparted to them in an attempt to deprive this ignorant German of his home and as a result thereof, to say the least, to reap the benefit of the $150 to be paid them by Mr. Bush.

I am convinced from the evidence that Bush knew when he made his entry of the unprofessional conduct of these lawyers, for on receiving the information, he immediately procures Hale to go and examine the land, who reported to him that it was occupied by a settler who had made improvements, and that no doubt he would have trouble if he made the entry. Notwithstanding this information, which was sufficient to put him on his guard, he starts that same evening for the land office; he rides all night, and is accompanied by Harrington, one of his informers, and at the earliest moment the next morning makes his entry under the vigilant care, counsel and direction of Harrington—thus showing, I think, that he knowingly undertook to profit by the conduct of his lawyers.

This Department will "under no circumstances 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 (top of page 160).

The entry of Bush will be canceled, and that of Newbaur admitted to record.

The decision of your office is therefore reversed.

REPAYMENT—HOMESTEAD ENTRY.

JOHN PLUMER.

Repayment can not be allowed under a homestead entry that is canceled for failure to submit final proof within the statutory period.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 20, 1891.

I have examined the appeal of John Plumer from the decision of your office, dated February 27, 1890, declining to recommend the repayment of fees, commissions and excess payment on his homestead entry for NE ¼, Sec. 4, Tp. 8 S., R. 2 W., New Orleans, Louisiana.

I find in this case that Plumer made his homestead entry May 25, 1871, and as the local officers at New Orleans reported that no final proof or application to make proof had been filed in their office prior to the expiration of seven years from date of entry, as required by

statute, your office, under date of May 26, 1887, canceled it for abandonment.

Under date of October 29, 1889, Plumer made application for the repayment of the fee, commissions and excess paid on his homestead at date of entry, and on February 27, 1890, your office rejected the application, from which action the appeal under consideration was taken.

The act of June 16, 1880, (21 Stat., 387) under which the appellant claims repayment, provides: That the fees, commissions and excess on a homestead entry may be returned to the party, his heirs or assigns, where such homestead has been canceled for conflict or has been erroneously allowed and cannot be confirmed. In the case under consideration, the entry was not canceled for conflict, or erroneously allowed; but was canceled for abandonment, the party having failed to comply with the law for a period of seven years from date of entry. The appellant in this case cannot plead that the entry falls within the statute, because through his own acts it cannot be confirmed. Therefore, the act referred to does not authorize any repayment in the case at bar.

The decision of your office is affirmed.

PRE-EMPTION—SECOND FILING.

SILANCE *v.* YEAGER.

A second filing cannot be allowed, in the presence of an adverse claim, to one who abandons the first because made without prior settlement on the tract covered thereby.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 21, 1891.

The case of William F. Silance *v.* John Yeager is here on appeal of the latter from your office decision of October 15, 1889, holding for cancellation his pre-emption filing for the NW. ¼ of Sec. 7, T. 7 N., R. 39 W., McCook, Nebraska, on the protest of Silance alleging priority of right in himself. Yeager filed his declaratory statement March 15, 1887, alleging settlement February 25, same year.

August 29, 1887, he gave notice that he would offer final proof on the 11th of October following. On that day Silance protested against the allowance of this proof, alleging priority of right on his part by reason of his having filed his declaratory statement for the tract July 1, 1886, in which he alleged settlement June 29, of the same year.

The case was tried before the local officers, October 11, 1887, who rendered dissenting opinions, the register finding in favor of the protestant and the receiver in favor of the claimant, Yeager. Both parties appealed.

By your said office decision, you concur in the opinion of the register, and Yeager prosecutes his appeal to this Department.

The evidence shows that Silance was the first to file and settle on the land; that he made valuable improvements, and that in his temporary absence from his claim Yeager settled thereon, under the belief, as he claims, that Silance had discontinued his residence and abandoned his claim to the land.

The evidence, I think, clearly shows that Silance had not abandoned the land, and that his absence therefrom was excusable. But it appeared in evidence that prior to filing for this tract, Silance had made pre-emption filing for another quarter section, and counsel for Yeager insists that he was thereby precluded from asserting and maintaining this, his second filing.

The evidence of his former filing is found in his own statement alone, as follows:

I saw this land was vacant. I think it was the eleventh day of July, 1885. I went to an attorney to have filing papers made out for the land. He asked me if I had made any improvements on the land. He said nothing, but went on and made out the papers. Went with me to the land office and handed papers in. I paid my money and got my papers on the land. Afterwards, I ascertained from other parties that my filing was illegal. It being the latter part of the summer and fall, I thought I would wait until the coming spring before taking another piece of land, as I had been told that my right was not exhausted. In February, 1886, I left home, en route to Chase Co., for the purpose of looking after this claim or another in its stead. I got to North Platte on my road. I went into the land office and made inquiries in regard to my former filing, stating the facts as they were. They told me as my filing was illegal, I could either put another filing on the same piece of land, if yet vacant, or I could use my right on some other tract. When I got to Imperial, Chase Co., I found the land had been homesteaded, and as I did not find any land that suited me at that time, I did not use my right until July first, 1886. I then procured filing papers on this piece of land, which is in dispute, as it was vacant at the time, intending to make it a home, and I done everything in my power up to the present time to make it that.

While it is now the rule of this Department that a filing without actual settlement, though irregular, is not a nullity, because "a subsequent *bona fide* settlement may be recognized, if made before the intervention of a valid adverse claim," (Hunt *v.* Lavin, 3 L. D., 499; Gray *v.* Nye, 6 L. D., 232; General Circular, 1889, page 9; Dallas *v.* Lyttle, 11 L. D., 208), yet it is equally as well settled by this Department supported by numerous decisions of the supreme court, that a second filing will only be allowed "where a prior claim has prevented the completion of the original entry or a mistake in the first declaration has occurred without the knowledge or any fault of the claimant." Sanford *v.* Sanford (139 U. S., decided April 13, 1891), and cases there cited. Birtch *v.* Cuddigan, 11 L. D., 121).

In the light of these decisions, do the facts in this case warrant me in sustaining the filing of Silance as against the claim of Yeager. The only excuse offered by him for not completing his entry under his first filing is, that he was informed (by other parties) that his filing was illegal.

It may be conceded that this filing was illegal, yet if it "resulted

from the wilfull fault or gross negligence of the pre-emptor" he exhausted his pre-emption right thereby. General Circular of 1889, page 9.

His declaratory statement alleged settlement prior to the date of filing. It was signed by him, notwithstanding he claims to have admitted to the lawyer who drew the same, that he had never been on the land. It does not appear in the evidence that he cannot read and write, on the contrary, his testimony is subscribed by him in his own hand, and on cross examination, in relation to his filing, he says that if his declaratory statement was required to be signed he probably signed it, although he does not remember the fact of signing.

Now if he read it, and signed it, he was guilty of a fraud in alleging settlement when he had made none. If he did not read it, but signed it without in any manner making himself acquainted with its contents, I think he is clearly guilty of gross negligence, and cannot be excused therefrom, to the prejudice of an adverse claimant, who has complied with the law in all respects.

The statute allows but one pre-emption filing and to hold that because Silance filed his declaratory statement without first having made settlement on the land, such filing was a nullity and no bar to a second filing, would be to reward fraud and negligence, and to countenance and encourage the very mischief the statute was intended to remedy, namely, the filing of declarations for several tracts, when only one can be pre-empted, "thus delaying the sales and preventing others from settling on or buying, with a view to a purchase by themselves or friends when it became convenient to do so." (Johnson *v.* Towsley, 13 Wall, 89). The cases of Christopher Helleckson (10 L. D., 229), and Charles E. Smith (id., 150), differ from the one at bar because in those cases there was no adverse claimant.

The evidence shows full compliance with law on the part of Yeager. The filing of Silance will be canceled and the proof of Yeager accepted.

The decision of your office is accordingly reversed.

FINAL PROOF—NOTICE—APPEAL.

EWING *v.* ROURKE.

Special notice of intention to submit final proof is only required to be given to parties in interest.

The right of appeal cannot be exercised by one who is not a party in interest.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 21, 1891.

Thomas F. Rourke, on November 24, 1884, made homestead entry for the S. ½ of the NW. ¼ and the N. ½ of the SW. ¼ of Sec. 2, T. 2 N., R.

32 E., Willamette meridian, La Grande land district, Oregon. His entry was made subject to the preference right of one John G. Dyas, successful contestant against William Ewing's timber-culture entry for the same tract. Dyas never applied to enter. Ewing afterward initiated a contest against Rourke's homestead entry, which contest was decided by this Department March 11, 1890, holding that where a successful contestant does not exercise his preference right within the period prescribed by law, the land becomes subject to appropriation by any qualified person; that when Rourke entered the tract it was subject to his entry; and that he had shown "ample good faith as to residence and improvements;" also dismissing Ewing's contest (10 L. D., 297).

Rourke's homestead proof was made January 24, 1890. Ewing alleges that this was illegal, in that he "was deprived of his right to attend the taking of the proof"—which he explains by adding that "the publication in the paper was no notice to take proof at an illegal time;" that the local officers erred when they first rejected it (because it was offered while a contest was pending), and afterwards (on receiving notice of departmental decision of March 11, 1890, in Rourke's favor) approved it; that they erred in giving the plaintiff no notice of the proceedings; and finally because "said homestead proof was not true."

By said departmental decision of March 11, 1890, Ewing's contest was dismissed, and from that date he has not been in the case, as a party in interest, hence could not rightfully claim any special notice not given to the world at large by the newspaper advertisement of the entryman's intention to make final proof. If Rourke's proof is satisfactory to the local officers and your office, Ewing, not being a party in interest, has no right to appeal. Moreover, "the invalidity of an adverse claim having been determined in a decision that became final as between the parties thereto, precludes the adverse claimant from again setting up his claim when the successful party offers final proof in accordance with the former decision" (Dickson *v.* Bennett, syllabus, 10 L. D., 451).

Ewing had no right of appeal in the premises, and his application to appeal was properly denied by your office, and as it does not appear that he has suffered any injustice that demands the interposition of the supervisory authority of the Department to remedy, there is no ground for a writ of certiorari, and his petition for the same is therefore denied. The papers are herewith transmitted.

RAILROAD GRANT—SECTION 7, ACT OF MARCH 3, 1891.

NORTHERN PACIFIC R. R. CO. *v.* EDGAR ET AL.

An entry of land embraced within the withdrawal on general route, and subsequently included within the railroad lands forfeited by the act of September 29, 1890, is relieved by said act from conflict with the railroad grant; and the former adverse claim of the company will not defeat the confirmation of said entry under section 7, act of March 3, 1891.

To bring an entry within the confirmatory operation of said section, for the benefit of a transferee, the proof of sale must be accompanied by a satisfactory showing that the land has not been reconveyed, and that no collusion exists between the entryman and the transferee.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 21, 1891.

I have considered the appeal of the Northern Pacific Railroad Company from your office decision of October 13, 1887, rejecting its claim to the SE. ¼ of the NE. ¼, and the N. ½ of the SE. ¼, Sec. 1, T. 7 N., R. 36 E., Walla Walla, Washington.

The tract in question is within the limits of the grant of July, 2, 1864 (13 Stat., 365), to said company.

On August 13, 1870, said company filed a map of general route, including within its limits the land in question. The road has never been built opposite this tract, neither was there a map of definite location ever filed.

On October 5, 1885, John Edgar made a homestead entry for the tract in question, and on June 26, 1886, commuted the same to cash entry.

On July 3, 1886, he sold the same to Ebenezer M. Peck and executed a warranty deed therefor. Said Peck is now asking that a patent be issued as provided by section 7 of the act of March 3, 1891 (26 Stat., 1095).

It is shown that Edgar made cash entry for the tract June 26, 1886, paid for the same and received a final receipt and certificate showing that fact. There is no adverse claim which originated prior to the date of the entry. It is true the Northern Pacific Railroad Company asserted a claim by reason of its grant; but as the road was never built opposite the tract, even if it had a claim before the passage of the act of September 29, 1890 (26 Stat., 496), the passage of that act disposes of it by declaring:

> That there is hereby forfeited to the United States, and the United States resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

The question for decision is, therefore, one between Edgar and the government. After the entry had been made, and before March 1,

1888, it was sold to Peck for a valuable consideration, to wit: $4,000. It is shown by the deed of conveyance, which is filed in the case, and by the affidavit of the transferee, that the sale and conveyance of the property was bona fide and for the consideration above named. This affidavit, however, hardly complies with the requirements of the circular of May 8, 1891 (12 L. D., 450), in that it does not show that the tract has not been reconveyed to the entryman.

You are therefore directed to call upon the transferee for an additional affidavit showing that the tract in question has not been reconveyed to the entryman and that there exists no collusion between said entryman and himself.

Upon receipt of this additional evidence, if it is satisfactory, you will adjudicate the case in the light of existing laws.

RAILROAD GRANT—REVOCATION OF INDEMNITY WITHDRAWALS.

ST. PAUL AND SIOUX CITY R. R. CO. ET AL.

It is within the authority of the Department to revoke an executive withdrawal of indemnity lands.

If the indemnity withdrawal for the benefit of the St. Paul and Sioux City R. R. Co. was made under legislative direction contained in section 7, act of March 3, 1865, no legal objection can now be made to the revocation of such withdrawal, as said section is repealed by the act of September 29, 1890.

Section 4 of the forfeiture act of 1890, is intended to enable the Department to open to settlement and entry lands formerly withdrawn for indemnity purposes, and this authority is not limited by the provisions of the adjustment act of March 3, 1887.

Directions given that, after due notice, all lands heretofore withdrawn for indemnity purposes under the grants in question be restored to settlement and entry.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 22, 1890.

On December 30, 1890, a rule was entered on certain land-grant railroad companies to show cause within thirty days from receipt thereof why the several orders of withdrawal from settlement of the lands within the indemnity limits of their respective grants should not be revoked and the lands therein embraced restored to settlement.

A copy of the rule was duly served on each of the following companies:

St. Paul and Sioux City R. R. Co.,

St. Paul, Stillwater and Taylor's Falls R. R. Co.,

St. Paul and Northern Pacific R'y Co.,

Sioux City and St. Paul R. R. Co.,

Great Northern R'y Co. (formerly St. Paul, Minneapolis and Manitoba R'y Co.),

Winona and St. Peter R. R. Co.,

Hastings and Dakota R. R. Co., and the

Chicago, Milwaukee and St. Paul R. R. Co.

A rule was also entered on the Iowa Railroad Land Company, successor to the land grant for the Cedar Rapids and Missouri River Railroad Company, to show cause why the order withdrawing from settlement the lands within the indemnity limits of the grant to the State of Iowa for the benefit of the Cedar Rapids and Missouri River Railroad Company, should not be revoked and the lands therein embraced restored to settlement.

Of these companies, the St. Paul and Sioux City Railroad Company, the Iowa Railroad Land Company, and the St. Paul and Northern Pacific Railway Company have responded to the rule by filing written reasons why the orders revoking the withdrawals should not be made.

The St. Paul and Sioux City Railroad Company state: That the withdrawal of indemnity lands for their benefit was made under the provisions of the act of Congress approved March 3, 1857 (11 Stat., 195), and of the seventh section of the act of May 12, 1864 (13 Stat. 72), and that neither said section nor the act of March 3, 1857, is mentioned in nor repealed by the fourth section of the act of September 29, 1890 (26 Stat., 496).

Upon examination it appears that neither the act of March 3, 1857, nor the 7th section of the act of May 12, 1864, directs the Secretary of the Interior to withdraw from market or entry the lands within the indemnity limits of the grant to said company. It appears that the indemnity withdrawal for the benefit of this company was not revoked in 1887, when the company was cited to show cause, etc., because it was claimed in answer to said citation, as a reason why said revocation should not be made, that the 7th section of an act approved March 3, 1865 (13 Stat., 526), was a legislative withdrawal of the lands in the indemnity limits of their grant and consequently the land department had no power, in the absence of legislative action, to revoke the order of withdrawal made by direction of Congress.

The Department was in some doubt, by reason of the language of said section 7, as to the power to revoke the order. All doubt has since been removed by the passage of the act of September 29, 1890, *supra*, the 4th section of which repeals section 7 of the act of 1865, *supra*.

It is now contended by the company that neither the act of 1857 nor 1864 was repealed by the 4th section of the forfeiture act of 1890. This contention is not material, since nowhere, in either of these acts is the Secretary of the Interior directed to withdraw lands within the indemnity limits for the benefit of this company. Nothing is found in the acts of 1857, and 1864, to prevent the Secretary of the Interior from revoking orders of withdrawal heretofore made.

If the withdrawal in question was made in pursuance of legislative command found in section 7, of the act of 1865, no legal objection can now be made to the revocation of said order, since said section 7 has been repealed. If the withdrawal in question was made by virtue of

the general authority over such matters possessed by the Secretary of the Interior, in the exercise of his discretion, then were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed exactly in the position which the law gave it, and deprived of no rights acquired thereunder. It would still have its right to select indemnity for lost lands, but it would have no advantage over the settler. (Atlantic and Pacific R. R. Co., 6 L. D., 84.)

The St. Paul and Sioux City Railroad Company further says that the fact that the grant to it remains unadjusted is not its fault, but is due to the failure of the government to determine all the questions presented by the grant and the definite location of the line of road under it, and that it would be unjust to revoke the order of withdrawal before the grant is finally adjusted. This assertion is without force. These lands have been withdrawn from settlement for many years; long enough, it would seem, for the company to have ascertained its loss in place and selected its lieu lands therefor.

The Iowa Railroad Land Company, successors in interest to the Cedar Rapids and Missouri River Railroad Company, state as reasons why the order of withdrawal of indemnity lands should not be revoked, that the fourth section of the act approved September 29, 1890 (26 Stat., 496), which repeals so much of the provisions of section four of the act approved June 2, 1864 (13, Stat., 95) as required the Secretary of the Interior to reserve any land s but the odd numbered sections within the six miles granted limits of the roads mentioned in said act of June 2, 1864, or the act of which the same is amendatory, should be construed in connection with and as following the adjustment act of March 3, 1887 (24 Stat., 556), which provides for the adjustment of land grants made by Congress to aid in the construction of railroads; that it is against both the letter and spirit of the adjustment act to restore any lands to market which might or may be found to be required to satisfy the grant to said road as to quantity; that this authority conferred upon the Secretary of the Interior to revoke the withdrawals heretofore made by statutory direction, should only be invoked when the grant to said road has been adjusted under the adjustment act of 1887.

This company has had the exclusive control over the lands in the indemnity belt for more than twenty years, and it cannot be contended that it has not had ample opportunities to have ascertained and secured its rights under said grant.

If Congress intended, at the time of making the grant for the benefit of the Cedar Rapids and Missouri River Railroad Company, that the government should withdraw from settlement the lands in the indemnity limits of their grant, it is evident that, by repealing "so much of the provisions of section four of the act approved June second, eighteen hundred and sixty four (13 Stat., 95), as required the Secretary of the Interior to reserve any lands but the odd-numbered sections within the six miles granted limits of the roads mentioned in said act," congress

indicated its willingness to have the indemnity withdrawals revoked, so that the railroad Company and their successors could not keep such lands in a state of indefinite withdrawal to wait their pleasure or convenience.

Section four of the forfeiture act was evidently passed by Congress for the purpose of enabling the Department to open these and other lands to settlement without any special reference to the adjustment act.

In my opinion, the Iowa Railroad Land Company has assigned no sufficient reason why the revocation of the order of withdrawal should not be made.

The St. Paul and Northern Pacific Railway Company, in answer to the rule entered against them to show cause why the order of withdrawal for the benefit of said company should not be revoked, say there are no vacant lands within the conceded indemnity limits of their grant, and that by reason of unavoidable litigation with the St. Paul, Minneapolis and Manitoba Railway Company, and the fact that the government has failed to determine the questions presented touching the rights of said company under its grants, this company has been unable to secure its selected lands, and it claims that it should have a reasonable time within which to select up to the limit of its full quantity. In addition to the reasons above set out, the company assigns a number of general reasons why the revocation of the orders of withdrawal would affect it injuriously.

I am unable to see, from an examination of the answer submitted by the company, any sufficient reason why the orders of withdrawal should not be revoked. If, as the company asserts, there are no vacant lands which would be thrown open to settlement by the revocation, then the company would lose nothing by it.

The other companies cited to discharge the rule entered against them have made no response.

There probably is but a small amount of vacant unappropriated land within the indemnity limits of some of the above-named roads; still, the withdrawals remain in force and are obstacles in the way of law-abiding citizens who may desire to settle upon the lands within the indemnity limits of said roads. I therefore direct that, after giving the usual notice, all lands under withdrawals heretofore made and held for indemnity purposes under the grants to said roads be restored to the public domain and opened to settlement and entry in accordance with the rules heretofore established in similar cases.

AFFIDAVIT OF CONTEST—CONTESTANT.

RAMEY *v.* GRIEGO.

An affidavit of contest may be properly rejected if not executed in due form, and the contestant, in such case, acquires no rights thereunder.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 22, 1891.

I have considered the appeal of John M. Ramey, from your decision dismissing his contest against the homestead entry of Pedro Griego for the S. ½ of SW. ¼ of Sec. 35, Tp. 31 S., and the N. ½ of NW. ¼ of Sec. 2, Tp. 32 S., R. 63 W., Pueblo, Colorado.

Your decision fairly states the evidence submitted at the hearing, and your c nclusions are in accordance with the law and the rulings of the Department.

It is contended by counsel for Ramey that his rights as a contestant became effective at the date of presenting his affidavit of contest, January 27, 1887, and that said affidavit was improperly rejected by the receiver. The affidavit in question purports to have been made before James McKrough, jr., a notary public, on January 26, 1887. It was presented at the local office the next day and "was rejected for the reason that it does not appear that the same was ever sworn to by the contestant."

On February 14, 1887, McKrough, the notary public, certified that Ramey was duly sworn to the affidavit on January 26, 1887, but that he overlooked "placing his signature and seal on that side of the affidavit." It thus appears that the paper presented at the local office on January 27, was not a properly executed affidavit of contest and it was properly rejected.

The affidavit properly executed was not filed until March 1, 1887, and the contestant intiated no rights under the same until that date, and prior to that time the laches of the claimant had been cured.

Your decision is affirmed.

RAILROAD GRANT—SELECTION FEES—REPAYMENT.

SULLIVAN *v.* ATLANTIC AND PACIFIC R. R. CO.

The existence of a homestead entry at the date of definite location excepts the lands covered thereby from the operation of the grant.

An application of the railroad company for the return of selection fees, on the cancellation of a selection, and the acceptance of such repayment, operates as a relinquishment of the company's claim to the land covered by such selection.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 22, 1891.

I am in receipt of your letter of May 13, 1891, enclosing a decision dated June 28, 1873, in the case of Sullivan *v.* The Atlantic and Pacific

Railroad Company, in relation to the right of ownership of the S ½ of lots 1 and 2, SW ¼ Sec. 19, T. 26 N., R. 24 W., Springfield, Missouri; and asking for instructions in the matter, in view of recent discoveries as to the nature of the claim of Sullivan.

It is stated that he made a homestead entry of the tract in question May 28, 1866. The lands are within the granted limits of the grant made July 27, 1866, to the Atlantic and Pacific Railroad Company (14 Stat., 292). The map of definite location was filed on December 17, 1866.

At the instance of the Railroad Company, on December 4, 1872, your office authorized a hearing to determine the rights of Sullivan under his homestead entry. No hearing was held until January 15, 1878; in the meantime Sullivan's entry was canceled by your office for abandonment. This hearing of January 15, 1878—if it may be called a hearing,—was not attended by either of the original parties. *Ex parte* testimony was submitted by one Francis M. Gardner, and was to the effect that Sullivan made his entry as an "adjoining farm," and that he lived on an adjoining tract of one hundred and sixty acres and continued to reside thereon until 1871, and that he did not own the tract he lived upon.

On June 28, 1878, your office, considering the testimony submitted as above, held that Sullivan's entry was illegal from its inception, and could not therefore operate to defeat the right of the railroad company under its grant. You accordingly awarded the tracts in question to it.

An appeal was taken by Gardner from your judgment to this Department, and on May 7, 1879, said ruling of your office was affirmed *pro forma.*

The tracts were listed by the railroad as belonging to it under its grant, but no patent has been issued therefor, and on April 10, 1890, upon examination of the original entry papers of Sullivan, you found that: "It is clear from the affidavit that he did not intend to make an adjoining farm entry, for he swears that the entry was made for actual settlement and cultivation." You further state that:

> There is not a word in the affidavit of the entryman to indicate his intention to make his entry as an adjoining farm, and it must be presumed that as he did not own the adjoining tract, or, if he supposed he owned it, being in possession under some license from the railroad company, he knew he was not entitled to an adjoining farm entry as the land upon which he lived contained one hundred and sixty acres.

You state that you have received a letter from James R. Vaughen, of Springfield, Missouri, stating that a client of his purchased the tracts in question from the railroad company after the decision of this Department in 1879, awarding the land to said company.

The entry of Sullivan made in 1866 was an ordinary homestead entry, and was of record at the date of the filing of the company's map of definite location. The tracts in question were thereby excepted from the operation of the grant and when the entry was abandoned by Sul-

livan it became unappropriated public land. In fact, the action of the railroad company in applying for and accepting repayment of the selection fees when its selection was canceled by you April 10, 1890, will operate as a relinquishment of its claim to the land.

If Mr. Vaughen's client applies for a patent under section five of the act of March 3, 1887 (24 Stats., 556), you will pass upon his application in accordance with the rules and decisions of this Department. (See case of Samuel L. Campbell, 12 L. D., 247, and cases therein cited.)

RAILROAD GRANT—SETTLEMENT—RELINQUISHMENT.

FLORIDA RY. & NAVIGATION CO. *v.* ROBERTS.

In the absence of evidence to the contrary, a settlement upon public land by a qualified person will be presumed to have been made with the intention of entering such land under the settlement laws.

Lands once relinquished by the company in favor of a settlement claim can not again be claimed by the company, even though the settler fail to perfect his entry.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 26, 1891.

This appeal is brought by the Florida Railway and Navigation Company from the decision of your office of October 16, 1888, rejecting its claim to the W. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼ of Sec. 29, and the NE. ¼ of the SE. ¼ of Sec. 30, T. 17 S., R. 23 E., Gainesville, Florida, and allowing the application of Isham Roberts to make homestead entry of said tract.

The tract in controversy is within the primary limits of the grant to the State of Florida (11 Stat., 15), to aid in the construction of a road from Amelia Island to Cedar Keys and Tampa Bay, the benefit of which was conferred by the State of Florida upon the Florida Railroad Company, whose rights and interests thereunder have been assigned and transferred through its successors to the Florida Railway and Navigation Company, the present claimants under said grant.

This road was definitely located December 14, 1860, a withdrawal having been made September 6, 1856, in anticipation of the probable limits of the road, which was affirmed April 25, 1857.

On December 7, 1875, the Atlantic, Gulf and West India Transit Company, who were the claimants under this grant, as successors to the Florida Railroad Company, submitted to the General Land Office a map of the definite location of the line of said road between Waldo and Tampa, and requested that instructions be given to the land office at Gainesville to withhold from entry the odd sections within the fifteen mile limits. This application was refused by Secretary Chandler, April 29, 1876, upon the ground that the failure to designate said line until after the expiration of the time fixed for completing the road is conclusive evidence of the abandonment of the grant.

In October, 1879, the company again presented this map to the General Land Office, with exhibits, showing that it was a true copy of the original map of definite location, which was filed in the General Land Office December 14, 1860, and asked that the decision of Secretary Chandler be reviewed, upon the ground that material facts showing the location of the entire road in 1860 were not before Secretary Chandler when his decision was rendered.

On January 28, 1881, Secretary Schurz granted said application, holding that the road from Amelia Island to Tampa Bay was definitely located, and such location was exhibited by maps filed in and recognized by the Department, December 14, 1860. The Commissioner of the General Land Office was directed to make the necessary withdrawal of lands to protect the rights of the company and to secure the proper adjustment of the grant upon the line designated.

The definite location of the road, December 14, 1860, caused the grant to attach to all the odd sections within the primary limits that did not come within the exceptions contained in the grant, and the right of the road as to such sections could not be defeated by settlement and improvements made subsequent to that date. This was the effect of the decision of Secretary Schurz of January 28, 1881, which was affirmed by Secretary Teller, in Atlantic, Gulf and West India Transit Company (2 L. D., 561), and by Secretary Lamar in Florida Railway and Navigation Company (5 L. D., 107).

To protect settlers who had in good faith made entries and settlements within said limits, it was necessary that the company should relinquish its claim to such tracts. The company had previously made a formal waiver of its claims in favor of actual settlers prior to December 13, 1875, and Secretary Schurz, calling the attention of the Commissioner to said waiver, instructed him to request the company to make a like waiver, covering the time from that date to the time when formal notice of the withdrawal, directed in his said letter of January 28, 1881, should be received at the local office.

In compliance with this request, the company extended the relinquishment or waiver to all actual bona-fide settlers, who make improvements prior to the 16th day of March, 1881.

Under this relinquishment, Roberts applied to make homestead entry of said tract, December 20, 1887, alleging settlement upon the land in March, 1880. The company had listed the tracts in the odd sections on May 24, 1884, as inuring under its grant, and selected the tract in the even section, January 18, 1882, under the act of June 22, 1874.

A hearing was ordered upon this application, and upon said hearing it was shown that Roberts settled upon the tract in 1880, and that it had been occupied by himself or some member of his family until 1887, when he was placed in jail. It appears that he was in jail when he made his application to make homestead entry, and that, at the time of the hearing, the place was occupied by his son, and the house was used as a school house.

Upon this testimony, your office held that the settlement of Roberts was protected by the company's relinquishment, and held his application for allowance.

From this decision the company appealed, assigning the following errors, to wit:

1. In awarding the land to Roberts without first ascertaining that his settlement was made with the intention of claiming the land under United States laws, or determining that he had such intention prior to March 26, [16] 1881.

2. In holding that a man confined in jail can make homestead entry of land on which neither he nor his family are residing.

3. In allowing him to embrace in such entry more land than he has ever occupied or controlled or claimed.

To the first assignment of error it may be answered that in the absence of any evidence to the contrary, a settlement upon public lands by a person qualified to enter will be presumed to have been made with the intention of entering said lands under the settlement laws, and the mere fact that subsequent to March 16, 1881, he may have attempted to purchase it from the railroad company does not overcome the presumption that his settlement made prior to that date was made with the intention of taking the land under the settlement laws. Wigg *v.* Florida Ry. & Navigation Co., 12 L. D., 301.

As to the second ground of error, the claimant and his witnesses testified that he settled upon the tract in controversy, which includes the four forties, in 1880, and improved the same, and no evidence was offered by the company showing that he did not settle upon all of the land in controversy. His improvements consisted of a dwelling house, corn crib, stable, smoke house, and eighteen acres cleared, fenced and planted in cotton, corn, peas, and potatoes; but there is no evidence that there was any part of the tract in controversy that was not at some time cultivated or improved.

The mere fact that the claimant was in jail when his application was made will not defeat his right to claim the land under his settlement, and, even if he should fail to perfect his entry, the lands having once been relinquished by the company, by reason of the settlement of Roberts, existing prior to March 16, 1881, they could not be again claimed by it, for the reason that in consideration of said relinquishment the company became entitled to select an equivalent quantity of even sections within said limits, under the act of June 22, 1874. Peninsular Railroad Company *v.* Carlton and Steele, 2 L. D., 531; Florida Railway and Navigation Company *v.* Dick, 7 L. D., 481.

The decision of your office is affirmed.

ADDITIONAL HOMESTEAD—ALABAMA LANDS—APPEAL.

AVERY *v.* SMITH.

Under the act of May 6, 1886, an additional entry may pass to patent without proof of settlement and cultivation, where final proof has been made on the original entry, and a contest, therefore, will not lie as against such additional entry on a general charge of abandonment.

The act of March 3, 1883, requiring, prior to entry, public offering of lands theretofore reported as containing coal and iron, under departmental construction is held applicable only to lands reported as "valuable" for coal.

The failure of a homestead applicant to appeal from the rejection of his application will not bar a subsequent assertion of priority of right as against another, where such failure is due to erroneous information received from the local officers as to the record status of the land.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 26, 1891.

I have considered the appeal of Margaret Avery from the decision of your office of October 23, 1889, dismissing her contest against the additional homestead entry of Martha Smith, for the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of Sec. 14, T. 14 S., R. 2 W., Huntsville, Alabama.

It appears from the record that Martha Smith made original homestead entry for the N. ½ of the NE. ¼ of said Sec. 14, T. 14 S., R. 2 W., September 25, 1878, and received patent for the same March 10, 1885. On February 16, 1887, she made additional homestead entry of the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of said section, under the provisions of the act of March 3, 1879 (20 Stat., 472), and the act of May 6, 1886 (24 Stat., 22), amendatory thereof, which provided that homestead settlers, within railroad limits, restricted to less than one hundred and sixty acres, who have made additional entry under the act of March 3, 1879, after having made final proof of settlement and cultivation under the original entry, shall be entitled to have the lands covered by the additional entry patented without further cost or proof of settlement and cultivation.

On July 26, 1889, Margaret Avery made affidavit, before a commissioner of the circuit court of the United States for the northern district of Alabama, alleging

> that the said Martha Smith has wholly abandoned said tract; that she has changed her residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law. Contestant also claims the prior right to enter said land, she having lived upon said land one year before Martha Smith entered said land, and contestant having applied to enter said land prior to Martha Smith's entry.

With said affidavit of contest she also filed a statement, not verified, alleging that she is a widow and actual *bona fide* settler on the tract in controversy and had been living on the tract for more than two years, upon which she had built a dwelling house and made valuable improve-

ments; that she resided on the land one year prior to the entry of Martha Smith, and that the said Martha Smith at the time she made her entry knew that contestant was residing upon and had improved the tract; that she made application at the local land office to enter said land the early part of January, 1887, which was rejected by the local officers, for the reason that it was described as coal and mineral land and was not subject to entry.

You dismissed the contest, for the reason that any rights which the plaintiff may have gained by her alleged prior settlement have been lost by her failure to appeal from the rejection of her application, and it is immaterial whether the defendant settled upon and cultivated the land, or whether she abandoned it. From this decision the contestant appealed.

When the claimant made her entry and when this contest was filed, the act of May 6, 1886, was in force, which allowed the additional entry to pass to patent without proof of settlement and cultivation, where full proof had been made on the original entry, and her entry was therefore not subject to contest upon this ground.

The only question for consideration upon this appeal is, whether the contestant was debarred from contesting this entry upon the ground of priority of right by reason of her failure to appeal from the rejection of her application to enter.

The act of March 3, 1883 (22 Stat., 487), provided that all lands that had been reported as containing coal and iron should not thereafter be subject to homestead entry, until said lands had first been offered at public sale.

In the circular of April 9, 1883 (1 L. D., 655), the local officers were directed not to allow entries of tracts that had been investigated and reported as *valuable* for minerals. The tract in controversy was within the limits of the belt of lands so reported, but upon investigation it was classed as "coal not valuable," and, hence, was subject to entry under the terms of the circular, although it was reported as containing coal.

It appears that the local officers, at the time when the contestant applied to enter the land, considered that the records of their office showed that the land was not subject to entry, and the application was therefore refused.

There can be no question that if the land was not subject to entry at the date of her application, the failure to appeal therefrom would not affect her right to contest the entry of another, which had been subsequently allowed upon the ground of priority of claim and settlement, and the only question that arises is, whether the mistake of the local officers in refusing to allow her application, upon the ground that the land was classed as coal or mineral and not subject to homestead entry, was a bar to the further assertion of a claim to the land after it had been entered by another.

I am of the opinion that her failure to appeal from this action of the local officers is not a bar to her right to assert priority of claim.

The act provided that lands reported as containing coal and iron should not be subject to entry until after public offering, and this tract was reported as containing coal. While the Department construed said act to embrace only such lands as were reported "valuable for minerals," and although this tract was designated on the list of lands sent to the local office as "coal not valuable," the contestant was justified in acting upon the information given to her by the local officers as to the status of said land, as shown by their records, and that it was not then subject to entry. Her failure to appeal therefrom should not deprive her of the right to have the error of the local officers corrected by contesting, upon the ground of priority, the claim of another who was allowed to enter the land.

If the contestant had improved the tract and was residing upon it at the date of entry, as alleged, the claimant had notice of the prior occupancy and improvements of the contestant, and made her entry subject to whatever right the contestant might have. Her rights should not be defeated upon mere technical grounds.

Your decision is reversed, and a hearing will be ordered upon the contest to determine the question of the priority of claim.

RIGHT OF WAY—MAP OF DEFINITE LOCATION.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RY. CO.

The map submitted on application for right of way must be in the form of one continuous map, and not in detached sections.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 28, 1891.

With your letter of the 9th instant to the Department, you transmitted, what is stated to be, a map divided into six detached sections, for convenience in handling and transmission to appropriate land districts, showing 38.24 miles of the definitely located line of road of the Minneapolis, St. Paul and Sault Ste Marie Railway Company in North Dakota and filed under the provisions of the right of way act of March 3, 1875.

This map as submitted, is not satisfactory to the Department and it is herewith returned without approval.

The regulations under the above act are to the effect that maps filed for the purpose of securing its benefits, should be drawn to a scale of not less than two thousand feet to one inch. An adherence to this scale has not been held to be imperative when maps drawn to a lesser one have been filed, if in other respects properly submitted, but in no instance have such been approved that have not formed one continuous map.

The map in hand is drawn to a scale of eight hundred feet to one inch. This fact, however, does not warrant its submission other than in the customary way as an entirety to which the required affidavit and certificate alone relate.

RAILROAD GRANT—ARMED OCCUPATION ACTS.

FLORIDA RY. AND NAVIGATION CO.

Directions given for the publication of railroad selections that embrace lands that may be covered by former entries under the "armed occupation acts."

Acting Secretary Chandler to the Commissioner of the General Land Office, May 28, 1891.

I am in receipt of your communication of the 20th instant, relative to entries made under the acts of August 4, 1842 (5 Stat., 502), June 15, 1844 (5 Stat., 671), and July 1, 1848 (9 Stat., 243), known as the Armed Occupation Acts, stating that the Florida Railway and Navigation Company has selected several hundred thousand acres of land under the grant to said road, which are now being examined with a view of certifying the same to the company; that inasmuch as a large number of these entries which lie within the limits of the grant to said road have not been ascertained and entered upon the tract books of the General Land Office and the local office, it will be impossible to protect such settlers, unless some action is taken to ascertain and locate these entries, before acting upon said selections.

In view of these facts, you request my opinion upon the propriety and advisability of detailing some one thoroughly familiar with these cases and the facts connected therewith to proceed to said State, and make a thorough examination of said entries, taking such testimony as may be submitted in support thereof, and to ascertain and locate the same with reference to the public surveys, to the end that such settlers or their heirs may be protected in their rights.

I am of the opinion that the rights of all settlers or the heirs of persons who settle under said acts will be better protected by directing the local officers to advertise a list of all lands selected within the limits aforesaid in the several papers published nearest to the lands, for the period of three months, requiring all claimants of the lands so selected to file notice of their claims in the local office within four months from the date of publication of such notice. At the expiration of that time, if no such claims are filed, I think the selections may then be approved.

This plan will dispense with the necessity of detailing a special agent to make examination into these entries, and in my opinion will be the more practical and feasible manner of protecting the rights of all settlers or the heirs of such settlers, who may still claim any lands now selected by the road which were settled upon under the acts aforesaid.

RAILROAD GRANT—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. v. MCCRIMMON.

A settlement at date of definite location, by one qualified to enter the land under the settlement laws, excepts the land covered thereby from the grant, even though such settler may be ignorant of his right and holds the land under the belief that it is subject to the grant.

When settlement and occupancy, alone, at the time rights under a railroad grant attach, are relied upon to except the land from such grant, it must affirmatively appear that the party in possession had the right at that time to assert a claim to the land in question under the settlement laws.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 28, 1891.

This appeal involves the right to the N. ½ of the NW. ¼ of Sec. 15, T. 13 N., R. 18 E., North Yakima, Washington, which is within the primary limits of the grant to the Northern Pacific Railroad Company.

The land was excepted from the operation of the withdrawal on general route, and the only question in issue is, whether there was such a claim to the tract at definite location as excepted it from the operation of the grant.

The record shows that at date of definite location, it was claimed and occupied by George N. Thomas, who had purchased the improvements of a prior settler. It appears that Thomas held adjoining land, in connection with this tract, and in 1881 he applied to enter it under the timber-culture or desert land law, but the local officers informed him that it was railroad land, and that he could not get it as government land; that he then filed for it as railroad land, thinking he could not get it any other way, and paid the register $3.00, and got a receipt from the railroad company.

At the same time, Thomas made a pre-emption filing on an adjoining tract of one hundred and sixty acres, which he was residing upon at date of definite location. He cultivated the tract in controversy, in connection with his pre-emption claim, and he testified that he claimed it as railroad land, but that it was his intention to file on it as government land, if he had been permitted to do so. He further states that in the fall of 1884 he applied to a lawyer to see if he could hold the land as government land, who promised to see about it, and hearing nothing from him, he traded it in 1885 to George F. Bullock for another ranch.

On October 13, 1886, Bullock entered the land under the timber culture law, which was canceled March 16, 1889, and on the same day John C. MacCrimmon, who had purchased the improvements of Bullock, made homestead entry of the land, and submitted final proof thereon October 29, 1889.

The claim of the company was rejected by your office, upon the ground that it is clearly shown that the land has been continuously

occupied, claimed, and improved since 1878, and under the ruling in the case of Northern Pacific Railroad Company *v.* Bowman, 7 L. D., 238, it was excepted from the operation of the grant.

From this decision the company appealed, alleging the following grounds of error:

1. Error to rule that this land was excepted from the grant to the company by the character of occupancy shown to have existed at date of definite location of the line of road May 25, 1884.

4. Error not to have found that said occupancy was by one claiming under an application to purchase from the company, and that there was no claim to the tract at date of definite location adverse to said company; that the claim of Thomas (then existing) was in privity with the company and could not defeat its right.

3. Error not to have rejected MacCrimmon's entry and in not awarding the land to the company.

In support of this appeal, counsel for the railroad company contend that Thomas did not claim the land as government land, but as railroad land, and that, although the land was excepted from the withdrawal on general route, yet Thomas did not insist upon the right to take it as government land, but was satisfied to claim it under the railroad company.

Under the ruling of the Department, as announced in the cases of Northern Pacific Railroad Company *v.* Bowman, 7 L. D., 238, and Northern Pacific Railroad Company *v.* Potter, 11 L. D., 531, the only question to be determined is, whether there was a settlement on the land at date of definite location by one having the qualification to enter the land under the settlement laws, and, if these facts are shown, the land would be excepted from the operation of the grant, although such settler might not have known of his right, but held the land under the belief that it was railroad land.

But, in the case of Northern Pacific Railway Company *v.* Potter, *supra*, it was also held that when settlement and occupancy, alone, at the time the rights under a railroad grant attach, are relied on to except the land from the operation of the grant, it must affirmatively appear that the party in possession had the right at that time to assert a claim to the land in question under the settlement laws.

The record shows that Thomas had filed a pre-emption declaratory statement for another tract, and was therefore disqualified to enter the land under the pre-emption law. He might, however, have entered the land under the homestead law if he was then qualified, but as it does not affirmatively appear that he was so qualified, under the ruling of the Department in the cases above cited his settlement did not except the tract from the operation of the grant.

The present claimant should, however, be notified that he will be allowed to submit supplemental proof as to whether Thomas had, at date of definite location, the qualification to enter the land under the homestead law, after due notice and service upon the company of such proof.

Your decision is modified accordingly.

HOMESTEAD ENTRY—MEANDERED STREAM.

HATTIE FUHRER.

The fact that a stream has been meandered, will not operate to defeat an entry embracing lands on each side thereof, where it is satisfactorily shown by the records of survey that such stream does not fall within the class that should be meandered.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 29, 1891.

I have examined the appeal of Hattie Fuhrer from the decision of your office dated February 11, 1890, suspending her homestead entry for lots 7, 8, 9, 19, 20 and 21, Sec. 2, Tp. 12 N., R. 5 W., Kingfisher, Oklahoma Territory, for the reason that the entry embraced lots on both sides of a meandered stream.

It appears that the appellant made homestead entry for the land above described April 26, 1889, lots 7, 8 and 9 lying on the left bank, and lots 19, 20 and 21 on the right bank of the North Fork of the Canadian River.

In the regular course of official business, the entry was reported to your office with the current returns for April, 1889, and on examination, was suspended by your office letter of February 11, 1890, allowing the party to elect whether she will relinquish such portion of the land so that the entry will be confined to one side of the river, or to relinquish the entire tract covered by her homestead, with the privilege of making a new entry.

From this decision and requirement, the appellant, on April 19, 1890, appealed to this Department, alleging that her home and improvements are situated on about fifty acres on the north side of said river, while about one hundred acres of the best and most valuable land in her entry, as also nearly all the timber on her claim, is located on the south side of the river; that all the public land in that section has been taken up by settlers, therefore should she relinquish her homestead entry to the United States, it would be impossible for her to secure another in that section of the country.

In view of the fact that quite a number of entries have been permitted to extend across this river, embracing lands on both sides thereof, a very careful examination of the field notes and meander lines of survey for nearly one hundred miles along the North Fork of the Canadian River, has been made, with the astonishing result that the general average width of said river at a right angle with the course of the stream, is found to be only about 1.30 chains, (84 feet) less than one-half the distance prescribed by the present rules and regulations for meandering rivers.

The survey of the townships through which said river flows, which also included the meander lines on both sides, was made by Theodore

H. Barrett under contract dated December 3, 1870, and the plats of survey were approved by Commissioner Drummond, September 23, 1873.

A careful investigation of the subject for the purpose of ascertaining by what authority said meander survey was made does not reveal that any specific instructions in relation thereto were ever issued, but the survey was carried out, probably, under the general instructions for the survey of the townships through which said stream passed. It must be observed, however, that east of the townships embraced in the contract of Barrett, for a distance of seventy-five or eighty miles by the course of the stream, the North Fork of the Canadian was meandered as the boundary line between the Kickapoo and Sac and Fox nations on the north of the river, and the Pottawattomie and Seminole nations on the south of the river. It is more than probable that Surveyor Barrett was aware of that fact, and in surveying the townships included in his contract, he assumed the authority, in the absence of specific instructions, to carry forward the meanders of said Fork connecting on the east with the meander lines already mentioned between said Indian nations.

The survey by Barrett was made under the manual of surveying instructions issued in 1855, which made no reference to any streams other than navigable rivers, and furthermore contained no restriction as to the width of streams that should be meandered.

It appears, however, although not referred to in the manual of 1855, that it has been the practice of your office for many years to restrict the meandering of streams to those in which the right angle width is three chains and upwards, and that where a stream was not navigable and yet of a width greater than three chains, special instructions in relation thereto were issued when the contract for survey was made.

In 1871, about the time Barrett was making the survey in question, supplemental instructions were issued by your office to surveyors general directing that all rivers not embraced in the class denominated "navigable" under the statute, but which are well defined natural arteries of internal communication and have a uniform width will only be meandered on one bank, and for the sake of uniformity, the surveyors will traverse the right bank when not impracticable.

These instructions were also silent with regard to the width of streams.

The existing manual of surveying instructions, issued in 1890, lays down the rule that all of the navigable rivers, as well as those not navigable, the width of which is three chains and upwards, will be meandered on both sides, and rivers not classed as navigable will not be meandered above the point where the average right angle width is less than three chains.

In a review of the facts above set forth it appears that the uniform practice of the Land Office has always been to limit the meandering of streams to those having a right angle width of three chains and up-

wards, although the rule was never embodied in the manual of survey until 1890; furthermore, that the North Fork of the Canadian has only an average width of less than one-half the minimum width established by practice and laid down in the present surveyor's manual.

It also appears that no special instructions were ever issued in the case of meandering the North Fork, but that the surveyor meandered said river under his general contract to survey the townships through which the river flows; this being the case, the meanders were not authorized, and as the river was of a class much below, in width, the grade in which the rule allowed its banks to be meandered, the survey should not have been allowed.

Under these circumstances, should this appellant be restricted to one bank of the river on account of the meander lines, it would simply perpetuate the error, and deny to her the same right allowed to other parties on streams of equal size, or even much larger, that have not been meandered. The fact that the stream has been meandered should not operate as a bar to the claim of appellant, when it is satisfactorily shown by the records of survey that such stream does not fall in the class to be meandered.

In view of these circumstances, I can see no just reason why the entry of appellant, embracing lots on both sides of the North Fork, if legal in all other respects, should not be allowed to stand as though no meander lines along said stream had ever been run; therefore, with this view of the case, the appeal is sustained, and the decision of your office is modified accordingly.

HOMESTEAD ENTRY—APPLICATION TO AMEND—ADDITIONAL ENTRY.

THOMAS B. HARTZELL (ON REVIEW).

An application to amend a homestead entry reserves the land covered thereby from other disposition until final action thereon.

An application to make additional homestead entry pending at the passage of the act of March 2, 1889, is entitled to the benefits thereof, and, until final action thereon, excludes subsequent adverse claims.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 29, 1891.

June 21, 1890, this Department rendered a decision in the case of Thomas B. Hartzell, *ex parte*, allowing him to make additional homestead entry for the SW. ¼ of the SE. ½ of Sec. 7, and the NW. ¼ of the NW. ¼ of Sec. 17, T. 14 S., R. 1 W., Los Angeles, California, under an act of Congress entitled: "An act to withdraw certain public lands from private entry, and for other purposes," approved March 2, 1889 (25 Stats., 854). (See said case, 10 L. D., 681).

At the time of rendering said decision, there was no record before me of the claims of any other parties to the said land. Some months

subsequent to the rendition thereof, information was conveyed to this Department that one Carrie F. Higby claimed adversely to Hartzell forty acres of said land, while the remaining forty acres were claimed by one Charles A. Pinkham. On receipt of this information, the Secretary recalled the said decision, and, by letter of December 26, 1890, directed your office to report the facts "pertaining to the adverse claims of said Hartzell, Higby, and Pinkham."

January 10, 1891, in response to said letter, your office reported that on July 13, 1888, fifteen days prior to Hartzell's application to enter the additional eighty acres, Higby made homestead entry for forty acres of the same tract, namely: the SW. ¼ of the SE. ¼ of Sec. 7, same township and range; and that on February 20, 1889, Pinkham filed preemption declaratory statement for the remaining forty acres, namely: the NW. ¼ of the NW. ¼ of Sec. 17, alleging settlement February 16, of the same year.

October 9, 1889, he made proof and cash entry for the same, which was held for cancellation by your office letter of October 25, 1890, because his settlement and filing were made pending the application of Hartzell to amend his entry, so as to embrace this land.

The homestead entry of Higby having been made prior to the application of Hartzell, it must prevail over his claim. The settlement and filing of Pinkham, however, were both made subsequent to the application of Hartzell, and such application operated to reserve the land from other disposition until final action thereon.

Hartzell was insisting upon his right to an additional entry when the law of March 2, 1889, was passed, granting such additional entry. His application not having been finally acted upon prior to the passage of said act, he was entitled to the benefits thereof; and the entry of Pinkham having been made before final action by the Department on the application of Hartzell, must be held subject to the rights of Hartzell. (See case of Arthur P. Toombs, 10 L. D., 192.)

It follows that the decision in the case of Thomas B. Hartzell (10 L. D., 681) was wrong, in so far as it affected the rights of Higby to the SW. ¼ of the SE. ¼ of Sec. 7 of said township and range, and the same is hereby modified and her entry allowed to stand, subject to compliance with the law.

The application of Hartzell will therefore be sustained as to the NW. ¼ of the NW. ¼ of Sec. 17, T. 14 S., R. 1 W., and the cash entry of Pinkham for the same will be cancelled.

Higby and Pinkham have both appealed from your office decisions of October 25, and 30, 1890, cancelling their said entries. As their claims together cover the same land claimed by Hartzell, the records in the several cases are consolidated, and the claims of all the parties being thus before me, have been considered and determined herein as one case.

You will therefore direct the register and receiver at Los Angeles, California, to adjust the claims of these several parties as herein directed.

PRE-EMPTION FINAL PROOF—AFFIDAVIT.

NANCY J. CREWS.

