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THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

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

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

RAILROAD RIGHT OF WAY—APPROVAL.

KANSAS CITY, PITTSBURG AND GULF R. R. Co.

Under an act of Congress granting a right of way for a railroad wherein the general direction of the road is specified, the Department is without authority to approve the location of a section of the road that shows a radical departure from the direction named in the granting act.

Assistant Attorney-General Hall to the Secretary of the Interior, July 3, 1895. (F. W. C.)

I have the honor to acknowledge the receipt, through reference from Hon. Acting Secretary Wm. H. Sims, of certain maps of right of way filed by the Kansas City, Pittsburg and Gulf Railroad company "with request to be advised whether the line of road marked down upon the within maps, come within the purview of the act granting right of way to this railroad."

By the act of Congress approved February 27, 1893 (27 Stat., 487), the right of way was granted the above mentioned company for a line of road through the Indian Territory, the description of the line therein provided for being as follows:

Beginning at a point on the south line of Cherokee County, near the town of Galena, in the State of Kansas, and running thence in a southerly direction through the Indian Territory or through the State of Arkansas and the Indian Territory, by the most feasible and practicable route, to a point on the Red River, near the town of Clarksville, in the State of Texas, with the right to construct, use and maintain such tracks, turnouts, sidings and extensions as said company may deem its interest to construct along and upon the right of way and depot grounds herein provided for.

By the sixth section of the act it is provided that the line of location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any section shall be begun.

On January 31, 1895, the maps of location showing the first and second sections of the road within the Indian Territory were approved

by this Department and the maps now submitted show the third and fourth sections of the proposed road.

The line of route shown upon map 3, commences at the end of section two, north of the Arkansas river, and extends in a general southerly direction through the Cherokee Nation for a distance of twenty-five miles to station No. 10 + 95 south of the Arkansas river in the Choctaw Nation.

Section four commences at the end of section three and extends in a southerly or southwesterly direction for a distance of two or three miles; it then curves easterly and extends in a northerly direction to Fort Smith, Arkansas, a distance of fourteen or sixteen miles, returning to the point where it curves easterly it then extends southerly or southwesterly a distance of six or seven miles making a total distance from the point or end of section three, including the branch to Fort Smith, a distance in all of twenty-five miles.

The real question presented is whether there is authority under the act for the approval of that portion of the line which leaving the road two or three miles south of the third section, extends easterly and north-easterly to Fort Smith.

The act provides for a road running in a southerly direction through Indian Territory by the most feasible and practicable route between the points therein named.

I can see no objection to the location so far as shown by the general line of road set out in these two sections but there would seem to be no authority for the branch line running to Fort Smith.

The only explanation offered by the company for this departure from the line of direction named in the act is that from the organization of the company it has been its intention to make Fort Smith a point on the route of their road. This is not a point mentioned in the act and the company is therefore not required under the terms of the grant of the right of way to enter Fort Smith, and, as it is not upon the line of road in the direction indicated by the act, I am of opinion that there is no authority for the approval of the fourth section of the road which shows, as before stated, an entire change of direction from that indicated in the act.

I therefore advise that section four, as shown upon the map of location herewith, be not approved.

As to section three, I can see no objection to the location as made, and I therefore advise that the same be approved.

Herewith are returned the papers referred.

Very respectfully,

JOHN I. HALL,
Assistant Attorney-General.

Approved,

HOKE SMITH,
Secretary.

TIMBER CULTURE CONTEST—COMMUTATION—FINAL PROOF.

FAIT *v.* STEWART.

An application to commute a timber culture entry, and submit final proof in support thereof, under section 1, act of March 3, 1891, can not be allowed in the presence of a pending contest in which there has been no hearing.

Amended Rule 53 of Practice permits the submission of final proof during the pendency of contest proceedings where the hearing therein has been had, but is not applicable prior thereto.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (J. I. P.)

By your office letter "H" of May 3, 1894, you transmitted to this Department the appeal of Lou Stewart from your office decision of January 6, 1894, holding for cancellation her timber culture entry No. 7878, Fargo, North Dakota, land district, for the NE. $\frac{1}{4}$ of Sec. 11, T. 131, R. 63, made December 20, 1882.

It appears that prior to this contest one was initiated against the same entry by Mary Ollie Fait, the daughter of this contestant; that said contest, after pending for four years, was finally dismissed by the Department, in July, 1892, notice of which decision reached the local office July 15, 1892, and on July 27, 1892, the contest affidavit in the case at bar was filed, alleging in substance failure on the part of the claimant to comply with the requirements of the timber culture law during the period covered by the former contest affidavit, and up to the time of the filing of the present affidavit of contest, thus covering not only the time covered by the first contest, but in addition thereto, covering the time during which the first contest was pending.

After due notice thereof, and continuance by agreement of the parties, a hearing on said contest affidavit was finally had before the local office, which was closed January 2, 1893.

On October 3, 1892, the defendant announced her intention to make final proof, and to purchase the tract under the first section of the act of March 3, 1891 (26 Stat., 1095), and on November 23, 1892, she appeared before the local office and offered her commutation proof, tendering at the same time the purchase price, \$1.25 per acre. This was rejected by the local office, on account of the pending contest of Clark G. Fait.

On the 17th of April, 1893, the local office rendered its decision on the contest case in favor of the contestant, and recommended the cancellation of the claimant's timber culture entry.

The testimony covering the first five years of said entry was excluded by the local office, for the reason that the decision of the Department on the contest of Mary Ollie Fait was conclusive of the proposition that claimant had complied with the law during that period; but testimony was allowed as to the years 1888, 1890, 1891 and 1892.

The testimony in the case shows that during the year 1888 the second five acres originally planted to tree seeds was plowed; that in 1889,

the entire ten or eleven acre tract was marked off, and planted to tree seed, but nothing ever came of the planting; that in 1890 nothing whatever was done on the tract; that in the year 1891 it was plowed and cultivated to corn and potatoes; and that in 1892, shortly before the contest affidavit in this case was filed, the cultivated tract was harrowed and planted in wheat. It is shown that for more than two years prior to the initiation of this contest and her offer to make commutation proof, she had done nothing whatever towards securing a growth of trees, as required by the terms of the timber culture law.

It is insisted by counsel that the instructions of the Department under the act of March 3, 1891, *supra*, issued on April 27, 1891, in reference to the commutation of timber culture entries under said act, required, first, that the person shall have in good faith complied with the provisions of the timber culture law for four years, and second, that he shall be an actual *bona fide* resident of the State or Territory in which the land is located. It is asserted that the decision of the Secretary dismissing the first contest for cause was an adjudication that the first requirements had been complied with, and that there was no doubt as to the qualifications of Miss Stewart under the second requirement.

Passing that discussion, it is evident that the rejection of the commutation proof and application to purchase under said act of March 3, 1891, was the proper action to take in the presence of the pending contest affidavit of Clark G. Fait, upon which there had been no hearing. Such action was entirely in accord with the rulings of this Department. (*Stevens v. Regan*, 13 L. D., 218.)

Final proof may be submitted during pendency of contest proceedings, where hearing in the contest case has been had (see amended rule 53 of practice, 14 L. D., 250). But no hearing had been held in this case when the application to purchase was made and final proof tendered. Hence amended rule 53 does not apply.

Also in the case of *Everson v. Wilson* (19 L. D., 38), it is held that the privilege of commuting a timber culture entry, accorded by section 1, act of March 3, 1891, does not defeat the right of a contestant to proceed with a pending contest.

Unquestionably, therefore, the action of the local office in holding the entry for cancellation and rejecting the application to commute, was in accordance with the holdings of this Department.

It is further insisted that this contest is manifestly speculative. I do not think so. The fact that the unsuccessful contest of the daughter was followed by a successful one by the father is not of itself proof conclusive that the contest was made for speculative purposes. But if it were, and should be dismissed for that reason, the government is still a party in interest, and the manifest failure of the claimant to comply with the requirements of the timber culture law would demand, at all events, the cancellation of the timber culture entry.

Your office decision is affirmed.

WESTENHAVER *v.* DODDS.

Motion for review of departmental decision of April 18, 1895, 20 L. D., 365, denied by Secretary Smith, July 6, 1895.

REPAYMENT—DESERT LAND ENTRY—INITIAL PAYMENT.

HERMAN L. KUHLMAN.

Repayment is not authorized where the entry is of land subject thereto and might have been confirmed if the entryman had complied with the law.

A showing held sufficient to justify the allowance of an application to change a desert land entry to a different tract, is also sufficient to warrant the transfer of the initial payment theretofore made.

Where the transfer of payment, in such a case, is denied, and the applicant fails to appeal, his rights in the premises are lost by such failure, and can not be recovered through a subsequent application for repayment.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895.
(G. C. R.)

Your office letter "G" of August 11, 1893, canceled desert land entry No. 588 for lot 4, Sec. 35, T. 27 N., R. 17 E., M. D. M., Susanville, California, made by Herman L. Kuhlman, December 29, 1891, and on same date allowed him to make a second desert land entry of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 25, in same township.

This action was taken upon a showing deemed by your office sufficient, and was to the effect that the land entered (said Lot 4) was not the land he supposed he was entering; that he was misinformed as to the true description of the land he desired by an agent of the Honey Lake Valley Land and Water Company, who was also a surveyor; that the land he selected, and which he supposed was properly described, is situated about one-half mile west of the land actually entered; that he "is informed" that there were no section corners to be found, and that their absence caused the mistake; that the land which he supposed he had entered was already covered by a desert land entry; he therefore applied to make a second entry of the land above described, and, as above seen, your office allowed the application.

After his application was favorably considered by your office, he then applied for a return of the purchase money (\$20) paid on said desert entry No. 588. Your office, by decision dated March 7, 1894, denied the application, and from that judgment he has appealed to this Department.

Section 2362 of the Revised Statutes provides for repayment to the purchaser, or his legal representatives or assigns, upon proof "that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed."

The responsibility for the entryman's mistake was not on the government; the land was surveyed in 1875; there were other desert land

entries made in the same section about the same time, and it would seem that the entryman by a little more care might have correctly described the lands he desired to enter. Again, the land actually entered appears to have been subject to the entry allowed, and had the entryman complied with the law, the sale might have been confirmed; hence repayment is not authorized. Heirs of G. and D. Duprey, 4 L. D., 187; Heirs of Pierre A. Sylve et al., *idem.*, 293; Ambrose W. Givens, 8 L. D., 462.

It is insisted, however, that the entryman had the right to have his entry changed under the provisions contained in section 2372 of the Revised Statutes. That section reads as follows:

In all cases of an entry hereafter made, of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered, where the tract, thus erroneously entered, does not, in quantity, exceed one half-section, and where the certificate of the original purchaser has not been assigned, or his right in any way transferred, the purchaser, or, in case of his death, the legal representatives, not being assignees or transferees, may, in any case coming within the provisions of this section, file his own affidavit, with such additional evidence as can be procured, showing the mistake of the numbers of the tract intended to be entered, and that every reasonable precaution and exertion had been used to avoid the error, with the register and receiver of the land-district within which such tract of land is situated, who shall transmit the evidence submitted to them in each case, together with their written opinion, both as to the existence of the mistake and the credibility of each person testifying thereto, to the Commissioner of the General Land Office, who, if he be entirely satisfied that the mistake had been made, and that every reasonable precaution and exertion had been made to avoid it, is authorized to change the entry, and transfer the payment from the tract erroneously entered, to that intended to be entered if unsold; but, if sold, to any other tract liable to entry; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize any such change of entry, nor shall anything herein contained affect the right of third persons.

The statute just quoted allows the transfer of a payment from the tract erroneously entered to that intended to be entered or to any other tract liable to entry, when proper showing is made.

When your office, by decision dated August 11, 1893, allowed the claimant to change his entry so as to include the land actually intended by him, the payment made on the erroneous entry should have been transferred to the second entry, as the first payment required. If the showing made was sufficient to allow his application for change of entry, it was also sufficient to have authorized the transfer of payment. Your office, however, held that, "The money paid on said entry can not be credited as initial payment on the second entry, *as requested*, but payment must be made in the regular manner."

Claimant did not appeal from that ruling, but, apparently, acquiesced, making his entry January 22, 1894, and paying the required amount, \$20.

Having thus waived his rights, which he might have obtained by filing his appeal, it is now too late to complain.

The section above quoted does not authorize repayments, and there is no existing law under which relief can be afforded.

The judgment appealed from is affirmed.

HOMESTEAD ENTRY—MEANDERED STREAM.

WILLIAM J. SIMMONS.

The fact that a stream has been meandered will not operate to defeat an entry embracing lands on both sides thereof, where it is satisfactorily shown by the records of survey that such stream does not fall within the class that should be meandered.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (F. W. C.)

I have considered the appeal by William J. Simmons from your office decision of April 15, 1893, denying his application to amend his homestead entry, made September 22, 1891, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 3, 4, and 6, Sec. 6, T. 11 N., R. 4 W., Oklahoma land district, Oklahoma, so as to include in addition thereto lot 5, which was omitted through mistake at the time of making said entry.

Your said office decision denied the application to amend, upon the ground that said lot 5 is not contiguous to the tracts covered by said entry, but failed to state the cause that rendered the same non-contiguous, and by departmental letter of December 8, 1894, a statement of facts relied upon by your said office decision was called for.

I am now in receipt of your office letter of May 10, 1895, in which it is stated that:

I find on examination of the official plats that said lot 5 is separated from the remaining tracts embraced in the entry of Simmons by the North fork of the Canadian River, a meandered stream, and presumably this is the ground on which the decision was based. I would further state that said plats show the average right angle width of the North Fork of the Canadian River to be 1.30 chains.

In the decision of this Department in the case of Hattie Fuhrer (12 L. D., 556), it was held that the fact that a stream has been meandered will not operate to defeat an entry embracing lands on both sides thereof, where it is satisfactorily shown by the records of survey that such stream does not fall within the class that should be meandered. In that case the stream considered is the same as that relied upon in the present case, namely, the North Fork of the Canadian River, and therein it was stated that the result of an examination made of the field notes of survey show—

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 meandered rivers.

This examination coincides with the report from your office in the present case, and I must, therefore, hold that the meandering of this stream was improper and is not sufficient cause for denying the application by Simmons.

Your office decision is therefore reversed, and the papers in the case are herewith returned, with directions that the amendment be allowed as applied for, if, upon further examination, no other sufficient reason exists for denying the same.

DAVIS *v.* TANNER ET AL.

Motion for review of departmental decision of March 19, 1895, 20 L. D., 220, and application for rehearing denied by Secretary Smith, July 6, 1895.

TIMBER CULTURE CONTEST—DEVISEE.

LEECH *v.* BROWNELL.

In proceedings against the timber culture entry of a deceased person the devisee of the sole heir of the entryman is the only party having an interest in the entry; and the failure of such party to appeal from an adverse decision is final as to his rights in the premises.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895.
(C. J. W.)

I have before me the appeal of Annie A. Williams, from your office decision of December 23, 1893, in which her petition to have the case of Samuel Leech against the heirs of Frank Brownell, deceased, involving timber culture entry No. 11,817, made January 4, 1887, re-opened, so as to allow appeal to be filed, was denied.

The contest of Leech was initiated December 3, 1892. After affidavit was filed and before notice issued, plaintiff applied for leave to publish the notice alleging the death of defendant who made said entry, and that there were no known heirs or legal representatives in the State of North Dakota, and service was accordingly ordered and perfected by publication.

March 22, 1892, W. K. Smith, a notary public at Lisbon, North Dakota, was designated and commissioned by proper order to take testimony in said case. At the taking of said testimony C. D. Austin appeared as attorney for the defense, claiming the right to represent the heirs of Brownell and over the objection of opposing counsel, cross-examined plaintiff's witnesses and introduced and examined witnesses for the defense, which testimony became a part of the record.

On the disposition of the case by the register and receiver, they found that the grounds of contest were sufficiently proven, and further found that Austin was not authorized under the rules of practice to represent defendants. Notice, however, of said decision was served on Austin by registered letter, and like notice directed to the heirs of Frank Brownell was sent by registered letter to Perry, New York, and as appears was duly received and receipted for by Annie A. Williams, the petitioner.

No appeal was taken and the finding of the register and receiver on the facts became final, and on September 16, 1893, said timber culture entry was canceled. On November 8, 1893, Samuel Leech exercised his preference right and made homestead entry No. 20,784 upon said tract.

In her affidavit Annie A. Williams alleges that Frank Brownell died about July 1, 1892, leaving his mother, Christina Brownell, as sole heir. That Christina Brownell died January 13, 1893, leaving a will in which she bequeathed to affiant her real estate, including this land; and that the notice directed to the heirs of Frank Brownell which she, affiant, received was not proper notice to her, and that Austin, who was attorney for defendant, was not notified of the decision of the register and receiver.

The petition and affidavit of Annie A. Williams forms the predicate for the present motion to re-open the case. It asserts that Christina Brownell was the sole heir of Frank Brownell, deceased, and that affiant is the devisee of the real estate of the said Christina Brownell, including the land in controversy. If these facts be true, then affiant was and is the legal representative of Frank Brownell, deceased, under timber culture laws and would represent his rights.

In *Starkweather et al. v. Starkweather et al.* (15 L. D., 162), First Assistant Chandler says:

I am satisfied that a timber culture entry is subject to a devise by will, and if the executor of a will complies with the requirements of law he may make final proof, as the deceased entryman could have done if living.

In the case of John A. Sabin, administrator (16 L. D. 149), it was held that either heirs or legal representatives might make final proof.

It follows that if the affidavit of Annie A. Williams is true, she, only, is interested in this land, and if so, she had notice of the decision complained of, as the record shows, and it was her own negligence not to appeal.

It is not necessary now to determine whether Austin exhibited proper authority to appear for defendants or not. Annie A. Williams recognizes his authority, and the record shows that he was legally served with notice of the adverse decision, and of the defendant's right to appeal.

Your office decision is approved.

SMITH ET AL. v. COPLIN.

Motion for review of departmental decision of March 28, 1895, 20 L. D., 264, denied by Secretary Smith, July 6, 1895.

TIMBER CULTURE ENTRY—ADVERSE POSSESSION.

STREETER *v.* ROLPH.

The possession and improvements of a settler who asserts no claim under the settlement laws within the period accorded therefor do not operate to exclude the land covered thereby from appropriation under the timber culture law by another person; and such intervening entry will defeat the subsequent assertion of the settlement right.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (C. J. W.)

October 14, 1863, Lucinda Green made homestead entry No. 159, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 1, T. 16 N., R. 3 E., Lincoln land district, Nebraska.

November 2, 1871, Byron Streeter made homestead entry No. 9541 for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ aforesaid, and made final proof November 10, 1876, and received final receipt and certificate No. 5597.

May 1, 1876, John F. Rolph made homestead entry No. 1876 for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$.

Your office, by letter of December 15, 1876, held Streeter's said entry for cancellation because of conflict with homestead entry No. 159. No appeal was taken and your office letter of October 1, 1877, canceled homestead entry No. 9541. Homestead entry No. 1876 was canceled for the same reason at the same time.

By letter of March 26, 1879, Mistress Green's entry was canceled because of her relinquishment thereof, and it was held that the lands covered thereby were excepted by her said entry from the grant to the Union Pacific Railroad Company.

The attorney for said company alleged that Mistress Green's entry was illegal at its inception and therein null and void, and that consequently said land was not excepted from said grant as a result thereof.

Your office, by letter of June 15, 1879, held that the land was not excepted from said grant.

July 19, 1880, Rolph made application to again enter the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ as a homestead. His application was rejected. He appealed. Departmental decision of March 14, 1881 allowed his application holding that the land was excepted from the grant to said company by reason of Mistress Green's said entry.

May 23, 1881, Rolph made timber culture entry No. 1361, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ the land covered by Streeter's canceled homestead entry.

August 14, 1882, Streeter filed an application for the re-instatement of his homestead entry No. 9541, timber culture entry No. 5597, alleging that he had no notice of the cancellation; that he had resided on and cultivated the land since October, 1871, and had improvements on the same, consisting of a frame house, corn crib, and forest trees, and had the greater part of the land under cultivation. That Rolph

knew of his residence and improvements when he made timber culture entry No. 1361.

Your office letter "F" of January 17, 1883, ordered a hearing between Streeter and Rolph, which was held May 16, 1883, with both parties in court.

January 7, 1884, the register and receiver found that Streeter and his family had lived continuously on the land from the fall of 1878 to the date of the hearing, and during all that time had cultivated and improved the same; that during all the time he was a qualified homesteader and that Rolph knew, when he made entry, of Streeter's residence and they recommended the cancellation of timber culture entry No. 1361.

February 1, 1884, the defendant, Rolph, appealed from said decision, contending that Streeter, by his long residence after the cancellation of his homestead entry, lost any rights that he may have gained by settlement and residence, and that the intervening adverse claim of Rolph was conclusive of his, Streeter's right of entry.

In your office decision of January 2, 1894, you agreed with the finding of the register and receiver as to the facts but disagreed with them as to the recommendation made for cancellation of timber culture entry No. 1361.

On the 27th day of February, 1894, Byron Streeter filed his appeal from your office decision. Said appeal specifies two grounds of error—

1.—That it was error not to hold that Rolph's claim was illegally initiated and should be canceled.