Pre-emption final proof cannot be accepted where the final affidavit is made before a notary public.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 1, 1891.

By letter of October 26, 1888, your office affirmed the action of the local office in rejecting the preemption proof of Nancy J. Crews for the SW. ¼, Sec. 8, T. 5 S., R. 42 W., Denver, Colorado, for the reason that said township had been withdrawn on account of alleged irregularities in the survey. Your office further said that, under no circumstances, could the proof be received as it had been made before a notary public, and not before the officers named in the published notice.

Claimant appealed. When the case was reached here, it appeared that a new survey had been accepted, and in view of this fact, the case, on May 1, 1890, was returned to your office for proper disposition, with the suggestion as to claimant, that "She will of course, be required to make proof according to the law and regulations."

I am now in receipt of your letter of April 30, transmitting a letter from L. E. Crews of Chicago, Illinois, and requesting "instructions as to whether or not entry shall be allowed upon the proof heretofore made and herewith forwarded, upon payment of the required purchase money."

Mr. Crews says that claimant was stricken with paralysis in April, 1889, "and has never taken a step since;" that she is very old and feeble, and it is absolutely impossible for her to go to the local office from her present home in Wayne county, Illinois.

It appears, from the published notice transmitted with your letter, that claimant intended to make proof before the register or receiver at Denver, on July 24, 1888. Instead of so doing, she went before a notary public on that day, made the final affidavit, and submitted proof.

Section 2262 of the Revised Statutes requires the claimant to make his affidavit before the register or receiver of the land district in which the land is situated; the act of June 9, 1880 (21 Stat., 169) authorizes such affidavit to 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 in case the lands are situated in an unorganized county, the affidavit may be made in a similar manner in any adjacent county in such State or Territory. This is the present state of the law, with the exception that a commissioner of the United States circuit court, under similar circumstances, may administer the oath under the act of May 26, 1890 (26 Stat., 391). See Edward Bowker (11 L. D., 361).

As claimant failed to make the affidavit, as required by law, I am bound to hold that entry cannot be allowed on the proof as made. This fact alone is sufficient to invalidate the proof.

TIMBER LAND ENTRY—DELAYED PURCHASE.

SVEN P. JANSSEN.

An applicant, in good faith, under the act of June 3, 1878, who, through no fault of his own, is unable to procure the purchase money at the time fixed for the completion of the entry, may be permitted on new notice, and in absence of adverse claims to complete the purchase.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 1, 1891.

I have considered the appeal of Sven P. Janssen from your decision of January 17, 1890, rejecting his application for an extension of time until October 24, 1890, within which time to complete the purchase, under act of June 3, 1878, of the SE. ¼, Sec. 13, Tp. 12 N., R. 13 E., M. D. M., Sacramento, California, Land District.

It appears, from the letter of the register and receiver, of April 11, 1889, to your office, that the taking of proof in the case was continued until after ninety days had elapsed, from date of giving notice, and that while the register regarded the proof as complete, the receiver declined to accept the money, because the ninety days had elapsed.

By letter "C" of your office, October 4, 1889, it appears that the sworn statement of Janssen was filed December 18, 1888. The hearing was adjourned on day of hearing, after taking the testimony of two witnesses, because the claimant was too ill to appear at the time set. He afterwards appeared, and the proof as made, being satisfactory, and there being no adverse claims, the local officers were directed to allow him to complete his entry.

It appears by the affidavit, November 20, 1889, of the applicant that before this letter reached the office, he had been unfortunate in having his arm broken, and that doctor bills and other expense had been such that he did not have the money to make the purchase at this time, although he did have it at the time he made proof. He says in his affidavit, he expects to have the money by October 24, 1890; that he has a regular job, etc. The date fixed by him has passed.

Inasmuch as this applicant has been unfortunate in his effort to purchase the land, but seems to have acted in good faith, and as there can be no objection on the part of the government to allowing him to purchase it, if it is still free from other claim, he will be allowed to give new notice within thirty days, and, if, upon proper notice, there is no adverse claim, he may be allowed to purchase. Your decision is modified accordingly.

HOMESTEAD CONTEST—RESIDENCE—HEIRS—CULTIVATION.

REID *v.* HEIRS OF PLUMMER.

The failure of a homesteader to maintain residence may be excused, where by intimidation and armed violence he is driven from the land, and by such means prevented from returning thereto.

The heirs of a deceased homesteader are not required to maintain residence on the land embraced within the entry of the decedent; cultivation of the land, in such case, being sufficient to maintain the right of the heirs, and the failure of the heirs to cultivate the land is excusable, when due to armed violence and intimidation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 1, 1891.

I have considered the case of James M. Reid *v.* the Heirs of J. M. Plummer, on appeal by the former from your decision of October 5, 1889, dismissing his contest against the entry of J. M. Plummer, made September 29, 1885, for the NW. ¼ of Sec. 9, T. 5 S., R. 31 W., Oberlin, Kansas.

The contest is based on the allegation that Plummer (deceased)

in his lifetime never established a residence upon said land up to the date of his death, to wit: May 12, 1886, and that his heirs and legal representatives have never resided upon, cultivated, or improved said land from May 12, 1886, up to this date, in any manner whatever.

The hearing, which was had before the register and receiver, substantially developed the truth of the contest affidavit, and the defense is in the nature of confession and avoidance.

It appears that prior to Plummer's entry, and on February 3, 1885, one D. W. Walling had filed on the land. It seems that he never made a *bona fide* settlement thereon, and, when, on February 22, 1886, Plummer with several workmen began the erection of a house on the land, Walling appeared with twenty-two of his companions, many of whom were armed with guns and revolvers, and drove Plummer away and compelled some of his workmen to assist in tearing down the house.

About a month after this, Plummer again went on the land and built a house, and, after it was completed and ready for occupancy, some persons went to it in the night and tore it down and burned the lumber.

On May 12, 1886, while engaged in planting corn near the tract in controversy, Plummer and his nephew, James Cozad, were murdered.

Prior to his death, Plummer had given a horse to Isaac Cozad, father of the murdered boy, to do some breaking for him, but, after the son was killed, the father feared to remain in that country and left.

Mary Plummer, aged seventeen, is the only heir of the entryman. After the murder of her father, her agent made repeated attempts to have the land cultivated, but those whom he sought to do the work were afraid of the same fate that befell Plummer. About May 27, 1887,

however, he induced one Wilson to break five acres of the land and plant same to corn, for which he paid $12.50, but this was after the contest was filed.

So it is seen that neither the entryman nor his heir ever established or maintained a residence on the land.

Plummer's acts conclusively show that he intended to reside on the land. His failure to carry out his intentions was by no means his own fault; he was threatened, intimidated and driven from his land, and his house twice torn down. The fact that he was soon thereafter murdered, while engaged in peaceful pursuits, presumably by some of the mob who drove him from the land and destroyed his house, conclusively establishes the reasonableness of his fear that he was in danger from the threats of his enemies, and, under such circumstances, his failure either to establish or maintain a residence on the land is excusable.

The heir did not reside on the land after her father's death, nor was she required to do so, cultivation only being thereafter required. Swanson *v.* Wisely's heirs, 9 L. D., 31; Lamb *v.* Ullery, 10 L. D., 528.

Under the excited condition of the country, resulting from threats, mobs, and murders, it was found impossible, after repeated efforts, to get any one to cultivate the land after the death of the entryman, until after the contest was brought. It would be manifestly unjust to hold the entry for cancellation for want of such cultivation. The same will therefore be permitted to remain intact, subject to future compliance with law.

In justice to the contestant, I think it fair to say that the record fails to connect him in any manner whatever in the acts of the mob which drove Plummer from the land and destroyed his house.

The judgment appealed from is affirmed.

PRE-EMPTION FILING—INDIAN RESERVATION.

JOHN W. WEBER.

A pre-emption filing can not be allowed to embrace land included within an Indian reservation.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 1, 1891.

I have considered the appeal of John W. Weber from the decision of your office dated January 20, 1890, rejecting his application to file a pre-emption declaratory statement for Lot 16 of section 28, and the E. ½ of the NE ¼ of Section 33, T. 14 N., R. 1 E., Humboldt Meridian, Humboldt, California, for the reason that a portion of the SE. ¼ of the NE. ¼ of said section 33 is within the limits of the Klamath Indian reservation.

The record shows that said Weber offered to file for said land and his application was rejected by the local officers "on account of the SE. ¼ of NE. ¼ being embraced in the Klamath Indian reservation." From this action Weber duly appealed.

Your office, in said decision of January 20, 1890, found, from examination of the township plat, that a portion of said SE. ¼ of the NE. ¼ was within the limits of said reservation and affirmed the decision of the local officers rejecting said filing.

Weber appealed and alleges error in holding that said Indian reservation existed in fact and that the land filed for was included within its limits.

On November 10, 1855, the Commissioner of Indian Affairs addressed a communication to this Department, inclosing a copy of a letter from the Superintendent of Indian Affairs for California, recommending the reservation of a strip of country one mile in width on each side of the Klamath river for a distance of twenty miles. The Commissioner recommended that the subject be laid before the President for his consideration, if the same met the approval of the Department, with a provision—

that, upon a survey of the tract selected, (that) a sufficient quantity be cut off from the upper end of the proposed reserve to bring it within the limitation of 25,000 acres authorized by the act of 3rd March last. (10 Stat., 699.)

The Department, on November 12, same year, submitted said report to the President, with its approval, and on the 16th of the same month the President made the following order: "Let the reservation be made as proposed." (Rep't Comm'r Ind. Aff., 1886, pp. 302–3.)

On February 25, 1889, this Department directed your office to "peremptorily refuse" all filings or applications to enter lands within the limits of said reservation. (Records Indian Div., v. 59, p. 48.)

The only serious question in this case is whether any of said SE. ¼ of the NE. ¼ is within the limits of the Indian reservation, for, if so, the land was not subject to settlement or entry under the land laws of the United States. Sec. 2258 R. S. U. S.; Wilcox *v.* Jackson (13 Pet., 498); Wolcott *v.* Des Moines Co. (5 Wall., 681–688.)

From an inspection of the small diagram, showing the location of said reservation opposite the land in question, transmitted by your office at the request of the Department, it appears that a small portion of the SE. ¼ of the NE. ¼ of said section 33 is within the said Indian reservation, as measured from the water's edge of the Klamath river. The fact that there is a small island within the river, does not change the point from whence the reservation must be measured. Nor is there any force in the suggestion that the reservation contains an area of more than 25,000 acres, for, until the reservation is reduced, if the area is in fact in excess of the amount specified in the act, it cannot be known which tracts would be restored to the public domain. Besides, the executive order provided that "a sufficient quantity be cut off from

the upper end thereof to bring it within the limit of 25,000 acres, authorized by law."

As only a small portion of the SE. ¼ of the NE. ¼ of said section 33 is within the Indian reservation, Mr. Weber may be allowed to amend his filing by omitting the said tract, and in the event that he does so, his amended filing should be accepted by the local officers. If he fails to amend his filing as herein suggested within thirty days after due notice hereof, the action of the local officers and your office will be affirmed.

The decision of your office is modified accordingly.

SWAMP LANDS—CERTIFICATION.

STATE OF FLORIDA.

The Department retains jurisdiction over swamp lands until the issueance of patent therefor, and may revoke the approval and certification of swamp lists, when made upon a misapprehension of the facts.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 1, 1891.

I am in receipt of your commnnication of March 16, 1891, submitting for my consideration list No. 14 of swamp lands, selected by the State of Florida, in the Gainesville land district, embracing an area of 125,244 acres, which list was approved by the Secretary of the Interior, February 16, 1885. You state that patent has not issued for any of the lands embraced in said selection, except for the SW. ¼ of the NE. ¼, Sec. 17, T. 22 S., R. 23 E., and, for the reasons stated in your said communication, you recommend that said certification be canceled, as to certain tracts of land stated therein.

Said list embraces Sec. 3, T. 5 S., R. 25 E., which you state is included in the donation claim of John Brindley, which was perfected under the act of February 8, 1827 (4 Stat. 202); also the SW. ¼ of Sec. 30, T. 22 S., R. 30, which was approved to the State April 15, 1851, under the act of September 4, 1841 (5 Stat., 453).

You further state that the area of the unsurveyed part of T. 23 S., R. 34 E., is given in the approved list as 17,280 acres, evidently estimated from a plat of survey of the private claim of Joseph Delespine, which covers land in the eastern part of the township and east of the St. Johns river. This township was sectionized in 1847, and more than 15,000 acres were patented to the State as swamp-land on September 27, 1858, which included the whole of the township outside of the private claim above mentioned.

From the statement contained in your letter, as above set forth, it appears that this township was subdivided in 1847; part of it was embraced in the private land claim of Delespine, and the remainder, embracing 15,000 acres, was patented to the State in 1858, yet in 1885 a list of lands, embracing 17,280 acres, as the unsurveyed portion of said

township, was presented to the Secretary for approval. As there was no part of said township then unsurveyed, and as all the land in the township had been disposed of, it is evident that the certification and approval of these lands by the Secretary was the result of a mistake of fact, and that such certification would not have been given, if the true facts had been known by the Secretary.

You also state that townships 21 S., R. 26 E., 21 S., R. 27 E., and 22 S., R. 27 E., contained no unsurveyed land at the date of selection, and that all of said townships not actually surveyed are embraced in what is known and designated on the plats as Lake Ahapopka.

From the foregoing statement of facts, it is apparent that the certification of these lands was made upon a misapprehension of the facts, and that said list would not have been certified and approved, if the facts, as shown by the records of your office, had been presented to the Secretary.

Having jurisdiction over such lands until after the issuance of patent, I deem it my duty, under the facts above set forth, to revoke and cancel said certification and approval, as to the lands above mentioned.

You further state that in all cases where the unsurveyed parts of whole townships were selected and approved, the description is too vague and uncertain to definitely determine what portions of such townships a patent would convey, and you recommend that certain selections embraced in list 14 which are of this character be revoked, in view of the expressions contained in the letter of the Department of September 8, 1890, returning Florida swamp land list No. 50.

In the decision referred to, I stated that if the entire body of unsurveyed land is unquestionally swamp, so that a subdivisional survey would show the greater part of every smallest legal subdivision to be swamp and overflowed, there would be no reason in such a case why selections might not be made of the entire body by estimated area; but, if there is the least uncertainty in determining whether the greater part of each smallest legal subdivision was of the character contemplated by the grant, a selection should not be allowed, until the township has been subdivided. In that case I followed the ruling of Secretary Vilas in the decision rendered by him January 12, 1889 (8 L. D., 65), in which it was also stated that if the lands so selected can be designated by metes and bounds, which clearly indicate and designate the land selected, the want of survey will be no objection to the issuance of patent.

I am unable to determine from the record before me, whether these selections can be designated by metes and bounds, so as to come within the ruling of the Department in the decision above referred to, but, in view of the uncertainty as to the validity of this entire list, it is ordered that the approval and certification of the list be revoked, and you will prepare another list, in which you will include such land only as may be clearly shown to be of the character contemplated by the grant, and

in all cases where the township has been surveyed, the selections must be of the specified legal subdivisions.

The State of Florida has been notified of the pendency of this action before the Department, and no sufficient ground has been shown by it why the certification of this list should not be revoked and canceled.

RAILROAD GRANT—PRE-EMPTION FILING.

ST. PAUL M. AND M. RY. CO. *v.* NORTHERN PAC. R. R. CO.

The existence of a prima facie valid pre-emption filing at the date when the grant becomes effective excludes the land covered thereby from the operation of the grant; and this is true even though such filing may embrace an excessive acreage.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 1, 1891.

This is an appeal by the St. Paul, Minneapolis and Manitoba Railway company, from your office decision of December 20, 1889, in the case of said company *v.* the Northern Pacific Railroad Company, involving lot 2, Sec. 35, T. 136 N., R. 44 W., St. Cloud, Minnesota.

It appears from the said decision, wherein the facts are sufficiently stated that the tract is within the primary limits of the appellant's grant and the indemnity limits of the defendant's grant; that it was embraced in a pre-emption declaratory statement filed December 13, 1870, by Johan Hanson, alleging settlement June 26, 1870, and also in a pre-emption declaratory statement filed January 12, 1871, by Ole Olson, alleging settlement June 18, 1870; that the appellant's rights attached on definite location December 19, 1871; that February 29, 1872, Hanson made homestead entry for the tracts embraced in his declaratory statement except the tract involved; that May 19, 1874, Olson made pre-emption proof and located agricultural college scrip on the land embraced in his filing; that owing to excessive area this location was canceled by your office letter of April 19, 1877, so far as it related to the tract in question; that the same was listed by the appellant November 24, 1883; that the defendant applied to select the same, June 16, 1885; that this application being rejected at the local office, the defendant appealed.

By its said decision your office found that the pre-emption claims of Hanson and Olson excepted the land from the appellant's grant and that, in consequence thereof, the defendant was entitled to it as the first legal applicant. The appellant's said listing was accordingly thereby held for cancellation and the defendant allowed a reasonable time to renew its application to select.

It is alleged on appeal that the pre-emption claims of Hanson and Olson comprised, before the exclusion of the tract involved, 178.20

and 193.10 acres respectively. It is accordingly urged that by reason of excessive area said claims were illegal and could not operate to except the land from appellant's grant.

This contention is without force. The filings of Hanson and Olson were, at the date when appellant's rights attached, of record and *prima facie* valid. They, consequently, served to reserve the land from the operation of its grant. Northern Pacific Railroad Company *v.* Stovenour (10 L. D., 645).

The decision appealed from is accordingly affirmed.

This disposition of the case renders it unnecessary to discuss the ruling of the supreme court in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1) to the effect that lands in Minnesota within the indemnity limits of the grant to the latter were appropriated thereby.

TIMBER CULTURE CONTEST—SERVICE BY PUBLICATION.

DANO *v.* LOZIER.

Service of notice by publication should be set aside, when it is satisfactorily made to appear that the defendant is a well known resident of the county in which the land is situated, and that personal service could have been obtained by ordinary diligence.

A contest must fail where the default charged is cured prior to notice of the contest, and the acts in compliance with law are not induced by knowledge of the impending suit.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 2, 1891.

I have considered the case of Jerome Dano *v.* Levi Lozier, on appeal by the former from your office decision of September 18, 1889, dismissing his contest against the timber culture entry of the latter for the NE ¼ of Sec. 20, T. 12 R. 38 W., North Platte, Nebraska.

Lozier made said entry November 3, 1883. Dano filed an affidavit of contest against the same on March 4, 1886, and on the same day he filed an affidavit which charged, among other things, that he had made inquiries in the neighborhood in which the land is situated in regard to the present residence of said claimant and is unable to obtain any information in regard thereto; that he believes him to be a non-resident of this State, and that personal service can not be had on him in this State. Thereupon notice was given by publication that testimony would be submitted before a notary public at Ogallala, Nebraska, on the 1st day of May 1886, and that final hearing would be had at the local land office on the 7th of May following. Contestant appeared before the notary public and submitted testimony. There was no appearance on the part of contestee, but on May 7, he appeared before the local office at the hearing, by his attorney, and moved to dismiss the contest "for the

reason that contestant did not file an application to enter the land when he initiated said contest," citing the case of Bundy *v.* Livingston. Considering this motion, the register and receiver dismissed the contest and stated that the service was made by publication while the claimant was living at Ogallala, the town nearest the land.

Contestant appealed from their ruling to your office and on May 19, 1888, you held that the case of Bundy *v.* Livingston had been overruled, and that contestant was not required to file an application to enter at the time of the filing of his contest, and that—

the notice of publication being regular in respect to all requirements, and there being no evidence in the record rebutting the affidavit upon which the order of publication was obtained, the second ground upon which your decision is based has no foundation to rest upon."

Your office refused to consider the case on its merits, however, but directed that, after notice to both parties the claimant should have an opportunity to appear and furnish evidence. No appeal was taken from your judgment.

A trial was had on July 2, 1888, at which both parties appeared and submitted testimony. On July 12, following, after considering the evidence, the local land officers found in favor of contestant and recommended that the entry be canceled. Contestee appealed from said finding to your office, and on September 18, 1889, you reversed the finding of the register and receiver, and held that the first hearing was without authority because there was no personal service of notice and no sufficient ground for the notice by publication, and that at the date of personal service before the second trial claimant had cured any defect by duly complying with the timber culture law.

The case is now before the Department on appeal of contestant from your said decision.

While a question has been raised as to the jurisdiction of the local officers to hear the matter in controversy the first time it was before them, because of an insufficient service of the notice of contest on the contestee I do not see that it is necessary to inquire into the sufficiency of that service, since the general appearance of claimant, made before the register and receiver May 7, 1886, on the day of the trial, will prevent him from now saying that the land officers had no jurisdiction. Said appearance was in the following language:

Now comes Levi Lozier, the claimant, by his attorney, T. C. Patterson, and moves that said contest be dismissed for the reason that contestant did not file an application to enter the land when he initiated said contest.

In the absence of such application, there is no right to contest. See Bundy *v.* Livingston, Copp, IX-173.

LEVI LOZIER,
By Thos. C. Patterson, his attorney.

Contestant testifies at the second trial that about two or three weeks before the first hearing he obtained a registered receipt, properly signed, showing that a copy of the notice had been received by con-

testee. This receipt is not put in evidence, and it is not shown that claimant received said copy thirty days before the hearing. He admits that he received it, but the date upon which it was received nowhere appears.

It seems clear that there was no sufficient notice served upon claimant thirty days before the hearing, for he was a well-known resident of the county where the land was situated, and might have been personally served with notice of said contest if even ordinary efforts had been made to do so. Upon these facts being shown before the local land officers, the service of notice by publication should have been set aside and held for naught. In this case it becomes necessary to see just when claimant received actual notice of said contest. He must have received his first actual knowledge through the registered letter, which is shown to have been mailed March 19, 1886. He admits that he received it, and it is in evidence that it was received two or three weeks before May 7, when the hearing was had. I conclude that he received actual notice about April 20, 1886. Any labor on the tract in question done by him after that date will be held to be as a result of his knowledge of the contest proceedings, and should not be considered by the Department in the face of the contest as curing any of his laches.

The evidence before me shows that after the entry was made in November, 1883, nothing was done on the tract until the spring of 1885, when ten acres were broken. About the 1st of April, 1886, the ten acres were re-plowed and stirred, and five acres of it planted to walnuts. The land was in fairly good condition. It appears that this work was done before the 20th of April, 1886, and constituted a substantial compliance with the law. We find ten acres of breaking, all of which had been re-plowed and stirred, and five acres of which had been planted to tree seeds. On April 20, when he received knowledge of the contest, he had cured any laches with which he was chargeable at the date the affidavit of contest was filed.

The conclusions reached in your judgment are correct. It is accordingly affirmed, and you will cause the contest to be dismissed.

PRE-EMPTION CONTEST—SECTION 7, ACT OF MARCH 3, 1891.

GERLACH *v.* KINDLER.

The pendency of a contest against an entry will not defeat the confirmatory operation of section 7, act of March 3, 1891, for the benefit of a *bona fide* mortgagee, holding under a mortgage executed for a valuable consideration after final entry and prior to March 1, 1888.

A mortgagee in establishing his right to the confirmation of an entry under section 7 of said act, must submit proof of the incumbrance as required by the departmental regulations.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 2, 1891.

I have considered the appeal of D. S. B. Johnston and Charles L. Johnston, mortgagees of Charles Kindler, from your decision of May 27, 1889, holding for cancellation said Kindler's pre-emption cash entry, made November 14, 1884, upon the S. ½ of the NW. ¼ and lots 3 and 4 of Sec. 1, T. 151 N., R. 45 W., Crookston, Minnesota.

It appears that appellants also, on August 19, 1889, filed in the local office a petition for a rehearing, which you, on November 4, thereafter, denied, and it is insisted that your "refusal to grant said petition and order a rehearing is an abuse of discretion."

The petition, which is sworn to, contains the following statement:

Your petitioners respectfully show that at all times mentioned herein they were, and still are, co-partners under the firm name of D. S. B. Johnston and Son; that about November 17th, A. D. 1884, they advanced the money to Charles Kindler, the man who made the above entry, to pay for making his final entry; that the money which they so advanced to him was used by him to pay for the land covered by said entry and to pay the expense of making final proof thereon; that, in addition to that, they advanced to him certain other moneys to be used in the cultivation and improvement of said lands; that a portion of the money so advanced by them, was advanced by them for one Frances S. Speer; that to secure the repayment of said moneys, Charles Kindler, the said entryman, on or about November 17th, A. D. 1886, executed and delivered to said Frances S. Speer a mortgage for the sum of $500, secured upon the lands covered by the said entry, and executed and delivered to your petitioners another mortgage for the remainder of the sum so advanced to him upon said premises; that said mortgages were duly recorded on the 17th of November, A. D. 1884, in the office of the register of deeds for Polk county, Minnesota, in which county said lands were then and now are situate; that both of the said mortgages are now held and owned by the original mortgagees named therein and are both unpaid; that your petitioners are and for a long time have been the agents of said Frances S. Speer, to look after said mortgage and the collection of interest and principal thereon, and have from time to time advanced said Frances S. Speer the interest which has become due upon said mortgage, which sums have not been repaid to your petitioners, but which sums are to be repaid out of the proceeds of the said mortgage and said lands, when the same shall be collected by the sale of said lands, or otherwise.

It appears that Gerlach filed his affidavit of contest against the entry, June 18, 1886, charging insufficiency of residence. Hearing was had, and the register and receiver recommended the cancellation of the entry, and on appeal you affirmed their action.

It is unnecessary to review the testimony in the record, or discuss the errors complained of.

The 7th section of the act of March 3, 1891 (26 Stat., 1095), provides as follows:

> and all entries made under the pre-emption, homestead, desert-land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

There is a pending contest against the validity of this entry; but it appears from the sworn petition, above set forth, that the land covered by the final certificate was "incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration." There has been no investigation by a government agent.

The facts on the face of the petition are sufficient under the act above cited to confirm the entry and pass the land to patent.

But, inasmuch as this appeal was filed prior to the passage of said act, and before the instructions thereunder were promulgated (12 L. D., 450), which require that the

> proof of sale or incumbrance prior to March 1, 1888, should consist of the original deed or mortgage from the entryman . . . . or certified copies of such instruments or a certified abstract of the proper records showing the chain of title back to the entryman, together with satisfactory proof that the incumbrance has not been discharged, or that the land has not been reconveyed to the entryman,

I remand the case, with directions that you require the mortgagees to make proof in compliance with the instructions above quoted.

The decision appealed from is accordingly modified.

RAILROAD GRANT—SUSPENDED HOMESTEAD ENTRY.

NORTHERN PACIFIC R. R. CO.

Land included within a suspended homestead entry at definite location is excepted from the operation of the grant.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 2, 1891.

I have considered the appeal of the Northern Pacific Railroad Company from the decision of your office of January 27, 1890, rejecting the claim of said company to the SE. ¼ of NW. ¼, the SW. ¼ of the NE. ¼, and the N. ½ of the SE. ¼, of Sec. 11, T. 4 S., R. 4 E., Bozeman, Montana.

The land in controversy is within the limits of the withdrawal made for the benefit of said railroad company, upon filing of map of general

route, February 21, 1872, and within the granted limits of said road as definitely located July 6, 1882.

From the record before me, it appears that John Ault made homestead entry of said tract May 4, 1872, and on December 4, 1874, the Commissioner of the General Land Office held said entry for cancellation, for conflict with the withdrawal of February 21, 1872, upon general route, subject to appeal within sixty days. Ault did not appeal, and no further action was taken upon said entry.

On December 14, 1886, the Northern Pacific Railroad Company applied to list said tract as inuring under its grant, but said application was rejected, for the reason that at the date of the withdrawal upon map of general route the land was covered by the pre-emption declaratory statement of Abraham A. Mesler, filed January 13, 1872, and at date of definite location by the entry of Ault, which still remained uncanceled upon the records.

On January 22, 1887, the register reported that the time within which Ault should have made proof had expired; that he had been notified thereof, and so far as he could learn Ault was dead, and he recommended that the entry be canceled.

The local officers were directed to make further effort to notify Ault, but made no report thereon, and your office by the decision now under consideration canceled said entry upon the records and files of your office, and rejected the claim of the railroad company, for the reason that the tract was excepted from withdrawal by the unexpired filing of record of Abraham A. Mesler and from the grant by the homestead entry of Ault, remaining of record at date of definite location.

From this decision the company appealed, assigning the following grounds of error:

1. Error to rule that the homestead entry of Ault excepted the land from the grant.
2. Error not to have ruled that the action of the General Land Office Dec. 1, 1874, virtually disposed of Ault's entry, and it was not an adverse claim July 6, 1882, when the line of road was definitely located.
3. Error not to have reversed the action of the district officers rejecting the application of the company to list said land.

It will be seen from the foregoing statement of facts, that there was no judgment of the Commissioner canceling the entry until the decision of January 27, 1890; nor does it affirmatively appear from the record that Ault had notice of the decision of the Commissioner of December 1, 1874, holding his entry for cancellation.

The order of the Commissioner of December 1, 1874, holding the entry for cancellation only held the matter in abeyance until final action should be taken, and no final action was taken at the time it is claimed that the right of the railroad attached. The effect of the Commissioner's decision of December 1, 1874, was to suspend Ault's entry, and a suspended entry at date of definite location excepts the land from the grant.

Your decision is affirmed.

RAILROAD RIGHT OF WAY—REVOCATION OF APPROVAL.

UNION RIVER LOGGING RAILROAD CO.

The Secretary of the Interior has the power to recall, annul, and set aside the action of his predecessor in office in approving the map of definite location, or profile, of a railroad, filed under section 4, act of March 3, 1875, where such approval is procured by fraud and misrepresentation, and for a purpose not authorized by law.

The approval of the map of definite location, heretofore filed by this company, is recalled and vacated.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 2, 1891.

I have considered the matter of the Union River Logging Railroad Company on rule to show cause why the action of the Department in approving its map of definite location, under the act of March 3, 1875, (18 Stats., 482) should not be revoked. In order to arrive at a full understanding of the matter, it appears to be necessary to commence with the facts and circumstances under which your office became aware of the existence of the respondent company.

On the 29th day of August, 1886, John McKenna, a claimant under the pre-emption law, complained to the Commissioner of the General Land Office, that the respondent company was then trespassing upon his claim, which embraced the E. ½ SW. ¼, and W. ½ SE. ¼ of Sec. 34, T. 24 N., R. 1 W., Willamette Meridian, Seattle, Washington, by cutting a right of way through his claim, and by cutting valuable timber upon the public lands along its roadway.

Thereupon, the matter was referred to Special Agent Carson for investigation. October 14, 1888, Agent Carson made his report showing the incorporation of the respondent company in March, 1883, and the building of about four and a half, or five miles of its road, and that the first of the year of 1888, said road changed hands and was at the date of the report, owned by the "Puget Mill Co." That the route they were taking through McKenna's claim, was a very great injury to it.

The records of the general land office were examined, and no record that such a company existed found there. The case was then referred to Special Agent Byrne, who investigated it and on the 19th day of November, 1888, made his report showing the respondent company to be wilfully trespassing upon the lands described in McKenna's complaint, and the public lands in the vicinity, and recommended the prosecution of the respondent company, "as any other trespasser on public lands." At the same time he forwarded to the Commissioner of the General Land Office, a proposition of settlement for the timber cut by said company upon said lands, wherein said company offered to pay the sum of $180, in full for said trespass.

On December 31, 1888, the Commissioner of the General Land Office, directed Special Agent Byrne to examine and ascertain whether or not

said railroad was being constructed as a common carrier, or for personal and private gain.

On the 5th day of January, 1889, it filed with the register of the land office at Seattle, its original and amended articles of incorporation, under the laws of Washington Territory; the original bearing date March 20, 1883, and the amended on the 14th day of August, 1888. On the 28th day of January, 1889, the Commissioner of the General Land Office, transmitted said articles of incorporation and proofs of the organization of the company to the Secretary of the Interior, with the recommendation that the same be filed; also a map showing the definite location of said company's road from a point in the SW. ¼ of the SW. ¼ of Sec. 29, T. 23 N., R. 1 W., to a point in the NE. ¼ of the SE. ¼ of Sec. 20, T. 24 N., R. 1 W., Seattle, Washington, a distance of about 13 miles; the approval of said map being recommended "subject to all existing possessory rights."

On the 29th day of January, 1889, said map of definite location was approved by Secretary Vilas.

On the 6th day of February, 1889, (pursuant to the direction of the Commissioner December 31, aforesaid) Agent Byrne reported

> That there is no doubt but what the road is being built for personal and private gain only, and will never be used as a common carrier for the benefit of the general public, because the character of the country through which it will pass and the small village which it will reach, will not justify the maintenance or operation of any kind of a railroad.

With his report he inclosed the affidavits of John Lunk, Edwin C. Bemis, John McKenna, G. I. Yousted, Krist Thompson, Samuel Robertson and C. A. Johnson.

On the 8th day of March, 1889, your office transmitted to the Department said report of Agent Byrne and the accompanying papers.

On the 29th day of March, 1889, the papers in the case were transmitted by this Department to the Attorney-General, and civil and criminal proceedings advised for the timber taken from the public lands, by said company, prior to its application for right of way privileges; an opinion was also requested as to whether the department still retains jurisdiction for the purpose of making investigation as to the purpose and object of said incorporation, and of cancelling and revoking its order, if it should appear that said approval was improperly granted. See 8 L. D., 374.

On the 4th of May, 1890, the opinion of the Hon. Attorney-General was received, in which he held that the Department of the Interior has jurisdiction to cancel its former approval of the maps of this route if it finds just cause therefor.

The question of jurisdiction having thus been disposed of by the Attorney General, the matter was carefully considered by the Department and on the 29th day of May, 1889, it was found from the evidence,

> That the approval of the articles of incorporation and maps of definite location of said company were obtained by false representations. That said corporation is not

such a duly organized and properly constituted railroad company as Congress contemplated or intended to provide the right of way for over the public lands, but that it is used exclusively for the private use and benefit of persons interested therein, and not for the use and benefit of the general public.

Thereupon you were directed to issue a rule and cause it to be served upon said company,

Requiring it to show cause, within thirty days, why the approval of the articles of incorporation and maps of definite location, made by the Secretary of the Interior, January 29, 1889, should not be revoked and annulled.

Said rule was duly issued and served, and on behalf of said company, Phillips, Zachry and McKenney, as attorneys for it, filed an answer to the rule as follows:

Now comes the Union River Logging R. R. Company by its President, William Walker, and not acknowledging but expressly denying the jurisdiction of the Secretary of the Interior in the premises, makes answer as follows:

1. The Union River Logging R. R. Co. was originally incorporated under the laws of Washington Territory on or about the 21st day of March, A. D. 1883 by John McReavy, Edwin F. McReavy and John Latham, for the purpose of building, equipping, running, maintaining, and operating a railroad for the transportation of saw logs, piles and other timber, and to charge and receive compensation and tolls therefor. Said railroad being intended to run from a starting point at tide water in Lynch's Cove at the head of Hood's Canal, in Mason County, in a northeasterly direction, a distance of ten miles, more or less, to a point at or near the northeast corner of Township 24 North, Range 1 West, Wil. Mer.

2. That the said original incorporators constructed between four and one-half (4½) and five (5) miles of said road and equipped and operated the same for the purpose of transporting logs and timber as aforesaid.

3. That on or about the day of A. D. 188 , your orator, and his associates, Cyrus Walker, D. B. Jackson and Edwin G. Ames purchased said road from its original incorporators and owners, paying therefor a large sum of money, aggregating many thousands of dollars.

4. That said road was purchased for the purpose and with the intention of extending and improving the same, your orator and his associates being of the opinion that should said road be extended as hereinafter set forth so as to connect the tide waters of Hoods canal with the tide waters of Dyes Inlet in Kitsap county, that an important and very desirable means of communication would be established, and a large section of country almost uninhabited but covered with a heavy growth of merchantable timber would thereby be opened up, and rendered available for purposes of settlement and entry.

5. That soon after purchasing said road and corporate franchise, your orator undertook to devise ways and means for carrying into execution the desires and wishes of said purchasers, and on July 31st, 1888, at a special meeting of the board of trustees of the Union River Logging R. R. Co., it was decided by an unanimous vote to file supplemental articles of incorporation, under which said company would be authorized to extend its railroad and to do and perform the business of a common carrier thereon.

6. That thereafter, to wit: on August 17, 1888, supplemental articles of incorporation were filed in accordance with the statute in such case made and provided. Said articles authorized said company to construct and equip a railroad and telegraph line, from a convenient point at tide water in Lynch's cove, at the head of Hoods canal, running in a northeasterly direction to tide water in Dye's inlet in Kitsap county; also to construct a branch from the main line at some convenient point running northerly to or near Seabeck on Hood's canal; also to construct a branch from

the main line by the most practicable route to tide water at or near Port Orchard; and also to construct such other branches as might be necessary or proper for the profitable management and extension of the business of said corporation.

And said articles of incorporation further authorized said company to transport freight and passengers over said road and branches, and to receive tolls therefor, to borrow money, to mortgage its railroad, branches and rolling stock, to engage in several different kinds of business specifically mentioned, and generally to do and perform all the duties of a common carrier.

7. That after the filing of said supplemental articles of incorporation and not before, said company by its officers, believing themselves to be authorized so to do by virtue of the act of March 3rd, 1875, (18 Stat., 482) and acting in perfect good faith, commenced to extend the construction of its road and in so doing cut a way forty feet in width over a portion of section thirty-four (34) in township 24 N., R. 1. W., Wil. Mer. and graded the same.

8. That thereafter, to wit: on January 5, 1889, duly certified copies of the company's articles of incorporation, together with a sworn map of a section of the road as definitely located, were filed in the local office, and after proper investigation and examination, the approval of William Vilas, the then Secretary of the Interior, was endorsed thereon.

9. That the said company has ever since that time been engaged in extending its main line and building its various branches. That over the completed portions of its roads it has continuously operated trains, for the transportation of such freight as might be offered, and the carrying of such passengers as might present themselves.

That said road being built through a timber district, the vast bulk of its business has been the transportation of saw logs, piles, and timber, although other classes of freight and many passengers have been transported.

10. Your orator denies that said railroad is run in the interest of any man, association of men, or company to the exclusion of the public at large, but alleges and stands ready to prove that said railroad company since the 17th day of August, A. D., 1888, when it was chartered as a common carrier, has stood ready to transport any and all freight such as is usually offered for transportation, and has transported all such that was offered without regard to who was the owner thereof, and has carried all passengers who applied for transportation, refusing none.

11. That as your orator and his associates conceived would be the case, with the increasing tide of immigration, many settlers have been induced to follow and locate along the line of the proposed road; lumbering operations on a more or less extensive scale have been put into execution, the surrounding country is rapidly being opened up, and the success of the proposed line of railroad as an important and necessary means of transportation through the country in which it is located is assured.

12. Your orator denies that any false or fraudulent statements of any sort of kind were made for the purpose of procuring the approval of the company's articles of incorporation and right of way map.

The application for such approval was made in strict compliance with the requirements of the statute and the departmental regulations issued in accordance therewith.

No fraud of any sort or kind was sought or intended to be perpetrated either upon the law or upon the Department, but each and every statement contained in the application for approval and the accompanying papers was true in intent and fact.

In support whereof, further affidavits are filed herewith.

Wherefore your orator prays that the said Union River Logging Railroad Company may be dismissed hence without day.

And your orator will ever pray etc.

WILLIAM WALKER,
Pres. U. R, L. R. R. Co.,
By PHILLIPS, ZACHRY & MCKENNEY,
His attorneys.

DISTRICT OF COLUMBIA,
Washington City, ss:

F. D. McKenney being first duly sworn deposes and says that he is a member of the firm of Phillips, Zachry and McKenney, attorneys at law, that he has read over the foregoing answer and knows the contents thereof, that the statements therein contained are true to the best of his knowledge, information, and belief.

F. D. MCKENNEY.

Subscribed and sworn to before me this 31st day of July, 1890.

MARTIN S. DECKER,
Notary Public.

The affidavits referred to in the answer of the company number fourteen in all; seven of them were made by persons living along the line of said railroad, and aside from the names, ages, length and place of residence of the several affiants, contain the same facts. One of them is all that is necessary to refer to as a sample:

Stephen Willett being first duly sworn, on oath deposes and says: That he is of the age of 42 years, and is, and for 3½ years last past has been, living in section 31, T. 23 north of range 1 W., and within one hundred yards of the Union River Logging Railroad Company; that during all of said time he has been accustomed, whenever occasion offered, or whenever he has desired so to do, to ship supplies, and such other freight as he desired, over the line of said road; that while it is true that the Union River Logging Railroad Company is chiefly engaged in the transportation of logs, piles, and such other timber, this affiant has had transported over said road all of the freight, of various kinds, and said company has never refused to receive and transport freight for him, and this affiant fully believes that said company carries such other freight, of any kind, as is offered to it for transportation; that the principal and, up to the present, almost the only business along the line of said railroad has been the business of logging, but that the business adjacent to said road is now more rapidly settling up, and said road is now, and will continue to be, a most important factor in developing the section of country through which it runs.

In addition to the foregoing Raymond Cormier testifies that in the years 1887, 1888, and 1889, he was operating a logging camp and carrying on a logging business along the line of said railroad; that during said time said railroad company carried for him, logs and timber; also transported freight for him. The affidavit of William Walker, the president of said road, shows that about the year 1886 he and his associates purchased the stock of said railroad; that it was then determined to extend said railroad from the waters of Hood's canal to some point or points on Dyer's Inlet and to carry on with the said railroad, the business of a common carrier for hire; that in July, 1888, it was decided to file supplemental articles of incorporation of said railroad so as to make it a common carrier.

That thereafter said logging road was extended, and preparations have been made to further extend the same to the waters of Dyer's Inlet in Kitsap county, and by a westerly branch to some point at or near Seabeck on Hood's Canal. And that the owners of said road intend to so extend said road and to use the same as a common carrier for hire, and to transport over said road all business offered therefor.

That ever since the adoption of said supplemental articles of incorporation, said road has carried such freight, other than the logging busi-

ness, as has been offered to it and carried such passengers as desired to travel over its line. And continues:

That said road runs through a country almost entirely uninhabited, and but just now filling up with settlers, and that the only business offered for said road of any consequence, has been the logging business, in the transportation of which said road has been chiefly employed; that said road at no time since the filing of said supplemental articles has refused to transport freight and passengers offered for transportation, but has always been ready and willing so to do. That the settlers along the line of said road, have and do use said road for the purpose of shipping small quantities of freight over the same and for transportation of themselves. Upon the completion of said road to Dyer's Inlet or to Seabeck, the present rate at which the surrounding country is being settled up said road will, in a few years be an important means of transportation between the points above named. And this affiant further says that no fraud or misrepresentation of any kind has ever been made to the Department of the Interior in order to secure the approval of its map of definite location, and that all the statements contained in said application are, to the best of this affiant's belief, true.

The affidavit of E. G. Ames, dated July 9, 1890, shows that he was then vice president of said railroad, and that for three years prior to April 29, 1890, he was the Secretary of said road; and as to the facts corroborates the affidavit of Walker. On the 23rd day of September, 1890, said Ames made another affidavit in which he swears that the Union River Logging and Railroad Company, is, in all respects, a separate and distinct corporation from the Puget Mill Company, with different officers, only connected with the Puget Mill Company when it transports for said Puget Mill Company logs and timber.

That the books of said Union River Logging Railroad Company show that during the year 1888, the transportation of said company amounted to upwards of seven million feet of logs, spars, piles and other timber, yielding a profit to said company, on its transportation account, of upwards of thirteen thousand dollars, and for the year 1889, the transportation of logs, spars, piles and other timber amounted to upwards of eight million feet, yielding a profit on the transportation account of said company of upwards of eight thousand dollars; that said timber was hauled principally for the Puget Sound Commercial Company and the Puget Mill Company, and that the hauling of said timber for said companies, and other persons logging along the said road, has been and is now the principal business of said company.

In a third affidavit made by said Ames, dated November 10, 1890, he states that the present owners of the Union River Logging and Railroad Company purchased it of McReavy and Latham who had been conducting business with said road prior to 1885.

That the said logging railroad was originally constructed and operated by said McReavy and Latham, and consisted only of a wooden railroad, the rails of which were made of square timbers of wood, and on which was operated a logging locomotive, known as the "Blackman" logging engine, which was an engine of a gauge of about eight feet, and designed solely for hauling logs at a moderate rate of speed, and that the only other rolling stock which the said McReavy and Latham then had, consisted of one or two old style logging cars.

In the latter part of the year 1885, McReavy and Latham sold the stock of said company to the present owners;

that soon after the purchase by the present owners of said road, new and supplemental Articles of Incorporation were filed, increasing the powers of the company.

In the following spring the new management of the road started in to rebuild it, and put it in shape for carrying on the business contemplated in the articles of incorporation. . . . It was decided to re-locate a right of way for almost the entire length of the line, which was then about four miles long. A new line was located, the old track torn up, a new road-bed made, and steel rails were used in building a standard gauge railroad, and the road was properly ballasted and put in first class condition for the purpose for which it was built. The new management then purchased an "H. K. Porter" seventeen-ton locomotive, and ten cars, which were used in operating the road, and later additional rolling stock was added to meet the requirements of the business along said road. Since the purchase of the road from McReavy and Latham, the road has been extended about three miles, and further extensions are contemplated by the company.

The articles of incorporation of the Union River Logging Railroad Company were acknowledged on the 20th day of March, 1883, and recorded with the Secretary of the Territory, May 7, 1883. The supplemental articles were acknowledged August 14, 1888, and recorded with the Secretary of the Territory, September 8, 1888. It appears from the affidavit of W. H. Newel, the book-keeper of the Puget Mill Company, that during the year 1888, said mill company paid to the Union River Railroad Company the sum of $16,344.28, for hauling logs over the line of said railroad company, and that for the year 1889, for like services paid to said railroad company $10,370.93.

It appears from an affidavit of C. R. Cronmer, the book-keeper of the Union River Logging Railroad company, that during the years 1887, 1888 and 1889, "it was a common thing for people living along the line of said road to have their freight sent over said road on the trains of the said Union River Logging Railroad Company."

In support of its answer, the company, filed a second affidavit of Edwin C. Bemis in which he reiterates the statements contained in his first one, as to the object of the original incorporators, and adds:

But I desire now to state that said railroad has been bought by other parties, and is being operated by other parties than the original incorporators, and since the last named parties have controlled said road, I have never known them to refuse to carry freight or passengers, and that they do carry passengers and traffic that is offered to them as common carriers, and with the development of the country in that locality and the increased demand for railroad facilities, I have no doubt but that they will continue to use said railroad as a general common carrier and traffic road, and will if so used, be of great advantage, and general utility to that section of country, and in connection with other lines of transportation established with other lines of transportation, established and proposed, both by water and land, will, I have no doubt, be of great benefit, not only to the owners but also to the people and country affected thereby.

The matter, upon the part of the respondent company, has been elaborately argued both orally and in print. A long array of authorities, has been cited by counsel in support of their views, all of which have received careful and patient examination. The first question presented, and the one most strenuously urged is whether the Department has jurisdiction in the premises. In the incipient stages of this proceeding, this question suggested itself, and in view of its importance it was

submitted to the Attorney-General for his opinion, which he rendered under date of May 4, 1890.

In his opinion he says,

There is no room to doubt, I think, that the privileges granted by the act of March 3, 1875, to any railroad company duly organized under State, Territorial, or Federal authority, of a right of way two hundred feet in width, through the public lands with the necessary lands for stations, shops, etc., together with the right to take earth, stone, timber, and other material from the public lands adjacent to the line of the road of such company, were meant to be extended by Congress to railroad companies intending to operate roads for the benefit and convenience of the public as common carriers, and not for their own benefit, except in so far as that benefit represented a return for their public services. This view is placed beyond doubt by the 3rd section of the act of 1875, which gives the territorial legislatures power to provide for the condemnation of "private lands and possessory claims on the public lands of the United States" for the benefit of the railroad companies entitled to claim the privileges of the act, and it is almost needless to add that Congress cannot be presumed to have had it in contemplation in this statute to authorize the right of eminent domain to be used for the benefit of a merely trading corporation. . . There can be no doubt that, for the benefit of settlers as well as its own, the government has the right to have an authoritative declaration made that the public lands through which the line of the railroad in question runs are not subject to the burdens imposed by the act of 1875. . . . . It follows then, that the application to the Department was for a purpose not authorized by law, and that the action taken in granting the application was void, it being perfectly clear that no disposition can be made of any part of the public domain without the authority of Congress. . . . . To hold that the Department can not in this case cancel its approval and erase the line of the railroad from the public plats, but that the United States must go into a court of equity for that purpose, would seem to urge the conclusiveness of executive action to an unreasonable extent. The principle of *res judicata* while, to some extent applicable to the action of executive officers, has never been held to prevent an officer from re-opening a matter in which he acted on a mistake of fact, or where new and additional evidence, which would justify a new trial or a rehearing, has been adduced. . . . . In the case before me it is entirely practicable for the Department to remove the line of railroad from the public plats, both here and in the local land office, and thus, effectually, cancel the approval improvidently given. It is not necessary, in order to undo what has been done, to compel the company to surrender any paper for cancellation, because it is the public plats alone that need to be changed, and these are under the entire control of the Department of the Interior. . . . . It would seem to be a useless circuity to have recourse to judicial proceedings to correct executive action in a case like the one in hand where there is a concurrence of mistake of fact and want of power in the department, and when the void proceeding is an obstacle in the way of the Land Office.

He supports his opinion by reference to, and quotations from Attorney-General Wirt (2 Opinions, 41); Attorney-General Cushing (7 Opinions, 701); the case of the United States *v.* Bank of Metropolis (15 Pet., 377, 401), and concludes:

That the company is not entitled to enjoy the benefits of the act of March 3, 1875, and that it is within the competency of the Department of the Interior to recall and annul its action approving the line of definite location of the railroad company and entering the same on the public plats.

I do not think this company is of the character contemplated by the act of March 3, 1875 (18 Stats., 482), granting to railroads the

right of way through the public lands, section 1 of which reads as follows:

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, 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.

While the act does not specifically define the character of the railroads which shall be entitled to the benefits of its provisions, yet it seems clear that Congress only meant to extend the benefits of the act to such railroads as are quasi public corporations and are common carriers of passengers and freight, having time cards, passenger and freight tariffs, station-buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations, for their use and operation; and for the use of the public, and such cars as are necessary for the safe and proper transportation of freight of different kinds, and the carrying of passengers over the line of such railroad. It is a railway which is of some benefit to the public, that Congress desired to favor.

This company is not equipped with the instrumentalities evidencing such a corporation. It is purely a private enterprise, constructed solely for the transportation of supplies necessary to feed these mills, and make them and the traffic in logs and lumber a profitable venture.

In this proceeding the respondent company was called upon to show cause why the approval of its map of definite location should not be annulled. Under said rule, it was bound to show that it was in fact such a railroad as the act of Congress extends the right of way over the public lands to, and that it was rightfully entitled to the benefits conferred by said act. It was not called on to show simply that it was organized as a railroad on paper but a railroad in fact. Its answer is indefinite and uncertain in its statements of fact; the evidence in support of its answer fails to show that said company has any depot or freight houses or has cars suitable for carrying general freight or passengers; fails to show that said road has any schedule of rates for carrying passengers or freight; fails to show that it runs its trains upon regular trips or at stated times, for the accommodation of the general public; fails to show that it starts from or terminates at any town or city. On the contrary, it appears that said road has been in operation for several years through a scope of country heavily timbered and sparsely settled; that its business has been and consists almost altogether in transporting logs and lumber to tide water on Hoods' Canal. That it has been operated not as a public railroad but a private concern; not in the interest of the

public as a common carrier, but in the private interest of its owners and promoters.

From a careful examination of the whole record I find: First, That at the time the respondent company filed its articles of incorporation with the register of the local land office, and at the time its map of definite location, or profile, was approved by the Secretary of the Interior, said company was not in fact such a railroad company as would be entitled to the benefits of the act of March 3, 1875 (18 Stats., 482);

Second, That the approval of the map of definite location, or profile, of the respondent company's line of road made by the Secretary of the Interior, on January 29, 1889, was procured by fraud and false representations.