2.—That it was error not to re-instate Streeter's entry.

In my opinion the effect of Mrs. Green's relinquishment of her entry was to restore the quarter-section covered by it to the public domain and render it subject to entry by any qualified applicant.

Streeter's former void entry was no bar to his right to make second entry of the same land if he had sought to do so.

Streeter's possession did not prevent Rolph's right to make timber culture entry, subject to Streeter's right to make homestead entry, within three months, because of prior settlement. Streeter having taken no steps to place his claim of record within three months by filing contest or otherwise, and having allowed several years to elapse before moving to re-instate his original entry, is too late as against the rights of an intervening entryman, it appearing from the record and evidence that he did have written notice of the fact that his entry was held for cancellation, and that he did not appeal. See *Burrus v. Cantrell* (15 L. D., 397).

Rolph's rights are purely legal and it seems to be a great hardship for Streeter to lose his home and his valuable improvements, but he has been guilty of such laches as to render the hardship remediless, in the presence of intervening rights.

Your office decision reversing the finding of the local officers, and directing the dismissal of Streeter's contest is approved.

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

Overruled
27 L.P. 522

PAUL v. WISEMAN.

The transfer of an undivided interest in land covered by an entry does not bring said entry within the confirmatory provisions of section 7, act of March 3, 1891. Where it does not affirmatively appear that an entryman has received notice of a requirement of the General Land Office, made prior to the passage of said act, the proceedings thus taken will not be held to defeat confirmation of the entry under the proviso to said section.

An entryman who has transferred all his interest in the land covered by his entry can not defeat the rights of his transferees by a subsequent relinquishment of the entry in question.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (G. C. R.)

On September 26, 1876, Louis Land made homestead entry No. 89, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 8, Sec. 35; also lot 1, in Sec. 34, T. 39 S., R. 11 $\frac{1}{2}$ E., W. M., Linkville (now Lakeview), Oregon. He submitted final proof April 23, 1883, and on May 3, 1883, final certificate No. 74 was issued.

Your office letter "C" of September 3, 1883, suspended the entry, and required Land to furnish proof of naturalization. The records of the local office show: "Parties notified this 15th day of September, 1883." It does not appear, however, that Land was notified of this requirement by registered letter; there is no proof, therefore, that he ever received the notice.

On June 15, 1893, Thomas M. Wiseman filed Land's relinquishment, and at the same time made homestead entry No. 1783 for the tracts embraced in Land's entry, except as to lot 1, Sec. 34.

On August 22, 1893, Wenzel J. Paul filed a protest against the allowance of Wiseman's entry, alleging that he had acquired title to the land by reason of a foreclosure of a certain mortgage executed by the transferee of the former entryman.

Your office, by letter "H" of September 13, 1894, held that Paul "has all the rights that Land formerly had, and that he would still have if he had not relinquished," and Paul was allowed ninety days from notice within which to furnish evidence of the naturalization of Land's father.

On October 13, 1894, Paul transmitted his own affidavit, together with a certificate of the county clerk of Siskiyou county, California, tending to show that Louis Land was as a citizen of the State of California registered in the Great Register of Siskiyou county.

Your office, by decision dated December 10, 1894, held the evidence thus furnished "is entirely satisfactory" as to Land's citizenship, and accordingly held Wiseman's entry for cancellation, and upon said decision becoming final, Land's entry would be reinstated.

From that judgment Wiseman has appealed to this Department, and alleges error:

1. In holding the evidence sufficient to establish the citizenship of Louis Land, under the land laws of the United States.

2. In reinstating a relinquished and canceled homestead entry contrary to law.

Wiseman's appeal and argument have not been formally answered, but since said appeal was filed Paul, the alleged transferee, has filed a motion to pass the entry to patent under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

It does not affirmatively appear of record when Louis Land, the entryman, first conveyed any interest in the land. It is admitted, however, that he sold an undivided one-half interest in said land, together with the same interest in about five hundred acres of other lands, to W. J. Paul, and it appears from the case of Paul *v.* Land, reported in 15 Oregon, p. 442, that Land conveyed this interest on May 24, 1883, about twenty days after he received final certificate. Subsequent to this transfer, and on December 24, 1883, Louis Land was married to Martha A. Swingle, and on July 1, 1889, he conveyed to his then wife, the said Martha, all his remaining interest in the land in question, together with his interests in some five hundred acres of other lands, apparently the same lands theretofore held in common with W. J. Paul. This transfer left the title of all the lands so conveyed apparently in Paul and Mrs. Land, as tenants in common.

It appears that on September 10, 1890, Martha A. Land purchased Paul's interest in the lands then held in common by them, including the lands in controversy. She gave her promissory note for the purchase price (\$5,520), payable two years after date (September 10, 1890), "in United States gold coin," and bearing interest from date at the rate of ten per cent per annum. To secure this note, she executed a mortgage upon all the land (about 700 acres, including land in controversy). She was divorced from Land June 23, 1891, and on November 24, of the same year, she was married to Thomas M. Wiseman, who, as above seen, secured Land's relinquishment of the land in question, and was allowed to make entry thereof June 15, 1893.

In November, 1892, Paul obtained a decree of foreclosure, in the circuit court of Klamath county, Oregon, against Mrs. Land, then Mrs. Wiseman; thereafter the land was sold, and Paul became the purchaser at the sheriff's sale.

Such being the facts, it is evident that Land's entry is not confirmed under the 7th section of the act of 1891 (*supra*), because of any sale or incumbrance made to Mrs. Land, for such sale was made after March 1, 1888; nor is the entry confirmed because of Land's transfer of one-half of the land to Paul; although this transfer was made prior to March 1, 1888, yet being an undivided interest, and not a specific

subdivision, it is held that the conveyance of such an interest does not bring the entry within the confirmatory provisions of said act. *Bradbury v. Dickenson* (14 L. D., 1). The proviso to section 7 reads as follows:

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.

No one appears to have filed any contest against Land's entry; but, as above seen, your office letter "C" of September 3, 1883, required him to furnish proof of naturalization.

The word "protest" in the act above quoted is interpreted as meaning any proceeding by any person who, under the rules of practice, seeks to defeat an entry (Circular, May 8, 1891, 12 L. D., 451). And "proceedings", as used in that circular, is construed

as including any action, order, or judgment had or made in your office, canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled. (Instructions, July 1, 1891, 13 L. D., 1.)

It does not appear that Land ever complied with this order. In his final proof he swore that he came to America when he was eight years old; and both he and one of his proof witnesses swore that his father was naturalized. If that be true, he was a qualified entryman. Nevertheless when he was called upon by your office to furnish proof of naturalization, he should have done so, if, in fact, he received notice of that requirement. It does not affirmatively appear that he received such notice; it would have been error to cancel his entry without giving him an opportunity to comply with said requirement, and the fact that he made no effort to do so would imply that he never received the notice.

It results, therefore, that there was no pending contest, protest, or "proceedings" had or begun against his entry on March 3, 1891, of which he was chargeable with notice; that being true, his entry comes directly within the terms of the proviso above quoted, unless he could by his own act defeat the rights of his transferee by his relinquishment, filed June 15, 1893.

When Land executed this relinquishment, he had then parted with all the interest he ever had in the land for a valuable consideration; his relinquishment was therefore null and void. *Daniel R. McIntosh*, 8 L. D., 641. He was not in a position then by his own act to defeat the rights of those who had paid him for the land. True, one of those transferees was his wife, and she is not here claiming any rights as a transferee; but the reason is manifest: she is the present wife of the

entryman, Wiseman, and all her rights have been duly foreclosed in the interest of Paul.

Land may have been willing by his relinquishment to injure Paul, although for the benefit of his former wife's present husband, but he can not, for reasons above given, be permitted to do so.

Your office, by its decision appealed from, found that Land was a citizen of the United States, and therefore a qualified entryman. From the above considerations, it is unnecessary to discuss the alleged errors, set forth in the appeal, as to the legality of that finding on the evidence produced.

Wiseman's entry will be canceled, and the tracts passed to patent under Land's entry.

The decision appealed from is accordingly modified.

HOMESTEAD CONTEST—RESIDENCE.

MONTGOMERY *v.* NEWTON.

A homestead entry attacked for failure to reside on the land will not be canceled where it appears that the entryman in fact had established and maintained residence on an adjacent tract, to which he acquired title after his entry, but removed to the land covered by his entry prior to notice of the contest, and where no evidence of bad faith is shown to exist.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895.
(F. W. C.)

I have considered the appeal by R. C. Montgomery from your office decision of March 12, 1894, dismissing his contest against the homestead entry of Thos. D. Newton, made March 4, 1889, covering the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 10 S., R. 3 W., Little Rock land district, Arkansas.

Montgomery's affidavit of contest was filed on January 20, 1892, alleging that the entry by Newton "was made for the purpose of another person's benefit, other than said Thos. D. Newton," and "that the said Thos. D. Newton has never resided on said land and has wholly abandoned said tract; that the said tract is not settled upon and cultivated by said party as required by law."

Said affidavit was executed in December, 1891, but does not appear to have been filed until January 20, 1892, upon which date notice for the hearing issued by the local officers, the testimony being taken before the clerk of the circuit court in Desho county, Arkansas. Upon the conclusion of the hearing and after reviewing the record made, the local officers on July 22, 1892, rendered their decision recommending the cancellation of defendant's entry. On appeal, said decision was reversed by your office decision, the contest dismissed, and defendant's application to amend to an adjoining farm homestead entry was allowed.

From said decision Montgomery has appealed to this Department.

It appears that the tract in question had for a long time prior to the making of defendant's entry, been in the possession of his father, whose claimed title dated back to the State. The land had been improved to considerable value, and defendant's father-in-law lived thereon as tenant of defendant's father.

The elder Newton, learning that the State had never selected the land, and that he therefore had no record title to the same, gave the improvements made by him upon the land to his son, the present claimant, who made the homestead entry therefor on March 4, 1889, as before stated. Prior to this time, to wit, in 1885, the elder Newton gave to his son the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 29, which was owned by him, and the present claimant built a house and made other improvements upon what he supposed was a part of said W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 29, but which proved in fact to be just south of the line and in the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 32. To protect his son's improvements the father acquired title to said NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32, and deeded the north twenty acres thereof to his son, but this was subsequent to March 4, 1889.

Claimant continued to reside in the house built, as before stated, on section 32, until in January, 1892, when as he states, learning that his right under the homestead law to the land in question was about to be contested he moved into the house upon the land in question occupied by his father-in-law, who moved on the land formerly occupied by claimant in section 32. This was several weeks prior to the service of notice of contest, so that whatever default may have formerly existed, was cured before the service of notice of contest in question by Montgomery.

Shortly after the filing of the contest, Newton, after stating the facts before recited, applied to change the form of his entry to an adjoining farm homestead entry, for which a formal application was made.

From a careful review of the matter I am unable to find any evidence of bad faith in the matter of his claim to the land in question, but rather that he was misled through ignorance, or bad advice, and as he was residing upon the land at the time of service of notice of the present contest, said contest must, therefore, stand dismissed.

The question as to his right to amend the form of his entry is one purely between him and the government and from a careful review of the matter I affirm your office decision holding that the amendment should be allowed.

HOMESTEAD CONTEST—RESIDENCE.

DARLING *v.* ROBINSON.

A plea that the entryman had established his residence on the land covered by his entry prior to notice of a contest against the same, and so cured his default, if any existed, can not be recognized, where it is apparent that the alleged residence was induced by the prior contest proceedings.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895.
(W. F. M.)

On May 28, 1892, George H. Robinson made homestead entry of the NE. $\frac{1}{4}$ of section 8, township 126 N., range 44 W., within the land district of St. Cloud, Minnesota.

On March 16, 1893, Malcolm M. Darling filed an affidavit of contest alleging that Robinson

has wholly abandoned said tract; that he has never made his residence on said land since making said entry; that said tract is not settled upon and cultivated by said party as required by law, that said George H. Robinson has not since said entry had or made his residence in the county of Stevens where the said land is situate.

A hearing was had on April 26, 1893, and on May 13, 1893, the register and receiver filed their separate opinions, the former finding for the contestant and the latter for the claimant.

The case is now here on appeal from the decision of your office dismissing the contest.

James Robinson, the father of the entryman, covered the land in controversy with a timber culture entry on June 26, 1889, which was canceled by relinquishment on May 28, 1892, the date of his son's homestead entry.

George H. Robinson, the son, and contestee here, resided at that time, and had resided for a dozen years, at Edina Mills, Hennepin County, Minnesota, near the city of Minneapolis, and during those years was variously engaged in farming, and as a clerk in coal and railroad offices, and for three and a half years in an insurance office. His residence when the entry was made was one hundred and seventy-five miles from the land, which he had never seen and which he did not see until the 19th day of November, 1892, very nearly six months after the date of his entry, when he went upon it and spent about ten hours. He did not see it again until the 16th of March, 1893, but meanwhile, on December 9, 1892, Darling had filed a contest, which was set down for hearing on January 26, 1893, and continued to March 15, 1893, on which date the contestee made a special appearance through counsel only, and moved to dismiss the contest for want of sufficient notice. The case was continued to the following day, March 16, and the motion having been favorably entertained and the contest dismissed, Darling at once instituted the present proceeding, but did not get service until two days thereafter, on March 18, 1893.

In the meantime, on March 16, the day upon which Darling's first contest was dismissed and the second filed, Robinson proceeded to the land, which was situated one hundred and thirty-two miles, by rail, from the land office, and affected to take up his residence thereon.

The foregoing recital, taken from the record, and mainly from the testimony of the claimant himself, discloses a case wholly inconsistent, as I view it, with that good faith which the law contemplates shall actuate persons who go upon the public lands for the purpose of taking them as homesteads. Intending settlers, in good faith, do not make entries without any knowledge whatever of the lands embraced therein, nor do they make contracts for dwellings thereon, as was done in this case, with persons whom they do not know.

Moreover, the conclusion of your office decision that

Darling, by filing a new affidavit of contest, and proceeding thereon, waived all right he may have had under his former contest, and at the same time left Robinson free to cure his default as to residence, if any, before notice of another contest,

while merely the statement of a general rule of pleading, when applied to the facts of the case at bar becomes in the last degree technical and shadowy. There was simply a want of technical notice to Robinson, for it is not denied that he had actual notice, and the effect of the proceedings had was not any more than could have been accomplished by a continuance for service, a practice recognized in the courts. The discontinuance of the one contest and the filing of the other were practically simultaneous acts, and while strictly they were and must be treated as independent proceedings, they may and should be considered together in estimating their stimulating effect on the delinquent entryman.

It is clear that Robinson made his pretended settlement on the 16th of March under pressure of contest proceedings, and such a course can not be sanctioned by this Department.

The decision appealed from is reversed, and it is ordered that the entry of Robinson be canceled.

RAILROAD GRANT—INDEMNITY—SELECTION.

ATLANTIC AND PACIFIC R. R. Co.

Where indemnity is sought for lands included in a reservation the true boundaries of said reservation should be established, in order to properly determine the lands for which indemnity may be allowed.

Secretary Smith to the Commissioner of the General Land Office, July 6,
(J. I. H.) 1895. (F. W. C.)

I have considered the matter submitted to this Department for instructions, by your office letter of March 23, 1894, the same being the matter of indemnity list No. 5, of selections made by the Atlantic and Pacific Railroad company June 22, 1887.

Said list embraces 387,377.07 acres within the Prescott land district, Arizona, selected on account of a like amount of lands claimed to have been lost to the grant, a portion of which basis is 224,000 acres, alleged to be within the limits of the Camp Verde Indian reservation, the balance being within the Moqui reservation.

In the case of the Atlantic and Pacific Railroad Company *v.* Willard (17 L. D., 554), it was held that the land embraced in the Camp Verde Indian Reservation was excepted from the company's grant, and upon release of said reservation did not inure to the benefit of said grant.

In calculating the basis on account of the lands lost to the grant for the Camp Verde Indian reservation it appears that one Edw. H. Wilton, county surveyor of Yavapai county, Arizona, has prepared a diagram in which he attempts to show the boundaries of said reservation and the extension of the public survey through the same, and upon this plat it is calculated that the reservation embraced 502,240 acres, and a basis is claimed on account of the odd numbered sections lost to the amount of 224,000 acres as before stated.

The limits of the reservation as shown upon the plat prepared by said surveyor is of a parallelogram about twenty miles by forty-five miles calculated from the old Camp Verde military reservation.

The facts connected with the establishment of the reservation in question are fully set forth in the decision in the case of the Atlantic and Pacific Railroad Co. *v.* Willard, *supra*. The basis of the order establishing the Camp Verde military reservation is the recommendation of Vincent Colyer, Commissioner, as set forth in his letter of October 3, 1871, which declared a reservation of "all that portion of country adjoining on the NW. side of and above the military reservation of this post on the Camp Verde river for a distance of ten miles on both sides of the river, to the point where the old wagon road to New Mexico crosses the Verde, supposed to be a distance up the river of about forty-five miles."

From the above it is plainly seen that the reservation declared was calculated from the Verde river, being ten miles on each side thereof. The Verde river does not follow a direct course in a north-westwardly direction from Camp Verde Military reservation to the point of meeting the wagon road to New Mexico, and the reservation established and followed by the county surveyor and made the basis for the company's selection does not even approximate the correct limits of said reservation properly established, the Verde river being made the basis therefor.

I have had prepared, and return herewith, a tracing of the Verde river and the limits of the reservation established thereon. Upon this map is laid down the limits recognized by the county surveyor referred to and from an examination of said diagram the difference will be apparent.

Your attention is directed to this matter, and the company's attention should also be called thereto, and proper steps should be taken to properly lay down the limits of the reservation established in 1871.

The remaining questions covering the selection of indemnity lands in lieu of the tracts lost to the grant by reason of being within an unsurveyed Indian reservation are disposed of in the decision of this Department in the case of the Northern Pacific Railroad company, on review (20 L. D., 187), and in the disposition of this matter you will be governed thereby.

The list is herewith returned for your consideration and action in view of the directions herein given.

REPAYMENT—TRANSFEREE—INCUMBRANCE.

C. N. LUKES.

A transferee who applies for repayment must show, among other things, that the land covered by the entry in question is not incumbered.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895.
(G. C. R.)

On December 17, 1883, cash receipt No. 6304 (Huron series) was issued to Kinsey H. Robinson, for the SE. $\frac{1}{4}$ of Sec. 33, T. 112, R. 75, Pierre, South Dakota.

On November 4, 1884, your office rejected the proof for insufficient residence. Robinson was duly notified of this action, and failing to furnish additional evidence, or appeal, the entry was canceled by your office letter of July 18, 1885.

On July 21, 1891, the application of C. N. Lukes, as bona fide purchaser, and R. H. Fleming, as incumbrancer, was forwarded to your office, asking confirmation of the entry under the 7th section of the act of March 3, 1891. Your office rejected this application, on the ground that said section does not operate to reinstate canceled entries. On appeal, the Department, on January 26, 1893 (L. & R. 261, p. 169), affirmed that judgment.

On December 17, following, Lukes made application for the return of the purchase money paid on said entry. With his application he filed:

1. Certified copy of the receiver's receipt.
2. Copy of warranty deed, dated January 21, 1884, from Kinsey H. Robinson (single) to C. N. Lukes, trustee, subject to "a certain mortgage of two hundred and fifty dollars."
3. A quitclaim deed to the land from C. N. Lukes to the United States of America (duly recorded).
4. A certificate from the register of deeds for the county, stating that "the receiver's receipt, warranty deed, and quitclaim deed, all attached thereto and attached to the application and affidavit of C. N. Lukes, constitute all of the record title to said tract of land, as shown by and from the records of my office."

5. Luke's affidavit, stating that he was the successor in interest of the entryman; that he had not sold, assigned, or incumbered the title to said tract; that upon diligent inquiry he had been unable to ascertain the whereabouts of the entryman, and that he was the successor in interest to the land at date the entry was canceled.

On April 7, 1894, your office required him to furnish a certificate of the recording officer to show that the mortgage (mentioned in the deed from Robinson to him) for \$250 had been satisfied; also requiring him to furnish an affidavit that he had not been indemnified for the failure of title. This requirement he attempted to meet by his affidavit, dated April 16, 1894, stating that he had never been indemnified against the failure of Robinson's title; also that he had never assumed the payment of the \$250 mortgage. In transmitting this affidavit, the register stated that the mortgage against the land of \$250 had not been satisfied, and that a certificate of satisfaction could not be obtained.

Your office, by letter of April 23, 1894, held that the mortgage is a lien upon the land, and that "under the law governing repayment of purchase money before repayment can be authorized, the land must be free from all incumbrances."

From that judgment Lukes has appealed to this Department.

It is apparent that the land was erroneously sold; that is, the money was accepted and receipt given upon evidence deemed by the local officers sufficient, but which upon review by your office was found insufficient on the question of residence. No fraud appears to have been charged against the entryman in the presentation of his final proof, and failing in due time to respond to the requirements of your office, the entry was canceled.