From the examination given the authorities, as well as upon principles of a sound public policy, and a just and proper administration of the public land laws, I reach the conclusion that in a case like the one at bar, the Secretary of the Interior has the power and authority to recall, annul, and set aside the action of his predecessor in office, in approving the map of definite location, or profile, of a railroad company, filed under the 4th section of the act of March 3, 1875. Having the power, the case at bar calls for its exercise as a bounden duty.

It is accordingly ordered that the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the map of definite location, or profile of the Union River Logging Railroad Company, be and the same is hereby annulled, canceled, set aside, and held for naught, and you are directed to carry out this order by causing it to be entered upon the appropriate plats and records of your office and the proper local land office.

NON-MINERAL ENTRIES IN ALASKA.

Regulations provided by the Commissioner of the General Land Office to carry into effect certain provisions for allowing entries of land in Alaska for townsite, trading, and manufacturing purposes.

Sections eleven, twelve, thirteen, fourteen and fifteen of an act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber-culture laws, and for other purposes," make provisions, under certain conditions, restrictions and exceptions, for the disposal of public land in the Territory of Alaska for townsite purposes, and for the use and necessities of trade and manufactures, as follows:

Sec. 11. That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made, the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of

said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same result would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one townsite entry.

Sec. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory in the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre: *Provided*, That in case more than one person, association, or corporation shall claim the same tract of land the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act.

Sec. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, ex officio surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, ex officio surveyor-general; and on the receipt of such estimate from the United States marshal, ex officio surveyor-general, the said person, association, or corporation shall deposit the amount in the United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, ex officio surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, ex officio surveyor-general; and the said United States marshal, ex officio surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same.

Sec. 14. That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any town site, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the island of Kadiak and Afognak for the purpose of establishing fish-culture stations. And all tracts of land not exceeding six hundred and forty acres in any one tract now occupied as missionary stations in said district of Alaska are hereby excepted from the operation of the last three preceding sections of this act. No portion of the islands of the Pribylov Group or the Seal Islands of Alaska shall be subject to sale under this act; and the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all

things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon.

Sec. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

Pursuant to these provisions, I have prepared the following rules and regulations for the observance and direction of the ex officio surveyor-general of said Territory, the ex-officio register and receiver of the Sitka land office, the trustees appointed under said provisions, and all other officials mentioned or referred to herein and such persons, associations, and corporations as desire to take advantage of the rights guaranteed to them under the provision of said act, and for convenience I shall first develop the mode of procedure and requirements in connection with entries made for purposes of trade and manufactures, to wit:

1. Applications for surveys must be made in writing, by the person entitled to purchase land under said act, or by the authorized agent of the association or corporation so entitled. The application must particularly describe the character of the land sought to be surveyed, and as accurately as possible, its geographical position, with the character, extent, and approximate value of the improvements. If a private survey had previously been made of the land occupied by the applicant, a copy of the plat and field-notes of such survey should accompany the application which must also state that the land contains neither coal, nor the precious metals, with reasons for such statement; that no part of the land described in the application includes improvements made by or in possession of another, prior to the passage of said act; that it does not include any land to which natives of Alaska have prior rights, by virtue of actual occupation; that it does not include a portion of any town site, or lands occupied by missionary stations, or any lands occupied or reserved by the United States for public purposes or selected by the United States Commissioner for Fish and Fisheries, or any lands reserved from sale under the provisions of this act. These statements must be verified by affidavit.

2. If, upon examination, the application shall be approved by the ex officio surveyor-general, he will furnish the applicants with two separate estimates, one for the field work, and one for office work, the latter to include clerk hire, and the necessary stationery. The ex officio surveyor-general will be careful to estimate adequate sums in order to avoid the necessity for additional deposits.

3. Upon receiving such estimates, applicants may deposit in a proper United States depository, to the credit of the Treasurer of the United

States, on account of surveying the public lands in Alaska, and expenses incident thereto, the sums so estimated as the total cost of the survey, including field and office work.

4. The original certificate must in every case be forwarded to the Secretary of the Treasury, the duplicate to the ex officio surveyor-general, the triplicate to be retained by the applicant as his receipt.

5. The triplicate certificate of deposit will be receivable in payment to the extent of the amount of such certificate, for the land purchased, the surveying of which is paid for out of such deposit, as provided in section 2403 of the Revised Statutes. (See Par. 9, *post.*)

6. Where the amount of the certificate or certificates is less than the value of the lands taken, the balance must be paid in cash. But, where the certificate is for an amount greater than the cost of the land, and is surrendered in full payment for such land, the United States marshal, ex officio surveyor-general, will indorse on the triplicate certificate the amount for which it is received and will charge the United States with that amount only. There is no provision of law authorizing the issue of duplicate certificates for certificates lost or destroyed.

7. Where the amount of the deposit is greater than the cost of survey, including field and office work, the excess is repayable as under the provisions of section 2402 of the Revised Statutes, upon an account to be stated by the ex officio surveyor-general who will in all cases be careful to express upon the plats of each survey the amount deposited as the cost of survey in the field and office work, and the amount to be refunded in each case. No provision of law exists, however, for refunding to other than the depositor.

8. Before transmitting accounts for refunding excesses, the ex officio surveyor-general will indorse on the back of the triplicate certificate the following, "$——— refunded to ——— ———, by account transmitted to the General Land Office with letter dated ———," and will state in the account that he has made such indorsement. Where the whole amount deposited is to be refunded, the *ex officio* surveyor-general will require the depositor to surrender the triplicate certificate, and will transmit it to this office with the account.

9. The provisions of section 2403 of the Revised Statutes, as amended by the act of March 3, 1879 (20 Stat. at Large, p. 352), relating to the assignment of certificates by indorsement, are not applicable to certificates of deposits for surveys in Alaska under said act of March 3, 1891, for the reason that the former statute contemplates the use of the certificates, after assignment, by settlers under the pre-emption and homestead laws of the United States and not otherwise. Therefore, these triplicate certificates can only be used by the respective depositors in payment for lands in Alaska.

10. The amount shown on the face of the certificate to have been deposited for "office work," will be placed to the credit of the ex officio surveyor-general, and upon his requisition, an advance will be made to

him from the Treasury Department to pay the expenses of said "office work." He will render quarterly accounts of such funds to the General Land Office, upon blanks furnished him for that purpose.

11. The amount deposited for "field work," will be placed to the credit of said work, and will be expended in the paying of the surveying accounts of the deputy surveyors, when the surveys are accepted and the accounts adjusted in this office, and transmitted to the First Comptroller of the Treasury for payment, from said deposits.

12. The contract system is not deemed applicable to the class of surveys contemplated by said act of March 3, 1891, owing to the small amounts which will doubtless be involved in many of the surveys, and particularly in view of the great distance between this office, and that of the ex officio surveyor-general, and the consequent inconvenient delays in correspondence. The ex officio surveyor-general will therefore appoint as many competent deputy surveyors as may be necessary for the prompt execution of the surveys, who will each be required to enter into a bond in the penal sum of five thousand dollars ($5,000), for the faithful execution, according to law and the instructions of the Commissioner of the General Land Office and the United States marshal, ex officio surveyor-general of Alaska, of all surveys which are required of him to be made in pursuance of his appointment as United States deputy surveyor, and for the return of said surveys to the United States marshal, ex officio surveyor-general, as required by law and instructions. The bonds, in duplicate, will be forwarded for acceptance by this office. Upon appointment, the deputy must take the oath of office required by section 2223 of the Revised Statutes.

13. When the duplicate certificates of deposit of the amounts estimated for field and office work, shall have been received by the ex officio surveyor-general, the requisite instructions for the surveys and making returns thereof, will be issued to the deputy surveyor who may be designated to do the work. The amount of compensation to the deputy surveyor must be stated in the instructions and the same must not exceed the amount deposited for the field work. The land to be surveyed under any one application, can not exceed one hundred and sixty acres, and it must be in one compact body, and as nearly in square form as the circumstances and the configuration of the land will admit.

14. The instruments used in the execution of these surveys, should be the same as those required for subdivisional surveys of public lands (see paragraph 6, page 18 of Manual), or an engineer's transit of approved make, and must be registered and tested at the ex officio surveyor-general's office, previous to the deputy commencing work, as directed in paragraph 7, page 19 of Manual.

15. The surveys will be numbered consecutively, beginning with number one. The true magnetic variation must be noted at the beginning point of each survey, as well as any marked changes during the progress of the work, and at the end of each line of the survey the

character of the soil, and the amount of timber, etc., must be noted at the end of the record thereof. The requirements in the "Summary of objects and data required to be noted," as set forth in the instructions for the survey of public lands (Revised Manual of Surveying Instructions, dated December 2, 1889, pages 44 and 45), must be observed by the deputy in these surveys. All corners must be marked by stone monuments, containing not less than 1,728 cubic inches. At the beginning point upon the outboundaries of each tract surveyed, a corner must be established with two pits (when practicable), of the size required for standard township corners, one upon each side of the corner on the line, and six feet distant. Upon the side of such corner facing the claim, the stone will be marked "S. No. ——" (for survey No. ——) and immediately under the same, the letters "Beg. Cor. 1" (for beginning corner one). These marks must be neatly and deeply cut, for the sake of legibility and permanence. From the beginning corner the deputy will proceed to survey the several lines of the tract, in accordance with the instructions of the ex officio surveyor-general, marking each corner on the side facing the claim with number of the survey, and "Cor. No. 11," "Cor. No. 111," etc., with pits of the size hereinbefore prescribed, upon the lines closing upon and starting from each corner and six feet distant. Such other marks, in addition to those above described, will be placed upon the corners, as may be required by the ex officio surveyor-general in his special written instructions. As far as practicable, bearings and distances must be taken from each of the corners to two or more trees, or prominent natural objects, if any, within a convenient distance, in the same manner as required in the instructions for the survey of public lands, and such trees or objects must be marked with the number of the survey and underneath the same the letters "B. T." or "B. O.," as the case may be.

16. Where a tract to be surveyed fronts upon tide-water, the front or meander line of the tract will be run at ordinary high-water mark, and the side lines of the tract will terminate at such high water mark, thus excluding from survey and disposal all lands situated between high and low-water marks. At the corners marking the termini of lines at high-water mark, one pit only will be dug, of the size prescribed in the manual for meander corners, on the side toward the land and six feet distant. At all corners where pits are impracticable, a mound of stone (consisting of not less than four stones, the mound to be at least one and a half feet high with two feet base), must be constructed and in cases where pits are practicable, if the deputy prefers raising a mound of stone, or stone covered with earth, as more likely to perpetuate the corner, he will be permitted to do so. For a mound of stone "covered with earth," the heighth and base will be the same as required by the manual for a mound of earth for township corners. Boundaries or portions of boundaries of previously established surveys, which also form a portion of the boundaries of the claim to be surveyed, will be adopted so far as common to both surveys.

17. The proper blank books for field-notes will be furnished by the ex officio surveyor-general, and in such books the deputy surveyor must make a faithful, distinct, and minute record of everything officially done and observed by himself and his assistants pursuant to instructions in relation to running, measuring, and marking lines, and establishing corners, and present as far as possible, a full and complete topographical description of the tract surveyed. From the data thus recorded at the time when the work is done on the ground, the deputy must prepare the true field-notes of the surveys executed by him, and return the same to the ex officio surveyor-general at the earliest practicable date, after the completion of his work in the field. The true field-notes are in no case to be made out in the office of the ex officio surveyor-general. The true field-notes and the transcript field-notes for this office, must be written in a bold legible hand, in durable black ink, upon paper of foolscap size. Each survey will be complete in itself. The first or title page of each set of field notes is to describe the subject-matter of the same, the locus of the survey, by whom surveyed, the date of the instructions, and the dates of the commencement and completion of the work. A general description of each tract must be given at the end of the field-notes of the survey of the same, which description must embrace a brief statement of the main feature of the tract surveyed, character of the land, timber, and other natural growth, whether there are any indications of mineral, characteristics of mountains, streams, etc., and the character of the improvements. All facts relative to the present occupancy of the land must be particularly noted. In preparing the true field-notes of the survey, the form prescribed in the manual will be followed as nearly as practicable. The names of assistants, with duties assigned to each, and the preliminary and final oaths of assistants, and final oath of the deputy, must be attached to the field-notes of each survey. The deputy surveyor must return with the field-notes a topographical map or plat of the survey. As far as practicable, all objects described in the field-notes, and the main features of the tract surveyed, including location of buildings, streams, mountains, etc., must be protracted upon such plat as accurately as possible. The course and length of each line will be expressed upon the plat. The deputy will note all objections to his survey that may be brought to his knowledge, and the ex officio surveyor-general will promptly report to this office all complaints made to him, and send up all protests filed in his office, together with a full report thereon.

18. From the plat and field-notes submitted by the deputy surveyor, the official plat will be prepared in triplicate, the original to be retained in the office of the ex officio surveyor-general, the duplicate to be forwarded to this office, and the triplicate, after notice of approval by the Commissioner, to be filed in United States district land office. All plats of these surveys must be made upon drawing paper of the best

quality, and of uniform size, nineteen by twenty-four inches (the size used for township plats of public land surveys). Upon each plat will be placed an appropriate title, and the certificate of approval by ex-officio surveyor-general. The title will be placed upon the upper right hand corner of the plat; immediately below will be placed the ex officio surveyor-general's approval, with sufficient space on the lower right hand corner for the Commissioner's approval. In all cases where the tracts are bounded in part by meanders, a table of the courses and distances of such meanders will be placed upon the plat. When the claim approaches one hundred and sixty acres in extent, the plat may be protracted upon a scale of five chains to one inch. For surveys of smaller extent the scale may be suitably increased. A clear margin two inches in width should be left upon all sides of each plat. The magnetic declination must be indicated upon the plats; also the scale of protraction. The use of all fluids, except a preparation of India ink of good quality, must be avoided by the draughtsman in the delineation of these surveys. All lines, figures, etc., must be sharply defined. All lettering on the plats must be clear and sharp in outline and design, and ornamentation of any kind is prohibited.

19. One copy of the instructions to the deputy must be forwarded with the returns of the survey, and one copy must accompany the account of the deputy. The returns and account will be forwarded with separate letters of transmittal.

20. The survey having been approved, it shall be the duty of such person, association, or corporation, within six months after notice thereof, to apply in writing to the United States court commissioner, ex officio register of the Sitka land office, to make proof and entry, in due form, reciting the name of the party who will make the entry, the name and geographical location of the land applied for, the place and date of making proof, and the names of four witnesses by whom it is proposed to establish the right of entry. This notice will be published by said commissioner, once a week for six consecutive weeks, at the applicant's expense, in a newspaper published nearest to the land applied for. Copies of said notice must be posted in the office of the ex officio register and in a conspicuous place upon the land applied for, for thirty days next preceding the date of making proof. The required proof shall consist of the affidavits of the applicant and two of published witnesses, and shall show:

First. The actual use and occupancy of the land as a trading post or for manufacturing purposes.

Second. The date when the land was first so occupied.

Third. The number of inhabitants and character and value of improvements thereon, and the annual value of the trade or business conducted upon the land.

Fourth. The non-mineral character of the land as prescribed in said act.

Fifth. That no portion of the land applied for is occupied or reserved, for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a townsite or missionary station; and that the tract does not include improvements made by or in possession of another person, association or corporation prior to the passage of said act.

Sixth. If the entry is made for the benefit of an individual, he must likewise prove his citizenship or file record evidence of his declaration of intention to become a citizen.

Seventh. If the entry is made for the benefit of an association, that and the further fact that over twenty per cent of the stock of the association is not held by aliens, must be established by the certificate of the secretary of the association.

Eighth. If the entry is made for the benefit of a corporation, that must be established by the certificate of the secretary of the State of Oregon, or any other officer having custody of the record of incorporation, and the further fact that over twenty per cent of the stock of such incorporated company is not held by aliens, must be established by the certificate of the secretary of the company.

Ninth. Proof of publication of notice for the required time, consisting of the affidavit of the publisher to that effect accompanied by a copy of the published notice, together with the certificate of the ex officio register as to the posting of notice in his office and the affidavit of the party who posted the notice upon the land applied for, reciting the fact and date of posting said notice, and that the same so remained for the specified time hereinbefore required.

21. When the proof has been examined and found satisfactory to the said ex officio register and surveyor-general, and the certificate of purchase and receipt for the purchase price respectively issued by them, all the papers will be forwarded to this office, and if found to be complete and the entry to have been made in accordance with these instructions, patent will issue in the course.

22. If upon the day appointed for making proof and payment for any tract of land by a person, association or corporation, any other person or the representative of any association or corporation, should appear and protest against the allowance of the entry, such protestant should be heard and permitted to cross-examine the claimant and his witnesses, and the complaint and the facts thus developed will be duly considered by the ex officio register and surveyor-general and such action taken as they may deem proper. Should the protestant desire to carry his action into a contest so as to introduce the testimony of witnesses either for the government or in his own behalf, he should be required by said officers to file a sworn and corroborated statement of his grounds of action, and that the contest is not initiated for the purpose of harrassing the claimant and extorting money from him under a compromise, but in good faith to prosecute the same to a final determination; and this

affidavit being filed, the said officers will immediately proceed to determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each the usual notice thereof and a fair opportunity to present their interests, in accordance with the principles of law and equity applicable to the case, as prescribed by the rules for the conduct of such cases before registers and receivers of other local land offices. At the close of the case, or as soon thereafter as their duties will permit, said officers will render their decision in writing give due notice to all parties in interest thereof, and at the earliest practicable date forward the papers to this office together with any appeal that may have been filed from their decision. Appeals from the action of this office will lie to the Secretary of the Interior, as in other matters of like character.

23. All town-site entries in said Territory are to be made by trustees, to be appointed by the Secretary of the Interior, according to the spirit and intent of Sec. 2387, U. S. Rev. Stat., which section provides that the entries of land for such purposes are to be made in trust for the several use and benefit of the occupants thereof, according to their respective interests, and at the minimum price, which in these cases shall be construed to mean $1.25 per acre. When the inhabitants of a place and their occupations and requirements constitute more than a mere trading post, but are less than one hundred in number, the town-site entry shall be restricted to one hundred and sixty acres; but where the inhabitants are in number one hundred and less than two hundred, the town-site entry may embrace any area not exceeding three hundred and twenty acres; and in cases where the inhabitants number more than two hundred, the town-site entry may embrace any area not exceeding six hundred and forty acres. It will be observed that no more than six hundred and forty acres shall be embraced in one town-site entry in said Territory.

The system of public surveys not having been extended over any portion of the Territory of Alaska, and no provisions being made in said act for the payment of the cost of officially making a special survey of the exterior lines of the town sites to be entered thereunder, it becomes necessary for the occupants of any town site in said territory, as a prerequisite to having an entry made of the land claimed by them, to proceed in the same manner and form to secure the special survey of the land, as is above prescribed for applicants for lands in said Territory for trade and manufacturing purposes. To that end the rules above set forth and numbered one to nineteen, inclusive, are hereby made applicable in manner, form and detail, to such occupants or their agent in applying for and securing the execution of the special survey of the outboundaries of such town sites, the occupants or agent to be reimbursed for the money thus expended as hereinafter provided.

24. The fee-simple title to certain real estate in the towns of Sitka and Kodiak was conferred under Russian rule upon certain individuals

and the Greek Oriental Church, and confirmed by the treaty concluded March 30, 1867, between the United States and the Emperor of Russia (15 Stat. at Large, 589); other real property is now held and occupied by the United States in several of the Alaska towns for school and other public purposes; while it is perhaps desirable that still other lots or blocks in those towns that take advantage of the provisions of said act, should be reserved to meet the future requirements for school purposes, or as sites for government buildings; therefore, the governor, judge of the district court, and marshal of the Territory of Alaska are constituted a board and it is hereby made a part of their official duties, as soon as notified by the United States marshal that the duplicate receipt for the money deposited to defray the costs of a special survey of the exterior lines of such town site, has been received by him, to go upon the land applied for and inquire into the title to the several private claims held therein under Russian conveyances, and to fix and determine the proper metes and bounds of the same, as originally granted and claimed at the date of our acquisition of said Territory. Such board will duly notify the present owners of said private claims both of their right to submit testimony and documents, either in person or by attorney, in support of their several claims and of their right, within thirty days from receipt of notice of the conclusions of said board, to file an appeal therefrom, with said board, for transmission to this office. Should any one of such parties be dissatisfied with the decision of this office in such a case, he may still further prosecute an appeal to the Secretary of the Interior upon such terms as shall be prescribed in each individual case. Proper evidence of notice should be taken by said board in all cases, and a record of all testimony submitted to them should be kept. If an appeal is taken, the same together with the decision of the board and all papers and evidence affecting the claims of the appellant should be forwarded direct to this office. Should no appeal be taken, the report of the board should be filed with the United States marshal, ex officio surveyor-general, for his use and guidance, as hereinafter directed.

It shall also be the official duty of said board to approximately fix and determine the metes and bounds of all lots and blocks in any such townsite now occupied by the government for school or other public purposes, and of all unclaimed lots or blocks, which, in their judgment, should be reserved for school or any other purpose; and to make report of such investigations to the ex officio surveyor-general, for his use and guidance, as also hereinafter directed, should no appeal be filed therefrom.

Should an appeal from the action or decision of such board be filed in any case, no further action will be taken by the ex officio surveyor-general until the matter has been finally decided by this office or the Department. But, should no appeal be filed, the ex officio surveyor-general will proceed to direct the survey of the outboundaries of the townsite to be made, the same in all respects as above directed in the

survey of land for trade and manufacturing purposes, except that he will accept the report and recommendations made by said board and exclude and except, by metes and bounds, from the land so surveyed all the lots and blocks for any purpose recommended to be excepted by said board. The execution of the survey of the lots and blocks thus excepted, shall be made a part of the duties of the surveyor who is deputized to survey the exterior lines of the town site, the survey of such lots or blocks shall be connected by course and distance with a corner of the town-site survey, and also fully described in the field-notes of said survey and protracted upon the plat of said townsite; and the limits of such lots or blocks will be permanently marked upon the ground in such manner as the ex officio surveyor-general shall direct. In forwarding the plat and field-notes of the survey of any town site for the approval of this office, the ex officio surveyor-general will also forward any report that said board may have filed with him for approval in like manner.

25. When the plat and field-notes of the survey of the out boundaries of any town site shall have been approved, and not before, by this office, the Secretary of the Interior will appoint one trustee to make entry of the tract so surveyed, in trust for the occupants thereof, as provided by said act. The trustee having received his appointment and qualified himself for duty by taking and subscribing the usual oath of office and executing the bond hereinafter required will call upon the occupants of said town site for the triplicate receipt for the money deposited to meet the expenses of the survey thereof and for the requisite amount of money necessary in addition to pay the government for the land as surveyed, and other expenses incident to the entry thereof, keeping an accurate account thereof and giving his receipt therefor; and when realized from assessment and allotment, he will refund the same, taking evidence thereof to be filed with his report in the manner hereinafter directed. He will then file with the United States court commissioner for Sitka who is ex officio register of the Sitka land office, a written notice, in due form, reciting the name of the party who will make the entry, the name and geographical location of the town site, the place and date of making proof, and the names of four witnesses by whom it is proposed to establish the right of entry. This notice will be published by said commissioner, once a week for six consecutive weeks, at the applicant's expense, in a newspaper published in the town for which the entry is to be made, or nearest to the land applied for. Copies of said notice must also be posted in the office of the ex officio register and in a conspicuous place upon the land applied for, for thirty days next preceding the date of making proof. The required proof shall consist of the affidavits of the applicant and two of the published witnesses, and shall show: (1) The actual occupancy of the land for municipal purposes; (2) the number of inhabitants; (3) the character, extent and value of town improvements; (4) the non-mineral character

of the town site; (5) that said town site does not contain any land occupied by the United States for school or other public purposes, nor any land to which the title in fee was conferred under Russian rule and confirmed by the treaty of transfer to the United States, nor any land for which patents have been issued by the United States; (6) and proof of the publication and posting of notices for the required time, the same in all respects as is required by the ninth subdivision of paragraph twenty hereof. The proof being accepted and the certificate of entry issued by the ex officio register of the Sitka land office, the purchase price of the land should be paid to and receipted for by the clerk of the district court who is ex officio receiver of the Sitka land office, after which all the papers will be forwarded to this office and if found to be complete and made in accordance with these instructions, patent will issue without delay. Cash certificate of entry (No. 4-182) will be used by the ex officio register in allowing all entries authorized by the law and these regulations, and said entries will be numbered consecutively beginning with number one. A protest against the allowance of a town-site entry will be heard and the same permitted to be carried into a contest in the same manner and under the same conditions as hereinbefore provided in the matter of applications to make entries for the purposes of trade and manufactures.

26. It is also made my duty to provide rules and regulations for the survey and platting of the town sites in Alaska into streets, alleys, blocks and lots, or for the approval of such surveys as may already have been made by the inhabitants thereof; and for the conveyance of the lots and blocks to the occupants of said town sites, according to their respective interests. To accomplish the latter provision necessitates the careful consideration of a somewhat difficult problem, involving the right of the natives of Alaska who constitute the larger part of the population of all the towns in said Territory, but who are not citizens of the United States, to receive title from the government to the lots severally occupied and claimed by them.

Although the political status of these people remains yet to be determined by legislation, still, the fact that they are held amenable to all the laws made applicable to said Territory in which they have lived at peace with the white settlers for ages, that they far outnumber the citizen and foreign-born population of all those towns in which white men have settled, and that many of them have invested their earnings in property in those towns and are exercising peaceable and undisputed occupancy and right of possession over the same, I therefore deem it proper, in order to further encourage them in adopting civilized life and accepting and following the instruction and example of the teachers, missionaries and all other right-thinking people who come among them, and equitable and just and within my power to construe the language of section 2387, U. S. Rev. Stat., under which town-site entries are made "in trust for the several use and benefit of the occupants thereof,

according to their respective interests," in the most liberal and comprehensive sense and to the advantage of these natives. Therefore, the trustees of the several town sites entered in said Territory shall levy assessments upon the property either occupied or possessed by any native Alaskan the same as if he were a white man, and shall apportion and convey the same to him according to his respective interest, without regard to the question of citizenship. But, in case of white settlers, or associations or corporations, the trustees shall require the same evidence of citizenship or the right to hold real estate, as the case may be, as is required above of purchasers of land for purposes of trade or manufactures.

27. The entry having been made and forwarded to this office, the trustee will cause an actual survey of the lots, blocks, streets and alleys of the town site to be made, conforming as near as in his judgment it is deemed advisable, to the original plan or survey of such town, making triplicate plats of said survey and designating upon each of said plats the lots occupied, together with the value of the same and the name of the owner or owners thereof; and in like manner he will designate thereon the lots occupied by any corporation, religious organization, or private or sectarian school. When the plats are finally completed, they will be certified to by him as follows:

I, the undersigned, trustee of the town site of Alaska Territory, hereby certify that I have examined the survey of said town site and approved the foregoing plat thereof as strictly conformable to said survey made in accordance with the act of Congress approved March 3, 1891, and my official instructions.

One of said plats shall be filed in the land office in the district where the town site is located, one in the office of the Commissioner of the General Land Office, and one retained for his own use. The designation of an owner on such plats shall be temporary until final decision of record in relation thereto, and shall in no case be taken or held as in any sense or to any degree a conclusion or judgment by the trustee as to the true ownership in any contested case coming before him.

28. As soon as said plats are completed, the trustee will then cause to be posted in three conspicuous places in the town, a notice to the effect that such survey and platting have been completed and notifying all persons concerned or interested in such town site that on a designated day he will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled under the provisions of said act. Such notices shall be posted at least fifteen days prior to the day set apart by the trustee for making such division and allotment. Proof of such notification shall be evidenced by the affidavit of the trustee, accompanied by a copy of such notice.

29. After such notice shall have been duly given, the trustee will proceed on the designated day, except in contest cases which shall be disposed of in the manner hereinafter provided, to set apart to the per-

sons entitled to receive the same, the lots, blocks and grounds to which such person, company or association of persons shall be entitled, according to their respective interests, including in the portion or portions set apart to each person, corporation or association of persons the improvements belonging thereto, and in so doing he will observe and follow as strictly as the platting of the town site will permit the rights of all parties to the property claimed by them as shown and defined by the records of the clerk of the district court of Alaska, who is ex officio recorder of deeds and mortgages and other contracts relating to real estate in said Territory.

30. After setting apart such lots, blocks or parcels, and, upon a valuation of the same, as hereinbefore provided for, the trustee will proceed to determine and assess upon such lots and blocks according to their value, such rate and sum as will be necessary to pay all expenses incident to the town-site entry. In those cases in which there appears more than one claimant for any lot or block, the trustee will require each claimant to pay the assessment, and upon the final determination of the contest as hereinbefore provided for, the unsuccessful claimant or claimants will be reimbursed in a sum equal to the assessment paid by them, such reimbursements to be properly accounted for by the trustee. In making the assessments the trustee will take into consideration:

First. The reimbursement of the parties who deposited the money to pay the cost of surveying and platting the outboundaries of the town site, and who advanced such money as was necessary in addition to pay the purchase price of the land.

Second. The money expended in advertising and making proof and entry of the town site.

Third. The compensation of himself as trustee.

Fourth. The expenses incident to making the conveyances.

Fifth. All necessary traveling expenses and all other legitimate expenses incident to the expeditious execution of his trust.

More than one assessment may be made, if necessary to effect the purposes of said act of Congress and these instructions. Upon receipt of the assessments the trustee will issue deeds for the uncontested lots, blank forms of conveyance being furnished by this office for that purpose.

31. His work having been completed to this point, the trustee will then, and not before, in cases where he finds two or more inhabitants claiming the same lot, block, or parcel of land, proceed to hear and determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each ten days' notice thereof, and a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing as far as practicable the rules prescribed for contests before registers and receivers of the local offices; he will administer oaths to

the witnesses, observe the rules of evidence as near as may be in making his investigations, and at the close of the case, or as soon thereafter as his duties will permit, render a decision in writing. If the notice herein provided for can not be personally served upon the party therein named within three days from its date, such service may be made by a printed notice published for ten days in a newspaper in the town in which the lot to be affected thereby is situated; or, if there is none published in such town, then said notice may be printed in any newspaper published in the Territory. Copies of such notice should also be posted upon the lot in controversy and in at least three other conspicuous places in the town wherein said lot is situated. The proof of such publication and posting of notices to be filed with the record, may be made as provided in these rules and regulations in other cases. The proceedings in these contests should be abbreviated in time and words or the work may not be completed within the limits of any reasonable period of time or expense.

Before proceeding to dispose of the contested cases, the trustee will require each claimant to deposit with him each morning a sum sufficient to cover and pay all costs and expenses on such proceedings for that day. At the close of the contests, on appeal or otherwise, the sum deposited by the successful party shall be returned to him, but that deposited by the losing party shall be retained and accounted for by said trustee.

32. Any person feeling aggrieved by the decision of the trustee may, within ten days after notice thereof, appeal to the Commissioner of the General Land Office under the rules (except as to time), as provided for appeals from the opinions of registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal within ten days from notice thereof to the Secretary of the Interior upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary, except as modified by the time within which the appeal is to be taken. All costs in such proceedings will be governed by the rules now applicable to contests before the local land offices.

33. The trustee shall receive and pay out all money provided for in these instructions, subject to the supervision of this office, and he shall keep a correct record of his proceedings and an accurate account of all money received and disbursed by him, taking and filing proper vouchers therefor in the manner hereinafter provided; and before entering upon duty, he shall, in addition to taking the official oath, also enter into a bond to the United States in the penal sum of five thousand dollars ($5,000), for the faithful discharge of his duties, both as now prescribed and furnished by the Department of the Interior.

34. All lots remaining unoccupied and unclaimed when the trustee shall have made his allotments and assessments, will be sold at public

outcry, for cash, to the highest bidder; the proceeds of such sales together with any balance remaining in the hands of the trustee to the credit of the town-site occupants, to be expended under the direction of the Secretary of the Interior for the benefit of the town.

35. All payments by the occupants of any town site for any of the purposes above named, except the survey of the outboundaries of the land so entered, shall be in cash and made only to the trustee thereof, who shall make duplicate receipts for all money paid him, one to be given the party making the payment and the other to be forwarded to this office with the trustee's papers and accounts. Said trustee shall also take receipts for all money disbursed by him and be held strictly accountable by this office, under his bond, for his proper handling of the trust funds in his possession.

36. The trustee of any town site in said Territory will be allowed compensation at the rate of five dollars per day for each day actually engaged and employed in the performance of his duties as such trustee, and his necessary traveling expenses.

37. The trustee's duties herein prescribed having been completed, the account of all his expenses and expenditures, together with a record of his proceedings and a list of the lots to be sold at public sale as hereinbefore provided, with all papers in his possession and all evidence of his official acts, shall be transmitted to this office to become a part of the records hereof, excepting from such papers, however, the subdivisional plat of the town site which he shall deliver to the clerk of the district court to be made of record and placed on file in his office as ex officio recorder of deeds, mortgage and other contracts relating to real estate in the Territory of Alaska.

It is believed that the foregoing regulations, together with copies of the laws, rules and regulations referred to therein, will be found sufficient for the proper determination of all cases that may arise, but, should unforeseen difficulties present themselves, the same should be submitted to this office for special instructions.

Very respectfully,

T. H. CARTER,
Commissioner.

Approved June 3, 1891,
GEO. CHANDLER,
Acting Secretary.

PRE-EMPTION ENTRY—ACT OF MARCH 3, 1891—SECOND CONTEST.

FULLER *v.* HILL ET AL.

A pre-emption entry, against which there is no adverse claim originating prior to its allowance, is confirmed by section 7, act of March 3, 1891, where, after final entry, and prior to March 1, 1888, the land is sold to a *bona fide* purchaser, on whose part fraud is not found.

An allegation that such entry was made in the interest of the transferee will not be made the subject of a hearing, where such charge has been fully investigated by the government.

A pre-emption filing and entry, on land embraced within the existing entry of another, confer no rights as against the prior entryman.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 26, 1891.

By letter of March 18, 1891, you transmitted the papers in the matter of the appeal of Walter V. Fuller from your decision of October 17, 1890, holding for cancellation his pre-emption entry for lots 1 and 2, Sec. 23 and the S. ½ of the SE. ¼ of Sec. 14, T. 59 N., R. 24 W., St. Cloud, Minnesota, land district, and re-instating the pre-emption entry of Jerome M. Hill for the same land.

Proceeding under the rule adopted April 8, 1891 (12 L. D., 308) to facilitate the disposition of those cases wherein the entries were confirmed by section 7 of the act of March 3, 1891 (26 Stat., 1095), the attorney for Hill, on April 16, 1891, filed a motion asking that his entry be declared confirmed under said law. Counsel for Fuller filed a reply to this motion on May 13, 1891, which, though not filed within the time fixed by the rule of April 8, 1891, I have examined and found to consist of a statement of the facts in the case and a formal request that the motion to confirm Hill's entry be dismissed, thus presenting nothing against the motion but what is presented by the record itself.

Hill made his entry for this land July 3, 1883, and on January 17, 1885, a hearing was ordered upon the report of a special agent, alleging that said entry was fraudulent and made in the interest "of John Martin and Company." As a result of the trial, your office, on May 27, 1885, canceled said entry. Upon appeal by the John Martin Lumber Company as transferee, this Department, on May 21, 1887, remanded the case for a further hearing. After various continuances and delays, said hearing was had, and as a result thereof, the local officers, on May 15, 1890, held that the government had not sustained the charges made, and recommended the dismissal of the case, and your office, on October 17, 1890, dismissed the charge by the government, and re-instated said entry.

In this same decision, it was recited that the local officers had, on July 22, 1890, allowed Walter V. Fuller to make pre-emption cash en-

try for said land, and that entry was held for cancellation. From this decision, Fuller appealed.

Such was the status of the case at the date of the passage of the act of March 3, 1891, *supra*, which, it is claimed, confirmed Hill's entry.

That portion of section 7 of said act of March 3, 1891, which has a bearing upon this case reads as follows:

> And all entries made under the pre-emption, homestead, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

In Hill's entry, final proof and payment have been made and certificate has been issued. There is no adverse claim originating prior to final entry. Fuller filed his declaratory statement November 6, alleging settlement October 10, 1889, more than six years after Hill's final entry. It is satisfactorily shown by the record and judgment of your office herein that the land was sold prior to March 1, 1888, and after final entry. It was finally determined, after an investigation extending over a period of more than five years, that this sale was to a bona-fide purchaser on whose part there was no fraud. Satisfactory proof of the transfer having been heretofore submitted, it is not necessary that it should be again presented.

It would seem then that this entry has all the qualifications and characteristics required to bring it within the class of entries confirmed by that portion of the act of March 3, 1891, quoted above.

Fuller acquired no right to this land by virtue of his filing and entry, both of which were made when the land was not subject thereto. The allegations made by him, attacking the good faith of the John Martin Lumber Company, in the premises, supported as they are by the statements of three different parties, to the effect that they believe from conversation with Hill, that the entry was made in the interest of said company, do not present sufficient grounds for a further inquiry, as this question was fully considered in the investigations heretofore had.

For the reasons herein set forth, Hill's entry is held to be confirmed by said act of March 3, 1891, and it is directed that said entry be passed to patent. This action necessarily involves the cancellation of Fuller's entry.

PRACTICE—NOTICE—APPEARANCE—CONTINUANCE.

UNDERHILL *v.* BROWN.

The defendant's general appearance on the day set for hearing, and stipulation for continuance, is a waiver of any irregularities in the service of notice.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 3, 1891.

I have considered the appeal of Mary E. Brown from the decision of your office of September 23, 1889, rejecting her application for a re-hearing in the contest case brought by John A. Underhill against her timber culture entry for the SE¼ of Sec. 3, T. 19 S., R. 37 W., WaKeeney land district, Kansas.

The record shows that she made a timber culture entry for the tract in question on August 12, 1885. On October 10, 1887, John A. Underhill initiated a contest against said entry and made an affidavit showing that he had made diligent efforts to ascertain the residence of claimant but was unable to do so; also that claimant was a non-resident of the State of Kansas.

Thereupon notice was given by publication that a hearing would be had on said contest on December 26, 1887, before the local land office at WaKeeney, Kansas. A registered letter containing a copy of the notice was also sent to claimant's last known address.

On the day set for the trial, A. H. Blair filed a paper in the land office, which is as follows:

I, Mary E. Brown, do hereby appoint A. H. Blair my attorney in above case.

MARY E. BROWN, defendant.

P. O. address, Indianapolis, Indiana.

After presenting the evidence of his authority to appear as attorney for claimant, the following stipulation for continuance was filed:

JOHN A. UNDERHILL, *v.* MARY E. BROWN. } No. 9924.

We the undersigned mutually agree and stipulate that the above entitled action be continued until January 26, 1888, at 1 P. M. Defendant hereby waiving any defect in service.

S. R. COWICK,
Att'y for Pl'ff.
A. H. BLAIR,
Att'y for Def't.

Again, on January 26, 1888, the day agreed upon for the hearing in the above stipulation, the following agreement was filed:

Before the U. S. Land Office, WaKeeney, Ks. 9924.

JOHN A. UNDERHILL, contestant,
v.
MARY E. BROWN, contestee.

Comes now the parties to the above entitled case and mutually agree that the hearing in said case be adjourned to (to) the 28th day of February, 1888, at 1 P. M., both parties waiving the right to any further adjournment on account of absent testimony from and after February 28, 1888.

A. H. BLAIR & CO.,
Att'y for contestee.
S. R. COWICK,
Att'y for Pl'ff.

On the day last agreed upon a trial was had at which contestant appeared and submitted testimony, but the claimant made default. Considering said evidence, on April 21, 1888, the local land officers found in favor of contestant and recommended the entry for cancellation.

On November 30, 1888, claimant applied for a rehearing of said case; she also, at the same time, filed some affidavits tending to show that she had complied with the law up to the time the contest was begun. The above application and accompanying affidavits were not transmitted to your office until June 11, 1889.

Considering the evidence submitted at the trial on said contest, your office affirmed the finding of the local officers, and canceled claimant's entry. On September 23, 1889, her application for a rehearing was considered by you and rejected. Thereupon she appealed to this Department.

It cannot be seriously contended that the local officers did not have jurisdiction to hear the matter of said contest upon the day of the trial, for it is well established by the evidence that Blair had ample authority to appear for her and consent to continuances.

It is shown that claimant resides at Indianapolis, Indiana; and that she had full knowledge of the day first set for the hearing is evidenced by her appointment of Blair as her attorney. His acts in stipulating for a continuance of the trial were, in contemplation of law, her acts, and if there had been any irregularity in the manner of the service of notice upon her, her general appearance on the day first set for the trial and agreement to a continuance thereof, was a waiver of any such irregularity. Hausen *v.* Ueland, 10 L. D., 273. She has had her day in court, and the present application for a rehearing fails to show a satisfactory excuse for her failure to make a defense, if she had any, on the day of trial. The showing is not sufficient to justify the Department in re-opening the case.

Your decision is accordingly affirmed.

MINING CLAIM—COLORADO SCHOOL LANDS.

FLEETWOOD LODE.

An entry canceled on the erroneous report of the local office that no response had been made to the previous adverse decision should be re-instated when the fact of such error is made known.

A mineral applicant for lands in section sixteen, in the State of Colorado, may submit proof, after due notice to the State, that the land applied for, was of known mineral character prior to, and at the date of the admission of the State to the Union.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 3, 1891.

I have considered the appeal of Wallace Ward from the decision of your office dated February 11, 1890, refusing to reinstate mineral entry No. 186, made October 14, 1885, by said Ward upon the Fleetwood lode claim, at the Pueblo land office, in the State of Colorado.

The record shows that the papers in said entry were considered by your office on June 4, 1887, and it was found that said claim was situate within the NW ¼ of Sec. 16, T. 22 S., R. 72 W., 6th P. M.; that its location was made on July 22, 1878, and the application for patent filed in the local office on June 16, 1885; that the survey of said township was approved on February 10, 1872, and said section sixteen was returned as agricultural in character; that the application contained no averment that said lode was discovered prior to the admission of Colorado as a State, on August 1, 1876, nor that said NW¼ was known to be valuable for minerals prior to said admission; and therefore said entry must be held for cancellation.

On July 30, 1887, said Ward, by his attorney in fact, filed in the local land office a petition asking to be allowed to amend his application for patent and to furnish proof that prior to August 1, 1876, the land embraced in said entry and also in the whole NW. ¼ of said section was known to be valuable for minerals and therefore did not pass to the State of Colorado under its school grant. The appellant also asked that the order holding said entry for cancellation be suspended and that further time be granted for an appeal from said decision during the period required for furnishing said proof, and that he might be promptly notified of the action of the Department upon his petition "in order that he may not lose or prejudice his right of appeal in case the same be denied."

On October 6, 1887, your office acknowledged the receipt from the local office of their letter dated September 21, 1887, with the proof of service of notice of said decision of your office upon the claimant, and stating that more than sixty days have since elapsed and no appeal or response had been received from the applicant, and your office held that said entry must, therefore, be canceled.

On June 21, 1889, you advised the local officers of the receipt of their letter dated November 5, 1887, in which they stated that a mistake was made in their former letter of September 21, 1887, reporting that no appeal or response from the parties in interest had been received. With said letter the local officers transmitted said communication from claimant's attorney, filed July 30, 1887, asking further time to furnish additional proof. Your office, however, called the attention of the local officers to the fact that the "official records" did not show that said attorney had ever been admitted to practice before this Department, and directed that if the parties have filed, or shall file within thirty days from due notice hereof, any evidence showing why the case should be re-opened and the entry re-instated, appropriate action would be taken thereon.

On July 2, (not 21st, as stated in your office letter of February 11, 1890,) the local office advised you that said attorney for applicant appeared as attorney in fact; that he was "duly qualified to practice before this (the local) office as per the list now on file in your office," and the local office also transmitted a communication in the nature of a motion for a re-instatement of said entry, which was duly verified and the applicant alleged therein that to sustain the cancellation of said entry would work great hardships upon many innocent persons; that long before the application for patent in this case the character of said section 16 had been determined by the Department to be mineral and that many mineral patents had been issued upon lode claims in said section where the proofs were otherwise sufficient; that the parties relying upon the supposed determination of the mineral character of said section have expended upwards of two hundred thousand dollars in the development of claims adjoining the Fleetwood lode claim; that the applicant never at any time received any notice of the cancellation of said entry on October 6, 1887, nor in reply to his said communication of July 30, 1887, until July 1, 1889, and he therefore asks that the case be re-opened, said entry re-instated and passed to patent. On February 11, 1890, your office considered said communication and refused to re-instate said entry, and held that no reason appeared from the record "why the cancellation heretofore made of the Fleetwood entry No. 186, was not in every way proper and demanded by the circumstances shown in the record."

In his appeal, the appellant insists (1) that you overlooked his request to be allowed to furnish proof that the land in question was known to be mineral long prior to August 1, 1876; (2) that the construction placed by you upon the decision in the case of Townsite of Silver Cliff *v.* State of Colorado (Copp's Min. Laws, 2 ed., p. 261) is erroneous because it clearly appears by said decision that evidence was taken at the hearing in said case showing the mineral character of the whole of said section 16; (3) that, there being no adverse claimant, applicant ought to be permitted to amend his application and furnish proof as to the mineral character of said land upon giving due notice to said State.

It is quite evident that the cancellation of said entry was erroneously made. True, it was made upon the report of the local office that no appeal or response had been made by the claimant to the notice of the decision of your office holding said entry for cancellation. But this report was incorrect, and, upon being notified by the local office of said error, you should have revoked the order of cancellation, thereby placing the claimant in the same position he would have been had his entry not been canceled upon the erroneous report of the local office. Moreover, his application to be allowed to furnish proof that the land in question was known to be valuable mineral land long prior to August 1, 1876, should have been granted by you.

In the case of the Boulder and Buffalo Mining Company (7 L. D., 54), decided by the Department on July 24, 1888, the claims were in the N½ of said section 16, and your office held the entries for cancellation because the evidence on file did not show that the land entered "was known to be valuable for mineral prior to the date of the admission of Colorado as a State, to wit, August 1, 1876." Afterwards, the claimant made a motion in your office for review of said decision, and asked that the entries be passed to patent, on the ground that the evidence in said Silver Cliff Townsite case determined the character of the land in said section 16; that, if this was not the case, then that he be allowed to furnish evidence that the land in question was known to be mineral long prior to the admission of said State. Your office refused the motion, and also the application to file further proof as to the mineral character of the land. But the Department modified your judgment and held that the decision in said Silver Cliff case determined the character of only the S½ of said section, and the language in said case must be held as applicable only to the land in the south half of said section 16; that there was no good reason for refusing to allow the appellant to make supplemental proof showing the mineral character of said land on August 1, 1876, upon giving due notice to the State of Colorado. Such action should be taken in the case at bar.

The order of your office dated October 6, 1867, cancelling said entry must be, and it is hereby, set aside, and the appellant will be allowed, within sixty days from notice hereof, to submit supplemental proof upon due notice to the State showing the mineral character of said land prior to and at the date of the admission of said State.

The decision of your office is accordingly modified.

MORTON *v.* LANE.

Motion for review of departmental decision rendered in the case above entitled, January 20, 1891, 12 L. D. 74, denied by Acting Secretary Chandler, June 4, 1891.

REPAYMENT—FRAUDULENT ENTRY.

YALE T. HATCH.

Repayment is not authorized where an entry, secured through false testimony, is subsequently canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 4, 1891.

On April 27, 1883, Charles Monroe made pre-emption cash entry No. 2722 for the NE. ¼ of Sec. 22, T. 112, R. 72 W., Huron, Dakota.

On October 7, 1884, hearing was ordered upon the allegations of Lucinda A. E. Robinson that the entry was made upon false and fraudulent "final proof," and that the entryman had not complied with the law.

Among other things that Monroe alleged in his final proof were:

1. That he settled and established actual residence on the land July 20, 1882.

2. That his first act of settlement was to build a house, twelve by sixteen feet, and that he had broken eight acres of land and planted some to corn, and completed a house costing $125.

3. That there were no improvements on the land when he settled.

All parties were present at the hearin g. The government was represented by Special Agent T. M. James.

Claimant executed to Yale T. Hatch (appellant) a mortgage on the premises, on the day he made final proof, and on October 29, 1883, he deeded the land to said Hatch, who was also present at the hearing.

The register and receiver found in favor of the entryman, and the case was duly appealed, and on June 11, 1887, you reversed that judgment and held the entry for cancellation, saying:

I am of the opinion that the testimony in its entirety establishes the fact that Monroe's final proof aforesaid was false in every particular, save the points as to the qualifications to make said entry.

Claimant again appealed, and on February 27, 1889, the Department affirmed the action of your office, saying:

The facts are substantially as stated in said decision, to which reference is made. . . . . The evidence taken at the hearing shows that it (the final proof) is false in important particulars.

A further statement in the departmental decision is as follows:

It will not avail the transferee in this case to say that he made inquiry as to the validity of the entry. His residence within a short distance and other facts in the case go to show that he might readily have ascertained, if he did not already know, the real facts in regard to the settlement, residence, and improvements made by the entryman. He either had knowledge of the facts, or is chargeable with laches in not obtaining that knowledge.

On February 19, 1890, the said Hatch filed in the local office his application for repayment of the purchase money of said land, and on April 3, 1890, you declined to recommend the repayment, on the grounds that "the proofs at date of entry showed a compliance with law, but it was afterwards determined that the proofs were false," and this appeal is brought to reverse that judgment.

The final proof, on which claimant procured the allowance of his entry, was fraudulent—a fraud in fact, and in such case it can not be held that the entry was "erroneously allowed," as the terms are used in Sec. 2 of the act of June 16, 1880 (21 Stat., 287), where repayment is authorized:

If a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was "erroneously allowed," and in such case repayment would not be authorized. (General Circular, January 1, 1889, pp. 66-67.)

This is the precise condition of Monroe's entry, and therefore his transferee is not entitled to the repayment applied for. Your said decision is accordingly affirmed.

RAILROAD GRANT—MINERAL LANDS.

NORTH STAR MINING CO. *v.* CENTRAL PACIFIC R. R. CO.

"All mineral lands" are excluded from the grant to this company, and until patent issues therefor, the Department has authority to determine the character of land claimed under the grant, and this is true, even though the company may have sold such land.

The authority of the Department to order a hearing on the petition of a mineral applicant for such land, is not abridged by a prior ex parte proceeding, on behalf of said company, in which the land was found to be agricultural in character.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 6, 1891.

I have considered the case of the North Star Mining Company *v.* The Central Pacific Railroad Company, as presented by the appeal of the latter from the decision of your office, dated March 12, 1890, affirming the action of the local officers at Sacramento, California, recommending the cancellation of its selection of lot 18, in Sec. 3, T. 15 N., R. 8 E., M. D. M., approved by the local officers on January 7, 1885, in so far as it conflicts with mineral lot No. 89, claimed by said North Star Mining Company.

The cancellation of said tract was recommended for the reason that at the date of said selection, and long prior to the grant to said company, by acts of Congress approved July 1, 1862, and July 2, 1864 (12 Stat., 489, 13 Stat., 356), from which were excluded in express terms "all mineral lands," the tract in question was well known to be valuable mineral land.

At a hearing duly ordered, the local officers, upon the evidence submitted, found that said lot 18 embraced said mineral lot No. 89, which has been known to possess valuable mineral since 1857; that by reason thereof it was excepted from the grant to said company; that the company's selection of said lot should be cancelled to the extent of the mineral lot, and the mining company should be allowed to make application for mineral patent to said lot No. 89, under the mining laws. On appeal, your office affirmed the findings of the local officers.

The company alleges in its appeal that the hearing was ordered without authority of law and without notice to it; that the grantee of the company was a necessary party; that the burden of proof was upon the mining company, and the evidence shows "that the land is not known, and never has been known to be valuable for mining purposes," and that your office decision is contrary to the law and evidence submitted in the case.

Neither contention of the appellant can be sustained. The hearing was duly ordered by your office letter of July 3, 1889, and said railroad company was represented at said hearing by attorneys who appeared generally and filed objection to the jurisdiction of your office to order said hearing, and afterwards cross-examined the witnesses.