The purchase money should not have been accepted, or final receipt given, because the final proof on its face did not justify that action; the error, however, was that of the local officers, and not of the entryman—hence, the entry was "erroneously allowed," within the meaning of section 2 of the act of June 16, 1880 (21 Stat., 287). That section authorizes repayment to be made "to the person who made such entry, or to his heirs or assigns," and section 4 of the act provides that the Commissioner of the General Land Office "shall make all necessary rules and issue all instructions to carry the provisions of this act into effect."

The question here presented is, whether repayment can be made to an assignee or vendee of the original entryman, in any case, where the records show the vendee purchased the land charged with a pre-existing incumbrance made by the entryman, and not released of record.

From the facts above given, I think enough is shown to authorize the favorable consideration of the application, unless the unsatisfied mortgage prevents it.

To secure repayment under section 2 of the act of 1880 (*supra*), it is not only necessary to show that the entry was "erroneously allowed," but the duplicate receipt must be surrendered, and "the execution of a

proper relinquishment of all claims to said land" must be made. The evident purpose of Congress was to provide that before repayment could be authorized, the title to the land must be wholly in the government, unclouded by incumbrances which might possibly interfere with an after acquired title under patent. And so in the circular of August 6, 1880, instructions were issued by your office, duly approved by the then Acting Secretary of the Interior, which, among other things, states that:

Where the duplicate receipt has been lost or destroyed, a certificate will also be required from the proper recording officer showing that the same has not become a matter of record, and that there is no incumbrance of the title to the land thereunder.

When the original entryman applies for repayment, he is required to make oath that he has not transferred "or incumbered the land." General Circular, 1892, page 85. The reason for this requirement is obvious: he should not be allowed to sell or encumber the land, and on failure of title obtain the purchase money to the injury of his grantee.

When one purchases the land from the original entryman and the land is charged with a pre-existing incumbrance, such purchaser can not be heard to say that he did not "assume" the payment of such incumbrance.

In the case at bar, Lukes's deed to the land recited an incumbrance of \$250. If the original entryman could not obtain the purchase price of the land without canceling this incumbrance, neither could his transferee; for the latter had no greater or further rights than the former.

The decision appealed from is affirmed.

ADJOINING FARM ENTRY—SECTION 5, ACT OF MARCH 2, 1889.

HARVEY A. BLACK.

The right to make an adjoining farm entry under section 2289, R. S., can not be allowed where the homestead right has been once exercised though for a less amount than one hundred and sixty acres.

The additional right conferred upon homesteaders by section 5, act of March 2, 1889, can only be exercised on land contiguous to the original homestead.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (S. V. P.)

On October 9, 1894, the Department allowed the application of Harvey A. Black to change his additional homestead entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 4, T. 7, R. 1 E., Huntsville, Alabama, to an adjoining farm entry for the same.

It appears that Black holds by patent under homestead entry eighty acres in section 8, in said township and range, and that he also owns

by deed from one Dean the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 4. August 31, 1889, he made an additional homestead entry for the tract first described, and on January 12, 1893, he made application to change said entry to an adjoining farm entry. This application was denied in your decision of May 25, 1893, but allowed in the departmental decision first referred to.

By letter of October 25, 1894, you returned the decision of the Department, in accordance with my request of the 23d, for a reconsideration thereof.

The right of adjoining farm entry does not appear to have been intended as an additional homestead right, but as a special privilege accorded to persons who already had secured title, under other laws, to less than one hundred and sixty acres of land adjacent to the public land, and to such persons was extended the special privilege of an entry of an adjacent tract of public land of an amount which added to the land already owned would aggregate one hundred and sixty acres, without removing from the land on which they were then residing. But where the homestead right has once been exercised, though for a less amount than one hundred and sixty acres, the right to make an adjoining farm entry has always been denied by the Department. Thomas B. Hartzell, 5 L. D., 124; John B. Doyle, 15 L. D., 221; John W. Cooper, 15 L. D., 285; General Circular, February 6, 1892, page 17.

To remedy hardships arising from this construction of the law and for similar purposes, various additional privileges have been granted, as under the acts of March 3, 1879, 20 Stat., 472; July 1, 1879, 21 Stat., 46; and March 2, 1889, 25 Stat., 854. The provisions of section 5 of the last named act seem especially directed toward cases where the claimant had already made one homestead entry of less than one hundred and sixty acres, allowing him to take, without residence thereon, an additional *contiguous* tract of an area sufficient to aggregate with his former entry one hundred and sixty acres.

This is clearly an "adjoining farm entry," but it is not the one granted under section 2289 of the Revised Statutes, nor the one claimed herein, for in the present case the land asked for is *not* contiguous to the original homestead entry.

Black's additional entry, as originally made, is clearly within the provisions of section 6 of the act of March 2, 1889, but, as it will be seen from the foregoing, there is no authority under any of the provisions of the homestead law, as construed by the Department, that would warrant the allowance of Black's present application.

The decision, therefore, of October 9, 1894, is vacated, and your decision of May 25, 1893, is hereby affirmed.

BROAD *v.* RAY.

Motion for review of departmental decision of April 27, 1895, 20 L. D., 422, and rehearing therein, denied by Secretary Smith, July 6, 1895.

RESERVATION—EXECUTIVE ORDER OF WITHDRAWAL.

NATHANIEL J. HUMPHREY.

A departmental letter to the Commissioner of the General Land Office directing him to withdraw at some future time, when surveyed, a sufficient quantity of land to serve a specified purpose, is not in and of itself a withdrawal.

Where a telegraphic order of the General Land Office to the surveyor general of a State directs the survey of certain lands for a specific purpose, and notice thereof is not given the local office, said order should not be treated as a withdrawal, as against the rights of settlers acquired without knowledge thereof.

Secretary Smith to the Commissioner of Indian Affairs, July 6, 1895.
(J. I. H.) (J. L. McC.)

The Department is in receipt of your office letter of May 18, 1895, directing attention to departmental decision of April 26, 1895, 20 L. D., 414, in the case of Nathaniel J. Humphrey, and several others. Said parties had been permitted by the local officers to make entries of lands in the Tongue river valley, Montana. The General Land Office held said entries for cancellation, on the ground that they had been allowed in violation of Department order of June 22, 1886, to the General Land Office, and of the General Land Office telegram of the same date to the surveyor general of Montana.

The Department held that no lands along the Tongue river valley were withdrawn until the letter of the General Land Office to the local officers, dated October 25, 1886; and that the only lands withdrawn were those described in said letter.

Your office letter of May 18, 1895, suggested in connection with this subject:

That the Department order of June 22, 1886, under which the General Land Office issued telegraphic instructions to the surveyor general of Montana, to make certain surveys "in Tongue river valley between three south and eight south," is still in force, never having been revoked, according to information in the possession of this office; and that Department order of September 3, 1886, under which the General Land Office directed the withdrawal of certain lands from the mouth of Stebbins' Creek to the mouth of Hanging Woman's Creek, is supplemental to the first order, and in no way set aside or annulled the same.

If I understand the above contention correctly, it is to the effect that the order withdrawing the land along Tongue river from the mouth of Stebbins' Creek to mouth of Hanging Woman's Creek was issued in pursuance of the *second* order of the Department (that of September 3, 1886); and not in pursuance of the *first* order of the Department (that of June 22, 1886)—which is still in force, "and in no way set aside or annulled."

The letter of the Commissioner of the General Land Office would seem to indicate that he considered himself, in his letter of October 25, 1886, to be carrying into effect *both* orders of the Department, and not

merely one. His letter (in so far as it bears upon this branch of the matter) reads as follows:

OCTOBER 25, 1886.

REGISTER AND RECEIVER,

Miles City, Montana.

GENTLEMEN: On the 22d of June last I telegraphed to the surveyor general at Helena, Montana, to survey certain townships of land in the Rosebud and Tongue river valleys, in your district—these surveys to extend far enough back from the rivers to take in all the agricultural lands in the valleys named, but no further.

The object of these surveys is mainly to enable the Department to locate the Northern Cheyenne Indians on homesteads in severalty in the valleys referred to.

On September 3, 1886, the Honorable Secretary of the Interior directed that no filings or entries of any kind be allowed pending the survey, nor afterward till the Indians have first made their homestead entries through authorized agents.

It seems to me clear that the land upon which “no filings or entries of any kind” shall “be allowed pending the survey,” are the lands referred to in general terms in the departmental order of June 22, 1886, and the “survey” referred to is the “survey” directed by the same order. The Commissioner of the General Land Office goes on to say:

You will therefore—

(That is, as I understand, because of the *two* orders previously referred to in the same letter—to wit, the order to the surveyor general, on June 22, in pursuance of the departmental letter of the same date, and also of the more *specific* departmental order of September 3, 1886.)

be on your guard and receive no filings, or entries, or locations of any kind, upon any unoccupied (by whites, legally,) lands on both sides of Tongue river, from the mouth of Stebbins' creek on the west bank to the mouth of Cook's creek, and on the east bank from opposite the mouth of Hanging Woman's creek.

But even if it were to be conceded that the contention of your office is correct—that the order to the local officers to withdraw lands in the Tongue valley between Stebbins' creek and Hanging Woman's creek on the south was in pursuance solely of the departmental order of September 3, 1886, and was *not* in pursuance of the departmental order of June 22, 1886—then there never has been any withdrawal under the departmental order of June 22. The departmental order of June 22nd is not *per se* a withdrawal; for a letter to the Commissioner of the General Land Office directing him to withdraw—at some future time, when surveyed—a “sufficient quantity” of land to serve a certain purpose, is not in and of itself a withdrawal. Nor is it the practice to withdraw lands from settlement and entry by telegraphic orders to the surveyor general of a State, ignoring utterly the register and receiver of the local land office—even if the information to the surveyor that “the surveyed land will not be open to entry” could be construed as an order of withdrawal. Certainly it would seem very unjust to all the settlers along the valley of the Tongue river for ten miles south of Hanging Woman's creek, to eject them from their homes and dispossess them of their

improvements because of a dispatch to the surveyor general, at Helena, of which neither they nor the local officers at Miles City had ever heard.

I am still of the opinion that the departmental order of June 22, 1886, directing the Commissioner of the General Land Office to withdraw "a sufficient quantity" of lands to locate the Northern Cheyenne Indians upon was not in and of itself a withdrawal; that the telegram of the Commissioner to the surveyor general directing the survey of certain townships was not in and of itself a withdrawal; and that the only lands withdrawn in the Tongue river valley were those withdrawn by the order of the Commissioner of the General Land Office to the register and receiver of the local office, on October 25, 1886, embracing lands "on both sides of Tongue river, from the mouth of Stebbins' creek on the west bank to the mouth of Cook's creek, and on the east bank from opposite the mouth of Hanging Woman's creek."

However, if it should be your opinion that the land withdrawn by the Commissioner of the General Land Office, by his letter of October 25, 1886, is not sufficient for the purposes set forth in said departmental letter of June 22, 1886, I should be willing, upon your recommendation, setting forth the facts upon which you base the same, to order a withdrawal from settlement and entry of the remainder of the lands surveyed in pursuance of the telegraphic order to the surveyor general of Montana, under date of June 22, 1886, in so far as said lands have not hitherto been settled upon or entered.

In any event, should any Indians be found occupying any lands in the Tongue river valley outside the limits herein held to be withdrawn, their claims will be entitled to consideration under the general allotment act of 1887, and every effort made by this Department to protect them in their rights.

ACT OF JUNE 15, 1880—WAIVER—PRACTICE—ACT OF MARCH 3, 1887.

BRITIAN *v.* NIXON.

The voluntary relinquishment of an adjoining farm homestead is a bar to the subsequent purchase of the land, by the entryman, under the act of June 15, 1880. The application of a party for the exercise of a right to which he is not entitled can not be held a waiver of his actual rights, where no one is induced to take action in the premises by reason of said application.

To avoid circuity of action the Department will determine the rights of parties in a case before it for consideration, though such action may involve matters not passed on by the General Land Office.

The right of a purchaser from a railroad company to perfect title under section 5, act of March 3, 1887, is not defeated by a pending application to make homestead entry not based on a settlement right.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895.
(J. I. P.)

By your office letter "F" of May 2, 1894, you transmitted to this Department the appeal of George W. Britian, in the case of the said Britian *v.* Alfred T. Nixon, from your office decision of January 10,

1894, rejecting Britian's application to purchase, under the act of June 15, 1880, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, T. 25 N., R. 24 W., Springfield, Missouri, land district, and holding Nixon's application to make homestead entry of said tract for acceptance, subject to Britian's right of appeal.

The facts in this case, briefly stated, are as follows—

June 25, 1866, Britian made an adjoining farm homestead entry for the tract described. January 26, 1875, his entry was canceled on his relinquishment thereof, for the reason, as stated therein, that he was the owner of more than one hundred and sixty acres of land at the date said entry was made, and was therefore not qualified to make entry of said tract.

August 23, 1887, he applied for a reinstatement of said entry.

August 28, 1887, Nixon applied to make homestead entry of said tract.

The local officers rejected both of said applications for alleged conflict with the grant to the Atlantic and Pacific Railroad Company. On appeals from that action, this Department decided, June 26, 1890, that said railroad company had no claim to the land in question, and directed that the controversy between Nixon and Britian be disposed of.

July 18, 1890, your office, in promulgating the departmental decision above mentioned, also denied Britian's application for reinstatement, because he had voluntarily relinquished his former entry, and the local officers were directed to advise him that as he claimed to be a purchaser from the railroad company he might be entitled to purchase under the act of March 3, 1887 (24 Stat., 556). Said letter also stated the character of the final proof that would be required, and the local officers were directed that in case Britian should apply to make final proof under said act, to notify Nixon.

Britian applied to purchase under the act of June 15, 1880 (21 Stat., 237), which application was rejected by the local officers, and on appeal to your office, the action of the local officers was affirmed April 1, 1891, and they were directed that in case Britian did not desire to appeal from said decision, to order a hearing to adjudicate the rights of Britian and Nixon in the premises.

No appeal was taken from your office decision of April 1, 1891, and the hearing ordered by the local officers, as directed, was had June 6, 1891, at which both parties were present.

June 11, 1891, the local officers found for Nixon, and recommended the acceptance of his application to enter. From that decision Britian appealed to your office.

In the decision of January 10, *supra*, your office found that neither party has ever resided on the land; that Nixon has never improved it, and that Britian built a frame house and placed other improvements thereon, aggregating in value \$500.

The failure of Britian to appeal from your office decision of April 1, 1891, made that action final, and effectually disposed of any alleged rights

that he might have had under said act of June 15, 1880. That decision was based on the proposition that his voluntary relinquishment of his adjoining farm homestead entry barred his right to purchase under the act of June 15, 1880, citing *Rice v. Bissell* (8 L. D., 606), and *Cole v. Reed* (10 L. D., 588), which conclusion, in my judgment, was sound, and in accordance with the holdings of this Department.

The hearing had before the local officers on June 8, 1891 developed nothing new as to the rights of Britian in the premises. The facts are that at or about the time Britian filed his relinquishment of said entry he was made to believe that the St. Louis and San Francisco Railroad Company, grantee of the Atlantic and Pacific Railroad Company, was entitled to the tract and he was induced to file said relinquishment on the promise of said railroad company to sell and convey said tract to him, which it afterwards did.

The application of Nixon to make homestead entry of said tract does not allege that he ever made settlement on said tract; in fact, the truth is that he never did make settlement of said tract, and as stated by himself at the hearing, had never resided upon or cultivated or improved the same.

The question presents itself whether or not the failure of Britian to make application to purchase under the act of March 3, 1887, *supra*, and instead thereof, making application to purchase under the act of June 15, 1880, was a waiver or abandonment of his rights under the act first above referred to.

In the case of *Nicholson v. Duffey* (4 L. D., 332), it is held that a

Waiver of a legal right to be operative must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from taking advantage of his own act to the injury of another who has acted upon it.

Nixon was not induced by Britian's application to purchase under the act of June 15, 1880, to take any action in the premises whatever, and hence he would not in any sense be injured or deprived of any right that he might possess by the application of Britian to the purchase under the act of March 3, 1887, *supra*. Had Britian, in fact, possessed any right to purchase under the act of June 15, 1880, *supra*, and had elected to pursue his remedy under that act, a different question would be presented; but he had no rights under the act of June 15, 1880, and to hold that a misapprehension on his part as to what his legal rights in the premises were should deprive him of his legal remedies as they really exist, would indeed be a hardship. I am disposed to hold, and do hold, that by reason of his application to purchase under the act of June 15, 1880, Britian did not waive or abandon whatever rights he may have, if any, to purchase under the act of March 3, 1887, *supra*.

Since this appeal was transmitted here, there has been filed with the papers in the case, and transmitted to the Department, the application of Britian to purchase said tract under the act of March 3, 1887. Said

application was rejected by the local officers, from which action he appealed to your office. That appeal, and the papers accompanying it, have been forwarded here without action thereon by your office

Notwithstanding the fact that your office has not passed on Britian's right under said application to purchase under the act of March 3, 1887, I have concluded, in order to avoid circuitry of action, to pass on said application. As stated above, the application of Nixon to make homestead entry of said tract does not allege any settlement on the tract, and is not based on any settlement rights. I am clearly of the opinion, therefore, that Nixon's application to enter, in the absence of settlement, is not such an adverse claim as would defeat Britian's right to purchase under said act. (*Union Pacific R. R. Co. v. Norton*, on review, 19 L. D., 524; *Jenkins et al. v. Dreyfus*, 19 L. D., 272.)

If, therefore, Britian's proof is otherwise found sufficient, you will grant his application to purchase said land in accordance with the views expressed in this decision.

Said application is therefore returned for action thereon as indicated.

MULLEN *v.* PORTER.

Motion for the review of departmental decision of April 12, 1895, 20 L. D., 334, denied by Secretary Smith, July 6, 1895.

TIMBER CULTURE ENTRY-COMMUTATION.

GOODWIN *v.* WOOD.

The right to commute a timber culture entry under the act of March 3, 1891, is dependent upon compliance with law up to the time when application is made to commute.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (F. W. C.)

I have considered the appeal of Hettie Wood from your office decision of October 9, 1893, holding for cancellation her timber culture entry No. 1700, made March 30, 1876, covering the SW. $\frac{1}{4}$, Sec. 25, T. 25 S., R. 27 W., Garden City land district, Kansas, upon a contest filed by T. G. Goodwin.

It appears that in July, 1892, claimant made final proof upon her timber culture entry which was rejected by the local officers because of not showing compliance with the law, from which action she appealed to your office, and in the appeal claimed the right of purchase under the provisions of the act of March 3, 1891 (26 Stat., 1095), in the event that her final proof was found satisfactory in the matter of compliance with the timber culture law.

Pending this appeal Goodwin filed an affidavit of contest against her entry, upon which a hearing was ordered by your office letter of October 4, 1892. As a result of the hearing it was held that the facts established by the plaintiff under the allegations of contest were amply sufficient to require the cancellation of the entry. From this decision an appeal has been filed to this Department in which it is urged that your office erred in not considering the claimed right of purchase under the act of 1891, *supra*.

A review of the testimony shows a failure to comply with the law for at least several years prior to the offer of proof. I can, therefore, see no error in the rejection of claimant's final proof.

While it appears that claimant may have complied with the law for several years following the making of her entry, yet, under the decision of this Department in the case of *Cassady v. Eiteljorg's heirs* (18 L. D., 235), to the effect that the right to commute a timber culture entry under the act of March 3, 1891, is dependent upon the compliance with law up to the time when application is made to commute, I must hold that the right of purchase is not shown to exist and the application therefore is denied.

Your office decision is affirmed and the claimant's entry will be canceled.

—

MINING CLAIM—PROTESTANT—ABSTRACT OF TITLE.

BRADSTREET ET AL. v. REHM.

A protestant who seeks to defeat an application for a mineral patent will not be heard to set up the rights of third parties for his benefit.

In the absence of an adverse claim asserted within the period of publication the Department is warranted in the assumption that no such claim exists.

Questions arising on the applicant's abstract of title are solely between the government and the applicant, and can not be raised by a protestant who sets up a specific defect, but has no interest in the alleged adverse right, and did not assert any adverse claim within the statutory period.

The decree of a court, relied upon as the basis of a sheriff's deed under which a mineral applicant claims, will be held to cover the property, where said decree, aided by the pleadings, and record of proceedings thereon identifies the land in question.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (J. I. P.)

By letter "N" of March 21, 1894, your office transmitted here the appeal of Andrew Rehm from its decision of December 21, 1893, holding for cancellation his mineral entry No. 921, made July 19, 1883, for the Niagara Lode claim, San Francisco mining district, Beaver county, Utah Territory, Salt Lake City land district.

The pertinent facts in this case, briefly stated, are as follows:

June 25, 1874, the Niagara Lode claim was located by one Thomas Adams. The location notice states that the said lode is situated about

*Reversed,
2/20/90 544*

200 feet south of a location known as the "Cerro Gordo," and subject to the laws of the United States and San Francisco district.

August 10, 1875, Adams conveyed a one-half interest in said property to William Stokes.

January 3, 1880, Adams and Stokes conveyed the entire claim to the "Cerro Gordo and Minnesota Consolidated Silver Mining Company," a corporation organized under the laws of Utah Territory. July 30, 1881, the Cerro Gordo and Minnesota Consolidated Silver Mining Company conveyed to a corporation of the same name, organized under the laws of the State of New York, the whole of said Niagara claim. For brevity the above named corporation organized under the laws of Utah will be called herein the Utah company, and the corporation of the same name organized under the laws of the State of New York will be called the New York company.

The Utah company was organized January 30, 1880, but the record does not show the date of the organization of the New York company.

The property of the Utah company consisted of the "Cerro Gordo, Minnesota and Niagara" mines, consolidated and known as the "Cerro Gordo and Minnesota mines."

On March 4, 1881, one T. M. Collins, in accordance with the statutes of Utah in such cases, made and provided, filed with the recorder of Beaver county, in said Territory, notice of a miner's lien, for work and labor performed, "as a miner in a certain mine commonly called the 'Cerro Gordo and Minnesota Mine,' under and by virtue of a contract to do labor in said mine made with E. E. Woods, the president of the Utah company, which was alleged to be the owner of said property." Said notice specifically sets forth the character of the work done and the amount due thereon.

January 20, 1882, a suit was brought by Collins, in the second judicial district of Utah, to foreclose his lien, to which action he made the Utah company, but not the New York company, a party defendant.

March 6, 1882, he obtained a judgment against the Utah company, and a decree ordering the property therein described to be sold, or so much thereof as might be necessary to satisfy Collins' judgment and costs.

In pursuance of said decree, the sheriff of Beaver county, in said Territory, sold the property therein described, on April 29, 1882, to the said Collins, for the sum of \$950.00, he being the highest bidder therefor.

The certificate of sale executed by said sheriff to Collins was by him assigned to one P. L. Orth, and on January 25, 1883, said sheriff executed to Orth a sheriff's deed, purporting to convey the property mentioned in the decree and described in said deed as the "Cerro Gordo," "Minnesota," and "Niagara Mines."

January 27, 1883, Orth, by deed, conveyed said property to one Andrew Rehm. On April 20, 1883, Rehm made application for patent for the Niagara Lode claim, notice by publication was given thereof for sixty

days, as required by law, and no adverse claim was filed against said claim. June 6, 1883, Rehm conveyed said claim to the "Chicago Calumet and Frisco Silver Mining Company," and on July 19, 1883, he was allowed to make final entry No. 921, as stated.

October 12, 1883, James R. Lindsey filed in the local office at Salt Lake City his protest, under oath, against said entry, claiming that said Niagara Lode claim was not the property of Rehm, but of said Utah company; that he was the owner of a large number of shares in said company, and that he would be greatly injured by issuance of patent to Rehm; that he had instituted two suits, one to set aside the deed from the Utah company to the New York company, and the deed from the sheriff to Orth, which he alleged were fraudulently obtained. Lindsey, by affidavit of February 18, 1891, stated, in substance, that the suit against the New York company was still pending, but made no reference to the action to set aside the sheriff's deed. October 20, 1891, by your office letter, "action on said entry (so far as Lindsey was concerned) was stayed until one or the other of the parties to said controversy furnished your office clear and certain evidence of the final disposition of both of said suits" (see circular approved July 6, 1883; page 39, mining circular.)

The protest of Bradstreet and Martin, filed in your office December 5, 1892, alleges in substance that Rehm has no title to the Niagara Lode claim, for the reason that the sheriff's deed to Orth, purporting to convey said claim, is null and void; that therefore Orth's deed to Rehm conveyed nothing; that Rehm has failed to perform the annual assessment work required, and that they, with others, are the owners of the Broadway and Copper Prince Lode claims, which embrace the Niagara claim.

It is contended that the sheriff's deed, conveying the Niagara Lode claim is void, for the reasons,—(1) that the New York company, to whom the said claim had been conveyed prior to the beginning of the action to foreclose Collins' lien, was not a party to that controversy, and hence its title to said property was not divested by the judgment and decree rendered in that case and the sale of said property by the sheriff in pursuance thereof; (2) that the decree in said action, on which the sheriff's sale and deed are based, does not direct the sale of the Niagara Lode claim.

Neither the New York company, nor any grantee thereof, is claiming title as against the applicant for patent. And whatever rights that company may have in the premises can only be asserted by it or its grantees, or other legal representative, and a third party cannot be heard to invoke those rights for his benefit. Yet that is what these protestants seek to do. Without any intention of passing on the rights of the New York company, which is not a party to this controversy, attention is called to the fact that during the period of publication of notice of Rehm's application for patent, no adverse claim was filed by

the New York company, or any one else, and the rule in such cases is that all adverse claims will be deemed adjudicated in favor of the applicant (*Petit v. Buffalo Gold and Silver Mining Company*, 9 L. D., 563), and that a failure to prosecute an adverse claim, or in other manner assert a right against a known pending application, is conclusive as against the existence of such a right. (*Nichols et al. v. Becker*, 11 L. D., 8.)

This Department has the right to assume, then, that no right exists in the New York company to the Niagara Lode adverse to the claim of this applicant for patent, and such being the case, the controversy of these protestants, in so far as it is based on the alleged rights of the New York company, must fail.

The further question presented, namely, that the decree rendered in the Collins foreclosure proceedings did not direct the sale of the Niagara Lode claim, and that the sheriff's deed conveying it was therefore void, is one between the government and this applicant for patent only, and arises on the applicant's abstract of title. Hence it is not a question that these protestants can be heard to assert, for the reason (1) that they were not parties to the judgment rendered in said proceedings, nor are they claiming under any person or persons who were parties thereto, and (2) because they are precluded from raising such question by section 2325 Revised Statutes, the provisions of which, bearing upon this point, are as follows—

If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant had failed to comply with the terms of this chapter.

That chapter does not in "terms" require the applicant for patent to file an abstract of title. That requirement is made by the regulations of the Department (Mining Circular of December 10, 1891, p. 24), and hence, as stated, is not an objection upon which "third parties shall be heard" under the section quoted.

The notice of lien alleges—"that I, H. M. Collins of Frisco, Beaver county, have performed labor as a miner in a certain *mine*, commonly called the 'Cerro Gordo and Minnesota Mines,' situate about five miles southwest of the town of Frisco and Beaver county. That it is his intention to claim a lien upon said mines of the Cerro Gordo and Minnesota Consolidated Silver Mining Company, and its appurtenances, as hereinafter described," etc., and the description of the property, consisting of said *mine* or mines, includes a description of the Cerro Gordo, Minnesota and Niagara mines.

In the decree "it is ordered and adjudged that *all and singular* the mortgaged premises mentioned in said complaint and lien, and hereinafter described, or so much thereof as may be sufficient," etc., be sold. It then declares the "boundaries of the property authorized to be sold

hereby so far as they can be ascertained, are as follows—"The properties and appurtenances of the 'Cerro Gordo and Minnesota mines,' situate in Beaver Co., Utah Territory, about five miles southwest of the town of Frisco," etc.

The mine owned by the "Cerro Gordo and Minnesota Consolidated Silver Mining Company" consisted, as stated, of the Cerro Gordo, Minnesota and Niagara mines, consolidated and known as the "Cerro Gordo and Minnesota mines." Hence when the decree declared the property authorized to be sold as "the property and appurtenances of the Cerro Gordo and Minnesota mines," it described the consolidated property, which included the Niagara mine.

The language of the decree is that there shall be sold "*all and singular* the mortgaged *premises* mentioned in said complaint and lien." The Niagara mine is specifically mentioned in the lien as a part of the "Cerro Gordo and Minnesota mines," or mine, on which it was declared said lien was held. If the description of this property in the decree is not sufficient to locate and identify *all* the property directed thereby to be sold, it is evident that reference may be had to the lien, and complaint to cure the omission. The rule of law is that "that is certain which can be made certain," and the omission in the decree to specifically describe the Niagara mine as a part of the "Cerro Gordo and Minnesota mines" directed to be sold, does not, in my judgment, invalidate its sale under said decree, as it is specifically described in the lien, and *all* property therein described, or so much as may be necessary to pay judgment and costs, is specifically directed in the decree to be sold.

The principle applicable here is that "a judgment may be aided by the pleadings and other parts of the record, and if the description obtainable from it and them would be sufficient if found in a conveyance to divest the title out of the grantor, it will be sufficient to sustain sales made under the judgment." (1st Freeman on Judgments, section 50, c; *Bloom v. Burdick*, 37 Amer. Decs., 299; *De Sepulveda v. Bough*, 5 Amer. State Reps., 455.)

Your office decision is therefore reversed.

CYRUS A. PAYNE.

On motion for review of departmental decision of December 21, 1894, 19 L. D., 546, filed on behalf of Manuel Chaves, and alleging an adverse settlement right, a hearing is ordered by Secretary Smith, July 6, 1895.

PRACTICE—CONTINUANCE—EVIDENCE—APPEAL.

MCMAHON v. ROUSE.

Where on the motion of the defendant a continuance is granted, with an order to take testimony before a commissioner, it is error to permit the contestant to submit testimony on the day first set for hearing, even though the notice of the continuance and order served on the contestant is defective.

In the service of notice of appeal by mail it is sufficient if the copy thereof is mailed to the opposite party within the time allowed for filing the appeal.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 6, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 7, T. 29 N., R. 21 W., Missoula land district, Montana, and is before the Department upon appeal by Mary C. Rouse from your office decision of November 14, 1893, affirming the decision of the local officers and holding for cancellation her entry for the above described tract, and allowing John McMahon to make entry thereof.

The record shows that on January 8, 1891, John McMahon made pre-emption declaratory statement for the land aforesaid, alleging settlement thereon on that date. This land was at that time situated in the Helena land district, the register and receiver of which refused to allow the said filing to be placed on record because it was not accompanied by the proper affidavit in force since August, 1890.

On the 18th of the month following, the proper affidavit was made, but no official acknowledgment or certificate was attached thereto, and it was consequently defective.

On March 7, 1891, McMahon, through an attorney, filed a second declaratory statement which was forwarded to the Helena land office, and there refused for the reason that the pre-emption law had been repealed, the local officers informing the applicant that it would be necessary for him to prove, by two witnesses, that he actually made settlement, as alleged, on January 8, 1891, before the filing would be allowed.

March 23, McMahon complied with these requirements and furnished corroborated affidavits that he made settlement on January 8, by the commencement of the erection of a house which was completed, and into which he moved on January 25.

Again McMahon failed to secure filing, his application being rejected for the reason that on March 21, 1891, Mary C. Rouse had been allowed to make entry for the tract.

On August 24 following, John McMahon filed an affidavit of contest alleging prior settlement.

Hearing was ordered for November 23, 1891. November 6, the defendant moved before the local office for a continuance and asked that the

testimony be taken near the land. This motion was granted and service was attempted to be made upon the contestant by mail, not registered, to which he paid no attention.

On November 23, 1891, the plaintiff appeared at the local office and submitted testimony.

On December 24, 1891, Mary C. Rouse asked for a new hearing, to be held near the land in controversy, and that the evidence submitted on November 23, by the contestant, be not considered. The request for a hearing was granted, but the testimony offered on November 23, was considered.

February 5, 1892, the parties were notified that evidence would be taken March 18, 1892, at Kalispell, Montana, before United States Commissioner Logan.

The notice of the change in date of the hearing set for November 23, 1891, given by the local officers to plaintiff was defective, but be that as it may, their action in allowing contestant to submit testimony on November 23 (the date first set), was improper and the evidence adduced on that day will not be considered by this Department.

On February 23, 1893, the local officers rendered their decision in favor of John McMahan and recommended the cancellation of the homestead entry of Mary C. Rouse, and on November 14, 1893, your office decision affirmed that appealed from.

February 5, 1894, Mary C. Rouse appealed to the Department, and there is contained in the record a motion by the plaintiff to dismiss the said appeal because it was not served upon the appellee, or his attorney, within sixty days after the service of the commissioner's decision appealed from. This motion is based upon the authority of the *Wagon Road Co. v. Hart* (17 L. D., 480), the syllabus in said case being as follows:

Notice of an appeal must be served upon the opposite party within the time allowed by the Rules of Practice for taking an appeal, and if not duly served within said period, the appeal may be properly dismissed.

Mailing a notice of appeal prior to the time allowed for an appeal is not the service of notice required, if in due course of the mail the notice can not be received by the opposite party until after the expiration of said period.

In *Stubblefield v. Honeyfield* (18 L. D., 543), syllabus it was held, *inter alia*, that—

In the service of notice of an appeal by mail it is sufficient if the copy thereof is mailed to the opposite party within the time allowed for filing the appeal.

On page 545 of the opinion thereof; the case cited by counsel in support of his motion to dismiss, is specifically overruled.

The motion to dismiss is therefore not well taken as service is complete from the time the process to be served is deposited in the post office (4 *Wait'd Practice*, 619).

An examination of the evidence leads me to concur in the opinion of your office upon the question of fact that the settlement of John McMahan upon the land in controversy was made prior to the settle-

ment and homestead entry of Mary C. Rouse. The evidence sustains the proposition that John McMahon initiated settlement upon the land in January or February, 1891, and that Mrs. Rouse certainly made no claim thereto prior to sometime during the first of March, and it is well to note in this connection that the application to make pre-emption filing of this land, made by the appellee on March 7, which was prior to the homestead entry of Mrs. Rouse and to her alleged settlement preceding her entry, was in all respects a proper application and that the local officers were without authority to require him to furnish the corroborative affidavits of two witnesses to the truth of his settlement in January.

The witnesses for the claimant admit having seen evidences of another person's improvements on the land prior to the initiation of any right by her, and in view of what the evidence discloses in this particular, the judgment heretofore rendered in the case is accordingly affirmed.

AMENDMENT—TRANSFEREE.

DANIEL A. G. FLOWEREE.

There is no authority for the amendment of a patented entry for the benefit of a transferee.

*Secretary Smith to the Commissioner of the General Land Office, July 6,
1895.* (G. C. R.)

Daniel A. G. Floweree has appealed from your office decisions of January 16, and January 23, 1894, denying his application for new patents for certain lands, hereinafter described.

1. In the case of John R. Smith, who, on February 3, 1886, made pre-emption cash entry, No. 2238, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 8; the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 7, T. 21 N., R. 4 W., Helena, Montana, upon which patent issued August 16, 1889; the application was made for a new patent for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 1, T. 21 N., R. 5 W.

2. Cash entry No. 2577, dated February 4, 1887, by James T. Graham, for Lot 1, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 7, T. 21 N., R. 4 W., and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 12, T. 21 N., R. 5 W.; application for new patent to embrace the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 2; the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 1, Tp. 21 N., R. 5 W.

3. Cash entry No. 3294, dated October 27, 1888, made by Herman F. Knoll, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 12, T. 21 N., R. 5 W., upon which patent issued September 9, 1889; application for new patent to embrace the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 2, T. 21 N., R. 5 W.

4. Cash entry No. 4426, made November 15, 1890, by Marion O. Hankins, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 12, T. 21 N., R. 5 W.; the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and Lot 3, Sec. 7, T. 21 N., R. 4 W., upon which patent issued

February 8, 1892, new patent to embrace the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 2; the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 1, T. 21 N., R. 5 W.

All in Helena, Montana, land district.

With these applications Mr. Floweree submits his duly corroborated affidavits, stating, substantially, that he had discovered by a careful survey that the improvements of the said entrymen and patentees were located upon lands not described in their several patents. He submits evidence that the land patented were conveyed to him, and states that he now occupies the lands upon which the improvements were made, and believed to be the lands actually patented, until the recent survey disclosed the actual location of the lands so improved, and to which the amendments are sought, etc.

Your office rejected the several applications, on the ground that none other than the original entrymen are entitled to obtain amendments, and then only when proper cause is shown therefor, citing section 2372 of the Revised Statutes, general circular (1892), page 104, and Christoph Nitschka, 7 L. D., 155.

Appellant admits that "the literal or technical construction of Sec. 2372 of the Revised Statutes may be construed against the appellant," but he insists that such construction would result in great hardship and loss to him, and since the amendments applied for could not possibly injure any one, and the government would lose nothing, the applications should be allowed, etc.

There can be no question of the legality or justice of allowing amendments, where through no fault of an entryman a mistake has been made in the description of the lands intended to be entered. The same reasoning might well apply in cases where the lands covered by the entry have been conveyed to a bona fide purchaser. In the absence, however, of statutory authority, the Department is powerless to give relief in such cases.

The decisions appealed from must be, and they are hereby, affirmed.

HOMESTEAD-SECTION 2, ACT OF JUNE 15, 1880.

EDWIN F. FROST ET AL.

A cash entry under section 2, act of June 15, 1880, allowed under the rule that "alienation of the land is no bar to the original party purchasing under said act," will not be canceled where it appears that the transfer of the land was prior to the change of said rule.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (J. L. McC.)

On December 8, 1894, the Department rendered a decision rejecting the application of E. M. Lowe, transferee of Edwin F. Frost, to purchase, under section 2, of the act of June 15, 1880, or for confirmation under section 7 of the act of March 3, 1891, lots 3 and 4 of Sec. 35, and

lots 3 and 7 of Sec. 39, T. 31 S., R. 39 E., Gainesville land district, Florida. (L. & R. copybook No. 298, page 423.)

Frost's entry was made May 7, 1877.

On March 27, 1883, one D. C. Erwin filed affidavit of contest against the entry, alleging abandonment. After proceedings, which need not be recited in detail, his contest was dismissed for failure to proceed after due notice, and he dropped out of the case.

On August 25, 1883, Frost applied to purchase under the second section of the act of June 15, 1880. The local officers allowed the petition, accepted the money tendered in payment for the land, and issued cash certificate to the entryman, Frost.

Frost's attorney in connection with said application to purchase was one George Cleveland; and the purchase, ostensibly for Frost, was in reality for Cleveland, to whom Frost had transferred his right to the land, by quitclaim deed, dated August 6, 1883, nineteen days prior to the date of the final certificate to Frost (August 25, 1883, *supra*).

George Cleveland sold the tract by warranty deed to one Alfred Du Buys, who conveyed it to Aaron P. Cleveland, who, on April 18, 1885, conveyed eighty-eight acres of it to E. M. Lowe. Aaron P. Cleveland died soon after the last named date; and on September 15, 1885, his heirs (with the exception of one son) conveyed the remaining 45.86 acres to Homer Kessler. On January 30, 1888, the remaining heir (William Cleveland) conveyed his interest to said Kessler.

The next proceedings in the case would seem to have been the application of Lowe and Kessler for confirmation of title in them as transferees, under section 7 of the act of March 3, 1891. This application was denied, for reasons set forth in the decision of your office, dated May 15, 1893.

Said office decision found that the present owners were charged with notice; that they have not shown themselves to be within the remedial provisions of the act of March 3, 1891; and that said section does not apply to the case at bar because the entry was transferred prior to final entry. The departmental decision of December 6, 1894, affirmed these conclusions; and the motion for review raises no question as to the correctness of said decision in this respect.

Said decision of your office held, further, "that when Frost deeded the land described, prior to final entry, there was nothing upon which to base the entry, and it was erroneously allowed" (citing *Mather v. Brown*, 12 L. D., 393, and other cases).

The departmental decision heretofore rendered affirmed the decision of your office in this respect also.

Said departmental decision further held that the *transferees* could not purchase under said act of June 15, 1880, because the land was not transferred to them until after the passage of said act (*Starbuck v. Kistler*, 5 L. D., 11; and many cases since).

The motion for review concedes that the rejection of the application to purchase under the second section of the act of June 15, 1880, is in

accordance with the uniform rulings of the Department, at least since August 30, 1883, when it rendered decision to the same effect in the case of *B. T. Thomas v. McClure and Yeates* (2 L. D., 125).

The motion directs attention, however, to the fact that prior to the date last above named the ruling had been that "alienation of the land is no bar to the original party purchasing under said act" of June 15, 1880 (Commissioner's decision of September 6, 1882, in case of *John D. Hay*, 1 L. D., 74).

In the case at bar, the entryman sold the land on August 6, 1883—twenty-four days prior to the date when the Department changed the ruling that had previously been in force.

"Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal." (*Miner v. Marriott et al.*, syllabus, 2 L. D., 709, and many cases since.)

The fact that the sale antedated the change in the ruling was not noticed at the time of the decision heretofore rendered. But as the record shows that such was the fact, said decision is hereby recalled and revoked; the decision of your office holding Frost's entry for cancellation is reversed; the purchase by said entryman under the act of June 15, 1880, will be recognized as valid; and patent will issue thereon.

OKLAHOMA LANDS—QUALIFICATIONS OF HOMESTEADER.

CURNUTT *v.* JONES.

In determining the qualifications of homestead entrymen in Oklahoma, in so far as the same may be affected by their entering said Territory within the prohibited period, it is not practicable to lay down any general rule for the guidance of the Department. The circumstances of each case should control its decision.

One who in the ordinary prosecution of his business enters said Territory during the prohibited period, but does not thereby add to his prior knowledge of the country, nor secure an advantage over others, and is outside of the Territory at the hour of its opening, is not by such entrance disqualified as a settler.

Secretary Smith to the Commissioner of the General Land Office, July 6,
(J. I. H.) 1895. (W. F. M.)

On April 27, 1889, James B. Jones made homestead entry for the NW. $\frac{1}{4}$ of section 35, township 13, range 1 W., Guthrie series, Oklahoma.