The tract in question, never having been patented to the company, the Department has authority at any time prior thereto to investigate the mineral character of the land, and the fact that the company sold said lands, with others, as alleged, will not alter the case. Nor does the fact, as alleged by the company, that upon its application in an ex parte proceeding the land had been found to be agricultural in character, prevent the Department from ordering a hearing upon the application of the mining company to determine the character of the land in question, which was returned as mineral. The character of the land has not passed "in rem judicatam," for the parties are different, and until patent issues the Department may investigate the character of the land, whether claimed under a railroad grant or the mining laws. Whitnall *v.* Hastings & Dakota R'y Co., 4 L. D., 249; Central Pacific R. R. Co. *v.* Valentine, 11 L. D., 238; Searle Placer, id., 441.

The evidence submitted clearly shows that said lot 89 was known to be valuable for mineral long prior to the date of said grant, and continued so to be at the date of said hearing.

The decision of your office must be and it is hereby affirmed.

COMMUTED HOMESTEAD—SECTION 7, ACT OF MARCH 3, 1891.

R. M. CHRISINGER.

An entry canceled by a decision that became final prior to the passage of the act of March 3, 1891, is not within the confirmatory provisions of section 7, of said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 6, 1891.

I am in receipt of your letter of April 27, 1891, transmitting the application of John J. Ballery, transferee, for the reinstatement and confirmation under section seven of the act of March 3, 1891, of the commuted homestead entry made by Robert M. Chrisinger for the SE. ¼, Sec. 6, T. 4 N., R. 32 E., La Grande, Oregon.

Said entry was canceled by the decision of the Department of January 25, 1886 (4 L. D., 347). That action was final in the case. An entry canceled by a decision that became final prior to the passage of the act of March 3, 1891, is not within the confirmatory provisions of section seven of said act. See case of James Ross (12 L. D., 446). Said application is accordingly denied.

PROCEEDINGS BY THE GOVERNMENT—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* DE LENDRECIE.

An adverse decision of the General Land Office, on proceedings instituted by the government, will not defeat the confirmatory effect of the proviso to section 7, act of March 3, 1891, where said proceedings are not begun within two years after issuance of the receiver's final receipt, and the entry is otherwise within the terms of said proviso.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 8, 1891.

I have considered the case of The United States *v.* Onesine J. De Lendrecie, on the appeal of the latter from your decision of January 22, 1890, holding for cancellation his commuted cash entry for the NE. ¼ of Sec. 8, T. 132 N., R. 62 W., Fargo land district, Dakota.

Homestead entry was made for the land in question on the 26th of February, 1883, and commuted to cash entry November 13, of the same year, upon proof satisfactory to the register and receiver that the entryman had complied with the law. Upon filing his proofs, and paying to the receiver the sum of two hundred dollars, he received from the register on that date a certificate entitling him to a patent for the land.

The General Land Office instructed special agent W. W. McIlvain to make examination of the land in question, and he examined the same on the 17th of May, 1883, and also in November of the same year,

making his report on the 15th of December, 1884, finding no evidences of fraud on the part of the entryman. Special agent Allen M. Easterly made examination of the land on the 7th and 9th of April, 1887, and made his report on the 13th of May, 1887, recommending that the entry be held for cancellation.

By your office letter of June 7, 1887, you instructed the register and receiver to give the claimant notice of the nature of the special agent's report, and advise him of his right to apply for a hearing to show cause why his entry should be sustained. Application for hearing was duly made, and directed by your office letter of January 11, 1888. It took place in May of that year, and on the 24th of September following, the register and receiver decided that the claimant had shown good faith by residence and improvement on the land, that he did not make the entry for speculation, but made it in good faith and for his own use and benefit, and that the case should be dismissed.

When the matter came before you for consideration, and on January 22, 1890, you reversed the judgment of the register and receiver, and held the entry for cancellation. The case comes to this Department upon appeal of the entryman from your decision.

Section 7 of the act of Congress entitled "An act to repeal timber culture laws, and for other purposes," approved March 3, 1891 (26 Stat., 1095), has a proviso which reads as follows:

> *Provided,* That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry upon any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and where there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry, before the issuance of a patent therefor.

No contest or adverse proceeding having been initiated by any person to secure the cancellation, or defeat the consummation of the entry in this case, and the proceedings which resulted in the judgment herein appealed from not having been instituted by the government within two years after the issuance of the receiver's receipt upon final entry, the entryman is entitled to a patent, under this proviso, and the instructions approved by this department under date of May 8, 1891, and published in 12 L. D., 450.

Your decision holding the entry for cancellation is therefore set aside, and a patent will issue.

OKLAHOMA TOWN-SITES—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
Washington, May 8th, 1891.

To the Trustees of Town-sites in Oklahoma:

Paragraphs 13 and 23 of the regulations provided by the Secretary of the Interior, for the guidance of trustees in the execution of their trust in allotting town-sites in Oklahoma, promulgated June 18, 1890, 10 L. D., 666, are hereby amended so as to read as follows:

13. Any person feeling aggrieved by your judgment may, within ten days after notice thereof, appeal to the Commissioner of the General Land Office under the rules (except as to time) as provided for in appeals from the opinions of registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal within ten days from notice thereof to the Secretary of the Interior upon like terms and conditions and under the sames rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary except as modified by the time within which the appeal is to be taken. Such cases will be made special by the Commissioner and the Secretary and determined as speedily as the public business of the Department will permit, but no contest for particular lots, blocks, or grounds shall delay the allotment of those not in controversy, and a failure to appeal as herein provided shall not be construed as a waiver of, or to prejudice the rights of either party, nor held to preclude suits in the courts in case the party entitled to appeal desires to proceed in that manner for the purpose of settling the title to the lot or lots in controversy.

23. You will be allowed six dollars per day for each day's service when you are actually engaged and employed in the performance of your duties as such trustee; your necessary traveling expenses; and three dollars per day for your subsistence. But these sums may be reduced in either board at the will of the Secretary of the Interior if he deems it for any cause necessary.

This order will take effect from and after its date.

Very respectfully,

JOHN W. NOBLE,
Secretary.

MINERAL LAND—COAL ENTRY—BURDEN OF PROOF.

SAVAGE ET AL. *v.* BOYNTON.

In an issue as to the character of land that is *prima facie* agricultural the burden of proof is with the mineral claimant.

The coal, or mineral character of land must be determined by the actual production from mining on the tract, or by satisfactory evidence that coal or mineral exists on said land in sufficient quantity to make the same more valuable for mining than for agriculture.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 10, 1891.

I have considered the appeal of Edward G. Savage and Frank E. Lyman from the decision of your office, dated February 17, 1890, in the case of Edward G. Savage and Frank E. Lyman *v.* Sarah E. Boyn-

ton, rejecting the application of said appellants to enter as coal lands, the SW. ¼ of SE. ¼, Sec. 33, T. 32 S., R. 68 W., and N. ½ of NE. ¼, Sec. 4, T. 33 S., R. 68 W., Pueblo, Colorado.

It appears that on December 12, 1887, Sarah E. Boynton filed a pre-emption declaratory statement for the tracts above described as also the NW. ¼ of NW. ¼, Sec. 3, T. 33 S., R. 68 W.; that on May 11, 1888, five months subsequent thereto, Edward G. Savage filed coal declaratory statement for the N. ½ of NW. ¼ and N. ½ of NE ¼, Sec. 4, T. 33 S., R. 68 W., and that on June 20, 1888, Frank E. Lyman filed coal declaratory statement for the S. ½ of SE. ¼, NW. ¼ of SE. ¼, and SW. ¼ of NE. ¼, Sec. 33, T. 32 S., R. 68 W., the coal claim of Savage being in conflict with the claim of Boynton as to the N. ½ of NE. ¼, Sec. 4, and the claim of Lyman being in conflict as to the SW. ¼, of SE. ¼, Sec. 33.

Final proof was made by Mrs. Boynton on her pre-emption claim February 28, 1889, before the clerk of the district court at Trinidad, Colorado, and on March 22, following, James E. Hammond, attorney in fact for the contestants, protested against the allowance of said proof on the ground that one hundred and twenty acres of said pre-emption were more valuable for its coal deposits than for agricultural purposes.

In view of these allegations, the local officers designated May 17, 1889, as a day of hearing, with notice to all parties in interest, to take testimony on the point at issue.

After an examination of the evide nce submitted the register decided that the alleged coal character of th e land in question was not satisfactorily shown and therefore the proof of Mrs. Boynton should be accepted.

The receiver, however, dissented from the view taken by the register and submitted an opinion holding that the coal character of the land was fully established. Your office, under date of February 17, 1890, sustained the decision of the register awarding the land to the defendant, from which decision the contestants appeal.

It appears that the land embraced by the claim of Boynton was surveyed sometime in 1871 and also in 1875, and there is no evidence in the field notes showing that the land was returned as coal land, although in some of the subdivisions near this tract coal has been found, and from a drift or opening in one of them, coal has been used to some extent by the settlers in the neighborhood.

It would seem from the record in this case, that the tracts in question lie in the margin of what is known in that section as the Trinidad coal field or belt; that coal has been discovered in a number of places within a radius of a few miles, and in the case under consideration it is claimed that part of the tract is coal land of more value for mining than for agricultural purposes.

The testimony shows that no coal has ever been mined on the tract in question, nor is there any reliable surface indications that coal, or any other mineral, exists on this land in sufficient quantities to make the land more valuable for mining than for agricultural purposes.

Only one witness testifies that he found coal or indications of coal, on any part of said tract, and he fails to show in his testimony any real value to the indications found, but simply gives his opinion that the tract is coal land.

It is also shown by the evidence that the contestants and their witnesses base all their opinions and beliefs respecting the coal character of the land, entirely upon discoveries and indications of coal found on other lands in the vicinity, nowithstanding the fact that at present there are no mines in operation for the purpose of merchandising coal for the general market; furthermore, the evidence shows that the defendant resides on her claim; that the lands along the stream are fertile and suitable for agriculture, while a portion of the remainder may be used for pasture lands.

The tracts embraced in Mrs. Boynton's claim, not having been returned by the surveyor general as mineral, and being suitable in part for farming and pasturage, are *prima facie* agricultural lands, therefore the burden of proof must rest upon the contestants to show the coal character of the same. Hooper *v.* Ferguson (2 L. D., 712), and Creswell M'g Co. *v.* Johnson (8 L. D., 440).

The questions to be determined in this case are whether the land contains coal, if so whether the land is more valuable for mining than for agricultural purposes, or whether the coal is of such a character as to warrant the conclusion that the coal that migh t be obtained by the usual means and methods, would make it more profitable for mining than for agriculture.

It has been repeatedly held by this Department that the proof of the mineral character of land must be specific and show actual production of mineral therefrom; that it is not enough to show lands in the neighborhood or adjoining lands are mineral in character, or that the lands in question may hereafter be found to be mineral, Kings County *v.* Alexander *et al* (5 L. D., 126), and Dughi *v.* Harkins (2 L. D. 721), and the same is the case in relation to coal lands; the proof must show satisfactorily the coal character and not be based upon a theory.

In the case at bar coal has been discovered in the vicinity of the land, and at one place about twenty-five or thirty tons have been taken out from time to time by the people living near by for their own use, but there is no evidence showing that coal is being or has been mined anywhere in that immediate section for merchantable purposes. Furthermore the contestants seek to establish that by reason of the coal measures found on adjacent tracts and by the dip and angle of inclination of said measures, that coal exists on the land in question at the depth of from seven hundred to eight hundred feet, but I do not think a preponderance of the testimony sustains this claim.

It is contended by counsel for appellants that the cases cited by you, as also the cases cited above, are not analogous cases and have but little bearing on the case at bar; I will in this connection only call

attention to the case of Kings County *v.* Alexander *et al* (5 L. D., 126) and in a comparison it will be observed that in both cases, coal was actually found on adjoining tracts; that in both cases the contestants endeavored to show that in consequence of the geological formation, the coal measures must necessarily extend under the land in controversy; that in both cases the land was *prima facie* agricultural land and that no coal had ever been taken from the land in controversy in either case. Thus it will be seen that the cases on the principal points at issue are almost identical, and therefore, in my opinion, the case at bar should follow the rule laid down in the Kings County case.

To establish the tract as coal land, it is not enough to produce testimony showing that lands in the vicinity are coal bearing. Therefore in the case at bar, although the evidence shows that coal to some extent has been found in adjacent lands, that does not establish as a fact that the land in controversy is of the same character.

Under such circumstances, the only safe rule for the Department to follow, is that already laid down and adhered to in many cases, that the coal or mineral character of the land must be determined by the actual production from mining on the tract in dispute, or by satisfactory evidence that coal or mineral exists on the land in question in sufficient quantity to make the same more valuable for mining than for agriculture, as no coal has ever been mined on this tract or any actual showing that there exists thereon coal in valuable quantities, I am of the opinion that the contestants have failed to establish their claim that the tracts in question are coal land.

The decision of your office is affirmed.

RAILROAD GRANT—STATE RELINQUISHMENT—SETTLER.

STROBECK *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The relinquishment of a tract by the governor of the State, under the State act of March 1, 1877, re-invests the United States with full title to such land, and the validity of said relinquishment is not affected by the fact that the settler, in whose favor such relinquishment was made, did not attain his majority until after the passage of said act.

It is not within the province of the Department to review the action of the governor in the execution of a relinquishment under said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 11, 1891.

I have considered the case of Nils Strobeck *v.* St. Paul, Minneapolis and Manitoba Railway Company, on appeal by the latter from your office decision of July 23, 1887, rejecting its claim to the NE. ¼, Sec. 9, T. 131 N., R. 39 W., 5th P. M., Fergus Falls, Minnesota.

The tract is within the common indemnity limits of the grants for the Northern Pacific and St. Paul, Minneapolis and Manitoba companies,

the withdrawal for the former of which was ordered on December 26, 1871, and for the latter, on February 15, 1872. These are the only withdrawals that embraced this land.

It appears that Strobeck settled on the tract in July, 1871, and has since maintained residence there, and that after the passage of the act of March 1, 1877, by the legislature of the State of Minnesota (Spec. Laws, Minnesota, 1877, p. 2571), the Governor of the State executed a deed of relinquishment in behalf of and for the benefit of Nils Strobeck, a settler on the land, reconveying to the United States all right, title, interest or claim acquired, or which might be acquired, to the land described, by virtue of the grant in aid of the construction of the St. Paul, Minneapolis and Manitoba Ry. Company, St. Vincent Extension, to the end that said Strobeck might acquire title thereto under the public land laws of the United States.

Strobeck applied to enter the tract under the homestead law on September 15, 1883. After a hearing had upon notice to said company, the local officers, on February 6, 1884, rejected Strobeck's application for the reason that at the date of the passage of said act of 1877, he was a single person under the age of twenty-one years. On appeal by Strobeck your office rejected the claim of the company.

It appears from the testimony taken that Strobeck attained his majority in November 1877, eight months after the passage of said act by the State legislature.

Section 10, of said act, provides:

> The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption, or homestead filing or entry—not to exceed one hundred and sixty acres to any one actual settler; and the Governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the land upon which they actually reside, from the United States, as homesteads or otherwise, and 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; and in deeding to the United States such lands, the Governor shall receive as *prima facie* evidence, of actual settlement on said lands, the testimony and evidence or copies thereof, heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

The appellant company is the successor to said Saint Paul and Pacific company.

In the case of St. Paul, Minneapolis and Manitoba Railway Company *v.* Chadwick (6 L. D. 128), it was held that said company by accepting the terms of said act extending the time for the construction of its road,

relinquished its claim to lands occupied by actual settlers and authorized the Governor of the State to reconvey such lands to the United States.

Inasmuch as the act is a statute of the State, and the Governor of the State is called upon to execute it in this particular, it must be apparent that all evidence touching the right of a settler to any tract, must be submitted to him in the first instance, and that he must determine whether such evidence is sufficient, under the act. Acting under this authority, the Governor has found that the settler was of the class intended to be benefited by the State legislation, and has accordingly relinquished to the United States whatever claim or title the State had in the premises. Thus the tract falls again into the public domain for disposition under the land laws. This being so, the only question left for the Department to determine relates to the qualifications of the applicant at the date of his application.

I cannot conceive it to be the province of this Department to enter into controversy with the State of Minnesota as to the correctness of its decisions touching the qualifications of claimants under said act. The interpretation of the act lies with the State, and no appeal lies to this Department on such questions. With full title reinvested in the United States it is the duty of this Department to dispose of the tract under the laws of the United States.

I, therefore, conclude that the fact that Strobeck did not attain majority until after the passage of said act of 1877, is not sufficient ground upon which to assail the validity of the Governor's deed.

The decision of your office is accordingly affirmed.

Overruled 26 L. D. 448

SECOND HOMESTEAD ENTRY—OKLAHOMA LANDS.

JAMES T. KRIGBAUM.

The right to make homestead entry of lands embraced within the Seminole purchase, accorded by the act of March 2, 1889, to persons who have commuted a former entry, is restricted to those who had perfected title under such commuted entry prior to the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 11, 1891.

The appeal of James T. Krigbaum from the decision of your office, dated February 14, 1890, holding for cancellation his homestead entry for the SE¼, Sec. 34, T. 18 N., R. 7 W., Kingfisher, Oklahoma Territory, has been considered.

It appears in this case that on December 16, 1884, the appellant made a homestead entry for the SW¼, Sec. 13, T. 23 S., R. 22 W., Larned, Kansas; that on February 18, 1889, he filed in the said land office at Larned his notice and application to make commutation proof on his

homestead; that on May 11, 1889, said proof was made and on May 13, following, the proof was filed in said office, payment made, and the cash certificate issued for the land in question.

On July 1, 1889, Krigbaum filed in the local office at Kingfisher, Oklahoma Territory, an application to enter the tract first above described, as a homestead, under the act approved March 2, 1889, entitled, "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1890, and for other purposes" (25 Stat., 1004).

The entry was allowed by the local officers and regularly reported to your office with the current returns for July, 1889, and when reached for examination, the entry was held for cancellation, from which action the appeal under consideration was taken.

The act of March 2, 1889, above referred to provides:

> That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply): And provided further, That any person who having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what is kno wn as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

Under date of April 1, 1889, your office issued a circular of instructions to local officers under said act, which was approved by this Department calling attention, *inter alia*, to the rule laid down on page 17 of General Circular issued January 1, 1889, under the title, "Only one homestead privilege to the same person permitted," and stating that said rule is so modified by the above act as to admit of a homestead entry being made by any one, who *prior* to the passage of said act, had made a homestead entry, but failed, from any cause, to secure a *title in fee* to the land embraced therein, or who having secured *such title*, did so by what is known as the commutation of his homestead entry (8 L. D., 336).

It will be observed that the construction placed upon the above act as laid down in the circular of April 1, 1889, requires that a party to a commuted homestead, who seeks to make another homestead entry under this act, must have completed said commutation before the passage of the act of March 2, 1889, to have entitled him to the privilege of making the second entry; or in other words that the party had performed, at the date of the above act, all the requirements of section 2301, Revised Statutes, necessary to receiving a patent for the land embraced in his commuted entry, otherwise he was not competent to make a homestead under the act in question.

In the case at bar the appellant did not make commutation proof until May 11, 1889, two months and nine days after the passage of the act, and therefore he is clearly outside of its provisions. It is claimed,

however, by the appellant that he gave notice and made application to commute his homestead February 18, 1889, several days prior to the passage of the act; that when he made application for the entry under consideration, an affidavit as to the facts of the prior commuted entry was filed with the case in accordance with circular of April 1, 1889, and the local officers with a full understanding of the matter, accepted and allowed the entry; furthermore, counsel for appellant contends that it has been the practice of this Department in homestead and pre-emption cases, to hold that the

filing of entryman's notice to make final proof at U. S. Land Office within the time limited to make final proof is good and sufficient, and the final proof being taken and filed afterwards is within the meaning of the law and a compliance therewith and is held good and sufficient;

that this being a fact the same rule and interpretation should apply in this case.

Without entering into a discussion of this matter it is sufficient to simply state that the case at bar and those referred to by counsel, are not analogous cases; in the former the rights of the appellant under the act of March 2, 1889, are determined by the date the party actually made commutation proof and cash entry of the land embraced in his original homestead or first entry, while in the latter cases no such conditions exist.

There seems no possibility that a proper construction of said act, other than that laid down in the circular of April 1, 1889, can be made. Take the exact language of the statute: "Or who made entry under what is known as the commuted provision of the homestead law," etc., and it must be seen that the language, "Who made entry," cannot refer to a case where simply notice had been given that such entry would be made, but that it only refers to commuted entries actually made, that is, proof made and purchase money paid, thus making, so far as the entryman is concerned, a complete commuted entry, such as was evidently contemplated by the act.

I am satisfied that the local officers erred in allowing the entry under the circumstances and in view of the fact that they had the circular of April 1, 1889, before them, it seems highly probable that they must have misunderstood the facts in the premises. With this view of the case the decision of your office is sustained.

PRACTICE—NOTICE OF CONTEST—JURISDICTION.

ANDERSON *v.* REY.

There is no authority under the rules of practice for the service of a notice of contest by registered letter, and by such service no jurisdiction is required by the local office.

A defendant may so far appear as to object to the jurisdiction of the court, either over the person or subject matter of the suit, and such appearance is special; but if by motion or otherwise, he seeks to call into action any power of the court, except such as pertains to its jurisdiction, it is an appearance.

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.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 12, 1891.

I have considered the case of Mary R. Anderson *v.* Rudolph Rey, on the appeal of the latter from the decision of your office, holding for cancellation his homestead entry for the W. ½ of SW. ¼ and SW. ¼ of NW. ¼ of S. 30, T. 26 S., R. 26 E., in Visalia land district, California.

He made homestead entry for the land in question March 29, 1886, and on the 19th of May, 1887, the plaintiff filed an affidavit of contest against the same, alleging abandonment and failure to cultivate by the defendant; and on that day the register issued a notice, appointing the 18th day of August of that year for the hearing. A copy of this notice was mailed on the 2d of June, 1887, by James E. Anderson, in a registered letter directed to the defendant, at Hanford, California, and received by him on the 7th of that month.

On the day set for the trial, the plaintiff applied for a continuance of the case, on account of the absence of material witnesses. The defendant appeared by counsel

for the purpose of resisting said motion for continuance, and for the purpose of moving a dismissal of this case, and for these purposes only.

Counsel stated the following as his reasons for resisting the motion for a continuance, and asking for a dismissal of the case:

That no personal service has been had or made upon the claimant herein, notwithstanding the fact that said claimant is a resident of this county and State, and that no copy of any notice in this case has been served on the said claimant as required by rule 9, of the Rules of Practice, and that no notice of publication has been given the said claimant or at all; and that there is no evidence before this office to show that said claimant ever received notice of this contest at all in any way.

Anderson then made affidavit of mailing a copy of the notice to the defendant in a registered letter, as already stated, and attached to the affidavit the defendant's receipt for the letter. The register then overruled said motion to dismiss, and allowed the plaintiff's application for a continuance until January 11, 1888; to which ruling, the defendant excepted.

On the day last stated, the parties appeared before the register and receiver, and the defendant renewed the motion made by him on the day first set for the hearing, which was overruled, and the trial took place. On the 7th of February, 1888, the local office rendered decision, holding the defendant's entry for cancellation, which judgment was affirmed by you on appeal on the 14th of October, 1889, from which the defendant appeals to this Department, alleging, as his first ground of error, that you erred "in sustaining the ruling of the register and receiver in refusing to dismiss the contest on account of the lack of personal service of the notice of contest."

The Rules of Practice prescribe only two modes for the service of notice of contest—personal, and by publication. Rule 9 prescribes when and how personal service must be made, and Rule 11, the cases and the manner in which the service may be made by publication. The service in the case under consideration was neither personal nor by publication. Notice of certain interlocutory motions, proceedings, orders, and decisions, may be made either personally, or by registered letter through the mail; but the Rules make no provision for the service of a notice of contest by registered letter. Such a notice institutes a proceeding which may deprive a defendant of a property right and it must be served in the manner prescribed, or the local officers do not obtain jurisdiction of the entryman.

In your decision, after reciting the circumstances of the mailing of the notice to the defendant in a registered letter, and its receipt by him, you add: "Under these circumstances claimant cannot be heard to say that service was not properly made." I cannot concur in that statement. In the case of Driscoll *v.* Johnson (11 L. D., 604), it is held that "the rules of Practice do not authorize the service of notice of contest on a resident defendant by registered letter." In that case, all the decisions of the Department bearing upon the question are collated, and the subject very thoroughly discussed.

If the question of jurisdiction was to be determined upon the manner of the service of notice of contest alone, it is clear that the register and receiver had no jurisdiction of the case. The only other point to be considered is whether the appearance of the defendant, at the time set for the trial, authorized the court to take jurisdiction of his person, and did he waive his objection to the jurisdiction by proceeding to trial after his motion to dismiss had been overruled? A defendant may so far appear as to object to the jurisdiction of the court, either over the person or subject matter of the suit, and such appearance is special; but, if by motion or otherwise, he seeks to call into action any power of the court, except such as pertains to its jurisdiction, it is an appearance. Ulmer *et al.* *v.* Hiatt *et al.* (4 Greene, Iowa, 439); Clark *v.* Blackwell (ibid. 441.)

In the case at bar, the defendant appeared on the day set for the trial, for the purpose of objecting to the granting of the plaintiff's motion

for a continuance, on the ground, in substance, that the court had no jurisdiction in the case, and no power to grant such motion; and he also moved for a dismissal on the ground that no notice had been served upon the defendant, and the court, therefore, had no jurisdiction over him.

Under the rule laid down in the cases cited, this was a special, and not a general appearance. It did not call into action any power of the court, except such as pertained to its jurisdiction. This Department has repeatedly held that "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." The United States *v.* Raymond (4 L. D., 439); Miller *v.* Knutsen (ibid. 536); Milne *v.* Dowling (ibid., 378); William W. Waterhouse (9 L. D., 131.)

The decisions of this Department, and the judgment of the United States supreme court are in harmony on this question. In Harkness *v.* Hyde (98 U. S., 476), that was the point in issue. Legal service was not had, and the defendant appeared specially by counsel, 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 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 was successful, 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.

Having already held that the service of the notice of contest upon the defendant gave the local office no jurisdiction, I find, further, that the defendant did not waive his jurisdictional objection by proceeding to trial after his motion to dismiss had been overruled.

It is clear, therefore, that both the local office and your office were without jurisdiction to hear and determine this case, and your office decision is therefore reversed, all proceedings subsequent to the filing of notice of contest set aside, and the case will be returned to the local office for a new hearing, after proper service of notice.

REPAYMENT—NEW FINAL PROOF—MORTGAGEE.

ALPHEUS R. BARRINGER.

A homesteader who submits commutation proof prematurely, and secures an entry thereunder, which is subsequently suspended for compliance with the regulations, is not entitled to repayment of the purchase price, and thereafter submit new proof under section 2291, R. S.

On requirement of new final proof a mortgagee may be permitted to show due compliance with law on the part of the entryman, prior to the submission of the original proof, where such entryman fails or refuses to comply with said requirement.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 12, 1891.

I have considered this case arising upon the appeal of Alpheus R. Barringer from your decision of March 4, 1890, rejecting his application for repayment of the purchase-money paid upon his commuted homestead entry for the E. ½ of the NE. ¼ of Sec. 32, and the W. ½ of the NW. ¼ of Sec. 33, T. 5 N., R. 31 W., McCook land district, Nebraska.

This Department, on December 19, 1888, in the case of Hinman *v.* Barringer, rejected said Barringer's final proof, because it had been made (on September 13, 1887,) while the question of the validity of his entry was pending undetermined; but directed that, in case Hinman failed to renew his application to enter within sixty days, Barringer should be afforded opportunity to make new proof.

Hinman not applying to make entry of the tract, your office, by letter of November 12, 1889, notified Barringer that opportunity was afforded him to make new proof. He refused to do so, his attorney stating "that his client desires to avail himself of the final homestead laws, in case his present proof can not be accepted," and transmitting an application of repayment of the purchase-money—which your office denied.

I find no error in your ruling. It is in accord with the requirements of the law. The statute authorizing repayment (Sec. 1362 R. S.) limits the same to cases where "any tract of land has been erroneously sold by the United States, so that from any cause *the sale can not be confirmed.*" This is not such a case; the sale can be confirmed without hindrance, if the entryman will make proof according to law and departmental regulations. Again, under the regulations of the Department, before repayment can be made in any case, the applicant "must make affidavit that he has not transferred or otherwise incumbered the title to the land, and that the same has not become a matter of record" (General Circular of January 1, 1889, p. 67). This the applicant in the case at bar has not done; on the contrary, he has erased from the blank form of application the printed statement to this effect.

Your action in rejecting the application for repayment is therefore affirmed.

Since your decision in the case, certain documents have been filed satisfactorily showing that on July 13, 1889, Barringer and his wife executed two mortgages upon the land in question to the Des Moines Loan and Trust Company—which mortgages were afterward assigned to the Hitchcock County Bank, Nebraska. Said bank now asks to be permitted to submit proof of Barringer's compliance with law. Under the circumstances this would appear to be a reasonable request. I have therefore to direct that you instruct the local officers to notify Barringer to make new proof within sixty days from receipt of notice; and that, in case he should refuse or neglect to do so, they notify said bank that it will be permitted, within a reasonable time, to file proof showing that the entryman fulfilled the requirements of the law, prior to the date of his commutation proof formerly made. (See Addison W. Hastie, 8 L. D., 618, last paragraph.)

MINING CLAIM—MILL SITE—SECTION 2337 R. S.

MINT LODE AND MILL SITE.

Land not improved or occupied for mining or milling purposes may not be appropriated as a mill site for the purpose of securing the use of water thereon.

Section 2337 R. S., does not authorize the entry of a mill site, where the land included therein is intended to be used in common with other mill sites, taken in connection with as many lode claims.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 12, 1891.

This is an appeal by the Mint Mining Company from your office decision of February 19, 1890, holding for cancellation its mineral entry, No. 3156, made December 30, 1886, for the Mint lode and mill site, lots 1974 A and B, Central City, Colorado, to the extent of lot 1974 B, the said mill site.

The mill site in question is one of five, for which said company is applying for patent in connection with as many different lode claims in the same vicinity. The mill site claims are contiguous, lying in a north and south line, and all are traversed by Kelso creek. They are known respectively, as lots 1977 B, 1976 B, 1979 B, 1974 B, and 1975 B.

For the purpose of showing that the mill site here in question is used and occupied in connection with the said Mint lode for mining or milling purposes, James U. and M. C. Harris, file an affiadavit in which they allege that the improvements upon said mill site claims, consist of the following:

On survey No. 1975 B, Mint extension lode mill site, a dam has been built across the creek, and ditching for a flume has been done on said mill site, and also on survey No. 1974 B, Mint lode mill site, survey No. 1978 B, Pocahontas lode mill site, survey No. 1976 B, Coach Whip lode mill site and survey No. 1977 B, Tornado lode mill site, and grading for a pen stock and water wheel upon said survey No. 1977 B. The five mill sites being used in common for the purpose of furnishing water power for mining and milling purposes.

In response to your office letter of June 1, 1889, calling for further evidence as to the use and occupation of said mill site, James U. Harris says that the applicants intend as soon as the development of the mines will warrant the expenditure, to erect a mill and power house, appropriating the water for mill power purposes, and that the improvements consist of the following: On lot 1975 B, a dam across the creek, an ore house for assorting ore, and "ditching for a water course to mill;" on lot 1974 B, a frame house to be used for a storehouse, and the continuation of the ditch on lot 1975 B; on lot 1978 B, a frame building for the workmen on the mines, and the continuation of said ditch; on lot 1976 B, a frame house for a blacksmith shop, and the continuation of said ditch; on lot 1977 B, grading and timber foundation (14 by 14 feet), for a mill and power house, and the continuation of said ditch.

I am unable to find from this recital that said mill site is used for mining or milling purposes in connection with the Mint lode. Land not improved or occupied for mining or milling purposes may not be appropriated as a mill site for the purpose of securing the use of water thereon. Cyprus Mill site (6 L. D., 706). Besides the dam and ditching the only improvement on the tract is "a frame house to be used for a store house." It does not appear that this structure has any connection with the mining operations, or that it is to be used in connection with the Mint lode claim. Nor is it shown with any certainty that this tract will ever be used for mining or milling purposes in such connection. See Iron King Mine and Mill Site (9 L. D., 201); Peru Lode and Mill Site (10 L. D., 196).

Moreover it appears that these five mill site claims are to be used in common in connection with the company's five lode claims. I do not think the statute would authorize patents to issue under such circumstances.

Section 2337 Revised Statutes, provides:

> Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall excede five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode.

This statute evidently intends to give to each operator of a lode claim, a tract of land, not exceeding five acres in extent, for the purpose of conducting mining or milling operations thereon, in connection with such lode. This excludes the idea that the mill site is to be used in connection with other lodes. The object of the mill site is to subserve the necessities of the lode to which it is attached, for mining and milling purposes.

The decision appealed from is accordingly affirmed.

CONTEST—PREFERENCE RIGHT—RELINQUISHMENT.

McDONNELL *v.* DE GOOD.

A relinquishment made after an affidavit of contest has been filed, but before service of notice, and without knowledge of said contest, and subsequently filed by the purchaser thereof, on being officially informed that said contest had been finally disposed of, does not inure to the benefit of said contest though in fact pending when said relinquishment was filed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 12, 1891.

I have considered the appeal of Michael McDonnell from your decision dismissing his contest against the timber culture entry of Elma De Good for the NE. ¼ of Sec. 20, T. 113, R. 44, Redwood Falls, Minnesota.

The facts in the case are stated in your decision and justify your action sustaining the decision of the local officers dismissing the contest, and the same is therefore affirmed.

Your decision was rendered November 13, 1889, and due notice of the same was given by the local officers on December 15, 1889, and on January 25, 1890, said officers reported that more than forty days had elapsed and no appeal had been taken. They also reported that the case was marked "closed" on their records.

On February 4, 1890, the relinquishment of Elma De Good was presented at the local office, and the entry was canceled and Ole K. Anderson made timber culture entry for said tract. Anderson filed an affidavit in which he states that he was told by the local officers that the contest of McDonnell was ended and that the land would be subject to entry upon the filing of the relinquishment of De Good, and therefore he paid the sum of $500, for said relinquishment and made entry for the tract, and that all his acts were done in good faith.

On February 10, 1890, the contestant McDonnell filed his appeal from your decision of November 13, 1889; this was within sixty days from the date he was notified of said decision and was therefore in time, and the same has been duly considered by me and dismissed as above stated.

On February 20, 1890, McDonnell presented his application to enter said tract, which was rejected by the local officers for the reason that the land was embraced in the timber culture entry of Ole K. Anderson, and McDonnell appealed. He alleges his preference right to enter by reason of his position as contestant, and the pendency of his contest, at the time the relinquishment was filed. The rule being that when a relinquishment is filed during the pendency of a contest, the presumption follows that such action is the result of the contest, the question arises, does the record in the case at bar overcome this presumption.

The contest was filed November 17, 1887, and notice was served on

the entryman December 7, 1887. The relinquishment was executed November 27, and acknowledged November 29, 1887, after the filing of the contest and before service of notice.

So far as the record shows Anderson appears to have acted in perfect good faith; he paid a valuable consideration for the claim, and acted upon information given him by the local officers in making his entry. In his appeal McDonnell alleges that the filing of the relinquishment established the fact that the entry of De Good was made for the use and benefit of A. C. Van House.

No charge of this kind was made in the affidavit of contest, but evidence in support of that proposition was introduced at the hearing, and consisted simply of showing that Van House, who formerly held the land and who was a half brother of De Good the claimant, who was a woman, had given instructions for the work to be done on the claim. McDonnell also alleges in his appeal that the relinquishment was the result of the contest as the same was acknowledged November 29, 1887, more than two years prior to the filing thereof.

A relinquishment takes effect when filed in the local office.

In the case of Kurtz *v.* Summers (7 L. D., 46), it was held that a relinquishment made after an affidavit of contest had been filed, but before notice had issued, and without the knowledge of said contest, does not inure to the benefit thereof. There is no evidence nor allegation, that De Good knew, when she executed her relinquishment, that a contest had been filed against the claim a few days before, and in the absence of such allegation, and in view ot the facts shown in the record before me, I am of the opinion that McDonnell has no ground upon which to claim the benefit resulting from the filing of the relinquishment, but that the entry of Anderson should be allowed to stand.

FINAL PROOF—COMPLIANCE WITH LAW—ADVERSE CLAIM.

SPARKS *v.* MCPHERSON.

When a claimant offers final proof in the face of an adverse claim, and fails to show compliance with law, he must submit to the cancellation of his filing or entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 13, 1891.

I have considered the case of William B. Sparks *v.* William A. McPherson, as presented by the appeal of the latter from the decision of your office, dated May 23, 1889, rejecting his final proof and holding for cancellation his pre-emption declaratory statement, No. 3402, for the SW ¼ SW. ¼ of Sec. 22, Tp. 15 N., R. 22 W., Harrison, Arkansas, filed March 12, 1888, alleging settlement October 1, 1887, on account of failure to make final proof within the time required by law for offered land, in the face of an adverse claim.

The record shows that when said McPherson filed his declaratory statement, he was informed that his filing expired on March 12, 1889, although the land was described as offered.

On October 1, 1888, said Sparks made homestead entry of the "SW.¼ of the SW. ¼ of Sec. 22," the NW. ¼ of the SW. ¼, and the W. ½ of the NW. ¼ of Sec. 27 in said township and range.

On February 5, 1889, the register gave notice by publication of McPherson's intention to make final proof in support of his claim before the local officers, on March 15, same year, at which time said Sparks filed his protest claiming under his said entry the lands included therein. Upon the evidence submitted, the local officers rejected the final proof because the pre-emptor failed to show six months' residence and cultivation of the land.

On appeal, your office found that as the land was offered and McPherson alleged settlement October 1, 1887, his right to make final proof to the exclusion of any other claim, expired on October 1, 1888; that it was not necessary to consider the question of compliance with the requirements of the pre-emption law, as to residence and cultivation, as the record showed that he had not made his final proof within the time required by law.

On March 4, 1890, your office refused to grant the application of McPherson for a rehearing, and he appealed to the Department, alleging that the decision of your office was "contrary to law and equity;" that it is contrary to the weight of the testimony, and that he has acted in good faith in trying to secure said land for a home.

The appeal is defective in not pointing specifically wherein the decision appealed from is contrary to law and equity, and it might be dismissed for that reason. But I have concluded to examine the whole record, and it appears that the pre-emptor has suffered no injury of which he can justly complain.

Aside from the question whether a pre-emptor is excusable for not proving up on offered land within twelve months from date of settlement when the certificate of the local officers states that he has twelve months from date of filing, and no objection is raised by the adverse claimant on account thereof, it is sufficient to say that the local officers were justified in holding that McPherson's final proof did not show compliance with the requirements of the pre-emption law, as to residence and improvements. Therein he testifies in answer to question No. 13: "I think the improvements are worth $150.00, while in answer to question 28, he says the improvements consist of "Log house, one room 16 x 16 feet, worth $10 or $12.00 about 6 or 7 acres cleared, fenced and in cultivation worth $8 per acre, Total $48 to 56.00." In answer to the question whether he has any personal property or live stock of any kind elsewhere than on the claim, he says "Yes, I have 2 mules, about 21 or 22 head of cattle, 27 head of sheep, 25 hogs, on my deeded land." Moreover, it appears that on April 5, 1875, he made

homestead entry on 2831 of the W. ½ of the SW. ¼ of Sec. 15, same township and range, which was canceled on relinquishment on April 13, 1889, although he says he never lived on his homestead.

It is well settled that when a party offers to make final proof in the face of an adverse claim, and fails to show compliance with the law, he must submit to the cancellation of his filing or entry.

It follows, therefore, that the conclusion of your office was correct. Said decision is accordingly affirmed.

HOMESTEAD SETTLEMENT—ACT OF MAY 14, 1880.

PRUITT *v.* SKEENS.

A homestead settler who fails to make application for the right of entry within the period provided by the act of May 14, 1880, is not thereafter protected as against the claim of another who has complied with the law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 13, 1891.

The record in the appeal of Daniel A. Skeens from your office decision of November 29, 1889, discloses the following facts:

September 20, 1886, Skeens made homestead entry for the E. ½ of the SE. ¼, the SW. ¼ of the SE. ¼, and the SE. ¼ of the SW. ¼, Sec. 20, T. 26 N., R. 15 W., Springfield, Missouri.

January 2, 1887, Pruitt filed an affidavit in the nature of a contest against said entry, alleging want of settlement and cultivation by Skeen, and that affiant

resides on said tract and has resided thereon since the 29th day of March, 1886, and has an improvement thereon, consisting of a dwelling house, and about seven acres in cultivation, and that he resided on said land at the time of the entry by said Skeens, and that he has never had the benefit of the homestead law.

Notice issued and the hearing was had March 23, 1887.

The evidence consists mainly of the depositions of the two claimants

That of Pruitt is to the effect, that he settled on the land on the 29th or 30th of March, 1886, and "at that time" made application to "homestead" it; that by reason of a wrong description of the section his application was rejected by the local officers, and that he did not receive notice of such rejection until June of the same year, although the date of the rejection was May 21; that on the 4th day of September following he again made application for homestead entry, correctly describing the land. This last application did not reach the local office until September 21 (it having been made before some other officer), when it was rejected, because of the homestead entry of Skeens, which was made September 20, the day before Pruitt's corrected application reached the land office. His excuse for delaying to make his corrected application is as follows:

The reason I did not make immediate application for the right numbers upon receipt of first rejection was, because I could not spare the money. I received, from the Land Office, the money sent, but could not at once spare it.

It is not disputed that Pruitt had resided on the land ever since his settlement, and that both claimants were residing on it at date of hearing. Skeens himself established his residence thereon the last of February or first of March, 1887.

Skeens in his deposition states, that he went to the Springfield land office, with a view of homesteading the land, in February, 1886; that he found "some confusion about the numbers, and went back to ascertain the correct description," and "got the surveyor and had the land run out;" that in March "I learned that Pruitt had homesteaded the land, and I did nothing further until September following, when . . . I came to the land office and learned it was vacant," when he made his aforesaid entry.

He further says, that he made a proposition to pay Pruitt for the material in his cabin, but that he (Pruitt) afterwards refused to give possession until he was compelled; that he then built a house and moved into it the 23d day of February; that afterwards "Pruitt came to me and proposed to arbitrate the amount he should receive for his improvements," which he, Skeens, declined to do.

These are all the material facts, and they are practically undisputed.

Pruitt's improvements consist of a "one room log cabin," a couple of acres cleared and a crop raised. The size and character of house built by Skeens are not given in the evidence.

On these facts the register and receiver recommended the cancellation of Skeens' entry, and by your said office decision their judgment is affirmed.

I can not concur in your judgment. The excuse offered by Pruitt for his laches in filing a correct application can not be accepted without doing violence to the rulings of this Department. If he did not wish to spare at once the money required to make his entry, and preferred to wait until he could do so more conveniently, he must wait at his own hazard. Even should it appear that he did not have the money and could not obtain it, this Department would not be authorized on that account to withhold the land from entry by another more fortunately circumstanced. When his first application was rejected, the money paid for filing the same was returned to him, and he used it for some other purpose, and when more than three months thereafter Skeens, finding the land vacant, made entry thereof, he asks this Department to set aside his entry and grant him permission to do now what he failed to do when he had the means at hand, and what every consideration of prudence should have prompted him to do at once.

The position assumed in your decision—namely, that because the notice to Pruitt of the rejection of his first application did not advise him of his right of appeal, it was therefore an "illegal notice," is, in

my judgment, untenable. Pruitt is not asking to be relieved from a failure to *appeal* in time, but from a failure to make a timely application to *enter* the land, and he can not by any rule of law or practice plead want of notice of his right to do something he is not attempting to do, and which could not avail him if he should attempt it, for his first application was properly rejected, and an appeal therefrom could be of no avail.

Under the act of May 14, 1880 (21 Stat., 140), a settler is allowed three months from date of settlement (same as pre-emptor) in which to file his application to make homestead entry. During that time no one can deprive him of his right. If, however, he should fail to make entry within the prescribed time, his settlement and occupancy will no longer protect him.

According to Pruitt's own statement, he received notice of the rejection of his first application "in June." The three months preference right of entry allowed him, by reason of his settlement, expired September 1. It is a well settled rule of law that the evidence of an interested party must be taken most strongly against him. Applying this construction, the statement of Pruitt that he did not receive notice "until June" must be construed to mean the first day of June. His application to enter was not made out until September 4, and did not reach the local office until the 21st of the same month.

Skeens had made his entry on the 20th.

I find nothing in the record sustaining the conclusion of the register and receiver, that "Skeens seems to have been guilty of sharp practice whereby he expected to become possessed of Pruitt's claim and improvements."

It is true, he knew that Pruitt was a settler on the land at the time he Skeens, made his entry, but Pruitt not having applied to enter within three months after notice of the rejection of his first application, the law raises the presumption that he did not design to enter. And, if it should be shown in evidence that Skeens knew that Pruitt meant to enter the land, this fact, of itself, would be no bar to Skeen's entry, for Pruitt not having made his entry within the time prescribed by the statute, the land was subject to the application of the next qualified entryman.

Had it been shown that by some trick, deception, or other fraudulent practice, Skeens had overreached Pruitt, or had taken advantage of facts or information obtained from him through any fiduciary, or other confidential relations existing between them, as in the case of Newbaur *v.* Bush (12 L. D., 533), the case would have presented a very different aspect, and would call for the interposition of this Department to prevent the consummation of a wrong and the triumph of fraud over right and justice.

No such charge can be laid to Skeens. He was the first to attempt to make entry of the land, and had it surveyed for that purpose, and

then learned that Pruitt had entered or applied to enter it. He thereupon steps aside and waits until Pruitt has forfeited his rights by his laches and then makes entry.

The fact that he had not established a residence or improved the land at date of contest is immaterial, for he is allowed six months after entry to do this, and less than four months had expired at date of contest.

The entry of Skeens will be allowed to remain intact subject to final proof.

The decision of your office is reversed.

REPAYMENT—DESERT LAND ENTRY.

HENRY L. DAVIS.

There is no authority for repayment of the excess over one dollar and twenty-five cents per acre, paid on a desert entry within railroad limits, made under the act of 1877, though the land was held at single minimum at the date of the initial entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 13, 1891.

I have considered the appeal of Henry L. Davis from your decision of April 24, 1890, declining to recommend the repayment of one dollar and twenty-five cents per acre on desert land entry No. 31, final certificate No. 12, on the SW. ¼ of Sec. 4, T. 44 N., R. 4 W., M. D. M., Shasta, California.

It appears that he made entry of said land on January 15, 1886, under the act of March 3, 1877 (19 Stat., 377), at the rate of one dollar and twenty-five cents per acre, and on making final proof he was required to pay double minimum price.

The land is within the primary limits of the grant to the California and Oregon Railroad Company. The map of the constructed line of said road, opposite the land, was certified by the president and chief engineer of the company, November 15, 1887, and received at the General Land Office November 12, 1889. The road was definitely located August 5, 1871.

The act of March 3, 1853 (10 Stat., 244), fixing the price of public lands within railroad limits at two dollars and fifty cents per acre, was not repealed by the desert land act (*supra*), which fixed the price of desert land at one dollar and twenty-five cents per acre; so that the price of desert lands within railroad limits is two dollars and fiffty cents. Annie Knaggs (9 L. D., 49).

On August 13, 1889 (9 L. D., 259), I concurred in your suggestion that all original entries (desert) made prior to the issuance of the circular of June 27, 1887 (5 L. D., 708), should be adjudicated according

to the regulations then existing; but it was not intended in that statement, as appellant insists, to direct that desert lands within railroad limits, entered before the promulgation of said circular, should be paid for at the minimum price.

In the case of Annie Knaggs (*supra*), after the entry (desert) was made, the land was increased to double minimum price, and repayment of the excess was refused.

There is no existing law which authorizes the repayment in this case, and the same is accordingly refused.

The decision appealed from is affirmed.

FINAL PROOF—SUSPENDED SURVEY.

ALBERT H. HOOPER.

Final proof should not be accepted while the survey of the township, in which the land is situated, is suspended for investigation.

During such order of suspension, a temporary absence from the land, after due compliance with law in the matter of residence and cultivation, will not affect the right of the homesteader.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 15, 1891.

The appeal of Albert H. Hooper, from the decision of your office, dated January 18, 1890, denying his application to make final proof on his homestead for lots 2 and 3, SE. ¼ of NW. ¼, and SW. ¼ of NE. ¼, Sec. 6, T. 15 N., R. 1 E., Humboldt, California, has been considered.

It appears that Hooper made entry of the tracts above described July 14, 1884, that subsequently and after the expiration of the five years required for settlement and cultivation, he applied to the local officers to make final proof, but said officers declined to receive said proof, on the ground that the survey of the township in connection with several others in that vicinity, had been withdrawn or suspended by order of your office.

Hooper then appealed to your office for an order directing the local officers to accept the proof in his case.

Under date of January 18, 1890, your office affirmed the action of the local officers, whereupon Hooper appeals.

In an examination of this case, it appears that the records show that said township 15 north, range 1 east, was surveyed by Charles Holcomb, under a contract dated June 5, 1882, yet it appears by an affidavit of Holcomb dated March 26, 1887, that he never had a surveying contract with the government and therefore said contract in his name must necessarily be fraudulent.

Under these circumstances it was not thought improbable that surveys, in which the contracts had been procured in this manner, would

not be properly executed, and therefore the surveys were suspended until an investigation could be made to determine their correctness.

The appellant claims that as the north boundary of his homestead is also the north line of the township or third standard parallel of which there is no question about the survey, and that the west line of section 6, in which his entry is situated, is the Humboldt Meridian line between ranges 1 east and 1 west, which has never been suspended, and furthermore that all of the lands in said section have been entered and that one hundred and sixty acres of the same lying south of and contiguous to his homestead was patenteed to him October 18, 1889, under the timber act of June 3, 1878, (20 Stat., 89) that under these circumstances, even should it be found necessary to resurvey the sectional lines of said township, it would not materially affect his entry, and he should therefore be allowed to make his final proof.

Appellant further states that he is sixty years of age, and desires to visit friends and relatives in other portions of the United States, but under the present situation he is advised, to absent himself from his claim might endanger his homestead; furthermore he believes that the foregoing facts in his case bring him within the ruling laid down in the case of Elisha B. Cravens (5 L. D., 540), and therefore asks that the local officers be instructed to receive his proof.

The case of Hooper is not a parallel case with the one above cited. In the Craven case the application to make proof, was allowed on the ground that the survey of the township had been examined by a skillful surveyor and on his report the suspension of said survey had been removed, while in the case under consideration the suspension of the survey still exists pending an examination in the field.

While it may be true, as Mr. Hooper alleges, that a resurvey, if found necessary to make one, may not materially change the present lines of survey bounding his homestead, yet in view of the fact that the excess or deficiency in a township is thrown in the north and west tier of sections, in both of which the entry in question is situated, it is probable that a resurvey would make a very considerable change in the lines.

I understand that the adjustment of said surveys will probably soon be taken up by your office and therefore, under the circumstances, I deem it inexpedient to allow proof to be taken, on entries embraced in the suspended surveys, until the proper examination and settlement of the question is made.

If Mr. Hooper has complied with the law in every respect as to residence and cultivation for five years from date of entry, I can see no reason why he should fear to leave the land to make a visit.

The action of your office in declining to allow said proof is affirmed.

ALABAMA LANDS—HOMESTEAD ENTRY.

JUSTICE *v.* STATE OF ALABAMA.

A settlement on Alabama land prior to the date when such land is reported as valuable for coal, and the subsequent entry thereof, prior to the act of March 3, 1883, both made when the settler was disqualified to enter, will not operate to except such land from the reservation provided in said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 15, 1891.

The case of Charles Justice *v.* The State of Alabama is here on appeal of the former from your office decision of June 30, 1890, denying his application to make additional homestead entry, under the act of March 2, 1889 (25 Stat., 854), for the SE. ¼ of the SW. ¼ of Sec. 8, T. 18 S., R. 5 W., Montgomery, Alabama.

From the record it appears that on February 5, 1870, Justice made homestead entry for the N. ½ and the SW. ¼ of said quarter section, and received patent therefor March 10, 1884.

March 7, 1881, he was allowed to make adjoining farm entry for the remaining quarter-quarter section, which is the land in question.