On January 12, 1891, Adah Curnutt filed an affidavit of contest against Jones's entry alleging that he did, after the 2d of March, 1889, and before 12 o'clock, noon, of April 22, 1889, enter upon and occupy a portion of the lands open to settlement in Indian Territory at 12 o'clock, noon, April 22, 1889, by proclamation of the President of the United States, dated March 23, 1889, issued pursuant to act of Congress dated March 2, 1889.

After an exhaustive hearing on the issue raised by the contest, the register and receiver found in favor of the contestant, and recommended the cancellation of Jones's entry.

Joab Jones, the father and heir at law of the entryman who had died during the pendency of the case below, prosecuted an appeal to your office, where the recommendation of the register and receiver was affirmed, and the case is now before me on appeal therefrom.

The motion to dismiss the appeal, interposed by the plaintiff, and based on the suggestion of indefiniteness of specifications of error, seems to me to be without merit, and it is, therefore, overruled.

The facts of the case, admitted, or proved, are well and fully stated in the decision of your office, and that statement, for the purposes of this opinion, will be utilized, as follows:

The evidence shows that the contestee had been once a resident of the state of Kentucky, but for some years previous to the opening of Oklahoma, he had been a tenant in the Cherokee Nation and since some time in November, 1888, he had resided on a ranch in the Pottawatomie country which he had leased from an Indian by the name of Tacey. He had from the date of his settlement at the last mentioned place, some time in November, 1888, gone back and forth to Oklahoma Station from his residence, about $\frac{1}{2}$ of a mile north of the northeast corner of Oklahoma Territory, for his mail and to purchase provisions and other goods and for railroad accommodations, there being no other point available to him. That in the month of January, 1888, he selected the tract in question and built a foundation of a house on it, intending thereby to claim it so soon as it was open for entry. On March 2, 1889, when the act was passed for the opening of said Territory for settlement by Proclamation of the President, the contestee was well acquainted with the tract in question as well as all the lands lying in close proximity to the route traveled by him from his residence in the Pottawatomie country to Oklahoma Station, as well as with the roads and the most available route from which he could make the race for the tract in question from his said residence. And being so situated and informed as to the condition of the country in the vicinity of this tract, the same being located about three miles southwest from his said residence and about one mile northwest of the usual route traveled by him on his trips to Oklahoma Station, it would appear from the evidence that by a continuation of his frequent trips into the Territory during the prohibited period he did not add anything to the information already possessed by him, whereby he might take advantage over others seeking to make entry. He was not in the Territory until after noon of April 22, 1889, having made the race that day on horseback; starting from his ranch, he crossed the east line of Oklahoma Territory, after 12 o'clock noon near the northeast corner of said Territory of Oklahoma, and commenced his residence upon the tract in question a few minutes after 12 o'clock noon of April 22, 1889, and continued to reside upon the same until he departed this life, January 3, 1892, having made improvements upon said tract worth \$1000. From the time he located on the Tacey Ranch near the northeast corner of Oklahoma Territory in November, 1888, until he made his said settlement upon the tract in question, he was obliged to go to the Oklahoma Station for the purposes as aforesaid or be compelled to travel from two to three times as far to other available points. He was upon his ranch, as the evidence conclusively proves, on the night of April 21, 1889, and remained at his ranch until a few minutes before the opening when he went down to the line and went in after 12 o'clock noon, April 22, had arrived, when he entered with other parties that had lodged with him the night previous.

It does not appear from the evidence that he understood that his entrance into the Territory for his mail and other objects of trade were in violation of law.

The sole question to be decided is whether or not the visits of Jones to Oklahoma city, under the circumstances narrated, operated to his disqualification as an entryman.

A review of the later authorities on the question here involved will be necessary to the establishment of an equitable rule on the subject.

In the case of *Sullivan v. McPeck*, 17 L. D., 402, the defendant was in the Territory during the first half of the month of March, 1889, and while he was outside at the moment of the opening, the testimony disclosed circumstances which justified the inference that the land subsequently entered had been selected by himself or an agent, and the route to the same adopted. It was concluded, therefore, that he had taken advantage of his previous sojourn in the Territory, and was, accordingly, held disqualified.

In *Dean v. Simmons*, 17 L. D., 526, the evidence showed that Simmons "was within the Territory of Oklahoma in the month of March; and the forepart of April, 1889, and engaged in examining and selecting tracts of land" suitable for homesteads. It appeared, however, that when he had been made aware of the provisions of the act opening the lands to settlement, and of the pursuant executive proclamation, he went outside the Territory and there remained until 12 o'clock, noon, April 22, 1889; but it also appeared that the land settled on by him, and now in contest, was the identical land, or in the immediate vicinity thereof, upon which he had previously encamped. Upon these facts, though Simmons's good faith was not impugned, he was held to have been advantaged by his unlawful presence in the Territory, and his entry was, therefore, canceled.

In the case of *Laughlin v. Martin*, 18 L. D., 112, both the plaintiff and defendant were charged, by a second contestant, with incompetency as homestead entrymen. As to Martin, it was found that he "knowingly crossed the territory" on April 21, 1889, with the probable object of getting near to, and acquiring land within a certain desirable region, and he was, thereupon, held to be disqualified, the following general rule being, also, at the same time, laid down: "It is, therefore, now held that one who entered the Territory prior to the hour of opening, knowingly—as did Martin in this case—became by such entry disqualified as a homesteader." With respect to Laughlin, it appeared that he had been, for some seven years, employed in herding cattle in and about the Territory, and that he was well acquainted with the land in controversy, having camped within a quarter of a mile thereof at one time during the prohibited period. It was also claimed that his thorough acquaintance with the land prior to its opening to settlement rendered his presence in the Territory of no advantage to him. He was found to be disqualified, and the following further general rule was announced: "It is, therefore, held that one who is within the territory from March 2, up to April 21, 1889, is disqualified to secure title to lands therein, unless it appears that he was lawfully within the Territory."

Having considered well the legislation respecting the opening to settlement of the lands embraced within the Territory of Oklahoma, and after a careful and patient review of the decisions of this Department

upon questions arising thereunder, I am impressed with the conviction that it is not practicable to lay down any general rules for the guidance of the Department in passing upon the qualifications of homestead entrymen in so far as the same may be affected by entry into the Territory out of time. The general doctrines of the decision just cited and quoted from (*Laughlin v. Martin*) seem to me, upon reconsideration, to be without justification upon the further and more specific ground that their statement was not essential to the decision of the case. It is the province of the text writer and commentator, by the philosophical process of generalization, to ascertain and state the universal rule, but this is not the function of the courts. These are, by the very law of their existence, limited to the narrower sphere of adjudicating specific questions presented in particular cases, and of establishing the rule for those cases only. It becomes important, therefore, to clearly distinguish that which is said *in arguendo* from expressions strictly *ex cathedra*.

If the broad doctrine of *Laughlin v. Martin, supra*, that one who knowingly entered the Territory prior to the hour of opening becomes by such entry disqualified as a homesteader, is to be rigidly followed, there is no escape from the conclusion that James B. Jones, the defendant in the case at bar, is within the inhibition, and is, therefore, precluded as an entryman.

I am inclined, however, to the less procrustean and more liberal view that the circumstances of each case, albeit there may have been a premature entry, should control its decision. I prefer the equitable construction intimated by way of anticipation by the supreme court of the United States in *Smith v. Townsend*, 148 U. S., 490:

It may be said that if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2 and before April 22, should chance to step within the limits of the Territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the Territory, it may perhaps be said that if within the letter he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead.

It is true that the supreme court here takes the extreme case of a chance entrance in illustration of the humane construction towards which it leans, but it is customary to cite extreme cases for such a purpose in order to bring out in clear relief the distinction sought to be made.

The earlier jurisprudence of this Department accords with this construction, and from the initial case of the series, that of *Townsite of Kingfisher v. Wood et al.*, 11 L. D., 330, in the argumentative part of the decision, the following reasonable announcement is quoted:

Each case must be determined upon its own merits and evidence; but it must be said generally, that the presence in the territory before the opening, under the proclamation, and the actual settlement and entry at the land office must be so widely

and obviously separated in every detail and circumstance as to render it impossible to reasonably conclude that the one was the result of the other, or in any wise dependent upon it.

That is but a different statement of the doctrine for a long time adhered to that one is disqualified who gains advantage by entering the territory himself, or through an agent, or who enters for the purpose of gaining advantage though none may result therefrom, the cases all appearing to turn upon the question of advantage, *vel non*. *Vide* *Blanchard v. White et al.*, 13 L. D., 66; *Oklahoma City Townsite v. Thornton et al.*, 13 L. D., 409; *Guthrie Townsite v. Paine et al.*, 13 L. D., 562. The case of *Taft v. Chapin*, 14 L. D., 593, held that one who is lawfully within the territory but who does not take advantage of his presence is not thereby disqualified, and also to the same general effect see *Winaus v. Beidler*, 15 L. D., 266; *Hagan v. Severns et al.*, 15 L. D., 451; *Donnell v. Kittrell*, 15 L. D., 580; *South Oklahoma v. Couch et al.*, 16 L. D., 132; *Standley v. Jones*, 16 L. D., 253.

One of the most conspicuous cases in the books, as it is also one of the most maturely considered, is that of *Golden v. Cole's Heirs*, 16 L. D., 375, from which is taken the following epitome of our jurisprudence up to that date:

The object of the statute and the proclamation was to keep all persons out of the territory until noon, on the 22nd day of April, 1889, when all could go in on an even race for homes. It was impossible to deprive people who had been over the territory of the knowledge they had thus acquired, but it was the intention of Congress that persons should stay out of the territory, after it had been secured as part of the public domain, until a certain hour. So, to steal into the territory, and look over the land for the purpose of selecting a particular tract; to send horses in advance, that one might have relays of horses in the race; to pretend to secure employment with a railroad company, to quit work within the territory at noon; to secure a deputy marshalship, to be resigned at noon on the 22d of April; to go into the territory on any pretense, prior to the time fixed, whereby the person sought to obtain unfairly an advantage over others, is an intentional violation, as it is an attempted evasion of the law and the proclamation.

It having been found, however, that Cole entered the territory ignorantly without any intention of violating the law or gaining an advantage, and that he actually took no advantage of the situation, he was held not disqualified.

The first departure from the rule established by the foregoing cases occurs in *Turner v. Courtwright*, 17 L. D., 414, expressly overruling *Taft v. Chapin*, *supra*, and holding that one who was within the territory at the hour of noon, April 22, 1889, is forever disqualified. This case is followed in *Laughlin v. Martin et al.*, *supra*, and apparently in *Standley v. Jones*, 18 L. D., 495, on review, but it is not followed in *Roff v. Coplin*, 18 L. D., 128, and in *Higgins et al. v. Adams*, 18 L. D., 598, the last case but one that has been adjudicated here, the most recent expression being found in *Smith v. Miller*, 19 L. D., 520, where it was correctly held that misinformation as to the law does not excuse entry within the prohibited period.

It will be seen that against this array of authorities the two cases of *Turner v. Courtwright* and *Laughlin v. Martin et al.*, *supra*, stand alone. In the light of a careful re-examination of that case, they do not even appear to be supported by *Smith v. Townsend*, *supra*, upon the authority of which their conclusions are mainly based. The thing decided there was that "an employé of the Atchison, Topeka & Santa Fe Railroad, residing within the Territory of Oklahoma before, up to and on the 22nd day of April, 1889, was thereby disabled from making a homestead entry upon the tract of land on which he was residing" (syllabus), and the court, pretermittng the expression of any opinion upon the supposititious case hereinbefore alluded to, and stating that "it will be time enough to consider that question when it is presented," lays down, in its decree, the general rule, "that one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein." There is certainly nothing in that decree to warrant the extreme and sweeping doctrines of the cases to which I am now inclined to take exception, and the opinion of the court, applying to the law the four elementary canons of construction, pursues a line of reasoning in remarkable consonance with the earlier decisions of this Department. After stating the conditions that prevailed at the date of the passage of the act, it is said:

Under such circumstances as these, this legislation was passed, and what, in view thereof, was the intent of Congress? As disclosed on the face of this legislation, evidently its purpose was to secure equality between all who desired to establish settlements in that territory. . . . No exception is made for the general language of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language.

And again, in discussing Smith's claim that he was excepted from the inhibition of the act, as having been rightfully on the railroad company's right of way the court says:

It (Congress) must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the territory—Indian agents, deputy marshals, mail carriers and many others; and if it intended that these parties, thus rightfully within the territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. [And again,] it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities.

It appears indisputable that the court ascribed to Congress the paramount purpose to secure absolute equality to intending settlers, and to prevent advantage to any; and, in any event, the notice of equality to all and special advantage to none was dominant in the minds of the court. These being assured, what else is there to be desired? The mischief aimed at was inequality, and if it appear, in

any particular case, that though the letter of the law has been violated, there has been no infringement of its spirit, where is the mischief?

The position now assumed, therefore, appears to be supported by the weight of authority as well as by reason.

Jones, the defendant in this case, had lived for some time on the border of the territory, within less than a mile from the line, and almost from the necessity of his situation was familiar with the lands in the immediate vicinity. His information respecting them, and particularly respecting the tract subsequently entered by him, is shown to have been acquired long prior to March 2, 1889, and, as was well said in the case of *Golden v. Cole's Heirs*, *supra*, "it was impossible to deprive people who had been over the Territory of the knowledge they had thus acquired." His periodical visits to Oklahoma city, which was at once his post-office, his most convenient and accessible railway station, and his market town, do not appear to have brought him any advantage over other persons seeking lands in the Territory, and his entrance therein upon the missions and for the purposes indicated by the evidence, it having been made affirmatively to appear that he reaped no advantage therefrom, should not, in my opinion, be held to disqualify him.

The decision of your office is, therefore, reversed.

RAILROAD GRANT—ADJUSTMENT—ACT OF MARCH 3, 1887.

BURLINGTON AND MISSOURI RIVER RAILROAD.

It is the duty of the Department to demand the reconveyance of lands erroneously certified on account of a railroad grant, with a view to judicial proceedings for the recovery of title. In the event of suit, the company responding therein, can plead such defense as it may have, and thus secure an authoritative determination of its responsibility in the premises.

Secretary Smith to the Commissioner of the General Land Office, July 6, 1895. (F. W. C.)

I am in receipt of your office letter of April 5, 1895, forwarding a statement of an adjustment made of the grant to the State of Iowa by the acts of May 15, 1856 (11 Stat., 9), and June 2, 1864 (13 Stat., 95), to aid in the construction of a railroad from Burlington, on the Mississippi river, to a point on the Missouri river, near the mouth of the Platte river, known as the Burlington and Missouri River Railroad of Iowa, but at present owned and operated by the Chicago, Burlington and Quincy Railroad Company.

This adjustment shows that there is still due, on account of the grant, more than six hundred thousand acres. It is shown, however, that of the lands heretofore certified on account of the grant more than twenty-five thousand acres appear to have been erroneously certified, the same having been covered by claims sufficient to except them from the operation of the grant, and in accordance with previous instruc-

tions from this Department in such cases, a rule was laid upon the company to show cause why such lands, a list of which is furnished, should not be reconveyed to the United States, as contemplated by the provisions of Sec. 2, of the act of March 3, 1887 (24 Stat., 556).

To said rule the company has made answer in which it is set up that of the twenty-five odd thousand acres alleged to have been erroneously certified, more than nineteen thousand have been adjudged to be swamp lands, so that if not properly conveyed to the railroad company they would, under the provisions of the swamp land grant and the action of the State, belong to the counties in which they are situated.

It is represented that in actions brought by the counties to recover these lands of the company, the company has yielded more than eleven thousand acres to the swamp land claimants and, by compromise, receive nearly eight thousand acres of the lands claimed. That all the lands claimed by it and embraced in the list as erroneously certified, have been sold, or transferred to other parties, and that the land department of the Burlington and Missouri river road in Iowa has been wound up for several years; and, therefore, represent that no good purpose can be accomplished by the bringing of the proposed suit.

As it appears, however, that the lands were erroneously certified, it becomes the duty of this Department to direct that demand be made upon the company for their reconveyance, and in the event that suit be brought, the company can then make answer to the action that it has made to the rule, and the entire matter can then be adjusted by the court having jurisdiction of the suit and the company's responsibility in the matter will thus be judicially determined.

I have, therefore, to direct that demand be made upon the proper officer of the company for the reconveyance of these lands and at the expiration of the time allowed by the statute within which to comply with the same, the matter be further reported to this Department for such action as the facts then disclosed by the record may warrant.

The papers are herewith returned that the full record may be again transmitted as herein directed.

Overruled so far as in conflict
31 L.O. 222
(See 35 L.O. 399)

MILITARY BOUNTY LAND WARRANTS—LOCATION.

JOSEPH T. BROWN.

Military bounty land warrants can only be located on land subject to private entry, or used in payment for a settlement claim.

Secretary Smith to the Commissioner of the General Land Office, July 18,
1895. (W. M. B.)

I have considered the appeal of Joseph T. Brown from the action of your office of date March 14, 1894, holding for cancellation location made by appellant, at Miles City, Montana, November 22, 1892, with

military bounty land warrant No. 4882, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 26, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 25, T. 5 S., R. 42 E., for reasons appearing below.

In your said office decision, above referred to, it is stated that—

Said township (T. 5 S., R. 42 E.), which embraces the tract in question was withdrawn from entry by the Secretary's order of June 22, 1886, except such tracts therein as were legally occupied by whites at the date of the withdrawal.

Said order has not been revoked or modified.

And further, military bounty land warrants can only be located upon vacant public lands of the United States that are subject to private entry, except in perfecting settlement rights.

The locator appeals from the above ruling, and proposes to amend his location, upon the ground set forth in the report of the register and receiver, of date April 24, 1894, in words as follows—

Mr. Brown has addressed to us a communication in the nature of an appeal from your decision above noted, which we also transmit, in which he proposes a relinquishment of a portion of the original location that is confessedly within the Indian limits, and the substitution therefor of an equal portion, contiguous to the original location, but outside of the Indian boundaries. The plat shows that the original location under consideration, is about equally divided by Cook Creek, which is the southern boundary of the Indian provisional reservation, but it is asserted by Mr. Brown that the course of the creek is not correctly laid down on the plat, and that after relinquishing the forty acres herein proposed (NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 25), there would remain but a small fraction of the original location on the north side of the creek, and within the Indian limits, and assuming this to be a fact, we have no hesitancy in recommending this disposition of the case.

The record shows that Brown held and owned such warrant No. 4882 by assignment.

It is not anywhere shown in the record before me, that the land sought to be entered is desired for settlement purposes.

Location under said warrant can only be made upon land subject to private entry in conformity with provisions contained in sections 4 and 5 of the act of March 3, 1855 (10 Stat., 702), and the only lands subject to such entry at the time the right of location was asserted were situated in the State of Missouri. *Vide* act of March 2, 1889 (25 Stat., 954).

The amendment of location by Brown could not cure the legal defect in his application so as to constitute a valid entry, since under the law existing at the time application was made no location—save for settlement purposes—under said warrant No. 4882 could be made upon any public lands in the State of Minnesota.

For the foregoing reasons your said office decision is hereby affirmed.

RAILROAD GRANT—ADJUSTMENT—EXCESSIVE APPROVALS.

ATCHISON, TOPEKA AND SANTA FE R. R. CO.

A railroad grant can not be regarded as adjusted until it has been finally determined what lands the company is entitled to both in the granted and indemnity limits. The fact that a railroad grant has been adjusted will not defeat the right of the government to recover, where an excess on account of the grant has been erroneously certified.

Lands within the primary limits of a grant, and subject thereto, but erroneously certified to another grant, must be charged to the first on the adjustment thereof.

Secretary Smith to the Commissioner of the General Land Office, July 18,
(J. I. H.) 1895. (F. W. C.)

The question of the adjustment of the grant of the Atchison, Topeka and Santa Fe Railroad Company has been for a number of years pending before this Department. By your office letters of January 11, and March 9, 1883, instructions were requested as to the proper mode of adjusting this grant. This action was induced by the company's demand for patents for certain of its lands falling within its primary or granted limits.

Upon the matter raised by your office request for instructions, oral argument was made before this Department, and as a result thereof your office was, by departmental communication of June 11, 1883, directed to hear arguments and make decision upon the questions involved.

On January 8, 1884, your office made report to this Department in which it was shown that there was an excess in approvals made on account of the grant, amounting to 73,351 acres, of which it appears that the company admits an excess of 15,160 acres, but denies the balance.

No further action appears to have been taken in the matter of this adjustment until, by departmental letter of November 14, 1889, the papers were returned to your office and therein it was stated:

As this Department has since, from time to time, rendered decisions upon said questions, and in view of the adjustment act of March 3, 1887, I herewith return the papers to your office that proper adjustment of the grant may be made under the laws and rulings now in force.

In your office letter of December 20, 1889, you submitted a further statement of the adjustment of the grant for this company, showing an excess of 70,334.85 acres in the approvals made on account of the grant for said company.

In opposition to the adjustment of this grant, the company filed a lengthy argument in which it is urged that all the lands within the indemnity limits were certified in the year 1875; that since that year no claim had been made on account of the grant for further indemnity, and that the action of this Department in approving the indemnity lands in 1875 was in effect a complete adjustment of the grant, and that the same should not now be disturbed.

Since 1875, to wit, on May 19, 1881, and October 1, 1883, lists were approved, amounting in the aggregate to nearly 500,000 acres, within the primary or granted limits of said road.

The effect of the company's position is that the indemnity portion of the grant is the only part that needs adjustment and that when all the lands within the indemnity limits have been certified, the grant thereupon must be considered as adjusted.

With this I am unable to agree. The grant must be considered as an entirety and it is as necessary to determine which of the lands within the primary limits passed on account of the grant as it is to ascertain which of the lands within the indemnity limits are necessary to be approved on account thereof; indeed, it is of the first importance to ascertain what lands were lost to the grant, for until that is determined the full measure of indemnity can not be ascertained.

No formal adjustment was made of this grant prior to or during the year 1875; indeed such an adjustment would not have been practicable, nearly half a million acres within the primary limits of the grant being then unsurveyed. The indemnity list of 1875 was therefore not based upon an adjustment made of this grant. Had these lists contained a basis for the tracts approved, then there might have been some force in the contention that by their certification the grant was to that extent adjusted. This was not the fact, however, and I am clearly of the opinion that by the approval of said lists this Department did not place this grant within the class of adjusted grants. So far as the recovery of an excess in the approvals made on account of the grant is concerned, it might be admitted that the grant was adjusted, and yet the right of the United States to recover such excess would not, in my opinion, be barred, and, as before stated, the company admits an excess, the only question of difference being the amount thereof.

At the time instructions were first requested in the matter of the adjustment of this grant there were yet awaiting approval nearly one-half million acres, as before stated, within the primary limits, and under the directions thereafter given by this Department, adjustments have been made of this grant and submitted for the approval of this Department, the last adjustment being that of December 20, 1889, before referred to, which shows as follows:

STATEMENT.

Total area of grant.....		2,921,138.38
Deduct moiety on account of grant for Missouri, Kansas and Texas		
R'y Co.....		37,161.14
Net area of grant.....		2,883,977.24
Approved in granted limits.....	2,022,515.00	
Erroneously approved to M. K. and T. R'y Co., within		
limits of A. T. & S. F. R. R. Co.....	19,499.56	
Vacant.....	80.00	
		<u>2,042,094.56</u>
Loss to grant.....		841,882.68
Approved as indemnity.....		<u>912,217.53</u>
Excess.....		70,334.85

In reporting this adjustment your office letter states:

In explanation of the charge for lands erroneously approved to the Missouri, Kansas and Texas Railway Co., within the limits of the grant for the road under consideration, I have to submit the following:

From Emporia southward, in the conflict of these two grants, they are of even date, while north of this point the Atchison, Topeka and Santa Fe Railroad Company has the prior grant, and upon establishing a terminal to separate the grants it is found that the M. K. & T. R'y Co., received patents for 6,845.62 acres, north of said terminal.

Until the adjustment of the grant for the M. K. & T. R'y Co., no terminal was ever established, but the line of the road of the A. T. & S. F. R. R. Co., seems to have been recognized as the dividing line.

It will be seen that the patenting of the lands in both of these items to the M. K. & T. R'y Co., was error, and it is believed that the same are recoverable by the A. T. & S. F. R. R. Co., and hence they are charged to them in the adjustment herein presented.

In the adjustment submitted by the statement above quoted the only item about which exception might be taken is that charging the Atchison, Topeka and Santa Fe Railroad company with 19,000 acres erroneously approved to the Missouri, Kansas and Texas Railway company, within the limits of the grant to the Atchison, Topeka and Santa Fe company. As these lands are within the primary limits of the grant for the last mentioned company the title thereto passed upon their identification and as the approval to the Missouri, Kansas and Texas Railway company appears to have been clearly without authority of law, I am of the opinion that the charge is a proper one and the same is therefore approved.

The matter of the ascertainment of the tracts constituting the excess has not been considered by your office, your purpose evidently being to present the form of adjustment for approval before attempting to specify the tracts constituting the excess.

Since forwarding the adjustment in question you have by your office letter of June 15, 1895, submitted copy of a list of lands embracing 8,086.89 acres which are found by your office to have been erroneously approved on account of said grant, the same having been, for reasons set forth in the margin under the column of remarks, excepted from said company's grant.

A rule has been served by your office upon said company under the provisions of the act of March 3, 1887 (24 Stat. 556), to show cause why reconveyance should not be made of the lands embraced in said list, as contemplated by said act, to which the company has made answer, and in addition to arguing the question involved, sets up a state of facts as to certain of the tracts which differ from those presented by your office letter and accompanying list. In view thereof, and as before stated, the excess found by your office adjustment has not been identified, I herewith return the papers to the end that the tracts in excess of the grant may be stated and that the company's answer to the rule in question may be, so far as it affects the question of fact, further considered and reported upon by your office.

When the whole matter is again returned to this Department, the question as to the tracts for which return of title should be demanded by this Department under the provisions of the act of March 3, 1887, *supra*, will then be considered so that the suit when recommended shall contain all the tracts for which demand should be made under the provisions of the act referred to.

TOWNSITE TRUSTEES—ASSESSMENT—DISPOSITION OF SURPLUS.

TOWNSITE OF PAWNEE.

Money derived from the assessment of lots, and left in the hands of the trustees, on the completion of their trust, should be returned in just proportion to the persons from whom it was collected.

Secretary Smith to the Commissioner of the General Land Office, July 18, 1895. (E. E. W.)

I am in receipt of your letter of the 17th ultimo, advising me that the townsite trustees of Pawnee, Oklahoma, have completed their trust, and, after paying all the expenses thereof, have a balance of \$555.64 on hand, derived from assessments on lots, and asking what disposition should be made of the same. You present the matter as follows:

The work of town-site trustees in Pawnee, Oklahoma Territory, has been completed, except the conveyance of lots involved in contests. The accounts of the disbursing agent have been adjusted and there remains a balance of assessments levied and collected upon lots in said town amounting to \$555.64.

Neither the law, nor regulations of the Department provide for any disposition of such balance.

I am of opinion that this money should be either returned, *pro rata*, to the persons from whom it was collected, or turned over to the municipal authorities for the use and benefit of the town.

The first proposition appears to me to be impracticable for several reasons, among which are the following: the difficulty of ascertaining in the near future the exact proportion due each individual, the very small amount to be returned in many instances and the labor and expense incident thereto, the impossibility of reaching many persons whose present residence is unknown, and the complications incident to death, heirship and proper legal representatives.

I am, therefore, of the opinion that the most feasible plan of disposition is that provided for the net proceeds of unclaimed lots, and recommend that said balance be turned over to the municipal authorities of the town for the benefit of the town.

Should this recommendation meet with your approval I have to request that you issue such instructions as may be necessary to carry it into effect, not only as to the town of Pawnee but of her towns in Oklahoma where similar conditions may arise.

The act of Congress of May 14, 1890, 26 Stat., 109, provided that townsites in Oklahoma should be entered by three trustees, who should be appointed by the Secretary of the Interior, and have power to levy and collect assessments on the lots sufficient in amount to defray all the expenses of their trust, including the purchase, surveying and platting of the land, the conveyance of the lots, and their own com-

pensation. This act only applied to the lands in Oklahoma open to settlement at the date of its passage; but by the joint resolution of Congress of September 1, 1893, it was made applicable to that portion of the Territory known as the "Cherokee Outlet," in which the town of Pawnee is situated.

Assessments levied under this act could hardly be expected to produce the exact amount required in every case, and authority to levy and collect additional assessments to meet deficits is amply contained in the express authority and requirement to assess an amount sufficient for the purpose.

But, as you remark, no direction is given, either in express terms or by implication, for the disposition of any balance or surplus that may be left over. To determine that question we must consider the purpose and scope of the act, and the powers and duties of the trustees.

The act is not in any sense a municipal charter. It simply creates one particular express trust, provides for the appointment of the trustees, and defines their powers and duties. The trustees can only do what the act expressly authorizes them to do. Any act not therein expressly authorized, or not obviously necessary to the execution of the trust as contemplated by the act, must be considered as prohibited.

The duty of levying assessments on lots sufficient in amount to defray all the expenses of executing their trust is expressly enjoined upon them. But they have no power to levy assessments on lots, or any other property, or to raise revenue by any other means, for municipal purposes.

They are invested with no part of the taxing power, and charged with none of the duties, of a common council. They constitute no part of the municipal government, and are not auxiliary to it. They are expressly charged with the duty of selling unoccupied lots for the benefit of the municipal government; but beyond this they have no authority to receive or collect money for the town on any account.

Their power to levy and collect assessments is limited to the levy on lots for the necessary expenses of their trust. They have no authority to levy or collect a dollar for any other purpose, or a dollar more for that purpose than is necessary for its proper accomplishment. Any sum taken above that amount is wrongfully taken, and, in my opinion, should be restored to those from whom it was collected.

Your suggestion that this sum should be turned over to the municipal government of the town of Pawnee has received serious consideration.

But, if the trustees had no authority to levy and collect an assessment for municipal purposes, certainly the bare wrongful act of collection does not make it the property of the town. It may be remarked also that there is no ground upon which it can be claimed as the property of the United States. And if it belongs neither to the town nor to the United States, then restoration to those who were required

to pay it in seems to me to be the proper disposition to make of it, though I realize the obstacles you suggest to that proceeding.

The trustees should be instructed to give notice that on a designated day they will refund this sum to the persons from whom it was collected, in just proportion. Receipts in due form should be taken and filed with their accounts. No reason is seen why remittances may not be made by post-office money order to those who live too far from the office to apply in person, provided they first send receipts for the amounts.

Any amount that cannot be refunded in this way should be deposited in the nearest depository of the United States, and the certificates thereof should show what fund it is, and be filed by the trustees with their accounts, and Congressional direction for its final disposition should be recommended in the next annual report of the Commissioner of the General Land Office.

This will be the rule in all similar cases.

PRACTICE—EVIDENCE—RULE 41.

TROTTER *v.* YOWELL.

The local officers are not authorized to exclude testimony on objection thereto, but it is their duty to stop irrelevant examination of witnesses.

Secretary Smith to the Commissioner of the General Land Office, July 18, 1895. (E. M. R.)

This case involved the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 18, T. 13 N., R. 1 W., Oklahoma land district, Oklahoma Territory.

The record shows that Norman W. Yowell made homestead entry April 29, 1889, for the above described tract, together with the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 19, same township and range.

May 6, 1889, James Trotter made application to enter the SW. $\frac{1}{4}$ of Sec. 18, which was rejected for conflict with the above entry of Yowell to the land in controversy.

May 25, 1889, Mary J. Duncan filed affidavit of contest against the entry of Yowell.

At the hearing ordered the local officers found in favor of the contestant Trotter and recommended for cancellation the entry of Yowell for the tract involved, and held for dismissal the contest of Duncan. Upon appeal by both Yowell and Duncan your office decision of May 5, 1892, sustained the finding of the local officers from which decision Yowell and Duncan again appealed. Subsequently, on April 15, 1893, Mary J. Duncan dismissed her appeal, thus leaving for consideration only the appeal of Yowell.

The testimony in the case is voluminous and contradictory beyond reconciliation. The hearing commenced on May 21, and concluded July 1, 1890, and much the greater portion of the matter contained in

the record is immaterial and obviously irrelevant and in this connection it is well to notice that while rule 41 of practice does not permit the local officers to keep out testimony on the ground of any objection thereto because of being incompetent, still it is their clear duty to put a stop to irrelevant questioning. If this had been done in this case, as the rule contemplated, the large record in the case could have been reduced to one-third of its present size and the time saved which has been needlessly consumed in the case. This has been from time to time set out in various decisions, but the manifest disregard to the rule has made these remarks appear not inapt at this time.

After an examination of the record I concur in the opinion of your office affirming that of the local office.

James Trotter will be allowed to enter the tract in issue and the entry of Norman W. Yowell will be canceled as to such portion awarded to contestant.

OTOE AND MISSOURIA LANDS.

INSTRUCTIONS.

The refusal of the Indians to consent to the terms of relief contemplated by the act of March 3, 1893, for the benefit of the purchasers of Otoe and Missouria lands, makes it the duty of the Department to enforce prior legislation with respect thereto, and cancel entries in default of payment thereunder after due notice from the local officers.

Secretary Smith to the Commissioner of the General Land Office, July 18, 1895. (J. I. P.)

By your office letter "C" of March 23, 1895, you applied to this Department for instructions relative to purchasers in default of payment for Otoe and Missouria Indian lands in Kansas and Nebraska. Before passing upon the questions submitted by your said office letter, the Department, under date of April 9, 1895, requested your office to forward here a copy of the report of the commission appointed to present to the Otoe and Missouria Indians the matter of the readjustment of the sale of their lands in Kansas and Nebraska, under the provisions of the act of March 3, 1893 (27 Stat., 568). By your office letter "C" of April 13, 1895, you transmitted said report, as requested.

An examination of that report shows that the commissioners appointed to present to said Indians the matter of the readjustment of the sale of their lands under the provisions of said act of March 3, 1893, met the tribe at the Otoe agency, in Oklahoma, on January 3, 1895, and after the selection of interpreters the matter was fully explained to the Indians, and, on the question being submitted as to whether they would accept the terms of the act of March 3, 1893, it was

resolved that we, the Otoe and Missouria Indians, fully understanding the act of Congress of March, 1893, do hereby refuse absolutely to accept the proposition to accede to the rebate as provided in said act, or any rebate whatever from the original amount of sale of said lands.

That resolution was signed by three-fourths of the adult members of the tribe, and said signatures were given of their own free will and volition, without duress or promises of any kind whatever; so say the commissioners.

It is evident, therefore, that the relief intended to be granted the purchasers of said lands by the act of March, 1893, can not be affected, and that nothing remains for the Department to do but to enforce the terms of said purchases.

The lands were sold under the provisions of the act of March 3, 1881 (21 Stat., 380), in May, June and December, 1893, and in expectation of unusual competition for them, they were sold at public auction to the highest bidder, and in many cases, were purchased at prices largely in excess of the appraised value. Under the terms of the act, last mentioned, such of the purchasers who so desired, were permitted to pay one-fourth of the purchase money in cash at the time of the sale, and the other three-quarters in one, two and three years respectively, with interest on the deferred payments at the rate of five per cent. per annum.

The act of March 3, 1885 (23 Stat., 371), provided for an extension of two years within which to make the deferred payments, and the act of August 2, 1886 (24 Stat., 214), provided for a further extension of two years.

The final payment under the act last mentioned, was due in May and June, 1890, for the lands sold in May and June, 1883, and in December, 1890, for the lands sold in December, 1883.

When the statement was made to the Department under date of March 31, 1894, there remained due for said lands upon the basis of the price at which they were sold \$194,775.82 principal, and interest thereon, computed to February 1, 1894, \$100,432.91, making a total of \$295,208.73. The number of cases in which full payment had not been made was 186.

Since the date of said report, full payments have been made in but two cases, and further installments paid in six cases. There remains due up to March 1, 1895, \$192,122.06 principal, and about \$108,000 interest.

Owing to the refusal of the Indians to consent to the relief intended to be extended to the purchasers of said lands by the act of March 3, 1893, *supra*, which makes the relief provisions of said act nugatory, it appears to be the duty of this Department to carry out the former legislation relative to said lands, action under which has been suspended owing to the pendency of said legislation and proceedings thereunder after the passage of the law.

You will therefore direct the district land officers to call upon the parties in default in payment of either principal or interest for said lands to pay the same within ninety days from receipt of notice, and to advise them that in the event of their failure to do so, their respective entries will be canceled.

RAILROAD GRANT-FORFEITURE ACT OF SEPTEMBER 29, 1890.

SPAULDING *v.* NORTHERN PACIFIC R. R. Co.

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and, so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act.

Secretary Smith to the Commissioner of the General Land Office, July 18, 1895. (F. W. C.)

I have considered the appeal by John T. Spaulding from your office decision of May 21, 1892, denying his application to purchase under the third section of the act of September 29, 1890 (26 Stat., 496), the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 5, T. 4 N., R. 2 E., Vancouver land district, Washington.

The act of September 29, 1890, *supra*, forfeited the lands opposite and coterminous with the unconstructed portion of any railroad to aid in the construction of which a grant had previously been made, and the basis of appellant's claim is that this land was forfeited by that act and was, therefore, subject to his application under the third section.

Your office decision holds that the lands falling within the primary limits of the grant upon the definite location shown upon the map filed September 22, 1882, are not affected by the act of forfeiture and Spaulding's application is therefore denied.

This land is in the neighborhood of Portland, Oregon, and would be east of a terminal line drawn at right angles to the last twenty-five miles of road, as shown upon the map of general route east of Portland. It is also within the primary limits of the grant appertaining to the road, as located and constructed north of Portland or between Portland and Tacoma.

In the case of the United States *v.* Northern Pacific Railroad company (152 U. S., 284), the court holds that the grant for the portion of the road between Portland and Puget Sound was made by the joint resolution of May 31, 1870 (16 Stat., 378), and that the company did not take by relation as of the act of July 2, 1864 (13 Stat., 365), for this portion of its road.

Under the act of July 2, 1864, a grant was made to the Northern Pacific Railroad company for a road via the valley of the Columbia river to a point at or near Portland, so that it must be clear that in the neighborhood of Portland the company has two grants: that *via* the valley of Columbia river east of Portland, being under the act of July 2, 1864, and the grant north of Portland to Puget Sound, being under the resolution of May 31, 1870.

Prior to the passage of the resolution of 1870, no location had ever been made of the grant under the act of 1864, so that when filing its map of general route on August 13, 1870, a continuous line was shown via the valley of the Columbia river extending northward to Puget Sound. The limits adjusted thereon were continuous limits and upon the maps of location of that portion of the road extending north of Portland, which was constructed, the limits were adjusted without regard to any conflict with the grant east of Portland. The line of road east of Portland *via* the valley of the Columbia river, was not constructed past Wallula, Washington, so that the portion of the road between Wallula and Portland, being unconstructed, the grant appertaining thereto was forfeited by the act of September 29, 1890, *supra*.

It appears that following the passage of the act of September 29, 1890, to wit, on October 28, 1890, your office submitted for approval a draft of a circular letter of instructions under that act, and therein the question as to the proper terminal separating the forfeited lands from those not forfeited at Wallula and Portland, was submitted for consideration.

This matter was considered in departmental letter of December 24, 1890 (11 L. D., 625), in which it was held, after referring to departmental decision of August 13, 1885 (5 L. D., 459), that—

Under this decision it is clear that the Department held the company to be entitled to patents for the road then constructed, down to the line so established, and no farther. Assuming this conclusion to be correct (and the forfeiture act in no way interferes with it) there is no reason now presented for changing the same. On the contrary the terms of the forfeiture act are in line with that decision. Said section four of the granting act, *supra*, directed patents to issue for lands "*opposite to and coterminous with* said completed section of said road; and so on as fast as every twenty-five miles of said road is completed as aforesaid;" the first section of the forfeiture act restores to the United States the title to "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." If the line fixed in 1885 separated the lands then earned by the company, by the construction of the road, from those not so earned, it does so now, as no more road has since been built. In other words that line divides the lands "*opposite to and coterminous with*" the portion not constructed, from those earned by the constructed road. The line of 1885, will, therefore be adhered to. The same principles apply to the line at Portland.

This has since been considered as the decision of this Department, and all lands within the limits of the grant adjusted to the line of location of the road north of Portland, have been held to have been saved from forfeiture and not subject to the provisions of the act of September 29, 1890.

The case in hand, however, for the first time presents this question for determination by the Department, and the instructions previously given can not be considered as an adjudication of the question. From what has been said it must be clear that there are two grants, under which this company claims, in the neighborhood of Portland: that east

of Portland being under the act of 1864, while that running north of Portland is under the resolution of 1870. The grant for that portion of the road in the neighborhood, and east of, Portland, was forfeited by the act of September 29, 1890. As provided in the act of forfeiture, none of the lands forfeited inure by reason of such forfeiture to any other grant. So far, therefore, as the limits of the grant for the portion of the road via the valley of Columbia river and east of Portland, overlaps the subsequent grant for the portion of the road north of Portland, the latter grant must, to that extent, fail, and it must be held that such lands are subject to the operation of the act of September 29, 1890.

In the departmental decision of August 13, 1885 (referred to in the instructions of December 24, 1890), the terminal under consideration was one occurring in the adjustment of the limits to a portion of the road in process of construction, the grant for which was made by the act of July 2, 1864, and it was therein correctly held that the terminal established upon the constructed road properly separated the lands earned from those forfeited, so far as that grant was concerned.

The question presented at Portland, however, was not similar to that discussed in the decision of August 13, 1885. Portland was the end of one grant and the beginning of another; these two approached each other at nearly right angles, so that, of necessity, the two grants in the neighborhood of Portland overlapped. The prior grant having been forfeited, the lands appertaining thereto were restored to the public domain, and the establishment of the terminal upon the construction of the road from Portland northward, could in nowise be considered as a terminal for separating the lands forfeited from those not forfeited, upon the other line for which another grant, of a different date, was claimed by the company.