He offered proof on this last entry October 27, 1883, which was rejected because he had exhausted his homestead right by his first entry. He never appealed from this rejection, and the entry was canceled August 16, 1888, and on February 28, 1889, the land was selected as school land by the State of Alabama.

February 27, 1879, two years prior to the adjoining farm entry of Justice, the tract was reported as "valuable for coal" by a special agent of your office, and so remains on the records, never since having been offered at public sale.

This was the status of the land when your said decision was rendered, denying his application for relief under the act of March 2, 1889, *supra.*

Since your said decision was rendered, to wit, on May 18, 1891, the State of Alabama relinquished its school selection, so far as this tract is concerned.

The judgment of your office is based upon the conflict between the claim of the petitioner and the school selection by the State, no consideration being given to the mineral character of the land, as reported in 1879.

The action of the State of Alabama in relinquishing its claim to the land leaves for consideration by this Department the question as to whether this land was subject to additional homestead entry by Justice March 2, 1889, the date of the passage of the act granting the right to make additional homestead entry to settlers who had theretofore entered less than one hundred and sixty acres.

The land having been reported valuable for coal in 1879, and never having been offered at public sale, was not subject to agricultural entry in 1881 (date of Justice's entry), and unless the confirmatory statute of March 3, 1883 (22 Stat., 487), excepted it from such mineral reservation, the entry can not be allowed.

That statute is as follows:

> That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however*, That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further*, That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

It will be seen that this statute confirms any "bona fide entry *under the provisions of the homestead law.*"

The entry of Justice was not made under any of the "provisions of the homestead law," for at that time there was no provision allowing a second homestead entry, or an additional entry, except in cases where the original entry had been restricted by existing law to eighty acres. (Act of March 3, 1879.)

But the claimant insists that this land came within the remedy of the said act (22 Stat., 487), because, as shown by his petition and affidavit, he had been for a long time prior to 1879 in the occupancy and control of the land embraced therein, and was in such occupancy at the time of the passage of the act of March 3, 1883, and in support of this petition he cites the case of E. S. Newman, 8 L. D., 448.

In that case it was held, in substance, that although there may have been no entry of record at the time of the passage of the act of March 3, 1883, yet, in virtue of the act of May 14, 1880, providing for the initiation of a homestead claim by settlement, such settlement equally with an entry of record "is within the intent of the act" (March 3, 1883).

The difference between the case of Newman and the one at bar is, that Newman at the time of making his settlement was a qualified entryman; whereas Justice was not, he having exhausted his homestead rights by his first entry. What avail could a settlement be to one who, under the law existing at the time of settlement, had exhausted his right to make entry? The question requires no answer.

His settlement, then, prior to March 3, 1879, the date the land was reported valuable for coal, and his subsequent entry of record, prior to the confirmatory act of March 3, 1883, both having been made when he was disqualified to enter, could confer upon him no rights, and could neither except it from reservation as coal land, nor bring it within the remedy of the act of 1883, *supra.*

By the act of March 2, 1889, he is allowed to make an additional entry of forty acres, his first entry having been only for one hundred and twenty acres; but such additional entry must be made upon land open to settlement and entry.

The land in question is not such land, it having been reported valuable for coal, and not since offered at public sale.

His petition must be denied.

Your decision is accordingly affirmed.

CITIZENSHIP—NATURALIZATION—PRE-EMPTION—ACT OF MARCH 3, 1891.

GEORGE DE SHANE ET AL.

A declaration of intention to become a citizen filed by the father, during the minority of the son, does not confer citizenship upon the son, or qualify him in that respect to make pre-emption entry.

A pre-emption entry made by one not shown to be qualified in the matter of citizenship, is confirmed by section 7, act of March 3, 1891, if prior to March 1, 1888, the land is sold to a bona fide purchaser, and there was no adverse claim at date of said entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 7, and March 27, 1891.

I have considered the appeal of J. W. Hockaday, from your decision holding for cancellation the pre-emption cash entry of George De Shane for the SW. ¼ of Sec. 32, T. 29 S., R. 27 W., Garden City, Kansas.

Hockaday is transferee and present owner of the land.

The record shows that George De Shane filed declaratory statement for the land June 14, alleging settlement thereon June 6, 1884, and submitted final proof before the register on December 10, 1884. In this proof he and his witnesses testify that he was twenty-one years of age, and that he was a naturalized citizen of the United States; following this statement is the qualification that he was seven years old when he came to the United States, and that his father is a naturalized citizen of the United States. The proof shows continuous residence from June 20, 1884, a sod house ten by twelve feet with door and window, and five acres broken, value of improvements $75.

This entry was suspended by your office for the reason that the improvements were not conclusive of good faith and further proof showing full compliance with the law in good faith was called for, also a copy of the father's citizen papers.

The transferee was given an opportunity to furnish said evidence, but he states that he is unable to furnish additional proof to supply any defect in the original proof of said entryman; he, however, filed a certified copy of the declaration of intention to become a citizen, by Paul De Shane, father of George De Shane, made March 2, 1874.

There is no evidence that the father became a full citizen prior to the date that said entryman became twenty-one years of age. Unless it can be shown by record or otherwise, that the father did become a full citizen prior to the date of the majority of his son, or the entryman qualifies himself in the matter of citizenship, the entry must be canceled as illegal.

Hockaday purchased the land on January 6, 1888, for the sum of $400. He swears that he has forty acres in cultivation, that he purchased the land in good faith without any knowledge of any defect in the proof, and this defect was not pointed out by your office until July 6, 1888.

The proof shows a substantial compliance with the law in the matter of residence and improvements, and during the six years since the entry, no allegation to the contrary has been made. In my opinion, the failure to submit further evidence in support of the entry does not justify the cancellation of the same, and should the proper evidence of citizenship be furnished, patent should issue. The transferee should be allowed a reasonable time to furnish said evidence.

Your decision is modified accordingly.

THE SAME, ON REVIEW.

I am in receipt of a letter from C. W. Holcomb, Esq., attorney for J. W. Hockaday, transferee and present owner of the SW. ¼ of section 32, T. 29 S., R. 27 W., Garden City, Kansas, embraced in the cash entry of George De Shane, in which he states that it is impossible to furnish any additional evidence as to the citizenship of said De Shane, and he invokes the equitable consideration of the Department in the case.

In departmental decision of January 7, 1891, further evidence of citizenship was called for, said evidence to be either record or secondary. This requirement was in accordance with the long established practice of the Land Department and was deemed essential for the protection of the government against illegal entries, and in the absence of legislation, I do not think this entry should be approved for patent without some additional evidence on the point mentioned.

Counsel asserts that the land was purchased in good faith prior to March 1, 1888. If such is the fact, and there was no adverse claim at the date of entry, the same is confirmed by the act of March 3, 1891, and patent should issue for the land.

The letter of counsel is herewith transmitted with instructions to proceed in the case, as the facts may justify.

IRREGULAR ENTRY—CONTEST—PRE-EMPTION-FILING.

THOMAS ET AL. *v.* SPENCE.

An entry improperly allowed for land embraced within an existing swamp selection, may be allowed to stand, on the cancellation of said selection, if such action does not defeat or impair the right of an adverse claimant.

A contestant will not be heard to question the validity of an entry thus allowed, on the ground of its alleged irregularity, unless he shows that the allowance of said entry is in violation of his prior right or equity.

An application to contest a pre-emption filing does not confer any right or equity upon the contestant in the event that such filing is subsequently canceled.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 19, 1891.

This appeal involves the right to the NW. ¼ of the SW. ¼ of Sec. 29 and the NE. ¼ of the SE. ¼ of Sec. 30, T. 63 N., R. 11 W., Duluth, Minnesota.

These lands were selected by the State of Minnesota as swamp and overflowed lands, July 20, 1885—the day the township plat was filed in the local office—but the claim of the State was finally rejected as to the NE. ¼ of the SE. ¼ of section 30, March 2, 1889, upon the contest of Angus McDonald, filed May 17, 1886, and as to the NW. ¼ of the SW. ¼ of section 29, on April 2, 1889.

Prior to the final action of the Department rejecting the claim of the State, Margaret A. Spence was allowed to make soldier's additional homestead entry of both of said tracts—to wit, August 17, 1887.

Morris Thomas, H. Spencer Moody, Daniel W. Smith, and Frank M. Thomas, severally, applied to contest this entry, all of said contests alleging, substantially, the same ground—to wit: that at the date of the entry, the land was embraced in the State selection, and that it was allowed in total disregard of the subsisting rights of others.

It also appears from the record that on April 28, 1887, prior to the entry of Spence, Fred. F. Huntress filed an application to contest the claim of Angus McDonald, who had filed a pre-emption declaratory statement for the said NE. ¼ of the SE. ¼ of Sec. 30.

Your office, by the decision of November 7, 1889, rejected all of said contests, and held that, although the entry of Spence was irregularly allowed prior to the final cancellation of the State's selection, yet the bar having been removed there is no reason why it should not remain intact.

The application of Huntress was disposed of upon the ground that the Secretary, in the decision of the Department of February, 1889, in the case of Hyde and McDonald *v.* Eaton, had held that Huntress was not entitled to the preference right of entry as a successful contestant, and his application was so considered and treated by your office, and was denied. From this decision the several applicants appealed.

It is shown by the record that the tracts in controversy were in reservation at the date the homestead entry of Spence was allowed, having been selected by the State of Minnesota as swamp and overflowed lands, and the claim of the State to said tracts was then pending before the Department on appeal. Said entry was therefore improperly allowed; but having been allowed and placed of record, it may remain intact after the bar of the reservation has been removed, unless the allowance of such entry will affect or impair the rights of others. Schrotberger *v.* Arnold, 6. L. D., 425; Wright *v.* Maher, Ib., 758; Richard Griffin, 11 L. D., 231.

Where an entry was allowed pending an appeal from the rejection of an indemnity selection by a railroad company, it was allowed to stand to await the final action of the Department upon said selection. Northern Pacific Railroad Company *v.* Halvorson, 10 L. D., 15; see also Russell *v.* Gerold, Ib., 18.

After the cancellation of the State's selection, the question, as to the validity of an entry made while the land was so appropriated, is one solely between the government and the entryman, and the entry may be allowed to remain intact, subject to future compliance with the law, unless the allowance of such entry would be in derogation of the rights of adverse claimants. A contestant will not be heard to question the validity of such entry upon the ground that it was invalid when allowed, unless he shows that the allowance of the entry would be in violation of his rights, or would defeat a prior right or equity. Meyers *v.* Smith, 3 L. D., 526.

It is therefore necessary to examine the claims of the several applicants to determine what rights, if any, to the tracts in controversy subsisted at the date of the entry.

As to the claim of Huntress, it appears that Angus McDonald filed a contest against the claim of the State to the NE. ¼ of the SE. ¼ of Sec. 30, May 17, 1886, and upon the testimony taken at a hearing had thereon the Commissioner, on March 11, 1887, canceled said selection, which was affirmed by the Department on March 2, 1889, on the appeal of the State.

On March 11, 1887, McDonald filed pre-emption declaratory statement for said tract, alleging settlement August 20, 1884, and on May 5, 1887, Huntress, a claimant under the State, applied to contest said filing, alleging that it was made for speculative purposes. On December 5, 1888, McDonald relinquished said filing, which Huntress contends was by reason of his contest, and it is upon this action that Huntress bases his claim to a preferred right of entry.

Conceding that the cancellation of the State's selection was the result of the contest of McDonald, and that by reason thereof he was entitled to the preference right to enter said tract, or that he had the prior claim to the land after cancellation by virtue of his settlement and filing, I do not see how that would have secured to Huntress a preference right by reason of his contest against McDonald.

The pre-emption filing of McDonald, even if it had been legal, was not in the way of Huntress, w ho was as much entitled to place a filing of record as McDonald. The rule is well settled by numerous decisions of the Department that a pre-emption filing is not ordinarily subject to contest prior to the offering of final proof, and an application to contest a mere filing does not confer any right or equity to the land after such filing has been canceled. Sprague *v.* Robinson, 1 L. D., 469; Percival *v.* Doheney, 4 L. D., 134; Bailey *v.* Townsend, 5 L. D., 176; Peterson *v.* Ward, 9 L. D., 92.

It must follow that the application of Huntress to contest the filing of McDonald conferred upon him no right or claim to the tract that was defeated or in any wise impaired by the allowance of said entry.

On October 12, 1888, Frank P. Harrington applied to contest the claim of the State to said NE. ¼ of the SE. ¼ of Sec. 30, and to enter said tract. This application was refused by the local officers, and their action was sustained by the Commissioner of the General Land Office, December 14, 1888. No appeal was taken from this decision, and Harrington is not a party to this record.

On November 19, 1888, Morris Thomas filed affidavit of contest against the entry of Margaret Spence, alleging (1) that at the time said entry was allowed, the land was embraced in a selection by the State of Minnesota, under the swamp land grant; and (2) that with respect to a portion of said land it was allowed in total disregard of other subsisting rights.

No prior right or claim to the land is alleged by Thomas, or shown by the record, and if said entry was allowed without regard to the subsisting rights of others, Thomas could not take exception thereto, without showing that his own right or claim had been disregarded. His contest is therefore controlled by the principle heretofore stated—to wit: that when an entry has been improperly or illegally allowed because of a prior entry or other appropriation of the land, it may be allowed to stand, after the removal of such prior entry or appropriation, if it will not defeat or affect subsisting rights.

The same may be said of the contests of Moody, Smith, and Frank L. Thomas, none of whom have alleged or shown any prior right or claim to the land, and who are contesting upon substantially the same grounds as those alleged in the contest of Morris Thomas.

The decision of your office, sustaining the entry of Spence, is affirmed.

CONTEST—JOINT OPINION OF LOCAL OFFICERS.

ANDERSON *v.* MORRISON.

If, by inadvertence, either the register or receiver should fail to sign an opinion that is really the opinion of both, such failure does not warrant the reversal of the judgment; and in such case the name omitted, at any time before the record is transmitted, may be subscribed to such opinion *nunc pro tunc*.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 20, 1891.

Ezra W. Morrison made homestead entry No. 4250, on March 19, 1886, upon the SW. ¼ of Sec. 12, T. 26 S., R. 25 E., Visalia, California.

On August 11, 1887, James E. Anderson filed his affidavit of contest against the entry, charging abandonment.

Hearing was duly had, and the register and receiver on January 27, 1888, dismissed the contest, and on appeal you, by your decision of January 6, 1890, affirmed that judgment.

Contestant again appeals.

The facts are substantially set forth in the decision appealed from. Claimant did not testify; three witnesses gave testimony for contestant; the evidence of two of them is of a negative character, and not sufficient to warrant the cancellation of the entry; that of the third is favorable to claimant. The allegation of abandonment was not sustained, and the contest was properly dismissed. The testimony, as a whole, demonstrates the wisdom and importance of observing the initiatory steps required in Rule 3 of Practice, that "the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses." The local officers ignored this rule.

It is insisted that the opinion of the local office was changed and mutilated after the appeal therefrom was taken. The appeal assigned, as one of the errors, the alleged fact that the register alone signed the opinion.

When the appeal reached your office, the names of both register and receiver were found duly subscribed thereto.

It is again insisted that, when the appeal was first taken, the register's name alone was subscribed to the opinion, and that if the receiver's name now appears thereon, it was placed there without the knowledge or consent of contestant or his attorney, and without notice. In support of this statement, the affidavits of contestant and his attorney (E. T. Cooper) are filed in the record.

The judgment against an unsuccessful litigant is always supposed to be "without his consent."

Rule of Practice 51 directs the register and receiver upon the termination of a contest to render a joint opinion in the case, and Rule 48 provides that in case of 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 not be disturbed by the Commissioner, except in four cases there stated, the third being "In event of disagreeing decisions by the local officers."

It is clearly the duty of both register and receiver to render an opinion; if they agree, it is a "joint opinion," and should be signed by both; if they disagree, there should be separate opinions, when you will determine and pass upon the merits of the case from the record before you. If, by inadvertence, either the register or receiver should fail to sign an opinion that was really the opinion of both, it would be no sufficient reason for reversing the judgment, and in such case the name omitted might at any time, before the record is transmitted to your office, be subscribed to the opinion, *nunc pro tunc.*

The judgment appealed from is affirmed.

ORDER OF CANCELLATION—APPLICATION.

CODER *v.* LOTRIDGE.

The cancellation of an entry by order of the General Land Office takes effect as of the date when said order is made; and the fact that such order is not formally executed in the local office, will not operate to defeat an application to enter filed subsequently to the date of said order.

An application to enter is equivalent to an actual entry so far as the rights of the applicant are concerned, and while pending reserves the land from any other disposition.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 17, 1891.

I have considered the case of Samuel N. Coder *v.* Jacob Lotridge, upon the appeal of the latter from your office decision reversing the judgment of the register and receiver, and holding the entry of Coder intact and the filing of Lotridge for cancellation, for the NW. ¼ of Sec. 9, T. 7 S., R. 22 W., Kirwin land district, Kansas.

The record shows that on the 29th of June, 1878, Judson W. Morehouse made timber culture entry for the land in question, which was canceled by decision of your office on the 19th of September, 1882, for non compliance with the law.

The land remaining vacant, and unimproved until the 5th of January, 1884, Samuel N. Coder, on that date, applied to make timber culture entry for the same, but was informed by the local officers that the entry of Morehouse was still in force, and a bar to his entry. He then instituted contest against the Morehouse entry, which was decided in his favor.

This decision, and the papers in the case, including Coder's affidavit and application to make entry for the land, were transmitted to your office by the register on the 11th of August, 1884, and on the 30th of September, 1886, your office rendered decision, dismissing Coder's con-

test, on the ground that previous to its initiation the entry of Morehouse had been canceled, and consequently there was nothing for him to contest. Upon appeal by Coder to this Department, your office decision was affirmed on the 5th of September, 1888.

Upon receiving information of said decision of September 30, 1886, Coder not only appealed therefrom, but he also made a new application to make entry for the land. This he was permitted to do, on the 5th of October, 1886. On the same day, Lotridge, the plaintiff herein, filed declaratory statement for the land, alleging settlement July 27, of that year.

In March, 1887, Lotridge published notice that on the 25th of April, following, he would apply to make final proof. He did so, Coder appearing and protesting, claiming a superior right under his application of 1884.

After hearing the contest, the register and receiver, on the 18th of May, 1887, decided in favor of Lotridge, holding that Coder, by his entry of 1886, had waived his right under his application of 1884, and that Lotridge having made settlement prior to Coder's application of 1886, had the better right.

From that judgment Coder appealed to your office, and on the 23rd of September, 1889, you gave judgment reversing the decision appealed from, holding Coder's entry intact, and Lotridge's proof for rejection and his filing for cancellation.

The appeal under consideration is by Lotridge from your decision.

The fact that your office letter of September 19, 1882, which directed the cancellation of the entry of Morehouse, was not received at the local office until September 20, 1886, and that the entry was not canceled in that office until October 4, 1886, as certified to by the register, seems to have occasioned all the trouble and confusion in this case. No explanation is given for the lapse of four years between the rendering of the decision by your office, and the entering of it in the local office. While this circumstance has occasioned expense and inconvenience to parties and litigants, it can not change the rule, that the cancellation of an entry by order of the Commissioner of the General Land Office takes effect as of the date when the decision is made. Anderson *v.* Northern Pacific R. R. Co. *et al* (7 L. D., 163); Dahlstrom *v.* St. Paul, Minneapolis and Manitoba Ry. Co. (12 L. D., 59).

Had the entry of Coder been allowed on the 5th of January, 1884, when he sought to make it, no question of priority as between him and Lotridge could have been raised. The fact that his application was rejected by the register and receiver, cannot deprive him of his rights under it, as it was held in Goodale *v.* Olney (12 L. D. 324), that an application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending, reserves the land from any other disposition.

Having given the facts with sufficient fullness, and stated the law

applicable to the case, I have only to add, that the decision appealed from is affirmed.

I deem it proper to state that from the papers transmitted by you, I learn that during the pendency of this appeal, a contest has been initiated by Lotridge against Coder's entry, alleging non compliance with the timber culture law, and that the register and receiver have heard the same, and have found in favor of Lotridge and against Coder. Nothing in relation to that subject is before me for consideration or decision, and I therefore content myself with calling your attention to such papers in the case.

HOMESTEAD ENTRY—RESIDENCE—COMMUTATION.

SAMUEL J. HAYNES.

One who relinquishes a portion of the land covered by his pre-emption filing and makes homestead entry of the remainder, together with another tract, is not entitled to claim residence on the latter except from the date of his entry, in the absence of proof showing actual residence thereon prior to that date.

A homestead entry of lands thus taken may be commuted in its entirety after the expiration of the period of residence required in such cases; but final entry under section 2291, R. S., can not be allowed until the entryman can show five years residence on the entire tract.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 17, 1891.

This appeal is filed by Samuel J. Haynes from the decision of your office of March 11, 1890, affirming the action of the local officers requiring said Haynes to pay the sum of $400 on his homestead entry, made February 1, 1887, for the N. ½ of the SE. ¼ and the S. ½ of the NE. ¼ of Sec. 20, T. 15 N., R. 55 W., Sidney, Nebraska, commuted to cash January 31, 1890.

The record presents the following facts:

Haynes filed pre-emption declaratory statement for the SE. ¼ of said section 20, June 30, 1884, and established his residence upon the tract immediately; that after occupying said tract for more than two years, his house and improvements being on the north half, he found that a homestead entry had been made on the south half of said quarter, which conflicted with his pre-emption filing, whereupon he abandoned said claim under his pre-emption filing, and made homestead entry February 1, 1887, of the N. ½ of the SE. ¼ (which had formerly been embraced in his pre-emption filing) and the S. ½ of the NE. ¼ of said section, and made final proof in support of said claim January 30, 1890, in which he stated that he first made settlement upon the tract in 1884.

When he appeared at the local office to make his proof, the local officers, having knowledge of the facts above stated, informed him that he could make final homestead proof on the eighty acres in the SE. ¼ that had been embraced in his pre-emption filing, or commutation

proof on the one hundred and sixty acres, or wait until he had completed his five years' residence on the entire tract, and then make final homestead proof for the one hundred and sixty acres. They state that he said that he would not give up the eighty acres, and would rather pay the $400 to commute his entry, and thereupon he made his final proof, and his entry was allowed upon the payment of $400, the cash price of said land.

He appealed from said decision, contending that he was entitled to make entry upon said proof for the entire one hundred and sixty acres, simply upon payment of the fees and commissions, and was not bound to pay government price therefor, as required in making commutation cash entry. He therefore asked that the de cision of the local officers, requiring him to pay $400, be reversed, and that re payment of said sum be allowed. With said appeal he submitted a statement of fact substantially in accordance with the foregoing findings.

You dismissed said appeal, placing your decision mainly upon the ground that he made no objection to paying the purchase money at the time of making his final proof and did not appeal from the decision of the local officers requiring said payment; that by commuting his entry, he acquiesced in the decision of the local officers.

Subsequently, he filed a motion for review of your decision, stating that it was rendered on a misapprehension of the facts, in this, that your office did not decide the question as to whether he was entitled to make final homestead entry without payment for the land upon the residence and cultivation shown by his proof, which was the only question presented by his appeal, and that his appeal was in the nature of a protest against said action. He further stated that the money was paid under protest and under circumstances that led him to believe that it would be returned to him, if the decision of the local officers should be reversed.

You refused to review your decision, and he appealed to the Department, alleging error, substantially, upon the same grounds as were set forth in his motion for review, to wit: that the issue made by his appeal was whether, under the facts shown by his final proof, he was entitled to make final homestead entry of the land upon payment of fees and commissions under section 2291 of the Revised Statutes, or whether he could only make entry upon such proof under section 2301.

Conceding that this was the true issue presented by his appeal, and that he has lost no right by making commutation entry, instead of appealing from the decision of the local officers, I see no error in their decision refusing to allow any but commutation cash entry to be made under said proof.

There is nothing in the record showing that he settled upon the S. ½ of the NE. ¼ of said section prior to February 1, 1887, except the presumption arising in all cases that settlement extends to every part of the tract embraced in the entry, and as he was a settler on the north half of the southeast quarter of the section from 1884, he contends that

his settlement and residence as to the entire tract embraced in his homestead entry should be considered as having commenced at that date. But it is shown from his own statement, which is a part of the record, that up to February 1, 1887, his residence and settlement, both actual and presumptive, were confined to the technical quarter section embraced in his preemption filing, and as there was no proof of actual settlement upon the S. ½ of the NE. ¼ of the section, his settlement as to that part of the tract embraced in his homestead entry did not commence until it was actually entered.

At the date when he offered to make final proof, he was entitled to make final homestead entry of the eighty acres in the SE. ¼ of the section by relinquishing the other eighty acres and paying the fees and commissions, but he could not at that date enter the entire tract, except by making commutation cash entry under section 2301 of the Revised Statutes, for the reason that the proof does not show that he had settled upon it for the period of five years, and there was no error in requiring him to pay the commutation cash price as prerequisite to entry.

Your decision is affirmed.

PRACTICE—REVIEW—APPEAL—FINAL PROOF—PRE-EMPTION.

BENNETT *v.* CRAVENS.

On a motion for review pending before the Commissioner it is within his discretion to waive the requirement of an affidavit, on the part of the applicant, that the motion is made in good faith and not for the purpose of delay.

The Commissioner of the General Land Office has no jurisdiction to consider a motion to dismiss an appeal taken from the decision of his office.

In computing the time allowed for appeal, the period covered by an intervening motion for review should be excluded.

A motion for review and rehearing based on alleged newly discovered evidence may be entertained though not filed within thirty days from notice of the decision.

Pre-emption final proof, satisfactory in all respects, but rejected on account of the suspension of the township plat, may be accepted, on the execution of new final affidavit, when such order of suspension is revoked.

One who enters upon public land for purposes of trade and business, and makes such use of said land, is not qualified to take the same under the pre-emption law.

The Department will consider testimony in relation to transactions subsequent to the submission of final proof, when the same tends to throw light on the intentions of the claimant prior to that date, but such evidence, in order to prevent consummation of title, must be clear and convincing.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 22, 1891.

I have considered the case of George Bennett *v.* Elisha B. Cravens involving the title to lots 1, 2, 3, 4 and 5, Sec. 9, T. 6 S., R. 39, Glenwood Springs, Colorado.

By judgment of May 13, 1889, your office reversed the register and receiver, rejected the claim of Cravens, held his declaratory statement for said land for cancellation and allowed the right of appeal. On June 14, 1889, he filed a motion for review of said decision which was not accompanied by an affidavit of good faith as required by rule 78 of the rules of practice.

In the exercise of your official discretion you waived the rule of practice in question, and considered said motion. The case was wholly within your jurisdiction, and it is not apparent that any injustice was the result of your action, or that said action was not within the limits of your discretionary power. Jolly Cobbler Lode (3 L. D., 321).

By your decision of August 10, 1889, you recalled office decision of May 13, 1889, and affirmed that of the register and receiver, dismissed the appeal of Bennett, and awarded the land to Cravens.

On September 23, 1889, the contestant filed a motion for a reconsideration, rehearing and review of said decision, based in part on what was alleged to be newly discovered evidence. On December 30, 1889, upon the consideration of said motion, it was denied.

January 11, 1890, Bennett by his local attorney took an appeal from the decisions of August 10, and September 30, 1889, and on February 18, 1890, Cravens' attorney filed a notice to dismiss said appeal. March 22, 1890, your office considered this motion and overruled the same. As an appeal had been taken from your decision you ceased to have jurisdiction over the subject matter and your further consideration thereof was unauthorized. Sapp *v.* Anderson (9 L. D., 165). The ground of said motion is, in substance, that the appeal was not filed in time, and in support thereof it is contended that the motion for a review and rehearing filed by Bennett, September 23, 1889, was a proceeding not recognized or authorized by the rules of practice, and that the time which elapsed between the filing of said motion, September 23, and the date of your decision December 30, 1889, could not be excluded in computing the time allowed for appeal.

I do not assent to this reasoning. The motion for the rehearing was predicated upon the ground of newly discovered evidence, hence your office could properly consider the same, although not filed within thirty days from date of decision. Sheldon *v.* Warren (9 L. D., 668), and Rule of Practice 77. This being the case, I do not consider it essential at this time, to discuss the point raised by counsel for Cravens, that the Commissioner has no authority to entertain a motion for a re-review.

The appeal of Bennett from the decision of August 10, 1889, was filed within the rule, excluding the time between September 23, and December 30, 1889, and the case should be disposed of upon its merits. So considering the case, I find that the record shows that the township plat was filed in the local office May 25, 1885, and Elisha B. Cravens filed pre-emption declaratory statement for lots 2, 3, 4 and 5, Sec. 9, T. 6 S., R. 89 W., May 26, 1885, alleging settlement May 15, 1884.

George Bennett filed pre-emption declaratory statement for lots 1, 2, 3 and 4, section 9, said township and range, June 15, 1885, alleging settlement thereon October 2, 1884.

John W. Dollison filed pre emption declaratory statement for lot 2, and other land in section 9, same township and range May 27, 1885, alleging settlement thereon May 1, 1885, and Charles Powell filed pre-emption declaratory statement for lots 2 and 3 and other land in section 9, said township and range, June 1, 1885, alleging settlement October 15, 1883. This filing was relinquished and canceled March 17, 1886. It will thus be seen that lots 2, 3 and 4, are in controversy.

On July 14, 1885, Cravens gave due notice by publication, of his intention to make final proof for the land claimed by him, before the register and receiver on August 29, 1885. During the period of publication of said notice, viz., on August 17, 1885, your office instructed the register and receiver to suspend all entries and disposal of public land in said township on account of alleged erroneous survey. This order was received by them on August 25, 1885.

On the day designated for submitting his final proof Cravens appeared at the local office with two of his advertised witnesses, Wm. Gristy and D. E. Baldwin, and submitted said proof, which was done in order to preserve any rights that Cravens might have in the premises. The payment for the land was tendered, also the fees for reducing the testimony to writing. The fees were accepted by the receiver, but the tender of the purchase money was declined, and the final proof rejected by the local officers on account of the instructions contained in your office letter of August 17, 1885. No other reason was assigned for rejecting the proof or declining to receive the purchase money.

The proof shows that Cravens was a duly qualified pre-emptor and had complied with the requirements of the law in the matter of residence and improvements, and so far as the record shows, the final entry should have been allowed had it not been for your said orders, or the existence of some adverse claim, which rendered necessary an investigation to determine the rights of the opposing parties.

The proof appears regular on its face. The register before whom it was taken, certifies that each witness was a person of respectability and that the testimony of each was read to him before being subscribed. He also certified that each question and answer in the claimant's testimony was read to him before being subscribed. At the hearing in the case testimony was introduced by the attorney for Bennett (who was the register at the time the proof was taken) to the effect that said proof was not taken in the regular way, that the witnesses were not sworn before the questions were asked. On this point, however, I think the preponderance of evidence shows that the proof was regularly taken, and it is but just to assume, in the absence of satisfactory evidence to the contrary, that the sworn officer of the government did his duty and that his certificates, made as such officer, were true.

It is contended that the proof of Cravens is illegal and void for the reason that it was taken at the time the order suspending entries in the township was in force.

By order from your office dated May 3, 1887, the plat of T. 6 S., R. 89 W., was ordered to be re-instated in the local office, and it was re-instated June 15, 1887.

On May 17, 1887, the local officers transmitted a petition by Cravens asking that a hearing be ordered between the various claimants to the lands with notice to all, and asking that the proofs submitted and on file in the local office be received without further publication of notice of intention to make proof.

In reply to the inquiry of local officers, your office on May 28, 1887, issued instructions, a portion of which were as follows:

> You state that on July 14, 1885, Elisha B. Cravens published his intention to make final proof as a pre-emptor on August 29, following, which being taken in pursuance thereof, entry was refused on account of the suspension in question. At the time of taking final proof several parties appeared to contest but all proceedings were stayed. You inquire if you shall call upon Cravens for new publication and proof and in this event will six months prior to date be required. Further, you state that several similar cases are now pending.
>
> You are advised that should it be the fact that the proof of a pre-emptor offered under circumstances described, be satisfactory to you in all regards, the fact that the township was temporarily withdrawn from disposition at date thereof, should not preclude its acceptance, the withdrawal being now revoked, upon the filing of the new pre-emption affidavit covering entry.

In my opinion these instructions were just and proper. As between the government and the claimant there is no reason why a further proof should be required, if the proof submitted is regular, and in conformity to the rules and regulations of the Department.

The parties to this record had filed their claims, and have been allowed full opportunity to maintain their rights; the status of the proof had in no way interfered with their rights.

At the time Cravens submitted his final proof, Bennett, Dollison and Powell appeared and filed objection to the same, but owing to the suspension of the township no hearing took place at that time, but under the instructions from your office dated May 28, 1887, a hearing was ordered between all parties in interest. Powell and Dollison made default, but Bennett appeared at the trial which extended over a period of nearly one year, during which time a vast amount of testimony was taken, much of it irrelevant, and most of it conflicting to an unusual degree.

The evidence clearly shows that the contestant Bennett, entered upon the land on October 2, 1884, and erected his saw mill thereon for the sole purpose of doing business, that of sawing lumber and selling the same. According to his own statement at the time he went upon the land, he had no intention of claiming the same under the pre-emption law for agricultural purposes. Should Cravens claim be rejected, Ben-

nett can not be regarded as a qualified pre-emptor, as he entered upon the land for business purposes only, and has used the the limited tract in his possession for that purpose. Fouts *v.* Thompson (6 L. D., 332) and (10 L. D., 649).

The evidence shows that Cravens was a qualified pre-emptor, that he settled on the land as alleged and up to the time of submitting his final proof, had complied with the requirements of the law as to residence and improvements.

It is alleged however, that this settlement was not made in good faith for his own use and benefit.

One witness for the contestant J. C. Brown, testified in substance that Cravens settled upon the land in dispute west of the township of Glenwood Springs at the instance of J. F. Clement, the surveyor who surveyed the township, for the benefit of one Whipple, who, was to pay him $500, for holding said land for a period of six months when he was to deliver up possession to Whipple, he was not however, to file upon or to make proof for the same. Brown also testified he was to hold land on the south of the townsite, on the same terms, for the same party. Both Brown and Cravens were at work at the time for Clement assisting him in surveying.

Whipple died soon after, and there is no evidence showing that he ever attempted to carry out the alleged agreement.

Brown, who admits his enmity against Clement, and who states that he had a difficulty with Cravens, but that he has "no personal ill-will against him," is not corroborated on this point by any other witness.

Cravens denies in the most emphatic manner the statement of Brown. Clement also denies most positively the testimony of Brown on this point.

Brown testifies that he held the land settled upon by him south of the town until some time in July, 1884, when he became satisfied that Clement and Cravens were not the kind of men he cared to be associated with, and he abandoned the claim. Notwithstanding this statement, the evidence shows that on June 21, 1884, Cravens filed his notice with the county recorder claiming such land upon which Brown had settled, in addition to his tract on the west of the town, and this filing seems to have been the result of a friendly understanding between the two. It is also shown that Clement and Brown were associated together in business for weeks after the time the latter asserts that the former was a man with whom he did not care to be associated. But subsequently a quarrel arose between them.

In your decision of August 10, 1889, the testimony of Charles Powell, a witness for Bennett, is discussed at length. Without repeating the argument, I will say that I concur in the conclusion, that said evidence goes far to establish the position that the settlement of Cravens could not have been in the interest of Whipple.

I have given careful consideration to the irreconcilable and unsatis-

factory testimony of Brown, Cravens and Clement, and have endeavored to give due weight to other testimony bearing directly or indidirectly on the question at issue between these parties. It is true that some incidents and facts considered separately, cast a suspicion upon the settlement of Cravens, that the same was not made for his own use and benefit. He swears that it was. To hold to the contrary, is to give controlling weight to suspicions aroused by testimony in relation to certain detached facts and transactions. But a settler's right to public land can not be denied on suspicion, and taking all the evidence into consideration, I am unable to reach the conclusion that the statements of the witness Brown should be taken as true as against the positive statement of Cravens and Clement. Cravens was evidently a man of intelligence. He was assisting the surveyor in surveying the town, and in that capacity he ascertained that there would be fractions on the west and south of the townsite. As an intelligent man he could not fail to be convinced that land immediately adjoining a growing town would soon become valuable, and there is nothing more reasonable than that he should strive to secure that land for his own benefit.

It appears that Whipple and Cooper who were alleged to be interested in the townsite and surrounding lands are dead, and much evidence was introduced for the purpose of showing that Cravens is seeking to enter the land for the benefit of Clement, and also that his counsel Taylor is interested in the entry inasmuch as Cravens is heavily in debt to him for money borrowed, and for professional services.

It is also shown that since the date of final proof August 29, 1885, Clement has at various times acted as agent for Cravens and has served and befriended him. Clement swears that he never had any interest in the land in question, neither in the past nor at the time of trial, and that he has been compensated by Cravens for services rendered.

The entry that Cravens is seeking to make, if allowed, must be based upon the final proof submitted August 29, 1885.

That proof showed compliance with the law sufficient to justify an entry. The Department will consider testimony in relation to transactions subsequent to the date of submitting final proof when the same is calculated to throw light upon the intention of the claimant prior to said date, but such evidence in order to prevent the consummation of title, should be clear and convincing. The evidence in this case is not of that character.

In your office letter of December 30, 1889, you discuss at length the motion for a rehearing filed by contestant September 23, 1889, and rejected the same. I concur in your views and action on that motion.

In the decision of the local officers, and in the various decisions of your office, numerous points were discussed, some of which I have referred to, but I have not deemed it essential to refer to them all.

The land involved has become valuable from the fact it adjoins the town of Glenwood Springs, and the inhabitants of that town are anxious

that a final decision in the case should be rendered in order that needed improvements, in the way of extension of streets, etc., may be made, hence at the solicitation of all parties in interest the case has been taken up for action out of its regular order.

It is to be regretted that the evidence before me is not more conclusive and satisfactory. I have, however, given it careful consideration, and in view of all the facts presented I am of the opinion that Cravens should be allowed to make payment and entry for the land upon the proof submitted by him.

In reaching this conclusion, I am influenced to a considerable extent by the decision of the local officers. The record indicates that they gave careful personal attention to the trial and the examination of the numerous witnesses. They saw them on the witness stand, and heard the conflicting statements, they must have been thoroughly acquainted with the character and reputation of most of those who testified. The land in controversy was under their immediate observation and inspection. Under all the rules and principles of law, those officers were especially qualified to render an intelligent and just decision in the case. Kelly *v.* Halvorson (6 L. D., 225); Austin *v.* Thomas (id., 330).

The decision of your office sustaining that of the local officers seems to have been based upon a thorough examination of the testimony.

In the case of Scott *v.* King (9 L. D., 299), it was said "the evidence being conflicting in its character and upon which fair minds might reasonably differ as to the conclusions that should be drawn therefrom, and it having been passed upon by two tribunals as triers of the facts, and each concurring, I do not feel warranted in reversing your action."

These remarks apply with equal justice and force in the case at bar.

Your decision of August 10, 1889, is, therefore, affirmed.

BRADY *v.* CENTRAL PACIFIC R. R. CO.

Motion for review of the departmental decision, rendered in the case above entitled November 21, 1890, 11 L. D., 463, denied by Acting Secretary Chandler, June 22, 1891.

OKLAHOMA LANDS—TOWNSITE ENTRY—SETTLEMENT RIGHTS.

GUTHRIE TOWNSITE *v.* PAINE ET AL.

A townsite entry cannot be allowed where it is apparent that the application is in the interest of a fraudulent speculation.

A soldier's declaratory statement filed on April 22, 1889, through an agent who was in the Territory prior to twelve o'clock, noon, of said day is illegal and void.

The entry of one who is lawfully within said Territory prior to noon, April 22, 1889, but takes advantage of his presence therein to secure a settlement right in advance of others, is in violation of the statute opening said lands to entry.

A homestead entry made with speculative intent to sell the land to townsite occupants, and not to use the same as a home and for agricultural purposes, is illegal and must be canceled; and priority of settlement in such case confers no right if such settlement is not in good faith and for the purposes contemplated by law.

A townsite entry can not be allowed in the interest of those who entered said Territory prior to the time fixed in the President's proclamation and in violation of the statute opening said lands to entry.

Secretary Noble to the Commissioner of the General Land Office, June 22, 1891.

On January 13, 1891, your office rendered a decision involving the E. ½ of section 8, the W. ½ of section 4, and section 9, T. 16 N., R. 2 W., Guthrie, Oklahoma.

You state that all conflicting claims to the E. ½ of section 8, claimed as the townsite of Guthrie, have been withdrawn, and that a patent for the same has issued for said townsite. Hence no further consideration of the claims to this tract, is necessary.

You rejected the claim of the townsite of North Guthrie to the W. ½ of section 4, holding that the same was essentially a speculative scheme and a fraud, as no municipal improvements of any kind had been placed upon the land, and no preparation of any kind had been made for such improvements, and the members of the pretended town organization and all others interested in the scheme lived elsewhere, and at the hearing all parties admitted that there was not then and never had been a single town lot occupant upon said land. You also ordered a hearing to determine the rights of the respective agricultural claimants to the land.

The mayor of the so called townsite of North Guthrie appeals from your decision so far as it relates to the NW. ¼ of section 4, and files a relinquishment of the company to the SW. ¼ of said section 4.

Your decision, so far as it relates to the W. ½ of section 4, is fully justified by the facts as shown in the record, and the same is affirmed, and you will order the hearing accordingly.

The claims to section 9 remain to be considered.

James H. Huckleberry, by his agent, Mark G. Cohn, filed soldiers' declaratory statement for the NW. ¼ of said section, and Benton Turner by the same agent, filed soldiers' declaratory statement for the SW. ¼ of section 9, soon after twelve o'clock, noon, on April 22, 1889. Both the local officers and your office held that said filings were illegal and void for the reason that the agent of the claimants, Mark G. Cohn, was in the Territory of Oklahoma, prior to twelve o'clock, noon, on April 22, 1889. Appeal is taken by Huckleberry and Turner.

Your decision is in accordance with the law and rulings, and without further discussing the question, the same is affirmed, and said filings will be canceled.

Ransom Payne made homestead entry for the NW. ¼ of Sec. 9, on April 23, 1889. Said Ransom Payne was a deputy United States mar-

shal duly appointed prior to the passage of the act of March 2, 1889, providing for the opening of the Territory of Oklahoma to settlement, and prior to proclamation of the President, fixing the day for said opening, and he entered said Territory prior to April 22, and was there at twelve o'clock noon on that day, in obedience to orders issued by his superior officers and he was there in the discharge of his official duties. Immediately after twelve o'clock noon on April 22, he went upon the land in question, and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement.

Your office held his entry for cancellation on the ground that he had entered the Territory prior to the time fixed in the proclamation of the President, basing said decision upon the decision of the Department in the case of the townsite of Kingfisher *v.* Wood *et al.* (11 L. D., 330). Payne appeals, and his counsel earnestly contend that their client does not come within the terms of said decision, but if it should be held that he does come within its terms, they ask that said decision be modified in so far as it applies to persons situated as Payne was, viz., lawfully within the Territory in the discharge of his official duties, at the hour of twelve o'clock noon, on April 22, 1889.

Neither Payne nor his counsel can deny that he took advantage of his presence in the Territory to go upon this tract of land before any other party could reach the same from the borders of the Territory, where all law abiding citizens had halted in obedience to the act of Congress and the proclamation thereunder.

In no act relating to the public domain, is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens and claimants on an absolute equality, so far as fixing the time when a claim to land could be asserted, and when the initiatory steps towards asserting such claim could be taken. To hold that deputy marshals, trainmen, and others who happened to be within the limits of the Territory in the discharge of their duties, and in the receipt of the salary and emoluments of their position at the moment the lands were open to settlement, could take advantage of that fact, and in advance of others, immediately enter upon desirable tracts to the exclusion of those who had in obedience to law remained outside of the Territory, would be a violation of the clearly expressed intention and spirit of the act. In my opinion such an interpretation is too unjust to be entertained. The facts in relation to the opening of this country were known to all. Parties who occupied positions similar to that occupied by Payne had abundant opportunity to qualify themselves as claimants by withdrawing from the territory and placing themselves on a par with others, had they so desired. This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in

obedience to law. This he can not be permitted to do under the law. Had Payne declined to make any act of settlement until after sufficient time had elapsed for those waiting on the border to reach the point in controversy, and thus placed himself on a par with other claimants, a far different state of facts would have existed, and a different rule might have been applied in the consideration of his claim, but under the present state of facts, there is neither equity nor law on his side, and your decision canceling his entry is affirmed.

Merton J. Keys who made application to enter the SW. ¼ of Sec. 9, as a homestead, basing his right upon a settlement made a few moments after twelve o'clock noon, on April 22, was, like Payne, a deputy marshal, and took the same advantage of his position and the same rule will govern in his case, and your decision rejecting his application, is affirmed.

The townsite company of East Guthrie made application to enter the W. ½ of section 9, as a townsite, and Veeder B. Paine made application to enter the SW. ¼ of Sec. 9, as a homestead, and Zenophon Fitzgerald made application to enter the NW. ¼ of said section 9, as a homestead.

Your office rejected the application of the company, and awarded the land to Paine and Fitzgerald, and the townsite company appeal.

Both Paine and Fitzgerald allege that they left the border line of Oklahoma Territory after twelve o'clock noon, on April 22, 1889, and that they made settlement on their respective claims before settlement was made thereon by the townsite claimants.

A great mass of conflicting testimony was taken on this point, but after a careful consideration of the same I am of the opinion that both Paine and Fitzgerald reached the respective tracts before any of the townsite claimants, who entered the territory after twelve o'clock noon, had settled upon said tracts, and the question arises, were these alleged homestead settlements made in good faith, for the purposes contemplated in the homestead law, or were they made for speculative purposes. Counsel for the homestead claimants truly say:

> If Paine and Fitzgerald were prior in time of legitimate settlement their right to the land is beyond discussion, and it is idle to plead matter of aggravation. If they were not the first among lawful settlers they have no right under their claims. This is the gist of the case.

It is unnecessary to discuss at length the purposes of the homestead law, they are too well known. For nearly thirty years, under the provisions of this act, thousands upon thousands of the best citizens of our land have established homes for themselves and their families on the public domain, have reclaimed and cultivated millions of acres, and the wealth and the power of the nation have been increased.

The object of the law was to procure the settlement and development of the unappropriated agricultural lands of the country, for this reason not only lands included within the limits of an incorporated town, but lands "selected as the site of a city or town" were excluded

from the operation of said law. It is true that in numerous instances the lands that were entered as homes for agricultural purposes, have become the sites of large towns, but that did not change the fact that the lands were entered in good faith under the provisions of the law.

The uniform practice of the Land Department has been to resist the efforts of those who have attempted under said act to obtain title to the public domain for other than agricultural purposes.

In the case under consideration we find that in the proclamation of the President of the United States issued March 23, 1889, one acre of the NW. ¼ of Sec. 9, had been reserved for government use and control, and by order of the President dated March 25, 1889, a land office was established at or near Guthrie which was the railroad station located on section 8, adjoining the land in dispute.

Every intelligent person is aware of the fact that for the last half century the establishment of a United States government land office was equivalent to the foundation of a town or city of greater or less magnitude; wherever a spot was selected for a land office that spot became the center of population, it became a town, and the land ceased to be in a condition where it could be used for agriculture, but it became valuable for townsite purposes. Of all the thousands of eager, active, and intelligent men who had collected on the borders of Oklahoma prior to twelve o'clock noon, on April 22, 1889, there was hardly one who was ignorant of the fact that a government land office had been established at Guthrie, and of the resulting fact that a town would be established there, and already predictions of its future greatness as the capital of the Territory, had been indulged in. The waiting crowds knew all these facts and they knew that the land in controversy must be used for the homes, the business, and the trade of the people who would compose the population of this coming town.

It is true there had been no reservation of the tract by the President for townsite purposes, but his official acts had given notice to the world of the fact that the lands would be used for purposes other than agricultural. Veeder B. Paine knew all these facts.

The evidence shows that he was a man possessed of intelligence and energy. He planned ingeniously to reach this land before any one else who left the border at the hour designated could do so.

Two of his friends left during the morning for Guthrie, for the purpose of taking the train. The vehicle which carried them to this point also transported the camping outfit, provisions, an ax, and the coat of Paine. Another friend who desired to go to Guthrie to take the train started a little later on horseback over the road which would be traveled by Paine. It may be true that the departure of these men at this time was merely incidental—an accident of their ordinary business life, but, however, this may be, their acts of kindness rendered assistance to their friend Paine.

In the meantime Paine was on the border of the Territory waiting

for the moment to start; he was mounted on a fleet horse, possessed of great powers of endurance. When the signal was given the waiting crowd, consisting of hundreds of people, started, and Paine, thus unincumbered, by his camping outfit, provisions, coat, etc., so necessary to a person who was to make a settlement on the uninhabited plains, found that the confidence reposed in his horse had not been misplaced, for from the very start he took the lead and soon was out of sight of all others. Soon after leaving the border one of the saddle girths was broken, but the rider continued his rapid journey. He took no note of the many unappropriated tracts of agricultural lands over which he passed, tracts whereon he could have established a home as contemplated by the homestead law, he was only eager to reach the land in dispute.

After riding about eight miles he overtook the friend who had preceded him on horseback, he had dismounted, and his horse was standing by the roadside eating grass. The friend saw the broken saddle girth and suggested an exchange of horses, which suggestion was instantly accepted and Paine pursued his journey to the desired tract, where one of his friends who had preceded him on the wagon, containing his effects, the ax, etc., was found, also a piece of board from which he made stakes with the ax and drove them into the ground, marking thereon his name and the fact that he claimed the same as his homestead; he blazed a tree situated on the land, and made a similar notation, and thus he made settlement, on what he alleges was a tract he intended for his homestead under the provisions of the homestead law.

It can not be denied that the friends who entered the Territory prior to the hour fixed in the proclamation of the President, rendered Paine valuable and material assistance. It is denied by both Paine and his friend that the exchange of horses was made in pursuance of any prior arrangement, but that it was only incidental, resulting from the breaking of the saddle girth, but no explanation is given why the friend was waiting by the roadside with a horse that had become at least partially rested, nor, if Paine's horse was still fresh, why horses were exchanged instead of saddles; whether previously intended or not there was in effect a relay of horses, and this relay was made possible by entering the territory prior to the hour fixed by the proclamation.

The assistance rendered by friends gave Paine an advantage over others, and this advantage was gained by unlawful means inasmuch as the aid was rendered by parties who entered the territory prior to twelve o'clock noon. Taking the whole history of this case, into consideration, I am unable to arrive at the conclusion that Paine, either in the conception or execution of his settlement on this land, acted in good faith, as a *bona fide* claimant under the homestead law, and in the absence of good faith, no claim can be recognized. All the facts indicate that the claim was taken for speculative purposes only, to enable him

to dispose of this land for townsite purposes, and that it was not taken for agricultural purposes, and for the purpose of a home, or at least for a home as contemplated by the homestead law.

Paine asserts that he was aware, on the morning of April 22, that the land office was to be placed on section 8, that is, a few hundred feet from the acre reserved in the President's proclamation for government use. But this incident in no way changed the fact as to the location of the townsite, and Paine as an intelligent man knew that such was the case.

Counsel cite the decision of my predecessor in the case of Plummer *et al. v.* Jackman (10 C. L. O., 71), and quote the following remarks:

> The statute cannot be construed to mean that persons going to the frontiers, or along the lines of projected railways, and anticipating centers of population, shall not enjoy the benefits of their enterprise and foresight, though they believed that their claims would become of great value on account of their proximity to cities and villages, or that villages or cities would even be built upon such claims, and thereby enable them ultimately to realize large prices for such lands.

No rule could be more just as applied in the case then under consideration, and in similar cases. But how different the facts in the case cited, and the one now under consideration. In the former the claimant had traveled for hundreds of miles across an uninhabited prairie, far in advance of settlements and civilization, and selected a tract of wild land for settlement, and cultivation. He may have anticipated that at some future day a railroad might cross a great river in that vicinity, and that a town might be established there in the years to come, but it was all uncertainty—even the building of the road was not an assured fact, and the selection of a point for the crossing of the river, was an unsolved problem. On the other hand, in the present case the location of the town was an assured fact of which Paine was aware long before he started on his rapid but short journey to reach the designated tract. He found the people with him, actuated by the same impulse, rushing for the same point for the express purpose of occupying it for trade, commerce and the upbuilding of a city. There could have been no uncertainty in his mind as to its immediate occupation for these purposes. The claim of Paine must be rejected on the theory that he seeks to make this entry for speculative purposes, makes it in order that he may sell it to townsite occupants, on account of its being occupied for purposes of trade and commerce.

I can not assent to the doctrine that one who, in the manner here indicated, reached this tract a few minutes in advance of his fellows, shall be permitted to hold the advantage he has thus gained and speculate off, and enrich himself from, their misfortune, in being less fleet than he, and especially so, when I am firmly convinced that he had been planning and arranging, for days, how he might reach this townsite in advance of the people contemplating locating thereon, and enter it as a homestead and then sell it to them at his own price.

The remarks applicable to Paine, apply with equal force to Fitzgerald in the consideration of his claim to the NW. ¼ of section 9. While the incidents connected with the trip of Paine did not take place in the trip of Fitzgerald, yet he possessed the same knowledge that the tract claimed by him would be used at once for townsite purposes.

His acts in connection with his so called settlement on the afternoon of April 22, show that he was not seeking a home on the public domain in accordance with the principles of the homestead law, but rather that he was seeking a tract for the purpose of speculating on the needs and necessities of those who had a few moments after his arrival occupied not only the NW. ¼ of section 9, but the surrounding lands for townsite purposes.

Mr. Mael testifies that he first met Fitzgerald on the NW. ¼ of section 9, about fifteen minutes after two o'clock on April 22, that Fitzgerald told him that the land was worthless for farming purposes but might do to build a city on, also that he had a lot of horses which were then on the NE. ¼ of section 8, and that he had taken said NE. ¼ of Sec. 8, as a homestead; this witness also testified that Fitzgerald neither gave him, nor those in his company, any notice that he was claiming the said NW. ¼ of section 9, as a homestead.

J. H. Larvell testifies that at about fifteen minutes before two o'clock on April 22, he Larvell, was on the east quarter of section 8, about one hundred and fifty feet west of Division street, and Fitzgerald came up to him and told him that he was claiming that land where he (Larvell) then stood, as a homestead, without defining any boundaries, and had taken it as a horse ranch, and pointed to two stakes or poles and said they were on his land, one of these poles was about one hundred or one hundred and fifty feet west of Division street; the other two hundred and fifty feet west of said street; that Fitzgerald told him that he did not consider the land of much account but that he had a lot of horses which he wished to sell.

Geo. F. Ford testifies that between half past two and three o'clock, he was very near the north line of what is now East Guthrie; he thinks north of the line, about three hundred yards east of Division street extended north. At that point he, with some friends, was about to set up a tent when Fitzgerald appeared and told him that he must get off his land, that he claimed that quarter section as a homestead and pointed out a stake slightly south of where they stood and said that this stake was on his south line as near as he could find the corner, and that he (Ford) must move to some point south of that place to get off his claim.

This evidence shows, that at the hour mentioned, three o'clock, on the afternoon of April 22, Fitzgerald was then claiming the quarter section north of the NW. ¼ of Sec. 9, viz., the SW. ¼ of Sec. 4. Ford's evidence on this point is fully corroborated by L. A. Brown and Edward H. Davis.

It is true that Fitzgerald denies these statements, but the evidence is too strong to be disregarded. We thus find that in addition to asserting a claim to the NW. ¼ of Sec. 9, and NE. ¼ of Sec. 8, later in the day, as the crowds of townsite settlers began to increase on these two quarters, he asserted a claim to the SW. ¼ of Sec. 4.

These acts were not consistent with good faith on the part of a *bona fide* homestead claimant, seeking a part of the public domain for a home, but are consistent with the intention of one who was seeking a tract upon which to speculate in town lots.

According to Fitzgerald's own statement, his acts immediately after reaching the land in dispute at 12.55 in the afternoon were not those of a person seeking to obtain a specified tract of land for a home to the exclusion of one elsewhere, for as soon as he had driven a stake and claimed the tract as a homestead, he left it and went some distance away to eat his dinner, knowing as he must have known, that within a very few moments scores, if not hundreds of townsite settlers would be claiming said land as a townsite. This act was rather consistent with the facts which are shown to have existed on his return from his dinner, viz., finding said quarter occupied by settlers, he asserted a claim to other tracts.

The land in controversy is now covered with lasting and valuable improvements, worth many thousands of dollars, and is occupied by an intelligent and thriving community, which located there in part within a few minutes after the arrival of Messrs. Paine and Fitzgerald, and to my mind it would be a very harsh, unjust and inequitable ruling to hold that because they reached this townsite first, if they did, that they own it. They knew it was to be a townsite; they started for it as a townsite with the intent to hold the land for that purpose under the guise of a homestead; and now they must hold it in common with the other inhabitants thereof as a townsite without levying tribute upon them for lots which they do not own.

Under all the facts and circumstances surrounding their going upon the land in controversy, they have no rights which are greater or more sacred, or which are entitled to other protection than the rights of those who in common with them and with the same intent and purpose started with them to settle upon these lands for townsite purposes.

Holding these views which the record forces me to entertain, I am unable to concur in your decision that either Paine or Fitzgerald made a *bona fide* settlement in good faith under the homestead law, and your decision allowing their application to enter, is reversed.

The application filed April 26, 1889, by T. H. Soward, Mayor, *et al.*, to enter the W. ½ of section 9, as the townsite of East Guthrie, having been made in the interest of men, many of whom entered the territory prior to the time fixed in the proclamation of the President, in violation of the act opening the same, it must be rejected. Such persons can obtain no rights under the law to the land, but the tract may be entered by the proper authorities in order that those who made valid

settlements may be protected under the provisions of the act of May 14, 1890, "to provide for townsite entries of lands in what is known as Oklahoma and for other purposes," as it is very clear that said W. ½ of Sec. 9, has been used for townsite purposes since the opening of the land for settlement.

You held that the E. ½ of Sec. 9 was subject to entry under the townsite law of May 14, 1890, for the reason that from April 22, 1889, to May 14, 1890, the population upon said half section and the subsequent town organization and improvements were sufficient to withdraw said tract from homestead settlement and entry. You rejected the homestead claims of Herbert Wolcott, James F. Bell and Henry N. Baker for the reason that all of said parties were within the limits of the Territory prior to twelve o'clock, noon, on April 22, 1889, and their claims must fall with those of Ransom Payne and Morton J. Keys, and for the reason stated in rejecting the claims of said Payne and Keys. You rejected the homestead claims of Charles H. Eberlie and Francis M. Karber for the reason that said parties settled upon the land after it had been selected and occupied as a townsite. Each of the homestead claimants appeals.

Your decision, so far as it relates to the E. ½ of Sec. 9, is in accordance with the facts as shown in the record, and is affirmed for the reasons stated therein.

Your decision of January 15, 1891, is modified according to the views herein expressed, and the record in the case is herewith returned, and you will take prompt action to carry this decision into effect.

ORVIS *v.* BIRTCH ET AL.

Motion for review of departmental decision rendered in the case above entitled November 22, 1890, 11 L. D., 477, denied by Acting Secretary Chandler, June 22, 1891.

TOWNSITE PATENT—MINERAL ENTRY.

PROTECTOR LODE.

Land included within an outstanding townsite patent is not subject to mineral entry; but an opportunity may be accorded the mineral applicant in such case to show that the mineral character of the land was known at the date of the townsite entry and patent, with a view to subsequent judicial proceedings to vacate said patent.

The provisions of section 16, act of March 3, 1891, are only applicable to entries made after the passage of said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 23, 1891.

I have considered the appeal of Charles S. Warren from the decision of your office dated March 29, 1890, holding for cancellation his mineral entry No. 1671, made January 6, 1888, for the Protector Lode claim, in

the Helena land district, State of Montana, for the reason that the land covered by said entry is wholly within the limits of the townsite of Butte for which patent issued on September 26, 1877; and under the instructions of the Department in the Pike's Peak Lode claim (10 L. D., 200), the land claimed under said mineral entry was not subject to entry.

The appellant alleges error in said decision of your office in holding that the rule in said Pike's Peak case is a precedent for the case at bar, and that the rights of claimant can be denied by a cancellation of said entry, since it was duly allowed by the local officers.

In said instructions upon the Pike's Peak Lode, the Department held that the validity of a placer patent and its extent, as in conflict with an alleged known lode or vein, are questions that can only be determined by judicial authority. The same rule is applicable, in my judgment to the case at bar, although the mineral application is for land already patented under the townsite law. The mineral location was not made until long after the patent was issued upon said townsite entry, and hence the land covered by said townsite patent, so long as the same remained outstanding and intact, was not subject to entry. If it can be shown that the land patented under said townsite entry contained known mines at the date of the townsite entry and patent, then proceedings should be instituted to set aside the townsite patent.

It may be claimed that the appellant is protected by section sixteen of the act of March 3, 1891 (26 Stats., 1095), but as there is no expressed intent of making said section retroactive, and as the use of the language clearly indicates to my mind that it was only to apply to entries made after the passage of the act, I must hold that the appeal in this case shall be dismissed; said mineral entry will be suspended and in case the mineral applicant shall apply for a hearing within thirty days from due notice hereof and offer to prove that, at the date of said townsite entry and patent there was within its limit any known mine of gold, silver, cinnabar, or copper, or any valid mining-claim or possession, a hearing will be ordered after due notice to all parties in interest, and if the evidence educed thereat shall warrant, a recommendation will be duly made that judicial proceedings be taken to set aside said townsite patent, so far as the same shall embrace land known to be mineral at the date thereof. If, however, no application for a hearing shall be made by the mineral entryman within thirty days from due notice hereof, then said mineral entry will be canceled. The decision of your office is modified accordingly.

SEARLE PLACER.

Motion for review of departmental decision rendered in the case above entitled, November 13, 1890, 11 L. D., 441, denied by Acting Secretary Chandler, June 22, 1891.

RAILROAD GRANT—PRIVATE CLAIM—SURVEY.

DUNCANSON *v.* SOUTHERN PACIFIC R. R. CO.

ON REVIEW.

A Mexican private claim for land within specific boundaries reserves only such land as may be finally determined to be within said boundaries as against the operation of a railroad grant, although other land may be claimed as within said boundaries at the time such grant takes effect.

A survey of a private claim, made under the act of July 1, 1864, does not operate to segregate the land covered thereby, if not approved by the Commissioner of the General Land Office.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 23, 1891.

I have considered the motion by attorneys for E. E. Duncanson for a review of departmental decision of December 1, 1890, (11 L. D., 538) in the case of E. E. Duncanson *v.* Southern Pacific railroad company, involving lots 2 and 3 of Sec. 27, T. 2 S., R. 7 W., S. B. M., Los Angeles, California, awarding the land to the railroad company.

The motion is based upon the ground: That the decision of the Honorable Secretary of the Interior heretofore made in this cause is against law, and is not authorized by, nor in accordance with, the existing law applicable to such cases, as the same is established by the decisions of the federal courts.

In said departmental decision it was held that the land in question inured to the grant for the Southern Pacific railroad company, which grant became effective April 3, 1871, the date of the definite location of the road. On the contrary, it is asserted by Duncanson that said land was within the claimed limits of the Mexican grant Jurupa, which was *sub judice* at the time the railroad grant became effective and was therefore excepted from the operation of said railroad grant in accordance with the ruling of the supreme court of the United States in the case of Newhall *v.* Sanger (92 U. S., 761).

The Jurupa grant was one within specified boundaries which were clearly indicated in the decree of judicial possession as well as in the decrees of the board of land commissioners, and the district court.

The location of the tract in dispute, whether within the limits of said grant or not, depends upon the correct location of the western boundary line of said grant. By a survey of the grant made in 1869, under the provisions of the act of July 1, 1864, (13 Stat., 332) the tract in question was embraced within its limits and the final decision of the Department, approving a survey which definitely located said boundary on a different line, thus rejecting the boundary designated by the survey of 1869, and excluding the tract in question, was not rendered until April 4, 1879, hence at the time the railroad grant took effect said tract was within the claimed limits of a Mexican grant, and the question arises was the same excepted from the operation of said railroad grant.

So far as this Department is concerned, the question must be determined by the rule established in the latest and controlling decisions made by the supreme court of the United States.

In the case of Doolan *v.* Carr (125 U. S., 613), the court in discussing the status of lands within the limits of Mexican grants which are also within the limits of a railroad grant, refer to the former decision of the court in the case of Newhall *v.* Sanger, and say, page 632:

> The court then goes on to show that the status of lands included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it, was such that the right of private property could not be impaired by a change of sovereignty, and that such lands were not included in the phrase "public lands" of these specific railroad grants, and that until such claims were finally decided to be invalid they were not restored to the body of public lands subject to be granted. These Mexican claims were often described, or attempted to be described, by specific boundaries. . . . . To the extent of the claim when the grant was for land with specific boundaries . . . . they are excluded from the grant to the railroad company.

In my opinion there can be but one interpretation put on this language and that is, when the Mexican claim is for land within specific boundaries, only the land which is actually within these boundaries, is excepted from a grant of public lands to a railroad company, notwithstanding the fact that other land may be claimed as within such boundaries at the time the railroad grant takes effect. The language of the court is too clear to admit of any other construction.

In the later case of United States *v.* McLaughlin (127 U. S., 428), the court say, page 451:

> We can well understand that Indian reservations and reservations for military and other purposes of the government should be considered as absolutely reserved and withdrawn from that portion of the public lands which are disposable to purchasers and settlers, for in those cases, the use to which they are devoted, and for which they are deemed to be reserved, extends to every foot of the reservation. The same reason applies to Mexican grants of specific tracts, such as a grant for all the land within certain definite boundaries named, or all the land confirmed in a certain rancho or estate.

In this case the court discuss at length the former decision in Newhall *v.* Sanger and say, on page 454:

> The opinion took no notice of the fact (which did not appear in the record) that the grant was one of that class in which the quantity granted was but a small part of the territory embraced within the boundaries named. It proceeded throughout as it would have done on the supposition that the grant covered and filled up the whole territory described. It simply dealt with and affirmed the general proposition that a Mexican grant, while under judicial investigation was not public land open for disposal and sale, but was reserved territory within the meaning of the law—a proposition not seriously disputed . . . . . The opinion, however, examined somewhat at large the grounds on which it should be held that Mexican grants (whether valid or invalid) while under judicial consideration, should be treated as reserved lands. The principal reason was that they were not "public lands" in the sense of congressional legislation; those terms being habitually used to describe such lands as are subject to sale or other disposal under general laws. . . . . .

This reasoning of the court in Newhall *v.* Sanger is entirely conclusive as to all definite grants which identified the land granted, such as the case before it then appeared to be;

Thus did the court in language and by reasoning, affirm the doctrine announced in Doolan *v.* Carr.

The only question which remains to be answered is this; Was the tract claimed by Duncanson within the specified or identified limits of the Jurupa grant? A negative answer would seem to be sufficient, based upon the fact that the survey, upon which a patent issued, excluded said tract.

If it should be held that an erroneous survey of the boundaries of a private grant which embraced a tract of land a few rods outside the actual boundaries, could reserve the land from other appropriation, it must be held, that a like survey which embraced land a few miles outside the boundaries would also reserve said land in like manner, a doctrine which is most emphatically denied by the court in the cases herein cited.

The survey made in 1869 under the provisions of the act of July 1, 1864, did not operate as a segregation of the land, for in order to become thus operative, it was necessary that it receive the approval of the Commissioner of the General Land Office, and had it been approved, patent must have issued. Said survey, however, was not approved, and the segregation was not made.

For the reasons herein stated it must be held that the departmental decision, of which review is asked, was in accordance with the law as construed and interpreted by the highest judicial tribunal and the motion is, therefore, denied.

L. H. WHEELER.

Motion for review of departmental decision rendered in the case above entitled October 13, 1890, 11 L. D., 381, denied by Acting Secretary Chandler, June 23, 1891.

HULDA M. SMITH.

Motion for review of departmental decision rendered in the case above entitled October 13, 1890, 11 L. D., 382, denied by Acting Secretary Chandler, June 23, 1891.

MEXICAN PRIVATE CLAIM—ACT OF JULY 23, 1866.

NAPHTALY *v.* BREGARD ET AL.

ON REVIEW.

Under a parol partition of a Mexican grant, in which each party thereto holds undisturbed possession according to the lines of such partition, and sells and conveys the lands thus received, the grantee of such Mexican claimant acquires the right of purchase under section 7, act of July 23, 1866, so far as the question of definite boundaries is concerned, even though in the instrument of transfer said lands are described as an undivided interest.

A hearing directed to determine the character of the title held by the grantee of the Mexican claimant at the date of the passage of said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 23, 1891.

I have considered the motion for review of departmental decision of February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.* (8 L. D., 144), involving the question of Naphtaly's right to purchase under section seven of the act of July 23, 1866, certain described tracts of land in T. 1 N., and T. 1 S., R. 2 W., M. D. M., San Francisco, California.

After a lengthy trial, during which much testimony was taken, the local officers rendered a decision in which they rejected the pre-emption and homestead claims of Bregard *et al.*, awarded certain tracts to the Central Pacific Railroad Company, successors to the Western Pacific Railroad company, and recognized the right of Naphtaly to purchase the balance of the land embraced in his application.

Your office rejected the application of Naphtaly to purchase on the ground (1) that there was no grant to the Romeros under whom Naphtaly claimed, and consequently, that he was not a purchaser from a "Mexican grantee or assign," and (2) that the act only applied to parties who purchased prior to the rejection of the supposed Mexican grant, and as Naphtaly purchased subsequent to the final rejection of the alleged Romero grant, he was not within the statute. My predecessor, Secretary Vilas, overruled your office on both these points but he rejected the application to purchase principally on the ground that at the date of the passage of the act July 23, 1866, no person possessed the qualifications of a purchaser under said act, and that Naphtaly acquired by conveyance no such right as the act contemplates. This conclusion was based upon the fact that at the date of the passage of the act, the title to the tract in question was in Urhetta Tice, and that she was not a purchaser for a valuable consideration for the reason that said land was conveyed to her by her son for the consideration of love and affection and her better support, maintenance and protection. My predecessor also found as a matter of fact, that the purchase from the Mexican grantee, was not in good faith, and was not for a specific and well defined tract of land.

In the motion for review numerous grounds of error are assigned both in the findings of matter of fact and of law.

Section seven of the act of July 23, 1866 (14 Stat., 218), under which Naphtaly makes application to purchase provides—

> That where persons in good faith and for a valuable consideration, have purchased lands from Mexican grantees or assigns, which grants have subsequently been rejected . . . . . and have used, improved, and continued in the actual posession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchaser may purchase the same.

I do not deem it necessary to give in detail the history of the Romero grant. Application was made to the Mexican governor of California in 1844, by three brothers, Innocencio, Mariano and Jose Romero, for a grant of land Certain proceedings, usual in such cases, were had looking to the granting of the request. The brothers went into posession of the tract petitioned for, occupied the same for years, and finally sold it, the different brothers disposing of different portions of the entire tract.

On December 26, 1853, Innocencio Romero and his wife, sold to Domingo Pujol and Francisco Sanjurjo

> all the undivided one-third of the lands and rancho in said Contra Costa county and state aforesaid, being the said lands and rancho granted to the parties of the first part and his two brothers, Jose Romero and Mariano Romero, by Governor Micheltorena in the year 1844 etc.

It is alleged that there was a partition of this grant between the three brothers in the year 1846, 1847 or 1848, and that the tract sold by Innocencio was the portion set off to him. This partition is denied by Bregard *et al.* Some contradictory evidence is submitted on this point, but in my opinion, the great preponderance of evidence is to the effect that such a partition was actually agreed upon and made by the brothers.

The testimony of Innocencio Romero and other witnesses, taken in 1875 by order of the judge of San Francisco county is positive. Romero testified that he, his brothers, Ignacio Sybrian, and his little son, rode over the land and "divided some of the land between us three," that they marked the boundaries and lines of each brother's piece, the well known points of land, the ridge and arroyos were selected as boundaries, that he took the westerly portion, Jose took the easterly portion and Mariano the northeasterly portion.

Ignacio Sybrian testified that he was present with the three brothers when they divided the grant among themselves in the year 1847 or 1848, that the lines of each portion were established and pointed out and each of the brothers occupied the portion set off to him and sold the same, and the right of each brother to the portion set apart was recognized by all, that the tract sold to Pujol and Sanjurjo was the portion set apart to Innocencio. At the hearing before the local officers the

same witness testified to substantially the same facts, that Innocencio took his portion to the west, Mariano on the east, and Jose on the north or northeast.

Manuel Sybrian testified that he had known the land since 1850, that he was present when Innocencio Romero delivered possession of the land he had sold to Pujol, that he delivered possession of what was then called the Innocencio Romero ranch and in describing the tract of which possession was given, he recites the same boundaries as were given by Innocencio Romero and Ignacio Sybrian in describing the portion set apart to the former.

Samuel S. Kendall testified that he was living on a portion of the land in dispute in 1852 in a cabin, that Romero in company with Moraga came to his cabin and told him that he was on his land, and at that time in the presence of Moraga described to him the boundaries of his claim, and in reciting these boundaries the witness gave in substance the boundaries above mentioned as given by Romero and Ignacio Sybrian, and he asserts that no one was in possession of said tract except Romero.

Jose Ramon Pico testified that he was acquainted with the Romero brothers and with the land in 1844 or 1845, that the grant was divided between the three brothers some time after 1845, that his father purchased the portion that was allotted to Mariano in 1851, viz., the southeastern portion of the grant, that Jose took the northeastern and Innocencio the northwestern portion.

D. P. Smith, a witness, and also associate counsel for Bregard *et al.* in the present case, was a witness before the local office in the case of Hyatt *v.* Smith on May 12, 1870. His evidence given at that time, has been made a part of the record in this case. He purchased in 1853 a portion of the tract which had been allotted to Jose, and he states that he knew from Innocencio Romero, and from other purchasers, that the ranch had been divided, that "Innocencio and Mariano had the south part of the valley, Jose had the north part or the northeast part."

On December 19, 1882, my predecessor rendered a decision in the case of Hyatt *v.* Smith, in which it was said "evidence established the fact that a parol partition of the tract was made between the three brothers and that Innocencio and Mariano took one part and Jose another."

Counsel assert that the evidence of partition in the case of Hyatt *v.* Smith and the present case is irreconcilable, either that the evidence in the former case is untrue or that in the present case. I do not think such a conclusion follows. Smith the principal witness in the former case testified as above recited; the fact sought to be established in the case then under consideration was that a portion of the grant had been allotted to Jose and my predecessor so found, but it does not follow that his finding was that neither Innocencio nor Mariano had a portion allotted to them.

Counsel for Naphtaly file certain affidavits with their argument in support of the motion for review.

One made May 14, 1889, by Jose Joaquin Romero, who states that he is fifty-nine years of age, and is the son of Innocencio Romero, that he knew that his uncles and his father divided the grant between themselves, that to his father came the piece of land lying south of Walnut Creek east of the Cuchilla de las Trampas and the eastern boundary of the land was the range of hills that run south from the hill near his father's house. (This is the same description of the tract in substance as is given by the other witnesses to the partition). He further states that his father was in the exclusive possession of this land after the division between himself and his brothers, that Jose's land was east of his father's, and Mariano's about southeast, that his uncles sold their portion, that "they were friendly with us and until we moved from the ranch in 1853, or 1854, they very frequently visited us in the adobe house on the ranch. I knew old Mr. Tice very well, the land I refer to was once held by him and his sons. My father died in 1878."

N. B. Smith made affidavit June 4, 1889, as follows:

I reside in Contra Costa county where I have lived since 1846. In the year 1850 or 1851, I bought from Innocencio Romero, a tract of land in Contra Costa county, of what was then supposed to be a part of what was known as the "Romero Grant," at that time and for years before it was believed that the three brothers Romero had obtained from the Mexican authorities, a grant of about five leagues, situated near the Moraga ranch, on the east of it. When I bought from Innocencio, I bought a segregated parcel of land near Walnut Creek, I took a deed from Innocencio only because it was notorious in the neighborhood, and I had been told by both Innocencio and Jose Romero, whom I knew very well, that the three brothers Romero, who claimed to own the grant, had divided the land which they took possession of under the grant among themselves, and that the part I was then buying had fallen to Innocencio and that his two brothers had no interest in it. I was also informed that Innocencio's part was the tract of land lying south of Walnut Creek, east of the Maraga and west of a range of hills that is nearest to the Alamo road, and south near Sugar Loaf canon. I knew the two Spaniards to whom Innocencio sold what he had left of his part of the ranch. It was the same land that the Tices bought and was afterwards called the "Tice" ranch.

It was a common thing in the early times of California, before and after California was admitted in the Union, to divide lands held in common by the people going on the land and each selecting his share of the land. If I had not known from the Romero brothers that they had partitioned the land among themselves, and that Innocencio's share included the land I bought from him, I would have procured the deed of Jose and Mariano. I sold the land so bought from Innocencio and the person who purchased from me, took the same title that I had.

Victor Castro made affidavit April 16, 1889, that he was born in 1820, and resided in Contra Costa county since 1837, that he was intimately acquainted with the Romero brothers, that in 1844, they claimed a grant from Micheltorena, that it was known to those living near the Romero claim that the brothers had divided the land between themselves, this partition was notorious and it was respected by the neighbors, that he was well acquainted with the tract allotted to Innocencio, that Innocencio had sold to different people lands within said tract and then sold what was left to the Spaniards in 1853 or 1854, that in the

division Jose got the land lying east of Innocencio's, and Mariano's land was south and south-east, that during all the time from the division up to the date of sale to the Spaniards, neither of the brothers nor any other person claimed any title as against Innocencio; that he was in undisturbed possession of the land claimed by him.

These affidavits, while they could not be taken as evidence to change a finding justified by the evidence contained in the record, are cited merely as sustaining a conclusion which I think must be found from that record, viz., that a parol partition of the grant was made by the brothers and that each one was in undisturbed possession of the portion allotted to him, and sold and disposed of said portion.

There appears to be a discrepancy between the testimony of Innocencio Romero and the other witnesses to the partition, on one point, viz., he states that the portion allotted to Mariano was the northeast section of the grant, while the other witnesses establish the fact that the portion allotted to Mariano was the southeast section of the grant.

At the time Innocencio gave his testimony he was seventy years of age, it was thirty years after the partition, the testimony was given in Spanish and was submitted through an interpreter and the record shows that frequent mistakes were made in recording and transcribing the testimony, in view of these facts I do not think said discrepancy in the record should be regarded as casting discredit on the testimony of these witnesses, they agree in their statements in all essential particulars although the evidence was taken at different times and before different tribunals.

On February 14, 1855, Pujol and Sanjurjo conveyed the land in dispute to J. W. Tice. On August 18, 1855, J. W. Tice conveyed the premises to A. J. Tice. On October 17, 1859, A. J. Tice, conveyed to S. P. Millett, and on October 17, 1860, Millett conveyed to J. W. Tice. All of these transfers were based upon a valuable consideration, and the tract conveyed was the same as that delivered by Romero to Pujol and Sanjurjo, and by the latter to J. W. Tice.

On April 6, 1861, J. W. Tice conveyed the premises to Urhetta Tice and thus the title was in her at the date of the passage of the act of July 23, 1866.

It is asserted that the interest conveyed to Pujol and Sanjurjo was an undivided one-third of the lands granted to the Romero brothers, and that it was not a definite tract of land which the parties could possess according to the lines of their original purchase. The evidence is explicit that Romero delivered to his grantees the tract of land which he claimed was allotted to him in the partition, that he went with them and pointed out the lines of their possession, as he states of

> the same land which when my brothers divided was set aside as my part and which I have already described to you, except some small parcels within the exterior lines which I had sold to others before and told Pujol about.

This statement is confirmed by Sybrian who was present when the grantees were put in possession by Romero.

In reply to the question "why did you specify the land sold to Pujol as an undivided one-third?" he answered,

> I did not write it, the grant lines were not fixed, and the grant was not divided by a surveyor or by a court, after we made the bargain I pointed out to Pujol the boundaries of my land and told him to draw a deed for the land. The land that I sold them was divided and well defined. But I sold him a third of the grant, which would amount to more than what Pujol took possession of.

The Romero grant was a sobrante or surplus of land after the claim of surrounding grantees had been satisfied, hence at the date of partition it was impossible to tell just where the exterior lines of the grant were located, and for this reason Innocencio testified "that he and his brothers divided some of the land" between them, but the evidence is clear that the portion divided was possessed and sold according to the lines of said division and I do not deem it necessary at this time to speculate as to how much land Pujol and Sanjurjo would have been entitled to, under their deed had they retained possession, and had the grant been confirmed, and for a greater quantity of land than was divided between the three brothers by boundaries the only question to be determined at this time is, did Romero sell a tract of land definite and specific as to boundaries? In my opinion the answer to this question must be in the affirmative.

The object of the statute under consideration was to afford relief to those who had used, improved, and continued in the actual possession of land purchased from supposed Mexican grantees.

The evidence is clear as to the tract intended to be purchased and the identity of said tract was not destroyed by the terms used in the instrument of transfer, viz., an undivided one-third of lands granted &c. Taylor *v.* Yates (10 L. D., 242). This was the tract conveyed to Tice by Pujol and Sanjurjo, and the title to the same was in Urhetta Tice on July 23, 1866, and was afterwards conveyed to Naphtaly and the evidence shows that all the purchasers from Pujol and Sanjurjo to Naphtaly maintained possession of said tract substantially according to the lines of the original purchase. It is asserted, however, that exclusive possession was not maintained by the different purchasers. It appears from the evidence that while a portion of the tract was cultivated, the greater portion was used for grazing purposes, that the tract was enclosed by fences and natural barriers, but that the stock of surrounding claimants would in certain seasons of the year intrude upon this enclosure, and also that the owners at times granted permission for cattle to graze on the land. It does not follow, however, that the claimants did not maintain possession of the tract in dispute and use it for the purpose for which it was best adapted. In the case of Dallas *v.* White (Copp's Land Owner, Vol. 5, p. 82), it was held after citing the case of Hyatt *v.* Smith, that it is sufficient under the act now under

consideration, if the lands claimed are used for the purpose for which they are best adapted, without a fence or enclosure.

It is alleged that neither Pujol and Sanjurjo nor any of the subsequent holders purchased in good faith, that each purchased a speculative title.

In my opinion the record does not sustain this conclusion.

The evidence shows that the Romero brothers believed that they had a valid grant, and this opinion and belief was shared generally by their neighbors and associates, and the community. The holders of the title to the lands claimed to have been granted had purchased prior to the rejection of the grant by the supreme court and up to the date of the rejection by the final tribunal, there was at least, reasonable grounds for the belief that the grant would be confirmed. It was rejected both by the lower tribunals and by the supreme court for the reason that there was no record evidence that the grant had actually issued by the Mexican Governor. There was, however, parol evidence introduced which taken separately, created a strong presumption that the grant had issued. In this connection the court say (1 Wallace, 721) "taken separately the parol evidence if competent, might possibly justify a different conclusion," but taken in connection with the documentary evidence and when so considered, the conclusion was that no grant was issued by the governor. If it required the careful analysis of the evidence by able lawyers to determine the character of the grant and the same was rejected for technical defects and not for fraud or the want of good faith on the part of the grantee, it is but reasonable to assume that the community at large were strong in the belief that the grant was a valid one and that the title purchased was a good one.

Attention is called to the fact that while the consideration named in the deed was $5,000, it was agreed and stipulated between the parties that an additional $3,000 should be paid in the event of the confirmation of the grant and this is cited in support of the conclusion that the title purchased was a speculative one. I do not concur in this view. The facts as they existed at that time, must be taken into account. It was well known that the grant must be confirmed by a judicial tribunal, and that it was essential that evidence of the grant should be produced before that tribunal and the parties to produce that evidence were the grantees themselves, and in order that they might retain their interest in producing such evidence it was but reasonable that increased consideration for the property should be agreed upon in the event of the confirmation of title, but it is not reasonable to assume that the sum of $5000, would be paid for a merely speculative title.

Attention is called to the fact that parol evidence shows that certain stock, horses, cattle, etc., passed with the land. The evidence, however, fails to show that the value of the stock amounted to any definite sum, nor is the record evidence overcome that a valuable money consideration was paid for the land by the grantees of Romero.

J. W. Tice was a purchaser for a valuable consideration from said grantees and he, on April 6, 1861, conveyed the title to his mother Urhetta Tice, the consideration being love and affection, and her better support, maintenance and protection, and it is contended that while this is a good consideration, it is not a valuable consideration, and hence that at the date of the passage of the act of July 23, 1866, the title was not vested in one who was qualified to purchase under said act.

I think the evidence clearly shows that Urhetta Tice, if the deed to her is to be considered an absolute conveyance, was a purchaser in good faith; that she purchased from the assignee of a Mexican grantee; that the grant was rejected subsequent to the purchase, that she had used and improved the land and continued in actual possession of the same according to the lines of the original purchase and that there was no valid adverse claim to the land except that of the United States. In view, however, of the consideration expressed in the deed, can she be considered a purchaser for a valuable consideration, the additional qualification necessary in order to be a purchaser under the statute?

I have carefully examined the discussion of this act by Congress for the purpose of ascertaining whether or not it was intended that any specific class of considerations should move between the Mexican holder and his transferree, and in the brief argument which arose over the passage of the bill I find no mention thereof, and I very seriously doubt whether Congress intended any more by this proviso than to prevent fraudulent or speculative transfers, hence it used the term, "valuable consideration," in its popular sense, rather than in its technical meaning and application. However, finding the words "valuable consideration," in the section, the presumption of the law is that Congress used it in its well defined legal signification, hence the department in interpreting the same, must be governed by the definition thereof, as used in the books. Bouvier defines "valuable consideration" as

> One which confers some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made; a valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.
>
> Good considerations are those of blood, natural love or affection, and the like. Motives of natural duty, generosity, and prudence come under this class.

I think it may be laid down as a general rule, that a "good consideration" will pass the title and support the covenants of a deed and will be enforced both in law and in equity, *inter partes*, and in all cases where such conveyance is not to the prejudice of creditors, or in fraud of the rights of others than the parties to the conveyance itself.

The act in question is remedial in its nature and should be liberally construed.

It has been held in the case of a remedial act that everything is to be done in advancement of the remedy than can be given consistently with any construction that can be put upon it.

The consideration between the son J. W. Tice and the mother Urhetta Tice, for the transfer was good and vested the title in her, unless the inhibition in the statute intervenes to prevent the same.

The record shows that the Tice family, consisting of the father and mother, the two sons, A. J. and James W. Tice, and the daughter, the wife of S. P. Millett, occupied and lived upon and improved the land, and various transfers were made between themselves prior to July 23, 1866, as before recited. By deed dated May 13, 1863, Urhetta Tice, A. J. Tice, S. P. Millett and wife, conveyed the land to D. P. Smith, who, on February 25, 1869, conveyed to John R. Spring, who, on March 24, 1869, conveyed to Martin Clark, and Clark on May 15, 1876, conveyed to Naphtaly. By deed dated April 1, 1869, James W. Tice conveyed the land to Martin Clark. All of these conveyances were for a valuable consideration.

The applicant, Naphtaly, has filed an affidavit in which he states that he was well acquainted with the Tice family, that when the conveyance was made, owing to the insolvency of the father, it was made to the son, James W. Tice, and the legal title was in him, although the other members of the family were interested in the purchase. James W. Tice, it was claimed, mortgaged the land for his own benefit, the other parties interested therefore insisted that the title should be transferred to the mother by a deed of gift, Mrs. Tice, however, holding the title only in trust for the other parties in interest and especially as security for the interest she and her husband had in the ranch. Subsequently, when it was determined to sell the ranch, she agreed to convey, provided the claims against the same were paid, and her claim of $2,000 was satisfied, which claim of $2,000, with interest, Naphtaly subsequently paid.

If the conveyance to Urhetta Tice was simply a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the property, a different rule might govern, and it may appear that the equitable title remained in the son, who was a qualified purchaser under the statute.

Whatever evidence there is on this point is outside the record, and is neither conclusive nor satisfactory, and in order that the facts may be ascertained, you are hereby instructed to order a further hearing on this point only.

Give due notice to the parties in interest and when the evidence is received, transmit the same to this Department for consideration, and in the meantime allow no disposal of the land in question.

Vacated so far as in conflict
29 L. D. 44

PRIVATE CLAIM—MINERAL LANDS.

BACA FLOAT NO. 3.

The act of June 21, 1860, authorized the heirs of Baca "to select instead of the land claimed by them an equal quantity of vacant land not mineral," and the burden of proof is, therefore, upon claimants under said grant to show that the lands so selected are non-mineral, and the Department may at any time before title passes from the government require the claimants to show that said land is not mineral, even though the character of the land may not have been known to the claimants at date of selection.

The right of claimants under this grant does not in any manner depend upon the present claim of the town of Las Vegas, nor is its extent to be measured by the quantity of land that may be awarded to said town upon the final disposition of that claim.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 24, 1891.

With your letter of July 20, 1889, you transmit the appeal of John C. Robinson, assignee, from the decision of your office denying his application for the survey of the private land claim in the Territory of Arizona, known as Baca Float No. 3.

This claim is one of the five blocks or tracts of land selected and located under the provision of the act of June 21, 1860 (12 Stat., 72), which provides:

That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas (Vegas), to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; *Provided, however,* That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

On July 26, 1860, the Commissioner of the General Land Office called the attention of the surveyor general of New Mexico to the claim of the heirs of Baca, and gave the following direction:—

You will proceed to have the exteriors of the Las Vegas town claim properly run and connected with the lines of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the town tract elsewhere in New Mexico, of vacant land, not mineral, in square bodies not exceeding five in number. You will furnish them with a certificate, transmitting at the same time a *duplicate* to this office, of their right, and the area they are to select in five square parcels.

Acting under these instructions the land claimed to be embraced in the grant to the town of Las Vegas was surveyed and found to contain 496,446.96 acres, and on December 8, 1860, the surveyor general of New Mexico, pursuant to the foregoing instructions, issued to the legal representatives of Baca the following certificate, a duplicate of which was sent to the General Land Office:—

I hereby certify that the grant to the town of Las Vegas has been surveyed under

instructions from this office, and according to the laws of the United States, and that the area of said tract of land is 496,446.96 acres.

Under the act of Congress, approved June 21st, 1860 (See Statutes at large, page 71), the heirs of Luis Maria Baca, are entitled to select in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same, therefore I notify you that this office is ready to coöperate with you, and receive your application, for the location of the lands granted by the government.

In accordance therewith, five tracts of land were selected and located, containing in each 99,289.39 acres, and known as Baca claims numbers 1, 2, 3, 4, and 5, respectively. The tract designated as claim or float number 3 was located by John S. Watts, as attorney for the Baca heirs, on June 17, 1863, which was amended upon application made April 30, 1866, so as to correct an alleged mistake in defining the location, and instructions for the survey of said location as amended were issued by the General Land Office, May 21, 1866, but the survey was not executed, because of the failure of claimant to deposit the necessary funds.

On August 15, 1877, J. H. Watts, one of the heirs of John S. Watts, who became upon his death the owner of Baca claim No. 3, applied to relocate said claim, upon the ground that the first location was made on land supposed to be vacant and non-mineral, but which, as he alleged, was disapproved by the General Land Office, because it contained mineral, or for absence of proof that it was not mineral. This application was rejected by Commissioner Williamson September 20, 1877, upon the ground that the act limits the right of location to three years and no longer, and that the time having expired the General Land Office had no power to authorize a relocation of the claim. He also called attention to the fact that the survey was not executed, because no deposit had been made but that there was now no obstacle to the execution of the survey of said location.

On February 13, 1885, John C. Robinson, who alleged himself to be the assignee of said claim also applied to relocate this claim, alleging that the claim had been located upon lands mineral in character, and upon this application Acting Commissioner Harrison, March 12, 1885, rejected the present location of the claim, for the reason that it embraced lands mineral in character and allowed a relocation of the same.

The question as to whether this claim can be relocated was afterwards submitted to the Department by said claimants, and on June 15, 1887, the Secretary held that the action of Acting Commissioner Harrison was without authority and void, for the reason that there is no power or authority in the Department to cancel such selection, if made prior to June 21, 1863, upon lands not known to contain mineral, or to allow a relocation of the claim after the expiration of the statutory period within which they were allowed the right of selection and location. (5 L. D., 705).

After said decision was rendered, John C. Robinson, assignee, applied for a survey of said location made in 1863, offering to make a deposit to cover the expense of said survey, which was denied by your office March 5, 1889, but in the decision of your office denying said application the surveyor general of Arizona was directed to order a hearing between the grant claimants and certain mineral claimants, whose applications to enter parts of said tract under the mining laws, are on file in your office, upon the following points:—

(1) As to whether or not the original claimants or their authorized agents or grantees knew, at the time of, or prior to the selection in 1863, of land under this claim, or at the time in 1866 of its amendment, of the existence of mines within the out-boundaries of the selection as designated by them in the written selections on file in your office; (2) as to whether, in point of fact, mines did exist within such out-boundaries or any of the lands therein situated were known in the vicinity to be mineral, at the time above specified.

From this decision said Robinson appealed, the material allegations of error being substantially to the effect that the Commissioner erred in failing to treat said claim as a perfected selection and location, which had been adjudicated by the approval of the surveyor-general of New Mexico, June 17, 1863, and that the Commissioner is without jurisdiction to re-open the question of the mineral character of the land, and to order a hearing for that purpose; that he erred in holding that the burden of proof was upon the grant claimants, and also in holding that the title to the location, made in 1863, "rests upon the confirmation or non-confirmation of the Las Vegas claim, to the extent at present claimed by the grantees thereof." While the Department held that it had no power to vacate or annul a selection made within the prescribed period of lands not known to contain mineral, yet it also held that, if claimants made selection of lands known to be mineral in character, such selection could be vacated, and the right to select other land in lieu thereof would be barred after the expiration of the statutory period.

The question as to the mineral character of this land has never been finally and definitely passed upon, so as to preclude a further examination of that question.

In the application to locate the tract made by John S. Watts, in 1863, as attorney for the heirs of Baca, he states, that "said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge." This application was approved by the surveyor-general, and in his letter transmitting it to the General Land Office he states, that as the location is far beyond any of the public surveys, he did not deem it necessary to procure any certificate from the register and receiver, as they could have no official knowledge concerning it. In reply to said letter, the Commissioner, on July 18, 1863, informed the surveyor-general that:—

Before the application of location No. 3, of the heirs aforesaid, can be approved by this office, it is necessary that our instructions of the 26th July, 1860, should be complied with by furnishing a statement from yourself and register and receiver that the land thus selected and embracing one fifth of the claim or 99,289 39-100 acres is vacant and not mineral.

On March 27, 1864, John S. Watts forwarded to the General Land Office a description of said location, again stating that it was vacant and not mineral, and also enclosed the certificate of the register and receiver that the claim is located upon unsurveyed lands, and, so far as the records of their office show, are vacant and not mineral lands. The surveyor general, in response to said letter of July 18, 1863, replied:—

> As I am personally unacquainted with that region of country, I cannot certify that the land in question is 'vacant and not mineral' or otherwise. Those facts can only be determined by actual examination and survey.

No further evidence of the character of the land embraced in said location seems to have been required, but on April 9, 1864, instructions were issued to the surveyor general directing that said land should be surveyed at the expense of the grant claimants. No survey was made under these instructions, but on April 30, 1866, John S. Watts filed an application, accompanied by a diagram of the intended location, which had been erroneously described by him in his application of June 17, 1863, asking that the surveyor general be instructed to correct the mistake, so as to change the initial point of the survey, and to commence at a point indicated in said amended application. The amendment was allowed, and instructions were accordingly given to the surveyor-general on May 21, 1886, in which he was instructed to

> cause the survey to be executed in accordance with the amended description of the beginning point, which is described in Mr. Watts' application of the 30th April last, provided by so doing the outboundaries of the grant thus surveyed will embrace vacant lands not mineral.

The survey was not executed under these instructions, primarily, for the reason that the claimants failed to deposit the money to pay for the expense of said survey, and, afterwards, for the reason that large mineral deposits had been discovered on the tract located.

There seems to be no question that the land embraced in this location is mineral land. This is shown by the admissions of John A. Watts, in his application to relocate this claim, dated August 15, 1877, and by the admission of John C. Robinson in his application of February 13, 1885. But there are also on file in your office communications from various parties asserting claims to certain portions of said tract, under mineral entries, alleging that the mineral character of said land was notoriously known at the date of selection, and that at the time of the selection in 1863 the original locators of the claim well knew that it embraced old and well known and long used Mexican silver mines.

There is also among the papers in this case an affidavit made by Thomas Gardner, who swears that he has lived within twenty or thirty miles of the old Salero mine from 1857 to 1888, excepting a little over one year, and that when he came to Arizona the country around the Salero mine (embraced in this location) was notoriously known as mineral land, and the Salero mine was known to every person as having

been worked by the Jesuit Fathers; that the Wrightson brothers worked the old Salero and other mines during the years 1858 and 1859, and, perhaps, 1860, "and the commencement of the civil war between the north and the south broke up the mining camp entirely;" that in 1863 William Wrightson, with Gilbert Hopkins, came back to Arizona, and said they were going to open up the Salero mines again, but in about six weeks they were killed by the Indians.

Taking into consideration the admission of the claimants that the land is mineral, together with the allegations of the several claimants that its mineral character was known to the claimants at the date of location in 1863, and of the affidavit of Gardner that the mineral character of the land was a matter of common notoriety, there is sufficient warrant for the action of your office in ordering a hearing to determine the question as to whether said location was made with a knowledge of the mineral character of the land.

But independently of this, the question as to whether the mineral character of the land was or was not known to claimants at date of location is immaterial. The act of June 21, 1860, authorized the heirs of Baca "to select instead of the land claimed by them an equal quantity of vacant land *not mineral*," and the burden of proof is upon the claimants under said grant to show that the lands so selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act, and the Department may at any time before the title passes from the government require the claimants to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location. If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral.

One of the alleged errors complained of in this appeal is, in holding that the title to the land embraced in this location rests upon the confirmation or non-confirmation of the Las Vegas claim, to the extent at present claimed by the grantees. The right of these claimants does not in any manner depend upon the present claim of the town of Las Vegas nor is its extent to be measured by the quantity of land that may be awarded to said town upon the final disposition of that claim.

In carrying out the provisions of the act of June 21, 1860, the surveyor general was instructed by the Commissioner of the General Land Office to first survey the Las Vegas claim, in order to ascertain the extent of the "tract of land as is claimed by the town of Las Vegas," and which was also claimed by Baca, and to furnish the claimants with a certificate of the quantity of land they were entitled to as an equivalent for the land claimed by them. Pursuant to these instructions, the surveyor-general surveyed the grant of the town of Las Vegas, and found it to contain 496,446.96 acres, and notified the representatives of

the heirs of Baca that they were entitled to select vacant, non-mineral land of equivalent quantity, in five bodies, and a duplicate of said certificate was sent to the General Land Office. This amount was determined by the proper officers, having jurisdiction to determine that question, to be the measure of quantity which the Baca heirs had the right to select within three years, and their adjudication is conclusive of that question, especially in view of the fact that the heirs of Baca acted upon said decision and made selection within the three years limited by the act, after which no selection could be made.

The action of the surveyor-general in determining the quantity of the grant seems to have been recognized by Congress. One of the bodies of land, containing one-fifth of the quantity found by the surveyor general to be the measure of the grant to the heirs of Baca, was located within the three years, as provided in the act, and Congress by act of July 11, 1864 (13 Stats., 125), authorized—

> the heirs of Luis Maria Baca to raise and withdraw the selection and location of one of the square bodies of land confirmed to them by said act, heretofore located by said heirs on the Pecos River, adjoining the Fort Sumner reservation, and to select and re-locate the same, in the manner provided by said act; . . . and upon such selection and re-location, the title to said square body of land, the same being the one fifth part of the private claim confirmed to said heirs as aforesaid, so selected and re-located, shall be, and is hereby confirmed to the said heirs of the said Luis Maria Baca as fully and perfectly as if the same had been selected and located within three years from and after the approval of the act aforesaid.

Furthermore, other locations made upon this measure of quantity, and in the hands of other assignees, have been perfected and passed beyond the control of this Department.

You will therefore direct that a hearing be had, with a view to determine the character of the land embraced in said location, and if said land or any part thereof is found to be mineral, you will take action thereon in accordance with the directions herein given.

APPLICATION FOR SURVEY—ISLAND.

JAMES C. MCLAUGHLIN (ON REVIEW).

Where land has been surveyed, sold, and patented by the government, the subsequent gradual erosion of the soil, resulting in the formation of an island in a navigable stream occupying the area formerly surveyed and sold, does not operate to vest title in the government to such formation, or authorize a public survey of the same.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 24, 1891.

I have considered the motion for review and reconsideration of the decision of the Department (12 L. D., 304), affirming the decision of your office refusing the application of James C. McLaughlin for the sur-

vey of an island in the Missouri River, in Sec. 22, T. 50 N., R. 33 W., in the State of Missouri, for the reason that said island is embraced within the former limits of the NE. ¼, the SE. ¼, and the E. ½ of the SW. ¼ of Sec. 22, in said township and range, which had been disposed of by the government, and that any riparian rights claimed by the owners upon the shores of the Missouri River must be adjudicated by the proper court.

It is alleged in said motion that the decision of your office was affirmed upon the authority of the case of St. Louis *v.* Rutz (138 U. S., 226), wherein the court based its decision upon the act of Congress admitting the State of Illinois into the Union, and upon the law of said State; that the proof in McLaughlin's case was positive that said island was permanent and formed by accretion; and that in the case of Packer *v.* Bird (137 U. S., 661), "not reported when the appeal of McLaughlin was heard," the United States supreme court held "that a patent by the United States which in terms bounds the land on the margin of a navigable stream, carries the title only to the water edge, and not to the center of the stream."

It is not alleged that there was any error in the statement of fact in said departmental decision, only that the law was misapplied. The decision sought to be reviewed found that said island was wholly within the limits of said section 22, which had been surveyed and disposed of by the government long prior to the formation of said island; that by a gradual change in the course of the river all of said land was washed away and in place thereof was a broad expanse of water with a channel for steamboats near both the eastern and western shores, and afterwards, by accretion of alluvial deposits, said island was formed on the spot where the land which was sold by the government was situated.

Counsel are mistaken in stating that the Packer-Bird case (*supra*) was not reported at the date when said appeal was heard, for it was decided on Jauuary 19, 1891, and the advance sheets containing the opinion were furnished to the Department soon after its rendition.

There is no conflict in the two decisions. It is true that the land in the St. Louis-Rutz case (*supra*) was in the State of Illinois, and the court (Op. p. 248–9) said:

> The enabling act of April 18, 1818, 3 Stat. 429, Par. 2, under which Illinois was organized as a State and admitted into the Union, made "the middle of the Mississippi River" the western boundary of the State. The enabling act of March 6, 1820, 3 Stat. 545, Par. 2, under which Missouri was organized as a State and admitted into the Union, made the "middle of the main channel of the Mississippi River" the eastern boundary of Missouri, so far as its boundary line was coterminous with the western boundary of Illinois. It has been held by the supreme court of Illinois, Buttenuth *v.* St. Louis Bridge Co., 123 Illinois, 535, that these two enabling acts are to be construed as *in pari materia*, and that the common boundary line between Missouri and Illinois is the "middle of the main channel of the Mississippi River." The "middle of the main channel of the Mississippi" has been constantly treated as the eastern boundary of the State of Missouri. Jones *v.* Soulard, 24 How., 41; The Schools *v.* Risley, 10 Wall., 91.

It follows that an island in the Mississippi River, in its course between Illinois and Missouri, must lie wholly in one of those States or the other, because the main channel of the river must run on one side or the other of such Island.

Again the court said:

We must not be understood as implying, that if an island in the Mississippi River remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the land would change, because it might be at one time on one side and at another time on the other side of the boundary between two States.

There is no conflict in said departmental decision with the doctrine announced in the Packer-Bird case, as stated by counsel,

that a patent by the United States which in terms bounds the land on the margin of a navigable stream carries the title only to the water edge and not to the center of the stream.

In the patent issued for the land disposed of by the government in said section 22, there was no limitation to the margin of the river, and the subsequent gradual washing away of the soil did not revest the title to the land in the government, so that it can again dispose of the land to another person. Such a proceeding would be contrary to reason and inequitable, and "reason is the soul of the law."