The instructions of December 24, 1890, are hereby recalled and vacated in so far as they hold that the terminal established upon the constructed road north of Portland correctly separates the lands in that vicinity (which were earned by the construction of the road aforesaid) from the land forfeited and appertaining to the road east of Portland. In the adjustment of this grant, therefore, it must be held, as before stated, that all lands within the limits of the grant adjusted to the line east of Portland, are forfeited and restored by the act of September 29, 1890, without regard to the limits of the adjustment upon the road north of Portland.

As your office decision denied Spaulding's application upon the ground that the same fell within the limits adjusted to the located road north of Portland, I must reverse your office decision and said application will be accepted, unless, upon further examination, other good and sufficient reasons appear for the rejection of the same.

APPLICATION TO ENTER—AMENDMENT OF APPLICATION.

McCORMICK v. BARCLAY.

Where an application to enter is found irregular in form, and is returned to the applicant for correction, it should be regarded by the local office as pending for a reasonable time, and excluding, during said period, other applications for the land.

Secretary Smith to the Commissioner of the General Land Office, July 18, 1895. (E. E. W.)

STATEMENT. The contestee, Ernest E. Barclay, filed pre-emption declaratory statement for lots 7, 8, 9 and 10, of Sec. 6, T. 40 N., R. 3 W., at Lewiston, Idaho, September 30, 1890, alleging settlement on the 23d of that month. On the 20th of October, 1890, the contestant, Leo S. McCormick, made homestead entry of the same land, alleging settlement in June, 1889. McCormick was seventy years old, and lived sixty miles from the land office. On the 8th of July, 1890, he went to the county seat of his county, and got the deputy clerk to make out his application, and send it to the land office. He had previously caused the land to be surveyed by a surveyor, who gave him the description as the NE. $\frac{1}{4}$, and they described it in the application as the NE. $\frac{1}{4}$, instead of as lots 7, 8, 9 and 10, as it is described on the tract books, and on the 11th of July the application was returned by the register for correction. McCormick's trip to the county seat on the 8th had made him sick, and he was not able to go back there again to have the application corrected until the 16th of October. The application being corrected and returned to the land office on that day, the entry was made on the 20th. McCormick had built a house and fenced a considerable portion of the land in 1889, and Barclay admits that the settlement which he made on the 23d of September—the one alleged in his declaratory statement—was inside of McCormick's enclosure. But he afterwards abandoned this settlement, and made another one on the land outside of McCormick's enclosure. The exact date of this change is not shown, but it was after the date of McCormick's entry, which, as above stated, was the 20th of October.

Both parties resided on the land, and each improved and cultivated certain portions of it, though McCormick's cultivation was the most extensive, and his improvements were the most valuable, being worth about \$800, and Barclay's about \$350.

In October, 1891, both parties made final proof, Barclay to establish his pre-emption, and McCormick in commutation of his homestead. On the trial of the contest thus formed, the local land officers decided in favor of Barclay, and McCormick appealed. The Commissioner of the General Land Office reversed the local officers, and Barclay appealed to the Department.

OPINION.—As McCormick's application of the 11th of July described the land by the numbers usually employed, and as an exceptional, or comparatively unusual method was used to describe this particular tract in the surveys, of which, of course, the law required him to take notice, but of which as a matter of fact he did not know, and could not without great inconvenience, it was proper to allow reasonable time for correction. As the land was described with certainty, it would have been error to reject the application outright; but as the description was not in technical conformity to the description in the surveys, it was not error to return it for correction. But having done this, the register and receiver should have treated the application as pending for a reasonable time, and it was error on their part to allow Barclay's pre-emption filing until such reasonable time had elapsed.

McCormick had been derelict. He had not attempted to make entry within three months from the date of his settlement. But his application of the 11th of July, derelict as it was, was more than two months prior to Barclay's settlement—the settlement which he admits he invaded McCormick's enclosure to make—and that application having been properly returned for correction, all subsequent applications should have been held subject to it for a reasonable time. What was reasonable time in the absence of any prescribed rule, was matter for the discretion of the register and receiver, the distance and means of communication being considered. The record does not show that they found that there had been reasonable time for correction and return of the application when they allowed Barclay's pre-emption. This is also a matter properly within the discretionary power and supervisory control of the Secretary of the Interior, and it is his opinion that reasonable time had not elapsed, and that Barclay's pre-emption was erroneously allowed, and should not stand in the way of McCormick's entry. While there is conflict in the testimony, the preponderance is that McCormick has complied with the law in the matter of residence as well as of improvement and cultivation, which is conceded. This being true, it is the opinion of the Department that his entry should be sustained.

The decision of the Commissioner of the General Land Office is affirmed.

ENTRY—RIGHT OF AMENDMENT—TRANSFeree.

PHIDELAH A. RICE.

The right to amend an entry so as to include other land therein can not be exercised by one holding thereunder as transferee. (W. F. M.)

So much of the facts of this case as are necessary to be considered in its decision are found in the following epitome of its history.

On November 19, 1883, Job Payne made pre-emption entry of the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 35, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 34, township 1 N., range 2 W., Ute series, within the land district of Montrose, Colorado, and on May 19, 1892, patent issued therefor.

On September 20, 1892, the attorney of Phidelah A. Rice, the transferee, through mesne conveyances, of the original entryman, Job Payne, filed in the local office an affidavit setting out that the latter, through mistake, had entered land other than that which he had intended to enter, to wit, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 35 and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 34, township 1 N., range 2 W., instead of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 35 and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 34, same township and range, upon which his improvements were situated, and asking

that the said filing be corrected to include the lands settled upon and improved as aforesaid, and that notations be made by the local land officers preserving said land from any further claim or filing until the said correction be made.

The matter having, in due course, reached your office, by letter "G" of September 15, 1893, the application to amend was denied, and your office decision of March 5, 1894, rendered on a motion for review, adheres to the original judgment.

The transferee, Rice, has appealed from both decisions, alleging in his first specification, which is the only one that need be adverted to here, error "in holding that amendment cannot be allowed because the original entryman had prior to the date of the application for amendment transferred his right under such original entry."

No adverse claim had arisen at the date of the initiation of Rice's effort to amend, and the record clearly establishes the good faith of both the entryman and his transferees. The appellant, therefore, presents a strong equitable case. The law of the case, however, appears so clearly adverse to his contention that his equities can avail him nothing. Section 2372 of the Revised Statutes provides for amendments in certain cases "of an entry hereafter made of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered," but in express terms denies the exercise of the right to assignees or transferees. That section is merely a re-enactment, in a slightly modified form, of an act approved May 24, 1824, 4 Stat., p. 31, and while in the nature of things, it applied at that time only to cash entries, this Department has, by regulation and by judicial action, extended its application to all classes of entries. *Vide* Christoph Nitschka, 7 L. D., p. 155, and General Circular, p. 104.

Counsel for the appellant cite the case of *Murphy v. Sanford*, 11 L. D., p. 123, in support of the position assumed in his appeal, and it is true that an entry was there allowed to be amended under circumstances almost precisely similar to those of the case at bar, but it is to be observed that the Department only undertook to decide as between the equities of the parties, the inhibitory provisions of section 2372

against transferees not even being invoked by the defendant, nor adverted to in the opinion. Judicial consistency does not seem to require that a decision so rendered should be accorded the sanctity of an authoritative utterance and thus be made effective in nullifying express law and overturning positive jurisprudence.

The decision of your office is affirmed.

RIGHT OF WAY FOR CANALS—ACT OF MARCH 3, 1891.

CHAFFEE COUNTY DITCH AND CANAL CO.

The approval of right of way maps, under the act of March 3, 1891, is limited to cases where it is shown that the purpose for which said right of way is desired is that of irrigation; and where it appears that the right desired is to be used for purposes other than irrigation, the Department is without authority to approve the application under said act.

Secretary Smith to the Commissioner of the General Land Office, July 18, 1895. (F. W. C.)

I am in receipt of your office letter of June 5, 1895, submitting for the approval of this Department the articles of incorporation, due proof of organization, and map of location filed by the Chaffee County Ditch and Canal Company, traversing certain public lands within the Leadville land district, Colorado, on account of which application is made for right of way for the ditch under the provisions of the act of March 3, 1891 (26 Stat., 1095).

In submitting these papers your office letter refers to the certificate required in the case of the South Platte Canal and Reservoir company (20 L. D., 154), in which it was held that the act of March 3, 1891, restricts the purpose for which the right of way therein granted may be used to that of irrigation and that maps of location would not be approved where it appears that the right of way is desired for any other purpose than irrigation.

In that case it was required of the company that it file its certificate under the signature of its president and the seal of the company, to the effect that the proposed reservoir and pipe line applied for, and on account of which a right of way was claimed, was desired for the sole purpose of irrigation, and you were directed in future to require a similar certificate of all companies claiming a right of way under this act where, under their articles of incorporation, the company is empowered to make other use of the water desired to be stored in its reservoir applied for, or conducted by its ditches, than that of irrigation.

In the case under consideration the company is empowered by its articles of incorporation—

To build, purchase and otherwise acquire ditches, flumes and reservoirs in Chaffee county, Colorado, for the purpose of storing water not needed for immediate use, and for conveying and delivering water along the line of such ditches, flumes and reservoirs to mines, mills and lands and for floatage purposes incidental thereto.

The company was therefore required to file its certificate for the purpose for which the water is desired to be used and in the certificate furnished it was stated that the main purpose for which the ditch and canal is desired is to provide for irrigating lands that lie under the line thereof; further, that the company "also wishes to avail itself of the right to float mining timbers and timbers for domestic manufacturing on said canal, as said canal when completed, will be virtually a water way convenient and suitable for such purpose;" and to a letter from the president of the company, which accompanied said certificate, he states as follows:

Large portions of Colorado being admittedly an arid country water and its use is a subject of the most careful and strict legislation. That parties having an irrigating canal or ditch and having water that can by reasonable diligence be carried in said ditch, are compelled to deliver such surplus to mill men, manufacturers and for domestic purposes.

In addition to these requirements, the canal of the Chaffee County Ditch and Canal Company traverses a mountain valley from near its head high up on the range to the mesa. That in said valley a great deal of timber is cut and used for domestic and mining purposes. That the natural stream is winding, crooked and the body of water is not so continuous as to afford a channel for any kind of transportation. That the canal contemplated by this company will cost about \$100,000, being for the most distance by a heavy flume. That parties along said line have offered this company advantageous concessions, it being understood that at proper season they can float timber on the line of said canal and that at the mouth of said canal the water, before being turned back into the stream, can be used for power.

In reference to this certificate your office letter states:

It is stated in the certificate that the main purpose of the canal is to furnish water for irrigation, but that in view of the State law governing the use of water and other facts set out in the certificate and letter, the company can not make a certificate to the effect that the water is desired for the sole purpose of irrigation.

It appears that the enterprise of this company will cost \$100,000, and apparently the company desires to take advantage of the natural features of its location and derive what profit it can from allowing its canal to be used for floating timber, and the utilization of the power, which would otherwise go to waste at the mouth of the ditch, before turning its surplus water back into the stream.

In view of these incidental modes of using the water without interference with its application to purposes of irrigation, usually essential to the profitable diversion of water in heavy mountain country; and the further fact that the water laws usually require canal owners to furnish water to all applicants whenever it can be obtained, with preferences for domestic, irrigation, mining and power purposes, usually in the order named, this office is unable to decide how strictly the expression "sole purpose of irrigation" is to be construed particularly in view of the language of section 16, that "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."

In reply to that portion of your office letter above quoted, I have but to say that the language of section 16 of the act of March 3, 1891, quoted therein has no application to the purpose for which the right of way granted might be used, but was plainly a disclaimer on the part of Congress of any attempt to control the use of water, desired to be

stored or conducted through canals, which was to remain under the authority of the respective States or Territories.

As before held by this Department, the approval of right of way maps, under the act of March 3, 1891, is limited to cases where it is shown that the purpose for which the same is desired is that of irrigation, and where it appears that the right of way desired is to be used for other than irrigation purposes, this Department is without authority to approve the same under the act referred to and all such applications must be denied.

In the present case, although it is stated that the main purpose for which the ditch and canal, on account of which a right of way is claimed, is desired to be used is for irrigating lands, yet it is apparent that the company desires the same for the purpose of establishing a water way for the transportation of timbers.

The certificate furnished is not satisfactory and unless it is stated that the sole purpose for which the right of way applied for is desired to be used is that of irrigation, the maps can not be approved under the provisions of the act referred to.

The maps and accompanying papers are therefore herewith returned to your office, and you will advise the company accordingly and allow it thirty days in which to file a certificate in accordance with the requirements herein contained.

PEHLING *v.* BREWER.

Motion for review of departmental decision of April 18, 1895, 20 L. D., 363, denied by Secretary Smith, July 18, 1895.

CLASSIFICATION OF LANDS—ACT OF FEBRUARY 26, 1895.

SWEENEY *v.* NORTHERN PACIFIC R. R. CO.

The act of February 26, 1895, providing for the classification of lands within the Northern Pacific grant, with respect to their mineral or non-mineral character, does not suspend the action of the Department, in its administration of the land laws, in the land districts affected by said act, nor suspend mineral locations or entries.

Secretary Smith to the Commissioner of the General Land Office, July 18,
(J. I. H.) 1895. (P. J. C.)

I have before me a motion filed by counsel for the Northern Pacific Railroad Company, asking that the judgment of the Department in the case of William J. Sweeney *v.* Northern Pacific Railroad Company (20 L. D., 394), be suspended until the commissioners appointed under the act of February 26, 1895 (28 Stat., 683), have submitted their report as to lands in the Helena, Montana, land district, the district in which the land in controversy is situated.

Sec. 1 of said act provides that the Secretary of the Interior shall cause all lands in districts named within the granted and indemnity limits of the Northern Pacific Railroad Company

to be examined and classified by commissioners to be appointed as hereinafter provided, with reference to the mineral or non-mineral character of such lands, and to reject, cancel and disallow any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any lands in said districts which upon examination shall be classified as provided in this act as mineral lands.

Sec. 2 provides for the appointment of three commissioners for each land district mentioned; fixes their compensation; and defines their duties and mode of procedure. Sec. 3 provides the manner in which the lands shall be classified as mineral, and enacts—"that the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof." The balance of the act deals entirely with the methods of procedure by the commissioners, the effect of their judgment, their reports, etc.

The gist of counsel's contention in this matter, as I understand it, is that "a special tribunal has been created to determine the character of this land, and it is wholly outside the powers of the Honorable Secretary to make such determination except in the way prescribed by statute, viz: through the commissioners," and inasmuch as this act was passed prior to the rendition of the judgment in this case, the departmental action should be suspended until the commissioners act.

I find myself unable to agree with this construction of the act. It will be observed that Congress neither directly or by implication suspends the action of the Department in its administration of the land laws in the districts for which the commissioners are appointed; nor does it suspend mineral locations or entries.

It is sufficient for the purposes of this motion to say that the judgment rendered by the Department is in no wise affected by the act. It was against the railroad company; that is, the mineral character of the land was established. This was done under a regular procedure, the validity of which is not assailed.

Counsel seem to put some stress upon the wording in section 3, that the land shall be examined and classified "without reference or regard to any previous examination report or classification." My understanding of this language is that it has reference to the return of the surveyors-general, or any other agent that may have reported as to the character of the land, officially or otherwise, and that it does not apply in cases like the one at bar, where the mineral character of the land has been established by the procedure provided by law and the rules of practice.

The motion is therefore overruled.

TIMBER LAND ENTRIES—ACT OF JUNE 3, 1878.

INSTRUCTIONS.

Timber land entries made in good faith prior to March 21, 1894, the date of the decision in the case of *Gibson v. Smith* (wherein it was first held that trees suitable only for fuel were not "timber" within the meaning of the act of June 3, 1878) may stand, though the trees on the land so entered are useful only for fire wood.

Secretary Smith to the Commissioner of the General Land Office, July 18,
(J. I. H.) 1895. (F. L. C.)

I am in receipt of your office letter of April 3d last, inviting attention to the definition of the word "timber" as given in departmental decision of March 21, 1894, in the case of *Gibson v. Smith* (18 L. D., 249), and recommending that your office

be instructed to hold intact all entries made prior to March 21, 1894, under the act of June 3, 1878, where such entries are free from all defects except their failure to come within the said definition of the word "timber."

Your said office letter gives as a reason for the recommendation as above quoted, that many entries under said act have been made for lands the timber on which was only suitable for fire wood; that in certain localities the scarcity of fuel and the mountainous and sterile character of the lands so entered render them chiefly valuable for the timber growing upon them, although its only utility is for fire wood. It is further stated, that to follow the departmental decision herein referred to and cancel these entries will involve repayment to the purchasers of the price paid for the lands, and in many cases would work great hardship and injustice to the entrymen.

Whilst I am not in doubt as to the correctness of the construction placed upon the law in the case of *Gibson v. Smith*, *supra*, I am strongly impressed with the view that entries made in good faith, the money paid for the land and receipt therefor given prior to the date of the decision above mentioned, to wit, March 21, 1894, such entries having been made of lands theretofore treated as timber lands within the meaning of the law by your office and the local offices, should be allowed to stand, if no objection exists other than that as to the character of the growth upon said lands. Such action will protect rights which in a sense became vested under the law as then administered, and is in line with precedent. See case of *James Spencer*, 6 L. D., 217.

Your office recommendation is accordingly approved.

DENMAN *v.* DOMENIGONI.

Motion for review of departmental decision of April 12, 1895, 20 L. D., denied by Secretary Smith, July 18, 1895.

CLASSIFICATION OF LANDS—DESIGNATION OF SURVEYOR.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 25, 1895.

U. S. SURVEYOR GENERAL,
Helena, Montana.

SIR: I am in receipt of your letter of July 9, 1895, stating that you have been asked by the board of commissioners, appointed under act of February 26, 1895, (20 L. D., 350,) for the Helena, Montana, land district, to designate a U. S. deputy surveyor to assist said board in the location of section corners, etc., said request being made by authority of the Honorable Secretary's letter of June 20, 1895, (20 L. D., 561) in which it was said:

As to the services of a surveyor to aid them in establishing lost corners, etc., I approve your suggestion and have to direct that they be advised to call upon the United States surveyor general, who will designate a United States deputy surveyor to assist them in this work.

You state that I (you) know of no law that would permit me to designate a deputy surveyor for service with this board and if such a selection should be made I know of no fund out of which he could receive a compensation.

You are advised that you have no duty to perform in this matter further than to designate a competent surveyor for the work mentioned, which you are authorized to do in this case, said deputy being governed by the conditions hereinafter set forth.

For the information and guidance of the U. S. surveyor general the various boards of commissioners and the U. S. deputy surveyors so designated, the following instructions are issued:

I. All applications to the surveyor general for the designation of a deputy surveyor should fully set forth the reasons for the application, and, when practicable, the dates on which the services of the deputy surveyor will be needed.

II. All such applications shall be forwarded to the Department by the surveyor general through the General Land Office for approval prior to a designation being made.

III. Upon being designated by the surveyor general, the deputy surveyor will report to the board of commissioners for duty at *such times as they may require his services.*

IV. It is immaterial whether a U. S. deputy surveyor, or a U. S. deputy mineral surveyor is designated. When practicable, however, a surveyor should be designated who resides near the lands in the examination of which his services are required.

V. Upon being advised by the surveyor general of the designation of a surveyor, the board of commissioners will immediately advise him of the place where and the dates when he should report for duty.

The commissioners should avoid any unnecessary expense in this particular, requiring the surveyor's attendance only when absolutely necessary to the proper performance of their duties under the act of February 26, 1895.

VI. The deputy surveyor, designated in accordance with these instructions, shall be subject to the orders of the board of commissioners, and shall be paid not exceeding \$10 per day out of the appropriation provided by section 8 of the act of February 26, 1895; for each day *actually employed*.

VII. On the last day of each month said deputy surveyor will file with the board of commissioners an itemized account, in duplicate, under oath.

The deputy surveyor shall file therewith receipts in duplicate to the disbursing clerk of the Department, signed in blank.

The account, if correct, should be approved by the chairman and secretary of the board and immediately be forwarded by them to this office, when the same will be audited as provided by section two of the Act of February 26, 1895.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

JNO. M. REYNOLDS,
Acting Secretary.

GOVERNMENT RESERVATION—PUBLIC BUILDINGS.

CITY OF KINGFISHER.

Consent of the Department given for the erection of a post-office building on the "government acre" at Kingfisher, Oklahoma, by the citizens of said place.

Acting Secretary Reynolds to the Postmaster-General, July 27, 1895.
(J. I. H.) (G. B. G.)

In the matter of the proposition of certain citizens of Kingfisher to build a post-office for the use of the government on the "government acre" at Kingfisher, Oklahoma, rejected by this Department on May 18 (20 L. D., 465), for indefiniteness, because under the proposition then submitted the building might form the basis of a demand against the

government, I have now before me a proposition free from this objection, and requesting that this Department permit the use of said "government acre" for that purpose. The proposition now made is as follows:

Our proposition of the 18th of February, 1895, was intended to state which we now state, that we would or will erect a building to be used for post office purposes, and to equip the same with the necessary lock boxes, call boxes, general delivery boxes, and other furniture deemed necessary by the Department; that said building was or is to be erected on ground known as the government acre and on site now occupied by the United States Land Office, which building we propose to move about seventy-five feet further north, with consent of your Department. The room to be used for post office purposes to be twenty-five by seventy-five feet and to have a ceiling fourteen feet from the floor; walls of the building to be thirteen inches in thickness and to be of brick, Kansas City stock brick or other suitable brick, and the said building to have a fire proof vault eight by eight by fourteen, and windows and doors to be properly protected with suitable iron bars. The said building is also to be provided with a separate and distinct apartment for the deposit of mail pouches, so when they are delivered by the different contractors or carriers, no ingress or egress to the post office proper can be had by them.