Upon careful consideration of the whole matter, no good reason appears for revoking said decision, and said motion must be and it is hereby denied.

MINING CLAIM—PLACER PATENT—KNOWN LODE.

REBEL LODE. Overruled, 20 L. D. 204; 45 L. D. 523

Where the record shows that there is no known lode or vein within the boundary of a placer claim, and patent regularly issues thereon, no subsequent application for a lode claim, within said placer, should be accepted so long as said placer patent remains uncanceled.

A lode entry, allowed in contravention of this rule, may be suspended, and opportunity given the entryman to apply for a hearing on the allegation that at the date of the placer entry and patent, said lode claim was known to exist, with a view to subsequent judicial proceedings against said placer patent if such allegation is sustained.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 24, 1891.

I have considered the appeal of Charles C. Kellogg *et al.*, from the decision of your predecessor dated March 27, 1890, holding for cancellation his mineral entry No. 2788, of the Rebel lode claim, made October 29, 1886, at the Leadville land office in the State of Colorado, to the extent of forty-seven one hundredths of an acre, lying within the Moyer placer claim, survey No. 300, which was patented on January 30, 1880, and no exclusion was made from said survey and patent of the land in question.

The appellant alleges error in said decision in holding said entry for

cancellation in whole or in part; in not holding that said lode claim, being known at the date of the entry of said placer, was expressly excluded therefrom, and no title to any lode claim passed under the patent for said placer claim, and in not issuing patent for the Rebel Lode claim so that the lode claimant and the placer claimant may test their rights in the courts.

Your office cited as authority for said ruling the Pike's Peak lode case (10 L. D., 200), in which, after a careful examination, and upon full consideration, it was held (*inter alia*) that if the record shows that there is no known lode or vein within the boundary of a placer claim, and patent regularly issues thereon, no subsequent application for a lode claim, within said placer, should be received by the local office, so long as said placer patent remains outstanding and uncanceled in whole or in part.

This ruling would seem to be decisive of the case at bar. But, inasmuch as the entry has been allowed, and there are certain ex parte affidavits in the record alleging that said lode claim was known to exist within the limits of said placer claim prior to the issuance of patent therefor, in my judgment said entry of the lode claim should be suspended for a reasonable time, say thirty days from notice hereof, in order that the lode claimant, if he so desires, may apply for a hearing to determine whether said Rebel lode claim was known to exist at the date of the entry and issuance of patent for said placer claim, to the end that, upon a sufficient showing, action may be recommended to set aside the placer patent so far as the same shall conflict with said lode claim. If no application should be made, as above indicated, then the decision of your office will be affirmed and the lode entry canceled as to the part in conflict with the placer claim.

Said decision is accordingly modified.

APPLICATION—APPEAL—SETTLEMENT—ENTRY.

BAXTER *v.* CRILLY.

The failure of an applicant to appeal from the rejection of his application for a tract of land, will not defeat his right to be heard, if he was not duly notified of his right of appeal, as provided in rule 66, of practice.

A hearing should be ordered to test the question of priority, where a pre-emptor, alleging a prior settlement right, applies to file for a tract of land embraced within the existing entry of another.

Under an alleged settlement right set up to defeat the entry of another, priority of settlement must not only appear, but also that the settler was at that date qualified to enter the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 24, 1891.

With your letter of June 9, 1890, you transmit the record in the case of Alfred R. Baxter *v.* Henry Crilly, on appeal by the latter from your decision of January 16, 1890, holding for cancellation his homestead

entry, made June 2, 1886, upon the NE. ¼ of Sec. 2, T. 25, R. 47, Chadron, Nebraska.

On July 5, 1886, Baxter forwarded to the local officers his pre-emption declaratory statement for said land, and the same was returned to him, for the reason that the land was covered by Crilly's homestead entry.

On December 22, thereafter, Baxter filed his affidavit of contest against the entry, alleging prior right to the land, by reason of settlement and residence as a pre-emptor.

Hearing was duly had, all parties being present and participating therein, and the register and receiver dismissed the contest; and, on appeal, you reversed that judgment.

I have examined the testimony, and find the same substantially set forth in the decision appealed from. I concur in the conclusions reached by your office, that Baxter had a settlement on the land at the date of Crilly's entry.

It is insisted that Baxter lost his right to the land when he failed to appeal within thirty days from the action of the local officers "rejecting" his application to file. It does not appear that the local officers formally rejected the application, but "returned" it, for the reason above set forth, which is in effect a rejection.

If the same had been rejected, he was entitled to notice of his right of appeal, under Rule of Practice 66; and in such case, until he was duly notified of such right, he would not be considered in default, if he failed to appeal within thirty days of such rejection. Turner *v.* Bumgardner, 5 L. D., 377.

Moreover, when Baxter applied to file his declaratory statement for the land embraced in Crilly's entry, alleging settlement prior to the date of such entry, a hearing should have been at once ordered to determine the rights of the parties. James *et al. v.* Nolan, 5 L. D., 526.

The hearing developed the fact that Baxter had settled on the land before Crilly made his entry thereon; but that fact alone is not sufficient to give him the superior right unless the additional fact appears that he was qualified to make entry at the date of his settlement. He was only twenty years old at date of hearing; and it does not appear from the record that he was the head of a family when he made the settlement; nor is it shown whether he ever had the benefit of any right of pre-emption, or whether he was the owner of three hundred and twenty acres of land, or whether he quit or abandoned his residence on his own land to reside on the public land in the same State. If he was not legally qualified to make entry at the date he settled upon the land, such settlement, although antedating Crilly's entry by two days, would not give him the superior right to the land. To defeat the entry, he must not only show that the had a prior *bona fide* settlement, but that he also had all the legal qualifications to make entry of the land at the date he settled.

I therefore remand the case, with directions that you require Baxter

to file supplemental proof, duly corroborated, that he was a qualified pre-emptor at date of his settlement on the land. You will allow him thirty days from date of notice of this decision to comply with this requirement. In the meantime, Crilly's entry will remain suspended.

Your decision is accordingly modified.

TOWNSITE PATENT—KNOWN LODE CLAIM—ACT OF MARCH 3, 1891.

PACIFIC SLOPE LODE.

Overruled so far as in conflict, 25 L. D. 51

The issuance of a townsite patent for land that contains a known lode claim conveys no title to said claim; but such patent, while outstanding, operates to remove the land described therein, and the title thereto, from the jurisdiction of the Department, and effectually precludes the issuance of a patent for said mining claim.

Where no exception of any portion of the surface ground is made from the land described in a townsite patent, departmental authority over such land, and the title thereto, terminates with the issuance of said patent, even though such instrument may in terms declare that no title shall be acquired thereby to any mine, or valid mining claim, and it shall subsequently appear that it covers land containing a lode claim known to exist at the date of the townsite entry and patent.

Where it appears that a townsite patent has issued for land containing a known lode claim, based on a record location made prior to the townsite entry, judicial proceedings should be instituted looking toward the vacation of said patent, so far as in conflict with said mining claim, and the subsequent issuance of propet title to the mineral claimant.

Section 16, act of March 3, 1891, is not retroactive in its operation, and hence can nor affect cases pending at the passage of said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 25, 1891.

I have considered the appeal of the proprietors of the Pacific Slope lode claim from the decision of your office of March 31, 1890, holding so much of their mineral entry for cancellation as conflicts with the patented townsite of Butte, Helena land district, Montana.

The record shows that a part of the tract described in the Pacific Slope lode claim was patented to the townsite of Butte on the 26th of September, 1877.

On May 28, 1874, the Pacific Slope lode claim was located, and, on the same day, duly recorded in Book 'F' at page 215 of the Lode Records of the Summit Valley mining district, Montana.

The townsite entry was made July 25, 1876, and a patent issued thereon September 26, 1877. On January 19, 1882, the mineral claimants applied for a patent, alleging that they were in the actual, quiet and undisturbed possession thereof under the mining laws of the United States and of Montana, and in accordance with the local customs and rules of miners.

On April 13, 1882, the lode claim entry was made, the claim paid for, and the proprietors received a receipt and certificate therefor.

Under date of July 9, 1887, your office ordered a hearing, for the purpose of ascertaining whether the grounds embraced in said mineral claim, so far as it lies within Butte townsite, were known to be valuable for minerals at the date of the townsite entry or prior thereto. A trial was had on June 23, 1888, at which the mineral claimants appeared and gave testimony, and W. O. Speer, city attorney of Butte City, appeared as a "friend of the register."

Considering the evidence submitted, on February 15, 1889, the local land officers found "that the Pacific Slope lode claim was worked and held prior to the townsite entry, and that it was more valuable for mineral than for townsite purposes, and prior to the occupation thereof for residence or business purposes under the townsite act."

No appeal was taken from this finding. However, the register and receiver forwarded all the papers to your office, where, on March 31, 1890, it was held that:

> In view . . . . . of departmental decision of February 21, 1890, in the case of the Pike's Peak Lode Claim (10 L. D., 200), mineral entry No. 819 is hereby held for cancellation as to so much thereof as lies within said patented townsite of Butte.

An appeal has been taken from your ruling to this Department.

The tract covered by the mineral entry is shown to have been known to be valuable for its minerals, and that a well-defined vein of gold was contained therein long before the townsite entry was made. It is shown that the location of said mineral claim consisted of placing monuments upon the surface of the ground to mark its boundaries, and in making a written declaration under oath of the discovery, and causing this declaration to be recorded in the public records of the county. This was notice to the world of the existence of valuable mineral in said claim, and the supreme court of the United States have held that:

> Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locators to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode. (Noyes *v.* Mantle, 127 U. S., 348.)

The case above cited was a controversy very much like one at bar. The location of the lode claim was made in April, 1878, under the same law that governed the location of the Pacific Slope lode claim, to wit: the act of Congress approved May 10, 1872 (17 Stats., 91; Rev. Stats., Title 32, Ch. 6). The adverse claimant asserted title to the lode claim under a patent of the United States issued to him on the 23rd day of April, 1880, for a placer mining claim which included that lode within its boundaries. The application of the placer claimant for a patent was

made in December, 1878, about eight months after the location of the lode claim.

In that case, as in the one at bar, there was no pretense that the original locators did not comply with all the requirements of the law in making the location of the lode claim or that the claim was ever abandoned or forfeited. The supreme court said:

> They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim and of subsequent expenditures to a specified amount in developing it. Until the patent issued, the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale.

It would seem that the reasoning in that case is applicable to the case at bar, for the Pacific Slope lode claim was regularly located before the date of the townsite entry. Such a location, when perfected under the law, is the property of the locators or their grantees, and the land covered by the location is not subject to the disposal of the government. Belk *v.* Meagher, 104 U. S., 279.

Accordingly, when the patent was issued to the townsite of Butte, and in accordance with the law which declares that no title shall be acquired under the townsite law to any mine of gold, silver, cinnabar, or copper, etc., your office expressly excluded such veins or lodes from the operation of the conveyance.

Having determined that the mineral claim was known to exist and was valuable for its product at the dates on which the townsite entry was made and the patent issued, the question arises: has the Department jurisdiction to issue a patent to the proprietors of the mineral claim while the patent to the townsite is still outstanding?

The general rule is well settled that the issuance of a patent terminates the jurisdiction of the Department over the land covered thereby, and such patent can be invalidated only by proceedings in the proper court. John P. S. Voght, 9 L. D., 114; United States *v.* Schurz, 102 U. S., 378; Moore *v.* Robbins, 96 U. S., 530; Pueblo of San Francisco, 5 L. D., 483, and numerous departmental decisions.

In order to secure a patent for a townsite claim, the applicant must make an affidavit that there is no "known lode or vein" within the boundary of the townsite entry. If such affidavit is falsely made, then the patent issued upon the entry could be vacated or annulled by appropriate action in the proper court.

From an examination of the records in this case, I am convinced that the existence of the Pacific Slope lode claim was known at the dates on which the townsite entry was made and patent issued, and, consequently, no title to the land embraced in this mineral claim passed to said townsite by reason of its patent. Furthermore, when the Pacific Slope lode claim was perfected, the ownership thereof passed thereby, and the

surface ground incident thereto and embraced therein was removed from the category of public lands; but, while it is seen that the patent to the townsite provides that "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of Congress," no exception is made of any of the surface-ground included in the grant to the townsite. It follows primarily that all of the land described in the patent is taken from out the control of the Department.

It is contended by counsel for the mineral claimants that the Department has jurisdiction to issue a patent for the lode, notwithstanding the fact that a patent has already been issued covering the surface embraced in the lode claim, maintaining that it is not a question of the issue of a second patent for the same land since the townsite patent expressly carved out and did not purport to convey the mineral claim.

This contention is untenable. The ground contended for is the same that is covered by the townsite patent, and, while the townsite may be compelled to surrender portions of its ground because of the prior right of the Pacific Slope lode claim, this Department is not the proper tribunal in which to seek that kind of relief. The surface of the ground included in the patent of the townsite is described by metes and bounds; no described exception is found therein, and any attempt of this Department to issue a second patent covering any part of the surface described in the townsite patent would be without authority. (Pike's Peak Lode, 10 L. D., 200.)

On April 13, 1891, the proprietors of the lode claim filed a motion to have this case taken up and disposed of under the provisions of section 16 of the act of Congress, approved March 3, 1891 (26 Stats., 1095), and under the rule of the Department, adopted April 8, 1891 (12 L. D., 308). This motion must be denied, under the ruling of the Department in the case of the Plymouth Lode Claim, dated May 16, 1891, which held that said section could not affect pending cases, because the terms of the act were not such as to make it retroactive in its effect. (12 L. D., 513.)

Since it is shown both by the evidence submitted at the hearing in this case and the records of the county wherein the land in question is situated, that the existence of the Pacific Slope lode claim was known when the townsite entry was made and patent issued, you will prepare a proper record of all the papers in the case and transmit the same to this Department with a view of their transmittal to the Attorney-General, in order to have a suit instituted in the proper court to have declared vacated so much of the patent of the townsite of Butte as includes the Pacific Slope lode claim.

Said mineral entry will be suspended pending further proceedings. Your decision is accordingly modified.

RELINQUISHMENT—INSANE PERSON—JURISDICTION.

ALDEN *v.* RYAN.

The jurisdiction of the Department to determine the validity of a claim to public land involves the necessary authority to determine the validity of a relinquishment, and for such purpose, to ascertain by proceedings of its own, whether the person executing such instrument was of sound mind.

A relinquishment executed by a person of unsound mind, prior to a judicial determination of his legal status, is not absolutely void, but is voidable by himself, his heirs, or devisees.

To warrant the vacation of action based on a relinquishment executed by one of unsound mind, some fraud, actual or constructive, must be charged and proven; and the party asking such vacation must tender a return of the money paid for such relinquishment.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 26, 1891.

I have considered the case of J. M. Alden, guardian of John Volwieler (insane person) *v.* Arthur Ryan on appeal by the latter from your decision of December 12, 1889, holding for cancellation his preemption declaratory statement, and re-instating the canceled homestead entry of Volwieler for the E. ½, NE. ¼, Sec. 34, and W. ½, NW. ¼, Sec. 35, T. 26 N., R. 4 W., Niobrara, Nebraska, land district.

This action was commenced by the guardian of Volwieler filing in the local land office, on May 13, 1887, a petition in which he set forth, substantially, (1) his appointment as guardian; (2) a description of the land; (3) that Volwieler was insane at the time he executed the relinquishment of his entry; (4) that Volwieler had purchased a relinquishment when he made homestead entry, paying $1,200 therefor; that he had put $500 worth of improvements thereon, and was residing thereon on December 15, 1886; (5) that on said day "he relinquished said homestead entry and sold his improvements thereon for the sum of $300 to the said Arthur Ryan"; (6) about a month afterward, he was adjudged insane; (7) he makes these statements to obtain cancellation of Arthur Ryan's declaratory statement filing, and that the canceled homestead entry of Volwieler be re-instated, and he asks a hearing.

A hearing was allowed and set for November 19, 1887. At the hearing, the parties appeared, and counsel for Ryan filed a motion in the nature of an objection to the jurisdiction of the land department, to try the question of Volwieler's insanity. They also filed a motion to dismiss for want of proper service, and a motion which was in the nature of a demurrer to the complaint. The local officers overruled all these motions, and proceeded to take the testimony in the case, which being completed they found that Volwieler was *non compos mentis* at the time he executed the relinquishment, and they held that his homestead entry should be re-instated and all adverse entries canceled. From this decision, Ryan appealed, and your office, on December 12, 1889, affirmed the said decision from which he again appealed.

The matter of service, and the question of the sufficiency of the petition are not insisted upon, but in the various assignments of error, eleven in number, they still insist that the Department has no jurisdiction to inquire into the insanity of Volwieler at the time he executed the relinquishment.

The precise limits of the jurisdiction of the land department have never been exactly defined or fixed by act of Congress, but, by Section 441, Revised Statutes, "The Secretary of the Interior is charged with the public business relating to . . . . the public lands including mines", and Congress has, from time to time, authorized the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, to make the necessary rules and regulations governing the disposition of the public lands by the various kinds of entries and filings, and it has long been established that the Department has jurisdiction of cases which involve entries, filings, settlements, etc., of the public lands, and to hear and to determine controversies between claimants, to cancel and to re-instate entries.

When a person goes upon the public lands to acquire title thereto by any process known to the law, he submits himself and his claim for title to the jurisdiction of the Department.

It may, upon complaint, or upon its own motion, inquire into the pre-emptor's or entryman's qualifications to make a filing or entry, or into his compliance with law, or the validity of his filing or entry. If his filing was erroneously allowed, it may be canceled. It is claimed that the filing in the case at bar was erroneously allowed because the land was under a homestead entry; that Volwieler being insane, his relinquishment was *absolutely void.* If this were the law, the Department would certainly have jurisdiction of the matter and could reinstate the entry and cancel the erroneous declaratory statement. That this is not the law does not change the jurisdiction nor affect the right to pass upon and determine the case. It follows, therefore, that the Department has the authority to determine the validity of the relinquishment before passing upon the validity of the declaratory statement filing, and I do not find any want of authority to do both.

There is really no charge in the complaint except that Volwieler was insane, and an inferential charge that the contract was unreasonable because the plaintiff's ward had paid $1,200 and made $500 worth of improvments, and that he had sold for $300, but the complaint does not say what the improvements were worth, nor that the contract was inequitable or unconscionable, nor does it charge any fraud on the part of Ryan, or deceit or overreaching, nor does it charge that he knew of Volwieler's affliction or that he did anything to aggravate his trouble or increase his mania.

Your office, as well as the register and receiver, was in error in holding that because Volwieler was insane in fact when he made the contract and executed the relinquishment, that it was absolutely void.

This is not the law of the land. "The deed of a *non compos* is *voidable* by himself, his heirs or devisees. If he is under guardianship, it is absolutely void." Hilliard—Real Property (Vol. 2, p. 433).

The adjudication of insanity renders the person legally incapable of performing any legal act. Not only this, but the record of the inquest and judgment is notice to the world of his incapacity, and no one can acquire any rights against the lunatic adjudged insane, by any agreement, or by the payment to him of money, or the delivery to him of property, but not so with a *non compos* who is free to contract, and who buys and sells—here rights do attach, and courts of equity are as much bound to protect the rights of a person dealing with such lunatic as they are to protect the rights of the insane person, and while it does not require the same amount of testimony to warrant the interference on behalf of an insane person, and strong presumptions are in his favor, yet it must be of the same kind of proof. Some fraud, actual or constructive must be charged and proven.

Judge Story (par. 227, Equity Jurisprudence) says:

> The ground upon which courts of equity now interfere to set aside contracts or other acts, however solemn of persons who are idiots, lunatics and otherwise *non compos mentis* is fraud. . . . . Every person dealing with them knowing their incapacity is deemed to perpetrate a fraud upon their rights.

Had Ryan knowledge of Volwieler's mental condition? Did he do or say anything to bring about the relinquishment which was in any degree false or fraudulent? Did he take advantage of the man's infirmity?

The testimony shows that Volwieler paid $1,200 for the relinquishment of a prior entryman, and that it was a great deal more than the value, and he offered the party $300 to rescind the contract, which offer was refused. He lived on the land from some time in 1885 up to the fall of 1886.

The testimony of the witnesses, fairly considered, shows the improvements in December, 1886 to have been worth between $400 and $500. It appears that Volwieler and his wife did not live harmoniously, and it was rumored that he had another wife living somewhere.

In the fall of 1886, his wife and their younger children went back to Illinois to her father. Volwieler had some chattel property, horses, cattle, etc. There was a mortgage on his "team" of horses to secure about $270 debt. This Ryan paid, and gave him a $20 gold piece for the improvements on the land. It appears that Ryan was not very well acquainted with Volwieler, having met him first some time in May, 1886. He testifies that he had heard that Volwieler wanted to sell his improvements to go back to Illinois, and that when he made the agreement of purchase, he had never heard or seen anything to cause him to think there was anything wrong with his (Volwieler's) mind; that he paid his money in good faith and went upon the land, moved the house to a point nearer the road, dug a cellar under it, also dug a well, broke

twelve acres of land and planted one-half acre to trees, before the hearing in the case.

It appears that Volwieler was a German, some 63 years of age. In the latter part of November, 1886, he talked strangely to some of the witnesses, and seemed to have an impression that certain of his neighbors were conspiring to take his land from him. He talked of being watched by people, talked of another wife who might appear and give him trouble. He appeared to place especial confidence in Dr. Alden and a Mr. Bell, and wanted them to stand by him in case he should get in trouble. Bell spoke to Dr. Alden once about Volwieler's condition, and the Doctor said "he is crazy," but there is no evidence that either of them ever mentioned the matter to any one else or talked about it themselves, excepting the one time. In fact, they gave it but little attention. There were a number of his nearest neighbors called as witnesses, no one of whom had any thought that there was anything wrong with his mind, or had ever heard an intimation of it, except the two in whom he confided. Naturally a quiet man, he seems to have moved about in the community without exciting any suspicion that his mind was diseased. The notary who made out the relinquishment and took the acknowledgment says that he had no suspicion of anything being wrong; that Volwieler understood what was to be done and was particular about having the business transacted carefully.

I have examined the testimony with great care, and am entirely satisfied that you are in error when you say Ryan "could not have been ignorant of Volwieler's mind." There is no testimony tending to show any such knowledge. It was not until the last of January, 1887, when his wife returned from Illinois and caused the inquest of lunacy to be held, that it became generally known that he was insane. There is then no presumption of fraud in the case, arising from knowledge of the disease of Volwieler. It will not do to say that the facts developed at the inquest were such as to put Ryan upon inquiry, unless it is shown that some of the facts had come to his knowledge previous to the payment of the money, and it will not do to hold that because a man was declared insane on January 24, 1887, that he was *prima facie* insane on December 15, 1886.

Nor can it be fairly claimed that the price asked by Volwieler was so unreasonably low as to put a man upon his guard or on inquiry.

It appears that the witness, Bell, who testifies to Volwieler's insanity, spoke to Ryan about the old man wanting to sell out, and when Ryan asked why he didn't buy the improvements, he said he did not have the money. They were spoken of as a good bargain, but not as exceedingly cheap. Bell testified that this talk was in the last of October. He has no recollection of saying anything to Ryan about the old man's mental condition. Dr. Alden, the guardian, who was entirely familiar with the land, and with that kind of property thinks the improvements at the time, worth about $450. Some say $300 was a fair price, others say they were worth from $300 to $500, according to circumstances. So

there does not appear to have been any such great sacrifice of the property as would put an ordinarily prudent man on inquiry, especially when the settler's wife had gone back to Illinois, and he claimed to want to sell so he could go too.

But there is another matter of importance in this case that your office seems to have ignored. This contract was not illegal, nor against public policy or good morals. It was a legitimate transaction, and money was paid upon the contract. Ordinarily a demurrer will lie to a bill in equity, where rescission is asked, or it is sought to have a contract set aside, if it appears on the face of the bill that part payment has been made, unless a tender of the money is also made.

Judge Story, in discussing this subject, says (par. 228, Equity Jurisprudence):

> And so, if a purchase is made in good faith without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not interfere to set aside a contract, if injustice will thereby be done to the other side and the parties cannot be placed in *statu quo* or in the state in which they were before the purchase.

There is no tender of the money paid in this case.

Having fully considered the entire record and the testimony, I cannot concur in your findings of fact, or your rulings as to the law governing the case. Your decision is therefore reversed, and the application dismissed. (This decision will not bar a new application if a court of equity should, upon a hearing, decree a rescission and restore Volwieler to possession of his claim).

CERTIORARI—SPECIAL CASE—APPEAL.

TAYLOR *v.* ROGERS.

The act of the Commissioner in making a case special, or in refusing so to do, is within his discretion, and will not be disturbed in the absence of a clear showing that such discretion has been abused, and that such abuse has resulted in injury to a party in interest.

An appeal in which it is alleged that certain important papers are missing from the record should not be dismissed on motion without allowing the appellant an opportunity to file argument in response to said motion, and take action with respect to the missing papers.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 27, 1891.

I have considered the application by Rogers for certiorari proceedings in the case of Samuel F. Taylor *v.* Harvey L. Rogers, involving desert land entry No. 241 for the E ½ of the SE ¼, the SW ¼ of the SE.¼, and lot 4, Sec. 25, T. 2 N., R. 37 E., Blackfoot, Idaho.

From the records transmitted by you, the facts in the case appear to be, briefly stated, as follows: Rogers made desert land entry for the tracts in question on March 13, 1890, and on March 15, following, filed notice of his intention to make final proof and cash entry.

On April 28, 1890, final proof was made, and on May 6, following, upon payment, cash certificate issued to him.

May 28, 1890, an affidavit of contest was filed in the local land office by Samuel F. Taylor, alleging

> That said tract was not at date of entry, nor at date of final proof, subject to entry under the desert act, in that a portion of said land had been for several years prior thereto appropriated and occupied by the Bingham County Agricultural Association, they having improvements thereon to the extent of $5,000 a portion of said land having also been reclaimed by said association prior to date of said entry.

A hearing was had on this affidavit on August 12, 1890. On September 4, 1890, after considering the evidence, the register and receiver found that the land had been reclaimed before the entry of Rogers; they accordingly recommended the same for cancellation.

On September 9, following, Rogers filed his notice of appeal, which, omitting the notice and formal parts, is as follows: "That said decision is contrary to the law and the evidence in the said case." No proof appears in the record that a copy of the notice and alleged assignment of errors was served upon the appellee.

On March 31, 1891, upon presentation of certain facts, by order of your office, said case was made special.

You state that on April 1, 1891, Taylor appeared specially by counsel and filed, with proof of service upon counsel for Rogers, a motion to dismiss said appeal for the following reasons:

> (1) Said appeal contains no specifications of error as required by the Rules of Practice.
>
> (2) There is no evidence of record that any appeal was served on Taylor the appellee.

A notice of the pendency of the motion was served on counsel for Rogers on March 31, 1891; and on April 3, following a letter was received at your office from him, of which the following is a copy:

> WASHINGTON, D. C., *April 3rd*, 1891.
>
> SIR: In the matter of the contest of Samuel F. Taylor *v.* Harvey L. Rogers now pending before you on appeal from the decision of the local office at Blackfoot, Idaho, involving Blackfoot, Idaho, D. L. Entry No. 1075, F. C. 241, E. ½ of SE ¼ and SW ¼ of SE ¼ and Lot 4, Sec. 25, Twp. 2 north, range 37 east, and in which case I represent Harvey L. Rogers I have been served with a notice of motion to dismiss the appeal.
>
> In examining the record of the case preparatory to replying to this motion I find certain important papers in the case missing.
>
> I write this simply to request that you will not take immediate or hasty action on the motion to dismiss the appeal until I have an opportunity to duplicate or account for the missing papers in order that I may properly reply to the motion.
>
> Very respectfully,
>
> R. B. PAIRO.

On April 10, following, considering said motion, your office held that the want of proof of the notice of appeal might be supplied, provided it was made to appear that the notice had been served; but held that the appeal must be dismissed because it contains no specifications of error as required by the Rules of Practice.

Rogers was notified that no appeal from your said ruling would be

allowed, because of his failure to perfect an appeal to your office from the findings of the register and receiver. Thereupon he petitioned for a writ of certiorari to compel the transmission of the record to this Department for final disposition.

It is well settled by the rulings of the Department that the writ of certiorari will not be granted to control the Commissioner's discretionary authority, unless there has been an apparent abuse thereof. Witter *v.* Ostroski, 11 L. D., 260.

The acts of the Commissioner in making a case special, which is pending before him, or in refusing to do so, are matters clearly within his discretion and consequently will not be disturbed by this Department in the absence of a clear showing that such discretion has been abused and that the abuse thereof has resulted in injury to a party in interest. Frank Quinn, 9 L. D., 530. Besides, it was held in the case of Lambert *v.* Fairchild, 5 L. D., 675, that "when a case is ready for consideration under the rules of practice, it may be advanced on the docket without notice to either party."

In this case, Rogers' appeal was taken on September 9, 1890, briefs were filed soon after, and the case was in every way ready for consideration on March 31, 1891, when it was made special. Without deciding whether the appeal was sufficient in form to constitute a compliance with the rules of practice, I am of the opinion that your office committed an error in dismissing the appeal over the objection of the attorney of Rogers and in the face of the showing made by him in his letter of April 3, 1891. He should have been allowed a sufficient length of time in which to have prepared his objections to the dismissal of the appeal on the motion made by contestant. On April 3, attorney for contestee requested that your office should not take hasty action on the motion to dismiss the appeal, and suggested that "in examining the record of the case preparatory to replying to this motion I find certain important papers in the case missing." On the seventh day after receiving this information, and although no brief had been filed for contestee, your office dismissed the appeal, and gave notice that no appeal to this Department would be allowed.

It appears that applicant is entitled to the relief asked for in his petition. It was manifestly a great injustice to contestee to have dismissed his appeal without allowing him time in which to discover the missing papers alleged to have been lost from the record and to file his argument against the motion to dismiss. It seems that his communication of April 3, asking time, was not answered, and the first information he received was that the appeal had been dismissed.

I think the facts presented in the petition warrant the exercise of that just supervision which the law vests in this Department over all proceedings instituted to acquire portions of the public lands. You will therefore, on receipt hereof, certify up to this Department the papers in the matter referred to, for investigation and such action as may be deemed appropriate.

INDEX.

Page.

Abandonment.

See *Residence.*

Accounts.

See *Fees, Repayment.*

Agent.

Acts of agency shown to exist in procuring an entry create a presumption as to the continuance of such relation 192

Alabama.

See *Mineral Land.*

Alaska.

Regulations provided to carry into effect certain provisions of the act of March 3, 1891, for allowing entries of land in, for townsite, trading, and manufacturing purposes. 583

Alien.

See *Entry, Naturalization, Settlement.*

Alienation.

The intent to sell after final proof may be compatible with good faith, and not defeat the right of entry 20

After issuance of certificate, and prior to patent, of a portion of the land is at the peril of the entryman, for if new proof is required the claimant will not be able to make the affidavit required by section 2291, R. S 132

Transferee under a timber land entry, is not an innocent purchaser, where the entry is fraudulent, and the transferee is a party to the fraud 313

Allotment.

See *Indian Lands.*

Amendment.

See *Application.*

Application.

See *Railroad Lands.*

To enter, is equivalent to an actual entry so far as the rights of the applicant are concerned 324, 643

To enter, while pending excludes the acquisition of rights adverse to the applicant 47, 324

To amend a homestead entry reserves the land covered thereby from other disposition until final action thereon 558

Page.

Rights under, relate back to date when actually made, irrespective of a later date shown by the papers through no fault of the applicant 173

To enter, not defeated through the failure of the local office to note of record an order canceling a former entry of the land applied for 643

Made in due compliance with existing regulations, is not prejudiced by a subsequent change of regulations, made prior to action on said application, especially where the applicant complies with the later construction of the law when notified thereof. 297

To purchase, under the timber and stone act confers no vested right 58, 326

To purchase, under the act of June 3, 1878, land previously withdrawn, does not except the land covered thereby from the operation of the act of October 1, 1890, providing for the reservation of certain forest lands in California 58, 326

To enter, can not be allowed for land embraced within an existing railroad indemnity withdrawal 27

To enter, can not be accepted for land embraced within a prior railroad indemnity selection 386

To file declaratory statement, should not be allowed for land covered by pending selection at date of settlement 448

To enter, or file, when the land is not subject thereto confers no right 188, 261

To make preëmption filing should not be received for land involved in a rejected railroad selection, pending on appeal; nor any action taken with respect to such land without special notice to the company 18

To make homestead entry, can not be allowed for land embaced in a pending contest 11

To enter, can not be allowed for land involved in the pending appeal of another 334

To enter, must be rejected where the land is covered by the prior entry of another, and embraced within a pending contest 377

Time within which to make, accorded the homestead settler by the act of May 14, 1880, does not run as against the settler during the pending of an erroneous application theretofore filed by him for the land in question 631

To enter, should not be allowed for land included within the prior pending application of another 47

Page.

To file declaratory statement, should not be allowed for land embraced within a pending order for its sale as an isolated tract.... 397

To make entry, may be received during the time allowed for appeal from a judgment canceling a previous entry of the land, subject to such appeal, but should not be made of record until the rights of the former entryman are finally determined..... 243

Filed during a vacancy in the register's office, is, in contemplation of law, submitted for official action when the vacancy is filled. 297

If rejected, the applicant should be informed of his right of appeal; and in the absence of such information, failure to appeal will not defeat the subsequent right of the applicant to be heard.....235, 684

Failure to appeal from rejection of, will not bar a subsequent assertion of priority, where such failure is due to erroneous information received from the local officers as to the record status of the land..... 550

Arid Land.

See *Reservation.*

Attorney.

Appearance of, in a case is general, if he seeks to call into action any powers of the court except such as pertain to its jurisdiction..... 620

An appearance entered in general terms can not be subsequently qualified by an allegation that it was for a special purpose 14

California.

See *States and Territories.*

Cancellation.

See *Judgment.*

Certificate.

Of deposit, issued on application for survey, is assignable under act of March 3, 1879, whether issued before or after said act..... 23

Certiorari.

The writ will not be granted where the right of appeal is lost through failure to assert the same within the prescribed period. 62

Will be granted where it is made to appear that the record should be reviewed for the consideration of the errors alleged..... 230

Will not be allowed where the right of appeal is lost through the attorney's negligence 388

Circulars.

See table of, page xvii, and *circulars cited and construed.*

Regulations not in conflict with the statute under which they are issued have all the force and effect of law..... 138

Citizenship.

See *Naturalization.*

Page.

Coal Land.

Entry of, not allowed for non-contiguous tracts 419

The character of land claimed as coal must be determined by the actual production from mining on the tract, or by satisfactory evidence that coal exists thereon in sufficient quantity to make it more valuable for mining than for agriculture 612

Colorado.

See *School Land.*

Commutation,

See *Homestead.*

Confirmation.

See *Entry.*

Contest.

See *Contestant.*

GENERALLY.

An affidavit of, may be properly rejected if not executed in due form, and the contestant in such case acquires no rights thereunder..... 545

An affidavit of, left with the register, but not made of record nor deposited for such purpose, does not confer upon affiant the status of a contestant, nor any right that he can assert as against one claiming under subsequent relinquishment 113

Proceedings against a final entry not permissible in the absence of due order therefor 305

Should not be entertained against an entry that is suspended on account of an alleged defective survey 370, 56

The regularity of an entry can not be called into question except by one who shows that the allowance of such entry is in violation of his prior right or equity.... 639

Departmental definition of, under section 7, act of March 3, 1891..... 453

The proviso to section 7, act of March 3, 1891, is one of limitation upon contests begun after the passage of said act, but does not relieve entries from the effect of contests pending at the passage of said act. .. 522

Pendency of, will not defeat the confirmatory operation of section 7, act of March 3, 1891, for the benefit of a bona fide mortgagee holding under a mortgage executed after final entry and prior to March 1, 1888..... 571

Withdrawal of, after the submission of testimony, leaves the case as between the entryman and the government..... 334

Second, can not be entertained, pending final disposition of the first..... 334

Second, filed during the period within which the first contestant is entitled to the right of appeal from an order dismissing his contest, is subject to the first, if the appeal is taken in time 525

Page.

Filed during the pendency of proceedings against the claim in question should be suspended until the disposition of the pending suit, and if cancellation results therefrom the second contest must be dismissed 157

Will not be allowed on a charge that has been made the subject of investigation and final decision by the Department.....317, 520

Will not be entertained on a charge that has been fully investigated by the government..... 600

Concurring decision of the local officers should be signed by both, but the failure of one to attach his signature in such a case will not warrant a reversal of the judgment..... 642

COAL LAND.

May be entertained against a coal entry, and if successful, a preferred right of entry secured thereby..... 336

DESERT LAND.

Against desert entries recognized as within the intent of section 2, act of May 14, 1880..... 41

HOMESTEAD.

On the death of the entryman, and substitution of the widow as defendant, she is entitled to notice, and must be brought into court through process of law or voluntary appearance 14

Against the entry of a deceased homesteader requires notice to the heirs and legal representatives of the decedent..... 510

The sale of the land embraced within an entry is ground for, at any time after the fact of such sale becomes known 510

May be properly entertained on a charge of abandonment, though the statutory life of the entry has expired 285

PREËMPTION.

Will not lie against a preëmption filing for the purpose of securing a preference right through its cancellation..... 639

An allegation of abandonment after the submission of final proof is not sufficient ground for 492

SWAMP LAND.

Against a swamp selection is not a statutory right, but recognized as an aid in determining the true character of the land... 64

Against a swamp selection should not be allowed except on prima facie showing that would warrant rejection of the claim under the grant 64

TIMBER CULTURE.

The wife of the entryman is entitled to notice, where it is known that the entryman has disappeared, and his whereabouts can not be discovered 203

Page.

An attempt to cure a default before service of notice, is inconsistent with good faith where such action is induced by the impending suit..... 403

Must fail where the default charged is cured prior to notice, and the acts in compliance with law are not induced by knowledge of the impending suit 568

Must fail where it appears that the entryman's failure to secure a growth of trees is not due to his negligence..... 502

Contestant.

Is not entitled to a preference right unless the cancellation or relinquishment of the entry is the result of the contest..... 25

No preference right acquired through a contest filed during proceedings by the government against the entry if such proceedings result in cancellation..... 25

The preference right of the successful, can not be questioned by the defeated party after his entry is regularly canceled 32

Questions as to the preference right of a, can only arise on application to exercise such right, and should not be decided prior thereto..... 157

The request of, for the dismissal of the contest will not defeat his preference right thereunder where he subsequently, in good faith, prosecutes the same to a successful conclusion 265

Preference right of, not defeated by the cancellation of the contested entry on subrequent proceedings by the government where prior thereto the contestant had submitted testimony sufficient to secure cancellation and obtained the favorable judgment of the local office thereon 285

Preference right of, not defeated by a hearing inadvertently ordered on the subsequent contest of another..... 318

While the government is an interested party it is not a contestant or protestant in the sense in which those terms are used in section 7, act of March 3, 1891..... 334

Withdrawal of, will not prevent the Department from considering the record and rendering such judgment as the law and facts require 495

Preference right may be awarded to one who applies to contest at his own expense a coal entry, and furnishes information that leads to the cancellation of the entry on proceedings subsequently initiated by the government..... 336

Preferred right of entry may be accorded the first, though the cancellation is made on the subsequent suit of another, where the first had prior thereto submitted sufficient evidence, was not in default, and the second is charged with notice of the rights of the first..... 525

Page.

Who resides upon and improves the land covered by the canceled entry, but fails through ignorance to enter the same within the statutory period, is not precluded from subsequently entering said land by the intervening entry of another secured through wrongful means, and with notice of the contestant's claim 533

No preferred right of entry can be secured through a contest against a preemption filing 639

Costs.

See *Practice.*

Decision.

See *Judgment.*

Publication of a departmental, in the Land Decisions is not equivalent to an official promulgation thereof 252

Of the local officers should be signed by both if they concur in the conclusions reached 642

If, through inadvertence, either the register or receiver fail to sign an opinion that is in fact the opinion of both, the signature may be attached, *nunc pro tunc*, at any time before the record is transmitted 642

Declaratory Statement.

See *Filing.*

Deed.

Made in good faith by the husband to the wife is recognized as valid by the Department if such transfer is authorized under the laws of the State 244, 455

Desert Land.

See *Entry, Final Proof.*

Land containing a natural growth of timber trees is not subject to entry under the desert-land act 34

Price of, within railroad limits is properly fixed at double minimum 632

Entry.

See *Application, Public Land.*

GENERALLY.

Circular regulations of April 27, 1891, under the first six sections of the act of March 3, 1891, with a copy of said act 405

Right of, not defeated by the adverse claim of one holding under a quitclaim deed from the State 519

Made by an alien is not void but voidable, and segregates the land included therein from the public domain while of record 345

Allowed during the pendency of the prior application of another confers no rights as against the prior applicant; and in the event that such application is allowed the intervening entryman should be called upon to show cause why his entry should not be canceled 47

Made subject to the preference right of a successful contestant should not be canceled without due notice to the entryman and an opportunity to be heard 285

Page.

In accordance with the lines of survey, as shown by the map on file, but found to embrace land within a military reservation, may be equitably confined on the release of such land from the reservation 192

Improperly allowed for land within a swamp selection may be permitted to stand, on the cancellation of the selection, if such action does not impair the right of an adverse claimant 639

May be reinstated where canceled on account of a prior valid adverse claim, and said claim is subsequently withdrawn 208

Canceled on the erroneous report of the local office that no response had been made to notice of the adverse decision, should be reinstated when the fact of such error is made known 604

That has been duly canceled is no bar to the subsequent settlement or entry of another 488

Containing an excess over one hundred sixty acres may stand, where it approximates such area as nearly as may be without destroying the contiguity of the tracts embraced therein 356

Of lands lying on both sides of a meandered stream will not be disturbed where it is shown by the records of survey that such stream should not have been meandered 556

Should not be allowed for land on both sides of an existing meandered stream 73

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

Instructions of May 8, 1891, issued to chiefs of divisions in the General Land Office, with respect to the provisions of said section 450

A contest pending at the passage of the act of March 3, 1891, defeats the confirmatory effect of the proviso to section 7, act of March 3, 1891 459

Confirmatory effect of said section need not be invoked where the pending contest is dismissed on the merits 497

A pending protest defeats the confirmatory effect of section 7, act of March 3, 1891 440

That has been canceled by a decision that became final before the passage of the act of March 3, 1891, is not within the confirmatory provisions of section 7, of said act ... 446, 610

Is confirmed by the proviso to said section, where two years have elapsed since final receipt issued, and no contest or protest is pending at the passage of said act ... 313, 334, 344

Adverse decision of the General Land Office, on proceedings by the government, will not defeat confirmation under the proviso to said section, if said proceedings are not begun within two years after issuance of final receipt, and the entry is otherwise within the terms of said proviso 610

Page.

Allowed where the husband and wife claimed separate residence in a house built across the line between two settlement claims, is confirmed by said section, if two years elapse from the issuance of final receipt and no protest or contest has been filed. (Overruled 13 L. D., 1.) 443

Allowed in conflict with a railroad grant, but relieved therefrom by the forfeiture of such grant, may be confirmed under said section, notwithstanding the previous adverse claims of the company 540

Of Osage land held to be within the confirmatory effect of section 7, act of March 3, 1891 442

The proviso to said section does not relieve entries from the effect of contests pending at the passage of said act 522

Against which there is no adverse claim pending at date of, is confirmed by said section, where the land after entry and prior to March 1, 1888, is sold to a bona fide purchaser 250, 279, 600

Fraud on the part of the entryman will not defeat the confirmatory effect of said section, where the entry is allowed in the absence of an adverse claim, and the land transferred prior to March 1, 1888, to a purchaser in good faith for a valuable consideration 444

Not confirmed by said section, for the benefit of a transferee, if fraud on the part of such transferee is found through investigation by the government 440

Made by one, not shown to be qualified in the matter of citizenship, is confirmed by said section, if prior to March 1, 1888, the land is sold to a bona fide purchaser, and there was no adverse claim at date of entry. 637

Mortgaged after allowance and prior to March 1, 1888, is confirmed by section 7, act of March 3, 1891, not withstanding the pendency of a contest 571

To bring a transferee within the cofirmatory provisions of said section 7, act of March 3, 1891, satisfactory proof of sale or incumbrance, and good faith between the parties must be furnished 305, 540, 571

DESERT LAND.

Circular regulations of April 20, 1891, giving directions for the manner of proceeding in case of final entry before survey 376

The preliminary affidavit must be made upon the personal knowledge of the entryman, derived from a personal inspection of the land 90

Allowance of initial, does not deprive the local office of jurisdiction in subsequent proceedings directed by the Department to ascertain the validity thereof 34

The departmental order of September 12, 1877, suspending Visalia entries revoked, and directions given for the disposition of pending contests against the same, and the reception of final proof thereon 34

Page.

HOMESTEAD.

Can not be perfected under section 2291, R. S., until five years' residence on the entire tract can be shown 645

Made with speculative intent to sell the land to townsite occupants is illegal and must be canceled 654

Of land partly within an Indian reservation must be corrected, though made in consequence of an erroneous survey, and valuable improvements have been placed on the land that must be excluded 437

May not be amended so as to embrace land not originally intended to be entered, but the applicant in such case may relinquish and make a second entry under section 2, act of March 2, 1889 268

The right to make second, of lands embraced within the Seminole purchase, accorded by the act of March 2, 1889, to those who have commuted a former entry, is restricted to persons who had thus perfected title prior to the passage of said act 617

Cancellation of commuted entry carries with it the cancellation of the original entry and record of such action should be accordingly noted 243

PREËMPTION.

Canceled for failure to comply with the law in the matter of residence can not be reinstated on a showing of subsequent residence and cultivation 418

Equitable Action,

See *Entry*.

Evidence.

Additional, by the contestant may be admitted, in the discretion of the local office, after the claimant has submitted his 14

Failure to appear and submit, under rule 35, can not be excused on the mere allegation that the party in default was apprehensive that his testimony would not be fairly taken 30

Ex parte affidavit not considered as, in a contested case 67

Under rule 41 of practice the local officers are invested with discretionary power to determine whether additional testimony will cause unnecessary expense 109

Rule 42 modified in Oklahoma townsite cases by circular instructions of August 18, 1890 186

As to acts performed by the entryman after the submission of final proof, is only considered for the purpose of discovering the claimant's intentions prior to said date, and must be clear and convincing to prevent the consummation of title 647

Fees.

See *Practice* (sub-title *Costs*).

Page.

Paid on Omaha Indian filings, under the act of August 7, 1882, must be reported as a part of the maximum amount allowed the local officers, on account of salary..... 371

The disposition of Omaha filing fees is not affected by the act of May 15, 1888..... 371

Can not be collected by local officers in contest cases for reducing testimony to writing, if such service is not performed by them or by one acting under their employment..... 531

Filing.

See *Application.*

Second, can not be allowed, in the presence of an adverse claim, to one who abandons the first because made without prior settlement on the tract covered thereby.... 536

Under the preëmption law can not be allowed to embrace land within an Indian reservation..... 563

On land embraced within the existing entry of another confers no right as against the prior entryman..... 600

When offered on alleged prior settlement right, for land covered by the existing entry of another, a hearing should be ordered to test the question of priority..... 684

Where erroneously allowed for land embraced within a rejected railroad selection, pending an appeal, it must be suspended until final disposition of the selection..... 18

Made through the consent and procurement of the preëmptor exhausts the preemptive right and renders a subsequent filing illegal..... 110

Made for the benefit of another is illegal and must be canceled..... 303

On the expiration of, without proof and payment, the presumption arises that the claim thereunder has been abandoned..... 384

For land subsequently withdrawn for reservoir purposes under the act of October 2, 1888, may be suspended until it can be determined whether said land will be actually required for the purpose for which it was withdrawn..... 438

Of a preëmptor, determines the amount of land covered by his claim, and a mere allegation that other land was embraced therein will not be accepted as against the record..... 471

Failure of preëmptor to make, within the statutory period, forfeits the settlement right in the presence of an intervening adverse claim..... 519

One who has failed to file in time can not post date his settlement in order to defeat the intervening claim of another..... 519

Final Proof.

GENERALLY.

Proofs accompanied with payment which are not acted upon by both local officers within one week after being received must be reported with reasons for delay..... 188

Page

Should not be accepted while the survey of the township in which the land is situated is suspended for investigation..... 633

Special notice of intention to submit is only required to be given to parties in interest..... 538

On offer of, for land covered by a railroad selection, the company is entitled to special notice..... 18

Failure of a railroad company to respond to the published notice of, will not defeat its title to lands which on the record are shown to have passed under the grant..... 351

One who offers, in the presence of an adverse claim, must submit to an order of cancellation if he fails to show compliance with law..... 627

Tender of payment, on submission of, will be presumed to have been made according to the regulations, in the absence of any showing to the contrary..... 492

No rights are prejudiced by delay in the issuance of final certificate..... 42

Protest against, may be acted upon by the local office, though filed after the submission of the proof..... 202

When submitted on indefinite notice, it may be accepted on new notice, in the absence of protest..... 213

When submitted for land embraced in a rejected railroad selection pending on appeal, the proof should be suspended and the claimant allowed to intervene in the selection proceedings, under the rules of practice..... 18

In proceedings before the local office where an adverse claimant who discloses his interest applies to intervene, he should be made a party, though such action may call for a continuance of the case..... 488

On the submission of additional, in accordance with the call of the General Land Office, to support an entry allowed by the local office, adverse testimony should not be received on behalf of a protestant in the absence of due order therefor..... 305

On requirement of new, a mortgagee may be permitted to show that the entryman complied with the law prior to the submission of proof, if the entryman fails or refuses to comply with said requirement..... 623

May be accepted in the absence of protest, and the entry equitably confirmed, where the proof is regularly taken, except that on account of sickness the claimant's evidence is taken at her residence in accordance with notice given by the officer taking the same..... 102

Evidence as to acts performed after the submission of, may be considered only for the purpose of discovering the intentions of the claimant prior to that date..... 647

DESERT LAND.

Circular regulations for the submission of, in case of final entry before survey..... 376

Page.

Must be made before the local officers, or the judge or clerk of court of the county in which the land is situated, or commissioner of the United States circuit court having jurisdiction over such county 90

Opportunity to submit further, may be accorded with a view to equitable action, where the entryman, through no fault of his own, fails to secure the requisite water supply within the statutory period 241

HOMESTEAD.

Can not be submitted under section 2291 Revised Statutes, until the entryman can show a period of five years' residence on the whole tract covered by his entry 645

OSAGE.

Submission of, relates back to the filing of notice of intention to submit the same, where said notice is filed in time, and the subsequent failure to make proof within the period fixed therefor is not due to the claimant's negligence 220

Where two claimants for the same tract are both in default in the matter of submitting, the one who first takes steps to cure the default is entitled to the land 195

The ruling in Rogers *v.* Lukens as to the effect of failure to submit, within six months from filing cited and followed 194

PREËMPTION

Can not be accepted where the final affidavit is made before a notary public 560

Satisfactory in all respects, but rejected on account of the suspension of the township plat, may be accepted, on the execution of new final affidavit, when the order of suspension is revoked 647

Forest Reservation.

See *Reservation, Timber Lands.*

Hearing.

See *Practice.*

Homestead.

See *Entry, Final Proof.*

GENERALLY.

Time within which to enter, does not run against a homestead settler under the act of May 14, 1880, during the pendency of an erroneous application theretofore filed by him for the land in question 631

A settler who fails to make application for the right of entry within the period provided in the act of May 14, 1880, is not thereafter protected as against another who has complied with the law 629

The right of a deserted wife to make entry of land, on which she is residing at date of desertion, will be recognized as against one claiming under a relinquishment, executed by the husband in pursuance of a conspiracy to defraud the wife 94

Page.

Failure of the heirs to cultivate the land embraced within the entry of a deceased homesteader excusable when due to armed violence and intimidation 562

The heirs of an alleged settler take nothing under a claim based on illegal residence of the decedent 197

Good faith of the entryman in attempting to cultivate the land is entitled to consideration 67

One who has complied with the preëmption law, submitted final proof and paid for the land, is not disqualified as a homestead applicant by the fact that final certificate has not issued on the preëmption proof 42

ADDITIONAL.

The right under the act of March 3, 1879, can only be exercised where the original entry had been made at the passage of said act 351

The land embraced within an entry made under the act of July 1, 1879, must adjoin the land covered by the original entry, and the residence required by said act can not be established nor maintained by a tenant 57

One who is restricted to an entry of 80 acres within railroad limits, may make an additional entry within an odd section, where by his original settlement such land was excepted from the grant, and he has continued to cultivate and improve the tract 395

Entry under the act of May 6, 1886, may pass to patent without proof of settlement and cultivation, if final proof has been made on the original entry 550

Application to make, pending at the passage of the act of March 2, 1889, is entitled to the benefits thereof, and until final action thereon, subsequent adverse claims are excluded thereby 558

ACT OF JUNE 15, 1880.

The right of purchase can not be exercised by an entryman who has sold the land embraced within the original entry 393

Cash entry made under said act, and canceled for failure to furnish the requisite proof, will not be reinstated on the application of one who claims as a transferee but does not trace his title to the entryman, nor occupy the status of an innocent purchaser. 469

Cancellation of the original entry, and subsequent improvident timber-culture entry of the land by the claimant, will not defeat his right of purchase 310

Right of homesteader who has abandoned the land to purchase, is defeated by the intervening adverse claim of his wife, who has remained on the land, and commenced proceedings in her own right to secure the same 320

Indemnity.

See *Railroad Grant, School Land,*

Page.

Indian Lands.

See *Fees, Right of Way.*

ALLOTMENT.

A non-tribal Indian who has received the full benefit of the preëmption and homestead laws is not entitled to an allotment under the act of February 8, 1887 181

The authority conferred by the act of October 19, 1888, upon the Secretary to accept the surrender of an Indian patent, and issue another in lieu thereof, extends to cases arising since said act as well as prior thereto .. 184

A non-reservation Indian who makes application for an allotment under section 4, act of February 8, 1887, has no authority to relinquish except by the consent and under direction of the Department 162

Allotments to the citizen band of Pottawatomies, on selections under the act of 1872, that were made before the ratification of the agreement of June 25, 1890, and authorized by law, may be perfected, notwithstanding the act of March 3, 1891 357

The right of the Sac and Fox Indians to take lands on which they had made valuable improvements prior to the ratification of the agreement of June 12, 1890, extends to lands in sections sixteen and thirty-six 359

The size of allotments to the Flandreau Sioux, provided for by section 7, act of March 2, 1889, is governed by the provisions regulating allotments to other Indians on the Great Sioux Reservation 292

The act of February 8, 1887, gives the Indians the same right within a reservation created by executive order as if made by treaty or statute; and lands subject to such right can only be relieved therefrom by Congressional action 205

Authority to make allotments under the act of March 2, 1889, terminates when the Secretary has approved the lists containing the names of those entitled to allotments .. 168

The inadvertent omission of a member of the tribe from the approved allotment list may be corrected on due proof of the fact .. 168

Indian parents not allowed to select lands within the ceded portion of the Sioux reservation, on which after February 28, 1891, white settlers had established residence prior to such selection 474

FLATHEAD.

The fifteen townships set apart for the benefit of the Flatheads, under the act of June 5, 1872, did not include lands lying in part below the Lo Lo Fork of the Bitter Root River 49

MILLE LAC.

The "further legislation" required by the act of 1884, prior to the disposition of Mille Lac lands, is provided in the act of January 14, 1889, and said act is now operative, as the Indian's right of occupancy has been ceded, and such action received the approval of the President 52

Page.

The proviso of section 3, act of January 14, 1889, does not apply to the particular lands on which the Mille Lacs, before their last agreement, were allowed to live under successive departmental regulations 55

OMAHA.

A purchaser of, whose claim is forfeited for nonpayment, may complete his payments, in the absence of adverse rights, where it appears that he had tendered the necessary sum prior to the judgment of forfeiture 111

Purchaser of, who has taken less than 160 acres, and has complied with the law, may enter contiguous land at the appraised price 325

OSAGE.

See *Entry, Final Proof, Residence.*

Insanity.

The acts of one who is of unsound mind, performed prior to a judicial determination of his legal status, are not void, but voidable 690

Instructions and Circulars.

See tables of, page XVII; and *Circulars and Instructions, Cited and Construed, page* XVII.

Island.

See *Survey.*

Where land has been surveyed, sold, and patented by the government, the subsequent gradual erosion of the soil, resulting in the formation of an island in a navigable stream, occupying the area formerly surveyed and sold, does not operate to vest title in the government to such formation .. 681

Judgment.

Final decision of the Department must be carried into effect, if not stayed by motion for review, or the direct action of the Secretary 45

Of cancellation, takes effect as of the date when the decision is made; and failure to note the order of record in the local office will not defeat the effect of the judgment. 59, 643

Jurisdiction.

Of the local office, in proceedings directed by the Department, not abridged by the allowance of initial desert entry 34

Of the Department extends to the determination, in proceedings of its own, whether a person executing a relinquishment is of sound mind 690

Lake.

See *Survey.*

Land Department.

See *Decision.*

When a vacancy occurs in the office of the register or receiver, official action can not be taken until the vacancy is filled 298

Page.

Mineral Land.

See *Private Claim, School Land, Timber and Stone Act.*

Stone that is useful only for general building purposes does not render the land containing the same subject to entry as mineral land 1

In issue joined as to the character of land that is *prima facie* agricultural the burden of proof is with the mineral claimant 612

The character of land claimed as mineral must be shown by the actual production from mining, or by satisfactory evidence that mineral exists on the land in sufficient quantity to make the same more valuable for mining than for agriculture 612

On proper showing that a tract included within a town-site patent was well known prior to the entry to contain a valuable mine, a hearing may be ordered with a view to subsequent judicial proceedings 513, 662

Section 16 of the act of March 3, 1891, is not retrospective in its operation ... 513, 662, 686

Settlement on Alabama land prior to the date when it is reported valuable for coal, and the subsequent entry thereof prior to the act of 1883, both made when the settler was disqualified to enter, will not except such land from the reservation provided in said act 635

The act of March 3, 1883, requiring prior to entry, public offering of lands theretofore reported as containing coal and iron, under departmental construction is held applicable only to lands reported as "valuable" for coal or iron.* 550

Mining Claim.

See *Town site.*

A stone quarry of common building stone may not be entered as a placer claim 1

Entry can not be allowed of land included within an outstanding town-site patent 662

Where the record shows no known lode within a placer claim and patent issues for the latter, a subsequent application for a lode claim within said placer should not be allowed while the placer patent is outstanding 683

A lode entry irregularly allowed for land included within the prior placer patent of another may be suspended and opportunity given for a hearing on the allegation that said lode was known to exist prior to the placer entry and patent 683

Entry of, by alien is not void, but voidable, and while of record segregates the land covered thereby from the public domain ... 345

Hearing should not be had before the local office on a protest during the pendency of adverse judicial proceedings 294

Page.

A location, by a protestant, on land segregated from the public domain, gives the locator no interest as against the prior entry or the government that will entitle him to be heard on appeal 345

An entry should not be canceled for failure to furnish additional proof, unless the record shows affirmatively that due notice of such requirement and of the order of cancellation was given; and a transferee holding under such entry is entitled to a reinstatement, with opportunity to show the facts with respect to the entryman's compliance with law 125

MILLSITE.

Section 2337 R. S. does not authorize the entry of a millsite when the land is intended to be used in common with other millsites taken in connection with corresponding lode claims 624

There is no provision of law by which a millsite can be acquired as additional to, or in connection with an existing millsite 75

Land not improved or occupied for mining or milling purposes can not be taken as a millsite in order to secure the use of water thereon 624

The right to a millsite under the second clause of section 2337 R. S. depends upon the existence on the land of a quartz mill or reduction works 75

Naturalization.

A declaration of intention to become a citizen filed by the father during the minority of the son does not confer citizenship upon the latter 637

Notice.

See *Practice.*

Oklahoma.

See *Townsite.*

A soldier's declaratory statement filed on April 22, 1889, through an agent who was in the Territory prior to 12 o'clock, noon, of said day is illegal 653

The entry of one who is lawfully within said Territory prior to noon of April 22, 1889 but takes advantage of his presence to secure a settlement right in advance of others is in violation of the statute opening said lands to entry 653

A homestead entry of land within said Territory made for the purpose of selling the land to townsite occupants is illegal, and priority of settlement in such case confers no right upon the entryman 654

Osage Land.

See *Entry, Final Proof, Residence.*

Patent.

See *Indian Lands, Mining Claim, Townsite.*

* The words "or iron" should be added at the close of the second paragraph of the syllabus of this decision.

Page.

Payment.

See *Final Proof.*

Practice.

GENERALLY.

Rule 42, modified in Oklahoma townsite cases 186

On excuse offered for failure to comply with the rules of, a definite statement of the facts relied upon should be made under oath 198

Ex parte cases, or cases in which the government is a party, in which the entry is confirmed by the act of March 3, 1891, may be disposed of on motion, without respect to position on the docket 308

Contest cases in which the entry is confirmed by the act of March 3, 1891, may be advanced on written motion and after notice to the adverse party 308

Order of January 17, 1891, fixing the first Monday in each month for the presentation of motions to dismiss on jurisdictional grounds 64

The act of the Commissioner in advancing a case, or refusing so to do, is discretionary, and will not be disturbed in the absence of a clear showing that such discretion has been abused and that a party in interest has been injured thereby 694

The local officers should each sign the decision reached in a contest if they concur 642

If, through mistake, either of the local officers fail to sign a decision that is in fact the opinion of both, the signature may be attached, *nunc pro tunc*, at any time before the record is sent up 642

In the disposition of a case it is competent for the Department to consider and determine all questions presented by the record 157

The validity of all rights claimed and set up by adverse parties may be properly determined on the final disposition of the case 138

The consideration at the same time of several cases that embrace similar questions and the promulgation of one decision covering the several cases do not abridge the right of each party to have his case separately considered 503

One who agrees by stipulation to be impleaded in a pending action with "the same force and effect" as if he had originally been made a party thereto, can not be heard to subsequently object to the authority of the Department to pass on the validity of his claim 138

A motion to dismiss should not be entertained, when made without notice, and not on the day of hearing 453

Publication of a departmental decision in the "Land Decisions" is not equivalent to an official promulgation of such decision ... 252

Page.

Transferee can not question the validity of proceedings against an entry if notice of his claim was not filed in the local office ... 462

APPEAL.

Rule 46 is mandatory and has all the force and effect of law 199

Rule 48 is not applicable to decisions rendered by the General Land Office 421

Rules affecting the time for, modified in Oklahoma townsite cases 187

Rule 70, as amended, does not apply to an appeal from a decision holding an entry for cancellation 93

Rules 79 and 87 are applicable to proceedings before the local office, as well as in cases before the General Land Office and the Department 62

In computing the time allowed from decision of the local office 10 days additional are accorded when notice of the decision is given through the mails by said office 62

Right of, can not be exercised by one who is not a party in interest 538

Protestant, without interest, is not entitled to right of 345

In computing the time allowed for, the period covered by an intervening motion for review should be excluded 62, 647

If not taken in time the Department is without jurisdiction to entertain the same .. 419

Applicant for land should be informed as to the right of, if his application is rejected 235, 684

Will not lie from an interlocutory order that deprives the appellant of no right ... 63, 495

Will lie from an order of the local office dismissing a contest for want of prosecution and refusing to reinstate the same on due showing 525

Will not be entertained in the absence of notice to the adverse party 93

A mistake in the name of appellant or appellee's attorney in notice of appeal is not fatal thereto where received in due time by the attorney of appellee and no prejudice to appellee is claimed 67

Will not be entertained by the Department in the absence of specifications of error, as required by the rules 98

Specification of error sufficient where made by reference to the specifications filed on appeal from the local office and the grounds of the appeal are explicitly set forth therein 476

A specification of error that sets forth that the decision is "contrary to law and the facts, and is unjust, unreasonable, illogical, and biased" is not sufficient 29

Specifications of error on appeal to the Department are not limited to the points raised by the appeal from the local office .. 67

Not defeated by failure to file specifications of error where the failure is caused by inability to secure a copy of the decision ... 74

Page.

From the Commissioner removes the case from the jurisdiction of the General Land Office 80

From the Commissioner's decision removes the case from the jurisdiction of the General Land Office, and no authority exists thereafter in said office to consider a motion to dismiss said appeal.....390, 422

Accepted by the General Land Office terminates its jurisdiction over the case; and it does not subsequently acquire jurisdiction on the withdrawal of such appeal, in the absence of departmental action thereon 495

The Commissioner of the General Land Office has no jurisdiction to consider a motion to dismiss an appeal from his office ... 647

Where an acceptance of service by appellee is coupled with an objection to the consideration of the appeal, on the ground of insufficient notice thereof, such objection should be presented in due form and supported with proof..... 220

The acceptance of service, by the authorized attorney of appellee, on a brief filed in support of an appeal is sufficient to confer jurisdiction on the Department..... 220

Will not be dismissed on the ground that notice thereof was not given appellee or his attorney, where the service was upon one who prior thereto had represented appellee as attorney, and where no prejudice to appellee is shown 113

In which it is alleged that certain important papers are missing from the record, should not be dismissed on motion, without allowing the appellant an opportunity to respond to said motion, and take action with respect to the missing papers..... 694

Withdrawal of, will not prevent the Department from considering the record and rendering such judgment as the law and facts require..... 495

Withdrawal of, after the expiration of the time allowed for taking the same, and filing a motion for review, does not revive the right of appeal, if the review should be denied..... 105

COSTS.

See *Fees*.

Of reducing testimony to writing in contest cases is taxable at 15 cents per one hundred words, except in States where a higher rate is fixed; that the actual expense of the clerical service amounts to less than the authorized rate does not warrant the taxation of such costs at a rate based on the actual expense..... 478

HEARING.

Discretionary authority rests with the Commissioner to refuse an order for, where the allegations on protest are deemed by him insufficient, and the corroborating witnesses testify from information and belief.. 49

Page.

The local officers have discretionary authority under Rule 41 in the matter of admitting additional testimony..... 109

Should be ordered to test the question of priority when a filing is offered, with an allegation of a prior settlement right, for land embraced within the existing entry of another 684

The effect of a general appearance can not be modified by a subsequent allegation that it was special in character..... 14

A defendant may so far appear as to object to the jurisdiction, and such appearance is "special;" but if he seeks to call into action any powers of the court except such as pertain to its jurisdiction the appearance is general 620

Failure to apply for a hearing within the specified time after notice of a rule to show cause why an entry should not be canceled is a confession of the charge and a waiver of all claim to the land 189

NOTICE.

Rule 8 contemplates a notice issued under a contest initiated to secure the preferred right of entry accorded by the act of May 14, 1880 462

In the absence of proper service, objection to the jurisdiction is not waived by proceeding to trial after a motion to dismiss is overruled 620

Service of, is fatally defective where the purported copy, delivered to the defendant, does not show the true date of hearing as fixed in the original notice..... 44

Of contest can not be served by registered letter, and no jurisdiction is acquired thereby 311, 620

Service of, by publication, can not be defeated by a subsequent allegation under oath that the defendant's residence could have been easily ascertained..... 453

Service by publication should be set aside when it is satisfactorily made to appear that the defendant is a well-known resident of the county in which the land is situated, and that personal service could have been obtained by ordinary diligence. 568

Service by publication not authorized where failure to secure personal service is due to the claimant's neglect to advance the fees required by the officer for such service. 311

The refusal of the defendant to receive and open a registered letter known by him to contain a notice of contest will not thereby defeat the service 403

Service by publication is fatally defective where in the affidavit therefor and the subsequent publication the defendant is erroneously designated as "Frederick Van Dem," instead of "Hendrik Van Oene" 47

All defects in the service of, waived by a general appearance 263

Page.

Acknowledgment of service is a waiver of all irregularities in the mode of service.. 239

General appearance on hearing day and stipulation for continuance is a waiver of any irregularity in the service.....263, 602

Where the entryman appears and invokes the judgment of the Department, he will not be heard to subsequently plead want of notice 14, 32, 620

On the substitution of the widow as defendant, she is entitled to 14

Must be served upon the heirs and legal representatives in case of contest against the entry of a deceased homesteader..... 510

Of a decision holding an entry for cancellation may be given by registered letter.... 192

Of a decision served upon the attorney is notice the client 388

Of a hearing directed to ascertain priorities between adverse claimants is not defective, though it may not contain the charges on which the hearing is ordered... 462

Of appeal, may be served by registered letter, and the proof of such service is made by the affidavit of the person mailing such letter, attached to a copy of the post-office receipt..... 59

To the entryman's agent of an order of cancellation is notice to the entryman 189

REHEARING.

Will not be granted to introduce cumulative evidence 233

Incompetency of applicant's attorney in the original proceedings not sufficient ground for 233

Not accorded a transferee unless he shows that he can furnish other and better evidence than that submitted by the entryman 462

REVIEW.

Rules regulating time allowed for motions, modified in Oklahoma townsite cases 187

On motion for, before the Commissioner, it is within his discretion to waive the requirement of an affidavit that the motion is in good faith 647

Motion for, can not be entertained by the Commissioner after an appeal has been taken from his decision, unless the appeal is withdrawn and made of record..... 80

Motion for, based on alleged newly discovered evidence may be entertained though not filed within 30 days from notice of the decision..... 647

A motion for, filed in due time, precludes while pending the intervention of adverse claims 529

Motion for, of departmental decision, if filed within the time specified, operates as a supersedeas, but if not filed within that time the execution of the judgment can only be stayed by the direct action of the Secretary 45

Page.

Motion for, will not be dismissed on the ground of being filed out of time, where the date of the service of the notice of the decision is not affirmatively shown..... 226

A question not raised nor determined in the decision will not be considered on motion for 503

Will be denied where no new question is presented for consideration..... 226

Where the motion for, is lost or mislaid, a copy thereof may be substituted..... 220

No ground for, that the decision rendered was embraced in a number of cases considered at the same time and covered by the promulgation of one decision..... 503

Application for the re-review of a decision will be denied where it presents no new question of law or fact..... 446

Re-review only granted under exceptional circumstances, and on special application, and not secured indirectly through subsequent proceedings in the case..... 364

Preëmption.

See *Entry, Filing.*

Land containining stone that is useful for general building purposes only is not exempt from, as mineral land 1

Right of, can not be exercised on land included within the use and occupancy of Indians..... 516

Right of, can not be exercised on land embraced within an Indian reservation..... 563

Right of, can not be exercised by one who is the owner of 320 acres of land..... 103

In determining whether a preëmptor is disqualified under the second clause of section 2260 R. S., his relation to the land formerly owned must be considered with respect to the date of establishing actual residence on the preëmption claim, and not with reference to the date of settlement thereon 529

Sale in good faith from the husband to the wife of the land formerly owned, prior to the establishment of actual residence on the claims, removes the statutory bar contained in section 2260 R. S.....244, 455

One who, prior to the establishment of actual residence, has sold, in good faith, the land on which he formerly resided, is not within the second inhibition of section 2260 R. S.....244, 455

An allegation that one is not disqualified through the ownership of other land, in that a part of said land had been sold prior to final proof, must fail if the good faith of the alleged transaction is not made apparent .. 103

Right of, can not be exercised by one who enters upon public land for the purposes of "trade and business," and makes such use of said land..... 647

Page.

Right of, not defeated by the fact that through a change of circumstances the preemptor, prior to final proof, forms the intent to sell, where previously thereto he has complied with the law in good faith..... 20

The actual date of settlement may be shown to be earlier than alleged in the declaratory statement..... 299

Right on unoffered land as defined by the act of 1841, and extended to lands in California by the act of March 3, 1853, is not defeated by failure to make proof and payment, prior to the day fixed for the public offering of the land, where said land is subsequently withheld from such sale..... 272

Transmutation of a claim for 160 acres to a homestead entry of less amount, is an abandonment of the former claim and exhausts the preëmptive right of the claimant 351

A pre-emptor whose claim is initiated prior to the act of March 2, 1889, is entitled, under section 2 thereof, to transmute his filing to a homestead entry..... 361

A declaration of intention to become a citizen filed by the father during the minority of the son does not qualify the latter in the matter of citizenship to make entry under the preëmption law 637

Price of Land.

See *Public Land.*

Private Claim.

See *States and Territories* (sub-title, *California.*)

In determining the boundaries of, the language of the decree of confirmation must be accepted and followed, unless so ambiguous as to require extraneous aid to show its meaning..... 364

In fixing the back line of the McDonogh and Fontenot claims, the lowest point of the southern shore of Lake Maurepas, as it now exists, should be taken as the starting point..... 496

Survey of, made under the act of July 1, 1864, does not segregate the land covered thereby if not approved by the Commissioner of the General Land Office..... 664

For land within specific boundaries, reserves only such land as may be finally determined to be within said boundaries..... 664

The act of June 21, 1860, authorized the heirs of Baca to select non-mineral lands in lieu of the original, and the burden is therefore upon the claimants to show that the lands selected are of the character designated; and this showing can be required at any time prior to patent, even though the character of the land may not have been known to the claimants at date of selection..... 676

The right of the Baca claimants under selections made in accordance with the act of June 21, 1860, is not dependent in any manner uppon the present claim of the town of Las Vegas..... 676

Page.

Private Entry.

Of land excluded from such disposition by the act of March 2, 1889, and allowed after the passage thereof, is invalid, though made before the local office had been officially notified of the passage of said act.... 201

Protestant.

See *Contestant, Mining Claim, Practice* (sub-title *Appeal*).

Departmental definition of the term "protest" as used in section 7, act of March 3, 1891..... 453

Public Land.

The limitation in acreage prescribed by the act of August 30, 1890, applies equally to all the land laws, and restricts the applicant thereunder to 320 acres in the aggregate..... 81

The provisions of the act of August 30, 1890, are prospective, and the right to secure 320 acres is not affected by the fact that the applicant has acquired a like amount prior to said act, if he is otherwise entitled to enter such amount..... 81

The disposition of an isolated tract, surveyed as an island, is not precluded by the fact that such land is not at all times surrounded by water, if there is no claim under riparian ownership..... 97

Odd sections, or parts of such sections, within the primary limits of the Northern Pacific, and excepted from the grant by existing entries, are properly held at double minimum if such entries are subsequently canceled..... 127

The price of desert land within the primary limits of a forfeited railroad grant remains at double minimum, where said land is also embraced within the limits of another grant, not forfeited, although said land may be excepted from the latter grant 296

Held under a quitclaim deed from the State is not excluded from appropriation.. 519

Public Sale.

An order directing the sale of an isolated tract excludes the land covered thereby from settlement, filing, or entry..... 397

Purchaser.

See *Alienation, Entry* (sub-title, *Confirmation*), *Homestead,* (sub-title *Act of June* 15, 1880), *Railroad Land, States and Territories.*

Railroad Grant.

See *Railroad Lands, Wagon Road Grant.*

GENERALLY.

Patents must issue in the name of the company to whom the grant is made, without respect to the fact that a portion of the road is now owned by another company.... 116

Page.

The patents issued to the Atlantic and Pacific Company should contain in express terms an exclusion of "all mineral lands other than coal and iron lands" 116

Section 8, act of September 29, 1890, is a limitation on the grant made to the Mobile and Girard Company by the act of June 3, 1856, and restricts said grant to the lands earned by the construction of the road from Girard to Troy 117

The certificate of the governor provided for in section 4, act of June 3, 1856, is limited to the fact of completion, and does not extend to conclusions of law 117

The Mobile and Girard's acceptance of the conditions imposed by the act of September 29, 1890, and the relinquishment filed thereunder, are held sufficient to furnish the proper basis for action in the adjustment of the grant 118

The acceptance of the relinquishment filed by the Mobile and Girard, under the act of September 29, 1890, waives no objection to the sufficiency of said instrument not apparent on its face 118

Instructions given for determining what lands are subject to the Mobile and Girard grant, and for the presentation of claims that are protected by the forfeiture act of 1890 118

Lands relinquished in favor of a settlement claim can not again be claimed by the company (Florida Railway and Navigation Company) even though the settler fails to perfect his entry 547

The relinquishment of the company in favor of *bona fide* settlers is not defeated by the failure of the settler to place his claim on record; nor will his subsequent purchase of the land from the company defeat his right under the relinquishment. (Florida Railway and Navigation Company) 301, 549

The authority of the Department to order a hearing between the company and a mineral applicant as to the character of the land is not abridged by a prior *ex parte* proceeding, on behalf of the company, in which the land was found to be agricultural 608

Directions given for the publication of selections on behalf of the Florida Railway and Navigation Company that may be covered by former entries made under the "armed occupation acts" 553

The right of the St. Paul, Minneapolis and Manitoba Company, successors of the St. Paul and Pacific Company, did not attach under the act of March 3, 1871, until the release required by said act was executed.... 512

Failure of the company to respond to a settler's published notice of final-proof proceedings will not defeat its title to land which on the record is shown to have passed under the grant 351

Page.

The construction of a fractional part of a section of 20 miles, the whole road not being completed, does not entitle the company (Tennessee and Coosa) to any lands under the grant of June 3, 1856 254

The failure to construct any part of the Tennessee and Coosa road in accordance with the grant renders it subject to the forfeiture act of 1890, not only as to the uncertified lands, but also as to the 120 sections certified in advance of construction, if such lands remain in the possession of the State or company 254

The line of constructed road is made the measure of the grant provided for in the act of April 20, 1871. (Marquette, Houghton and Ontonagon Company) 214

In the grant of April 20, 1871, the coterminous principle is recognized in determining the measure of the grant, and the "line of road as completed" forms the basis of measurement 214

In the execution of the forfeiture act of March 2, 1889, the western terminal line, separating the lands opposite the unconstructed portion of the Marquette, Houghton and Ontonagon road from those opposite the constructed portion thereof, must be drawn at right angles to the line of constructed road 214

An application of the company for the return of selection fees on the cancellation of a selection, and the acceptance of such repayment is a waiver of the company's claim to the land 545

The right of the California and Oregon Company under the act of July 25, 1866, attaches to the granted sections when the map designating the line of its road is filed with the Secretary of the Interior and accepted by that officer 133

It is not within the province of the Department to review the action of the governor of Minnesota in the execution of a relinquishment under the State act of March 1, 1877.. 615

The relinquishment of a tract by the governer of Minnesota under the State act of March 1, 1877, re-invests the government with full title, and the validity of such relinquishment is not affected by the fact the settler in whose favor it was made did not attain his majority until after the passage of said act 615

The State (Minnesota) act of March 1, 1877, did not affect lands to which title had been perfected prior thereto in the company, hence a subsequent reconveyance of such lands by the State would not give the Department jurisdiction over the same 354

LANDS EXCEPTED.

The existence of a valid pre-emption filing at date of definite location excepts the land covered thereby from the operation of the grant 2

Page.

Existence of a *prima facie* valid preëmption filing at the date when the grant becomes effective excepts the land covered thereby, even though such filing may embrace an excessive acreage 567

Land covered by a *prima facie* valid preëmption filing when the grant to the Oregon and California Company becomes effective is excepted therefrom, and the failure of the preëmptor to comply with the law does not defeat the exception..... 232

Claim of a qualified preëmptor based on residence and improvement existing when the grant to the Southern Pacific becomes effective excepts the land covered thereby from the grant 479

A homestead entry existing at date of definite location excepts the land covered thereby from the grant 545

Land included within a suspended entry at definite location is excepted from the grant. 572

Land occupied and claimed by a qualified preëmptor at the date the grant became effective is excepted therefrom (Northern Pacific) 299

Donation claim of record prior to the attachment of rights under the grant, and asserted until after said grant becomes effective, excepts the land covered thereby from the grant..... 238

A mere allegation that land not covered by a preëmption filing was in fact embraced within the claim will not be accepted as sufficient to defeat the grant..... 471

A mere allegation of settlement prior to definite location will not work an exception of the land, where the filing in which such allegation appears is not made until after the rights of the road have attached 384

When settlement and occupancy alone are relied upon to except land from the operation of a grant it must affirmatively appear that the party in possession had a right that could have been asserted as against the grant when it became effective. 554

Settlement at date of definite location by a qualified settler excepts the land covered from the grant, even though such settler is ignorant of his right, and holds the land under the belief that it is subject to the grant 554

Settlement of an alien confers no rights as against the operation of a grant 507

Occupancy of land by one who intends to purchase it from the company is not effective as against the grant..... 322

Right of purchase under section 2, act of June 15, 1880, excepts the land covered thereby from the effect of definite location, and can be exercised as against the grant at any time prior to patent 310

The fact that an order canceling an entry is not received at the local office until after definite location, though made prior thereto, will not operate to defeat the grant..... 59

Page.

Failure to officially inform the local office of an executive order releasing land from a military reservation will not operate to reserve such land as against the grant..... 465

Erroneous action of the local office in designating land as within a military reservation will not defeat the operation of the grant 465

A private claim for land within specific boundaries reserves only such land as may be finally determined to be within said boundaries as against the operation of a railroad grant, though other land may be claimed as within said boundaries at the time such grant takes effect..... 664

Lands within the outboundaries of a Mexican grant of quantity within a tract of larger area are subject to the operation of a railroad grant at the date it becomes effective except as to the amount that may be actually required to satisfy the claim..... 507

Lands within the withdrawal on general route of the Northern Pacific, and within the indemnity limits on definite location thereof, are excepted from the subsequent operation of the St. Paul, Minneapolis and Manitoba grant.....395, 398

The unappropriated odd sections within the primary limits of the grant of June 10, 1852, were not "reserved" lands when the grant of 1866 was made to the Atlantic and Pacific, and therefore passed to said company when found in the primary limits of its grant 116

"All mineral lands" are excluded from the grant to the Central Pacific, and until patent issues the Department has authority to determine the character of land claimed under the grant, and this is true though the company may have sold the land..... 608

INDEMNITY.

Selection of record excludes the land from other disposition..... 386

The pendency of a selection bars other disposition of the land; but a subsequent filing may be allowed to stand subject to the final disposition of the selection..... 195

A selection made under the order waiving the requirement of a specified loss is legally made and excludes the acquisition of settlement rights; and an application to make preëmption filing on land thus selected at date of settlement, must be rejected where the loss has been designated previously thereto..... 448

Selections will not be approved in the absence of due specification of the losses for which indemnity is sought..... 518

Departmental order of May 28, 1883, dispensing with designation of bases under Northern Pacific selections 196

Page.

The circular requirement of a specified basis, issued August 4, 1885, was not intended to invalidate selections theretofore made, but to require a specification of the losses for which such selections were made. 450

The right to select a particular tract depends upon its status at the date of selection and not at date of withdrawal 19

No action should be taken on selections for lands embraced within expired preëmption filings until after notice to the claimants to assert any rights they may possess. 88

During the pendency of judicial proceedings that affect the status of lands under a grant selections therefor should not be allowed 88

Lands included within pending selections not restored to the public domain by the revocation of the withdrawal 29

Land excepted from withdrawal by the existence of a preëmption claim is not excluded from subsequent selection if at the date thereof such claim has expired and been abandoned 19

The provision in the grant of July 4, 1866 (Hastings and Dakota), for a reversion of the lands granted, if the road is not completed within the period specified, does not, in the absence of action to enforce forfeiture, defeat the right of selection, even though the road is not completed in said period.... 228

The right of the Gulf and Ship Island Company under the last clause of section 7, act of September 29, 1890, to select is restricted to even sections within the original indemnity limits "nearest to and opposite" that portion of the road that may be constructed at date of selection 269

WITHDRAWAL.

Made by executive authority for indemnity purposes may be revoked by the Department 541

For indemnity purposes, while existing, excludes the land from any other appropriation 27, 228, 261

Of indemnity lands under the act of July 4, 1866, reserves said lands from any disposal except for the purposes of the grant; and settlement on land so withdrawn is subject to the company's right of selection. (Hastings and Dakota) 228

Directions given for indemnity, on the line of the Gulf and Ship Island definite location south of Hattiesburgh 269

Directed, in accordance with the Supreme Court decision in the St. Paul, Minneapolis and Manitoba Company *v.* Phelps, of the lands granted in aid of the main and branch line of said company and now lying in the Dakotas 373, 375

Section 4, act of September 29, 1890, is intended to restore lands formerly withdrawn for indemnity purposes, and this restoration is not limited by the adjustment act of March 3, 1887 541

Page.

If that made for the St. Paul and Sioux City Company was under legislative direction contained in section 7, act of March 3, 1865, no objection can be made to the revocation of said withdrawal after the repeal of said section 541

Directions given for the restoration to settlement and entry of lands heretofore withdrawn for certain companies 541

Railroad Lands.

Forfeiture of, circular under the act of September 29, 1890, with special instructions as to the Sioux City and St. Paul, the Northern Pacific, and Gulf and Ship Island roads 3

Directions given for the disposition of applications to enter, pending at the passage of the forfeiture act of September 29, 1890 (Wisconsin Central) 188

Notice of intention to purchase under section 3, act of September 29, 1890, must be filed in the local office by applicants, within 60 days after publication of the regulation of March 31, 1891 308

Bona fide purchasers of, certified in advance of construction, take a good title, where such sale is authorized by the grant; and the title to such lands thus held is not affected by the forfeiture act of September 29, 1890 258

Erroneous certification to a railroad company of land previously purchased under the graduation act calls for proceedings under the act of 1887 to set aside such certification 280

In proceedings for the recovery of title under the act of March 3, 1887, the demand for reconveyance is a statutory requirement to be made only by direction of the Department 210

The demand for reconveyance under the act of 1887 should be served personally or by registered letter upon the officers of the company or some one authorized to acknowledge service 210

Under the act of March 3, 1887, it is mandatory upon the Secretary of the Interior to demand a reconveyance of title where lands have been erroneously patented or certified for the benefit of a railroad company, and the grant remains unadjusted 347

In determining whether proceedings shall be instituted under the act of 1887 for the recovery of title, the Department must accept the present rulings of the Supreme Court as to the time when the grant becomes effective, although a different rule may have formerly been followed in the adjustment of grants 348

The doctrine of *res judicata* will not prevent the consideration of an application to enter, erroneously rejected, if such matter comes within section 3, act of March 3, 1887 272

Page.

Section 3, act of March 3, 1887, makes it the duty of the Secretary of the Interior to reinstate the settler in all his rights to lands upon which he may have settled, and for which his application may have been erroneously rejected, if the settler has not abandoned the land and located another claim.. 272

The right of purchase under section 5, act of March 3, 1887, is intended for the relief of bona fide purchasers from a railroad company, where the title of the company fails by reason of the land being excepted from the grant 247

Right of an actual settler to enter lands embraced within the forfeiture act of January 31, 1885, not defeated by his temporary absence from the land at the passage of the act, or an informal agreement to sell the lands if the grant was not forfeited 378

Former directions given in the matter of the restoration and disposition of lands withdrawn for the Chicago, St. Paul, Minneapolis and Omaha grant, and not taken thereunder, modified 259

Receiver and Register.

See *Land Department.*

Rehearing.

See *Practice.*

Reinstatement.

See *Railroad Lands.*

Relinquishment.

The rule that one who has parted with his interest in land will not be permitted to relinquish, is for the protection of the transferee and should not prevent action on a relinquishment where it is asked by the transferee, who also urges noncompliance with law as against the existing entry..... 100

Of Indian allotment may not be made except under direction of the Department ... 162

Filed during the pendency of an invalid contest, and independently thereof, leaves the land open to the first legal applicant... 492

Made after initiation of contest, but before notice and without knowledge thereof, and subsequently filed by the purchaser on being officially informed that said contest has been finally closed, does not inure to the benefit thereof, though in fact pending when the relinquishment is filed 626

In ascertaining the validity of a, the Department may, in proceedings of its own, determine whether the person executing the same was of sound mind 690

Executed by one of unsound mind, prior to a judicial determination of his legal status, is not void, but voidable, by himself, his heirs, or devisees 690

To warrant the vacation of action based on a, executed by one of unsound mind, some fraud, actual or constructive, must be charged and proven, and a return of the purchase money tendered..... 690

Page.

Repayment,

Can not be allowed to a desert entryman who fails to secure a permanent water supply, in the absence of diligence shown in such matter..... 78

Will not be allowed where the entry is canceled on account of the false testimony of the claimant 130

Not authorized where the entry is secured through false testimony and canceled for that reason 607

Of alleged double minimum excess, not allowed, where land within the limits of a railroad grant (Northern Pacific) is properly sold at that price, even though the grant, including the limits in question, is subsequently forfeited..... 316

Allowed where a timber-land entry, made in good faith, is canceled on the ground that the land is not of the character subject to such appropriation 431

Can not be allowed under a homestead entry that is canceled for failure to comply with the law..... 528

Can not be allowed under a homestead entry that is canceled for failure to submit final proof within the statutory period..... 535

Not allowed to one whose commuted homestead entry is suspended for further proof, and who thereupon seeks to recover the purchase price, with the privilege of thereafter submitting new proof under section 2291, R. S 623

Not authorized, of the excess over one dollar and twenty-five cents per acre paid on a desert entry within railroad limits, though the land was held at single minimum at date of initial entry..... 632

Reservation.

Of certain forest lands in California directed by the act of October 1, 1890, not defeated by pending application to purchase such lands under the timber and stone act. 58, 326

Of forest lands, by the acts of September 25 and October 1, 1890, does not take effect upon lands legally entered, but applications to purchase such lands, or filings therefor, will not defeat the operation of said statutes.....86, 326

The use and occupancy of unsurveyed public land for the purposes of a trading post will not except such land from a subsequent executive order creating an Indian reservation..... 205

The order of March 10, 1863, did not restore to the public domain any of the lands previously reserved at Port Angeles for townsite and other purposes 284

The right to enter lands in abandoned military, restricted by the act of July 5, 1884, to those who have made in the manner prescribed an actual settlement thereon.... 288

Page.

An applicant for lands within an abandoned military, can not found any right on the claims of others that were existing when the reservation was created and that have since been extinguished 288

The act of February 13, 1891, directing the disposition of Fort Ellis military, protects only such settlement rights as were recognized by the act of July 5, 1884 288

An order suspending public land from disposal to prevent the fraudulent entry thereof is within the authority of the Commissioner of the General Land Office 326

Of land by executive order for the use of Indians excludes the acquisition of settlement rights thereto 437

Of lands for reservoir purposes under the act of October 2, 1888, not defeated by a preëmption settlement and filing on the land included therein 438

Created at Fort Cœur d'Alêne by the order of August 25, 1879, was not continued in force by the failure of the General Land Office to officially notify the local office of the executive order of April 22, 1880, modifying the boundaries thereof 468

Reservoir Lands.

See *Reservation.*

Residence.

Can not be established nor maintained through a tenant 57

Acquired in the first instance only by actual presence on the land, but continuous presence thereafter is not essential to the continuity of such residence 497

Not required of an applicant to enter, pending final decision on his right of entry. 324

Continuity of not broken by temporary absences made necessary by the poverty of the claimant 102

Compulsory absence of the homesteader and his family caused by the land being flooded does not interrupt the continuity of, that has been established and maintained in good faith 199

In good faith in a house believed by the entryman to be upon the land entered is constructive residence on such land 67

Failure of the wife and children of the claimant to reside on the land until after initiation of the contest does not necessarily impeach the good faith of the claimant 472

During suspension of the township plat a temporary absence from the land prior to final proof, but after full compliance with law in the matter of residence, will not affect the right of the settler 633

Failure to maintain may be excused where by intimidation and armed violence the settler is driven from the land, and by such means prevented from returning thereto 562

Page.

Can not be maintained by a married woman, separately from her husband, in a house built across the line between two settlement claims 443

During the existence of the marital relation can not be maintained by a married woman, separately from her husband, in a house built across the line between two settlement claims held by each separately; and such residence confers no rights that can be perfected by the heirs of the wife 197

HOMESTEAD.

Not required of the heirs of a deceased homesteader to perfect the claim of the decedent 562

Failure of a homesteader to establish, can not be excused on the ground that it was due to his arrest under a criminal charge and subsequent sentence thereunder 239

One who relinquishes a part of the land covered by a filing, and makes homestead entry of the remainder together with another tract, is not entitled to claim residence on the latter except from the date of entry 645

OSAGE.

Six months' residence prior to final proof not required of purchaser of Osage, but actual settlement must be shown by acts that indicate an intent to take the land for a home to the exclusion of one elsewhere .. 12

Six months' continuous, next preceding final proof, not required, but after settlement is made the residence should be continuous until final proof, and a home maintained on the land to the exclusion of one elsewhere 290

Res Judicata.

See *Railroad Lands.*

Review.

See *Practice.*

Revised Statutes.

See *Revised Statutes, cited and construed,* page xix.

Right of Way.

Circular of January 13, 1888, with copy of the act of March 3, 1875 423

Circular of April 17, 1891, in the matter of canals, ditches, and reservoirs located under the act of March 3, 1891 429

Application under the act of 1875 should be accompanied by an authenticated copy of the local statutes regulating the organization of railroad companies 72

The termini of the road should be noted on the map of definite location accompanying an application for 72, 92

Page

The map of definite location should be filed within twelve months after such location if made on surveyed land 79

Land embraced within a prima facie valid entry is not subject to selection for station purposes 264

The length of each section of road should be stated in the affidavit and certificate accompanying the map submitted for approval 360

Action of the Department authorizing the construction of a road across an Indian reservation, pending the completion of the necessary arrangements, is not final in its character and confers no vested rights 481

The proviso in section 5, act of March 3, 1875, does not render said act generally applicable where a right of way is provided for under treaty stipulation but provides that when such privilege has been specifically granted the provisions of said act shall govern so far as applicable 481

Conveyances for, executed by Indians holding under patents in which the right of alienation is dependent upon the President's approval, must be submitted to the President for his action 481

The map submitted with application for, should be in the form of one continous map, and not in detached sections 552

The Secretary of the Interior has the power to annul the action of his predecessor in approving the map of definite location, where such approval is secured by fraud and misrepresentation and for a purpose not authorized by law 574

The approval of, for the Union River Logging R. R. Co., recalled and vacated 574

School Land.

See *Indian Lands, States and Territories.*

In adjusting the grant to the State of Colorado, indemnity may be allowed for lands lost by settlement and entry, and also where the bases are covered by military reservations or patented private claims 70

Indemnity selections may be made from lands that are reasonably contiguous to the bases (Colorado) 70

In States where two sections to each township are granted, twice the amount specified in section 2276, R. S., will be allowed for deficiencies in fractional townships 80

Indemnity selections by the Territory of Washington under the act of 1859, reserve the land selected, and the act admitting the Territory into the Union does not release the land from such reservation 165

Fee to the school sections within the Menomonee reservation passed to the State (Wisconsin), subject to the Indian occupancy, which can not be disturbed by the State nor its assignee 176

Page.

Where the fee of, is in the United States at date of survey and the land is so encumbered that possession does not then vest in the State, it can, if it so elects, take lieu land, or wait till title and right of possession unite in the government 180

Settlers on Territorial, after survey, can not be authorized by the Department to remain in occupancy until the lands are subject to disposal by the State 183

The State by accepting indemnity in lieu of a deficiency shown by the existing survey is divested thereby of all right to the basis, and can asert no claim thereto under a later survey and after the rights of third parties have intervened 390

The act of February 22, 1889, so far as in conflict with sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891, is superseded by said amended sections, and the grant of 1889 should be adjusted under the later legislation 400

Mineral applicant for lands in section 16 (Colorado) may submit proof, after due notice to the State, that the land was of known mineral character prior to and at the date when the State was admitted to the Union. 604

Scrip.

Sioux half-breed, issued under the act of July 17, 1854, is not transferable, and the beneficiary is estopped from denying the validity of a location made under a duplicate issue, as such location could only be made for his benefit 105

Where title has been acquired through location of duplicate, the beneficiary can not locate the original on another tract while patent to the former is outstanding 106

Sioux half-breed, intended as an evidence of a personal right in the half-breed to locate, and receive patent for the number of acres named therein, and can not be used to secure title to lands except for the benefit of the half-breed 138

A location of Sioux half-breed, by one acting in his own interest and not for the half-breed, is in violation of the statute under which the scrip issued 138

The right to locate Sioux half-breed, on unsurveyed land can only be exercised where the half-breed has made improvements on the land, and such improvements must be for the benefit of the half-breed 138

If the location of Sioux half-breed, is illegal a deed of ratification, executed by the beneficiary, will not give it validity or prevent inquiry as to whether the improvements were placed on the land for the benefit of the half-breed 157

Land embraced within a reservation for townsite purposes is not subject to location with Valentine 281

Page.

Land within the corporate limits of the city of Chicago is not vacant public land, and as such subject to location with McKee scrip 389

Settlement.

Made without violence within the unlawful and unauthorized inclosure of another is valid and will not be defeated by such unlawful occupancy 382, 488

Land included within a pending order for its sale as an isolated tract is not subject to. 397

The act of, is complete from the instant the settler goes upon the land with the intention of making it his home, and performs some act indicative of such intent 415

Act of, is sufficient if it tends to disclose a design to appropriate the land in accordance with the law 415

No rights acquired by, where the land is included within a reservation created by executive order 437

A canceled entry is no bar to the subsequent acquisition of settlement rights by another 488

Of an alien, confers no right to public land 507

Where rights are claimed under the acts of one who is an alien by nativity it must be affirmatively shown that the disqualification in the matter of citizenship was removed during the existence of the alleged settlement 507

May not be post dated in order to defeat the intervening right of another 519

On public land by a qualified settler is presumptively made with the intention of entering the same under the settlement laws 547

Priority of, confers no right where it is not made for the purposes contemplated by law 654

Right set up to defeat the entry of another must fail unless the qualification of the settler to make entry is made to appear 684

Preëmptor is not estopped from proving that his settlement was made at a different and earlier date than alleged in the declaratory statement 299

States and Territories.

CALIFORNIA.

Under a parol partition of a Mexican grant in which the parties thereto hold undisturbed possession, according to the lines of such partition, and sell the lands thus received, the grantee acquires the right of purchase under section 7, act of July 23, 1866, so far as the question of boundaries is concerned, though in the instrument of transfer the lands are described as an undivided interest 667

The right of purchase under section 7, act of July 23, 1866, dependent upon the character of title held by the grantee at date of said act 667

Page.

DAKOTAS.

Under section 14, act of February 22, 1889, each of the Dakotas is entitled to seventy-two sections of land for university purposes, and the lands selected by the Territory of Dakota, lying wholly within South Dakota, inure to said State 89

MINNESOTA.

An application in 1889 for the reinstatement of university selections canceled in 1882 on the governor's relinquishment comes too late for favorable action where most of the lands have in the mean time been sold by the government 135

Statutes.

See *acts of Congress cited* and construed, page XVII.

Executive construction of, in circular regulations has all the force and effect of law if not in conflict with the statute under which they are issued 138, 155

Where power is given to public officers, and the public interests or individual rights call for its exercise, the statutory language, though permissive in form, is in fact peremptory 171

An earlier special statute is not repealed by a later general act 401

Of remedial character should receive a liberal construction 674

Survey.

Showing a meandered stream, that does not in fact exist, may be reformed in accordance with the changed conditions 73

The improper meander of a stream will not defeat an entry subsequently allowed for lands lying on both sides of said stream. 556

Of isolated tracts, formed since the original survey, denied by the Department, where the Commissioner recommends such action and objection is made to the application, unless the denial deprives the applicant of a right 137

Of an island will be denied, where it appears that said island is embraced within the limits of a former survey, and that the land as thus surveyed has been disposed of 304, 681

May be allowed of land formerly covered by the waters of a shallow, meandered lake that is subsequently drained by artificial mean, and thus rendered valuable for agricultural purposes 433

One holding under a purchase or location made in accordance with the plat of, may claim under the boundary lines thereof, though a subsequent survey may show a conflict with a confirmed private claim; the question of ownership in such case must be judicially determined 460

A resurvey is authorized, at rates not in excess of those provided by law, where such action is rendered necessary by the imperfect work done on the original survey. 505

Page.

Suspension of township, precludes the submission of final proof for land embraced therein 633

Swamp Land.

The right to contest selection of, is recognized as an aid in determining the true character of the land 64

A waiver of the State's right to submit testimony in support of its claim, by one authorized to examine witnesses on behalf of the State, is conclusive in such matter as against the State, and it will not be heard to say thereafter that it had no opportunity to offer such testimony 276

Land that can not be cultivated to agricultural crops falls within the terms of the grant 278

The Department retains jurisdiction over, until the issuance of patent, and may revoke the approval and certification of lists when made upon a misapprehension of the facts 565

Timber Culture.

See *Contest, Entry.*

Circular regulations of April 27, 1891, under the repealing act of March 3, 1891, with a copy of said act 405

The statutory requirement as to breaking can not be waived, even though the land will raise crops without breaking 91

Planting should be done when the ground is in such condition as will, under ordinary circumstances, be favorable to the growth of trees 476

Sowing tree seeds broadcast can not be accepted as in compliance with the timber-culture law 476

One who intrusts his claim to the care of an agent is responsible for the negligence of his representative 476

Breaking and planting may be legally done in advance of the time fixed by the statute 502

Failure to secure the requisite growth of trees does not call for cancellation if not due to the entryman's negligence 502

Timber Cutting.

Action will not lie for timber cutting on land within the forest reservations created by the acts of September 25 and October 1, 1890, where such lands are covered by final entries, made prior to the withdrawal under said acts 83

Persons who have filed for lands embraced within the forest reservations created by the acts of September 25 and October 1, 1890, and are cutting timber thereon are trespassers and should be removed 83

Homesteaders within the reservations created by the acts of September 25 and October 1, 1890, who have not perfected title, may be restrained from unlawfully removing the timber until the validity of their entries can be determined 83

Page.

Under the proviso to section 4, act of June 3, 1878, action will not lie for timber cut from unsurveyed land and used by one in the improvement of his own land, and under the act of March 3, 1891, the fact of such use may be set up in defense to any civil or criminal action 246

Regulations of May 5, 1891, with respect to timber cutting on the public domain, as modified by the act of March 3, 1891, and the amendatory act of the same date 456

Timber Lands.

The act of October 1, 1890, providing for the reservation of certain forest lands in California is not defeated by pending application to purchase the land covered thereby under the act of June 3, 1878 ..... 58, 326

Instructions to special agents in the matter of procuring the requisite information upon which to order the reservation of forest lands under section 24, act of March 3, 1891 .. 499

Timber and Stone Act.

See *Application.*

Lands chiefly valuable for a deposit of slate, and unfit for agriculture, may be entered under this act 100

In determining the validity of a timber entry, the Department must ascertain whether the tract, with the timber removed, is unfit for cultivation 503

An applicant in good faith who is unable to procure the purchase money at the time fixed for the completion of the entry, may be permitted on new notice, and in the absence of adverse claims, to complete the purchase 561

Townsite.

See *Oklahoma, Reservation.*

In contest cases arising in the allotment of Oklahoma townsite lots, rule 42 is modified. Circular order of August 18, 1890 186

Rules of practice modified in Oklahoma cases; instructions of August 21, 1890 187

Section 16, act of March 3, 1891, is not retrospective in its operation 513, 662, 686

Circular of May 8, 1891, amending paragraphs 13 and 23 of the regulations issued June 18, 1890 612

Entry can not be allowed where it is apparent that the application is in the interest of a fraudulent speculation 653

Entry in Oklahoma can not be allowed in the interest of those who entered said Territory in violation of law 654

Hearing may be ordered with a view to judicial proceedings where it is properly shown that a patent for, covers land that was known to be valuable for mineral prior to the entry and patent 513, 662

Patent issued for, that includes a known mining claim conveys no title to said claim; but such patent while outstanding removes the land and the title thereto from the jurisdiction of the Department, and precludes the issuance of a patent for said claim 686

Page.

Under a patent for, in which no portion of the surface ground is excepted from the land described therein, the departmental jurisdiction over said land terminates, even though said instrument declares that no title to any mining claim shall be acquired thereby, and it subsequently appears that it includes a lode claim known to exist at the date of the townsite entry 686

Patent issued for a, that includes a known lode claim, based on a record location made prior to the townsite entry, should be vacated by judicial proceedings so far as in conflict with said claim 686

Page.

Wagon Road Grant.

The case of the Willamette Valley Wagon Road Company *v.* Morton, 10 L. D., 456, cited and followed 331

A claim, based upon settlement and residence, existing when the grant of July 2, 1864 (Oregon), became effective, excepts the land covered thereby from said grant 362

Water Right.

See *Right of Way.*