We propose to lease this building, which is to be of first class workmanship in every particular, to the government, at the annual rental of one dollar, for five years, at the expiration of which time, the building and fixtures to revert to the government and become its absolute property, without any charge whatever upon our part for the same.

Whenever the proposition is accepted, we will furnish to the Department a good and sufficient bond for the faithful performance of our contract.

The parties propose to move the United States land office building, now on said acre, about seventy-five feet farther north to make room for the new building. This is thought inadvisable by the register and receiver of the Kingfisher land office for sanitary reasons, but they suggest that a move of twelve or fifteen feet will make room for the proposed post office building, or, if the postal authorities feel that the new building must be separated from the land office to any considerable extent, that the land office building be moved "flush with the south line of the government acre," thus leaving room to place the post office building as far north on the lot as may be desired. The showing made by the register and receiver would seem to make this plan advisable.

I know of no express provision of law that authorizes me to permit the use of government lands for the erection of buildings, but precedent seems to sanction it, and this Department has granted a similar request in the case of Guthrie and Perry, Oklahoma.

Inasmuch as the erection of another building on the government acre will necessarily increase the risk from fire, it is recommended that the parties desiring to build be required on moving the land office to erect therein a fire proof vault for the preservation of public records.

With the modifications above specified, the parties will be allowed to use said lot for the erection of a building of the character designated in the specifications.

RESERVATION—ADDITIONAL TOWNSITE-SCRIP LOCATION.

MCCHESENEY *v.* MCALLISTER ET AL.

- A departmental order directing that no entries be allowed of a specified tract, pending the final determination of an alleged right thereto under the townsite laws, effectually deprives the local office of all authority to allow subsequent applications for said land, during the pendency of said order.
- A city founded and incorporated on private land is not entitled to make an additional townsite entry under the act of March 3, 1877.
- An application to locate scrip is not complete unless the scrip on which it is based accompanies the application.

Secretary Smith to the Commissioner of the General Land Office, August 3, 1895. (J. I. H.) (J. I. P.)

The tract involved in this controversy is the SE. $\frac{1}{4}$ of Sec. 14, T. 123 N., R. 64 W., Aberdeen, South Dakota, land district, and a proper consideration of the questions presented necessitates a brief recital of the history of said tract; as disclosed by the records of this Department.

Said tract lies west of and immediately adjoining the site of the city of Aberdeen, South Dakota, and is embraced within the corporate limits of that city.

On October 1, 1887, there was pending before the Department the case of *Dayton v. Dayton*, involving this tract, and its history, as connected with that case, is found in 6 L. D., 164. In disposing of that case on the date last above named the Department rejected the claim of both the *Daytons* to said tract, and closed its decision as follows:

With the papers in the case appears the application of the city of Aberdeen to intervene and show its superior right to this land or a portion of the same. . . . In order, therefore, that the claim now and heretofore asserted by the city of Aberdeen may be presented in due form, you will direct that no entries of the land be allowed until such time as the right of said city thereto may be duly determined, and to such end notice should be duly given the attorneys for said city, requiring the presentation of the city's claim under the townsite laws within sixty days after notice of this decision.

The above decision was promulgated by your office on October 17, 1887, and on October 21, 1887, the mayor of Aberdeen, for the city, accepted notice thereof.

On December 17, 1887, an application couched in the following language was filed in the local office at Aberdeen:

I, R. A. Mills, mayor of the city of Aberdeen, Broom county, Territory of Dakota, do hereby, in behalf of said city make application to enter the SE. $\frac{1}{4}$, Sec. 14, Twp. 123 N., R. No. 64 W., 6th P. M., under and by virtue of the acts of Congress relating to townsites, said land being within the corporate limits of the city of Aberdeen, and not subject to entry under the agricultural pre-emption laws; said land being now occupied for townsite purposes, said city of Aberdeen being duly incorporated,

and said entry being made in trust for the use and benefit of the occupants thereof, and the city of Aberdeen, according to their respective interests.

Given under my hand this 17th day of December, 1887.

THE CITY OF ABERDEEN,
By R. A. MILLS,
Mayor of said City.

In the presence of—
PHIL SKILLMAN.

That application was on December 19, 1887, forwarded by the local office to your office, with request for instructions as to what action it should take in the premises.

Both of the Daytons filed motions for review of the decision of October 1, 1887, *supra*, and by its decision of February 25, 1889, the Department denied said motions (8 L. D., 248).

The decision, after quoting the closing paragraph of the decision of October 1, 1887, *supra*, closes as follows:

As action under said decision of October 1, 1887, was suspended during the pendency of the motions for review and revocation thereof, the above provisions forbidding allowance of entry of said land until the claim of said city thereto is determined, are hereby expressly continued in force, and it is directed that sixty days, after due service of notice hereof on the attorneys of said city, be allowed for the presentation of said claim, if it has not already been duly presented.

That decision was promulgated on March 8, 1889, by your office, and on April 27, 1889, the city of Aberdeen filed, through its mayor, A. W. Pratt, another application to make townsite entry of said land. Said application is in the form of a preamble and resolution. It recites the fact of its application of December 17, 1887, and declares that it is the purpose of the city to claim said tract as an additional townsite entry under the act of March 3, 1877 (19 Stat., 392), together with the act approved March 2, 1867 (14 Stat., 541), and declares that said tract, with the other lands embraced within the corporate limits of said city, do not exceed the 2560 acres allowed by section 2384 of the Revised Statutes of the United States.

Accompanying said application is a plat of said tract prepared by the "city engineer;" also certain resolutions of the city council of Aberdeen, directing the city attorney to prepare said application and for the mayor to "file the same with the utmost speed."

Motions for re review were filed by both the Daytons, which were denied July 17, 1889 (9 L. D., 93).

Leaving the city of Aberdeen at this point for a time, let us return to the decision of October 1, 1887. That decision eliminated all the parties from the controversy then before the Department, except the city of Aberdeen, and inhibited any entry of the tract in question until such time as the rights of said city thereto, under its claim "now and heretofore asserted," had been fully determined.

On the second day following that decision, to wit, October 3, 1887, Abner C. McAllister filed pre-emption declaratory statement for said

tract, alleging settlement thereon October 2, 1887. Said application was rejected, because of the homestead entry of Lyman C. Dayton. From this action McAllister did not appeal. October 20, 1887, at 1:30 o'clock, P. M., John T. McChesney made application to locate Porterfield scrip (per warrant No. 16 and 20), on the S. $\frac{1}{2}$ of said tract. That application was rejected because of the decision of October 1, 1887, inhibiting entry of said tract as stated. McChesney appealed. At 2:17 o'clock P. M., on the same day McAllister again presented his original declaratory statement, which was endorsed, "again presented and rejected;" McAllister then appealed.

The application of the city of Aberdeen, filed December 17, 1887, has been noted.

December 20, 1887, McChesney again applied to locate S. $\frac{1}{2}$ of said tract with Porterfield warrants. His application was again rejected, and he again appealed.

December 21, 1887, McChesney made a third attempt to locate the S. $\frac{1}{2}$ of said tract with said Porterfield scrip, but his application was again rejected, and he again appealed.

Pending the proceedings detailed above, various other persons filed applications for said tract, all of which were rejected, and all of them, save McAllister and McChesney, are now out of the case.

February 20, 1892, your office disposed of the various claims pending before it on the different appeals taken, as follows:

1. It rejected the application of the city of Aberdeen to enter said tract "as an additional entry to the townsite of Aberdeen," on the ground that being originally founded and located on private lands, said city owed its existence to the territorial laws of Dakota, and not to the United States townsite laws, and that not being a government townsite, it could not exercise any of the functions of such.

2. It rejected the pre-emption claim of McAllister on the ground that as said tract was within the incorporated limits of Aberdeen, said claim was prohibited by section 2258 of the Revised Statutes of the United States.

3. It awarded the S. $\frac{1}{2}$ of said tract to McChesney and the N. $\frac{1}{2}$ to one Keene (then a party to said controversy, but now out of it entirely), by virtue of their respective applications to locate Porterfield scrip on said tracts, said award being based on the principle enunciated in the case of *Lewis et al. v. Town of Seattle et al.* (1 L. D., 497), viz, that

scrip may be located on offered or unoffered land, upon land within the limits of an incorporated town, and that no mere *de facto* appropriation can defeat or preclude the location of the same.

From that decision the city of Aberdeen did not appeal; McAllister alone appealed.

May 2, 1892, McChesney filed a fourth application to locate his Porterfield scrip on the S. $\frac{1}{2}$ of said tract, which application was for the fourth time rejected, and he again appealed. It is proper to note here

that up to this date McChesney's rights under his first application only had been passed on by your office decision of February 20, 1892, *supra*.

April 26, 1893, the case being then before it on McAllister's appeal, was disposed of by the Department as follows (16 L. D., 397): (1) Referring to the grounds upon which your office in its decision of February 20, 1892, based its rejection of the application of the city of Aberdeen, as above set forth, it said:

Without passing on the correctness of this ruling, it is sufficient to remark that the city of Aberdeen did not appeal from your decision but it does not follow that said land cannot be entered under the townsite laws by the occupants thereof, provided it is actually inhabited, occupied and used for townsite purposes. In the application by the townsite of Aberdeen to enter the land, it is alleged that it is used for townsite purposes. This, of course, is a question of fact.

2. Referring to the rejection of McAllister's pre-emption claim and the reasons given therefor, as above stated, it is said—

It is the ruling of the Department that the mere fact that a tract of government land has been included within the corporate limits of a city or town does not prevent entry of the same under the general land laws, provided that said tract of land cannot be entered as a townsite by the authorities of said town or city (citing the case of Harper v. Grand Junction, on review, 16 L. D., 127). Your office decision, therefore, rejecting the claim of McAllister, cannot be sustained, on the ground assigned by you; it does not follow, however, that he is entitled to enter the land. That will depend upon the facts connected with this tract.

3. To that portion of your office decision that awarded said tract to McChesney and Keene, as stated, it responds as follows:

While it is true that a mere *de facto* appropriation of the land will not prevent the location of scrip, it is the ruling of the Department that land which is actually settled upon and used and occupied for townsite purposes is not subject to scrip location.

Then follows this significant statement:

It will thus be seen that before an intelligent decision can be rendered in this case *the facts in relation to the townsite settlement and occupation of this land must be ascertained.*

Said decision then closes by directing the local office to order a hearing in relation to said land—

where the facts in reference to its *settlement, occupation and use* may be ascertained, in order that the Department may have a basis upon which to determine its future disposal, whether (1) it should be reserved for townsite purposes, or whether (2) it should be entered as a part of the townsite of Aberdeen, or (3) as a separate townsite, or (4) should be awarded to the pre-emption claimant, or (5) to the scrip applicants. The facts are not known to the Department, and before an intelligent and just decision can be rendered, the facts must be shown.

As soon as the evidence is received, the case should be made special by you, in order that it may be finally disposed of.

June 6, 1893, McChesney moved for a reconsideration of said decision so far as it affected the S. $\frac{1}{2}$ of said tract, which motion was denied by the Department December 19, 1893 (17 L. D., 576).

May 10, 1894, the hearing ordered by the decision of April 26, 1893, *supra*, was had, the only parties who appeared being McChesney, McAllister and the city of Aberdeen.

January 15, 1895, the evidence taken at said hearing having been transmitted to your office, it disposed of said case, in the light of the evidence, as follows:

It rejected the claims of both McAllister and McChesney, on the ground that the order in the decision of October 1, 1887, *supra*, "that no entries of the land be allowed until such time as the right of said city thereto may be duly determined" was mandatory and left the local officers without discretion in the matter of said claims, and that they were compelled to reject them. That the purpose of said order and of the reservation created thereby was to relieve the right of the city of Aberdeen, if found to exist, of any embarrassment, by subsequent claims being *placed of record* during the time occupied in considering the claim of said city.

It rejected both applications of the city of Aberdeen (as presented) to make entry of said tract. The first one, which was an application to make an original townsite entry, on the ground that the tract is "now occupied for townsite purposes," was rejected for informalities, and for the further reason that at that time "the tract in question was without population, trade or business, and was not used, in fact, for any municipal purpose whatever;" and that said city at that time "had no right to an entry for townsite purposes of the tract in question under any law of the United States." The second application to make additional townsite entry under the act of March 3, 1877 (19 Stat., 392), and the act of March 2, 1867 (14 Stat., 541), was rejected for informality, and on the further ground that said city was founded and incorporated on private land, and was therefore not entitled to make additional townsite entry under the act of March 3, 1877, not being originally a government townsite.

But it held in effect that at the date of the hearing (May 10, 1894), said tract was occupied for townsite purposes by a number of persons (about forty-five, as shown by the record,) who were citizens of the city of Aberdeen, and that therefore the right existed for the corporate authorities of said city to make entry of said land under the act of March 2, 1867—sections 2387 to 2389, Revised Statutes of the United States, and directed that the corporate authorities be allowed sixty days to make townsite entry of the land.

It also held that if the city of Aberdeen did not appeal from said decision, the reservation created by the decision of October 1, 1887, would become determined.

The city of Aberdeen did not appeal from said decision, but both McAllister and McChesney did, and their separate appeals bring the case here.

Since said appeals were transmitted here, to wit, on April 20, 1895, the mayor of the city of Aberdeen, as mayor, in pursuance of your said decision of January 15, 1895, applied to the local office to purchase said tract under sections 2387, 2388 and 2389, Revised Statutes of the United States. Accompanying said application is the certificate of said mayor that said tract was within the corporate limits of the city of Aberdeen, and was occupied for townsite purposes by one hundred or more persons. On the date it was made said application was rejected by the local office, because of the pending controversy, and on April 22, 1895, said mayor appealed to your office, which, without taking any action thereon, and by its letter "G" of May 1, 1895, transmitted said appeal and the papers accompanying it, to this Department for its information.

Since this case has been on appeal here and under consideration; the Department on or about June 5, 1895, through its proper officer, at the request of one of the opposing counsel in the case, who desired to examine the same, directed McChesney to file as part of the record in the case, the Porterfield warrants on which his application to locate was based. Without any sufficient excuse therefor he has refused to comply with that direction. An application to locate scrip is not complete unless the scrip on which it is based accompanies the application. It is aside from the question to urge that it has never been the practice to require the scrip to be filed in the record where the application to locate has been rejected and an appeal taken. There is neither practice nor precedent to warrant the withholding of the scrip where it is specifically called for by the Department, as in this instance. It is not necessary that the Department should designate the reasons why the filing of the scrip is required. They may be numerous, and many readily suggest themselves. The failure of McChesney to complete his application to locate by filing in the record the scrip upon which it is based, when called upon by the Department to do so, leaves the record without sufficient evidence to show that McChesney now has or ever had the qualifications necessary to enable him to locate said scrip. Your decision therefore, rejecting McChesney's application is affirmed, for the reasons therein stated, and the additional reason herein given.

Your decision rejecting the pre-emption filing of McAllister and the applications of the city of Aberdeen, is also affirmed. The application above noted, filed by the mayor of Aberdeen to enter said tract in trust for the townsite occupants of said tract, since your decision was rendered, is hereby returned to your office for appropriate action thereon.

Among the papers in the case is an application of the Chicago, Milwaukee and St. Paul Railway Company, for a modification of your office decision of January 15, 1895, in so far as it affects its alleged rights to twenty acres of said tract awarded it for depot quarters, under the act of March 3, 1875, by the Department on March 9, 1887. Said railroad company avers that it had no notice of the hearing of

May 10, 1894, and had no opportunity to protect its interests at that hearing.

That petition was transmitted here by your office letter "G" of April 13, 1895.

The twenty acres referred to by said railroad company consists of a strip of land four hundred feet off the whole east side of said quarter section. It was awarded to said railroad company for depot grounds, by the Department on March 9, 1887, under the provisions of the act of March 3, 1875.

The award of said lands, however, was expressly made subject to all valid existing rights of third parties.

In passing on the application filed by the mayor of Aberdeen, hereby returned for action, you will consider and pass upon the alleged rights of said railroad company in the premises.

APPLICATION FOR SURVEY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 7, 1895.

To United States Surveyors-General and Registers and Receivers of United States District Land Offices.

GENTLEMEN: The circular of this office dated June 24, 1885, relative to surveys under the provisions of section 2401 Revised Statutes of the United States, and the acceptance by receivers of public moneys of certificates issued for deposits made under the provisions of said section, is hereby revoked, and the following substituted therefor:

1. The provisions of law governing such surveys and the issue and application of certificates of deposit on account thereof, are sections 2401, 2402, and 2403, as amended by the act of August 20, 1894.

Section 2401.—(As amended by act of August 20, 1894.)

When the settlers in any township not mineral or reserved by the government, or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or when the owners or grantees of public lands of the United States, under any law thereof, desire a survey made of the same under the authority of the surveyor-general and shall file an application therefor in writing and shall deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto, without cost or claim for indemnity on the United States, it shall be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with law, to survey such township or such public lands owned by said grantees of the government, and make return thereof to the general and proper local land office. *Provided*, That no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.

Section 2402.—The deposit of moneys in a proper United States depository, under the provisions of the preceding section, shall be deemed an appropriation of the sum so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriation for the surveying service; but any excesses over and above the actual cost of the surveys, comprising all expenses incident thereto for which they were severally deposited, shall be repaid to the depositors respectively.

Section 2403.—(As amended by the act of August 20, 1894.)

Where settlers or owners or grantees of public lands make deposits in accordance with the provisions of section twenty-four hundred and one, as hereby amended, certificates shall be issued for such deposits which may be used by settlers in part payment for the lands settled upon by them, the survey of which is paid for out of such deposits, or said certificates may be assigned by indorsement and may be received by the government in payment for any public lands of the United States in the States where the surveys were made, entered or to be entered, under the laws thereof.

APPLICATIONS FOR SURVEYS.

2. The amended law authorizes applications for surveys by settlers, or by persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or by the owners or grantees of public lands of the United States under any law thereof.

SETTLERS' APPLICATIONS.

3. The law contemplates *bona fide* surveys upon *bona fide* applications by actual settlers. Settlers are persons who have attached themselves permanently to the soil. Nomadic persons and persons employed by others to make applications for surveys or to make alleged settlements for the purpose of acquiring a title to lands to be transferred to others are not settlers within the meaning of the law and are not lawful applicants under the provision allowing *settlers* to make deposits for public land surveys.

4. In the case of applications for surveys by settlers the body of such settlers in the township, the survey of which is desired, must join in the application. There must also be a sufficient number of settlers to show good faith and to indicate that the survey is honestly desired for the benefit of existing actual settlements as contemplated by the law.

5. Applications for surveys must be made in writing, and must designate, as nearly as practicable, the township to be surveyed, and state that the applicants are well acquainted with the character and condition of the land included in said township, and that the same is not mineral or reserved by the government. Such applications must also particularly describe the land sought to be surveyed, stating whether the same is cultivable, grazing, timber, desert, swamp, mountainous, rocky, &c., and the reasons why it is claimed to be non-mineral, and must state the number of settlers in the township, the character and duration of their inhabitancy of the land, the extent and value of their improvements, the uses made of the land, and the quantity under

cultivation. The situation of the township in respect to lines of public communication, and the progress of the settlement of the country should be described, and all facts and circumstances stated which will enable an intelligent judgment to be formed in respect to the propriety of making the survey applied for. These statements must be verified by affidavit, and applicants must also declare that their applications are made in good faith and not for the purpose of enabling a surveying contract to be obtained, nor at the instance or in the interest or for the benefit of any other person.

6. Townships within known mineral belts or known to contain mineral lands or lands reserved by the government are *not* surveyable under this system.

7. Surveys under the deposit system are authorized only where "the township so proposed to be surveyed *is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys.*" Under this provision of the law it will be held that only township exteriors and subdivisional lines are surveyable, and that the deposit system is not applicable to the survey of standard lines or bases.

8. Retracements, or the resurvey of lines previously surveyed, will not be deemed authorized under the deposit system.

9. Surveyors-general will critically examine all applications for survey, testing the accuracy and reliability of the statements made by their knowledge of persons and lands and the best information they can obtain. They will reject all applications not believed by them to be made in good faith, and upon truthful statements of fact.

10. When an application for survey is approved by the surveyor-general, he will transmit the same to this office, with the required proofs and his report upon the same, giving his reasons in full for the recommendation made. It is not believed that fictitious applications, or applications procured at the instance of surveyors or of operators in contract surveys, or applications designed to open unsettled townships to fraudulent entry can successfully be imposed upon vigilant and faithful officers. Surveyors-general will therefore be held to strict accountability for their recommendation of applications or contracts hereafter found to be fictitious, fraudulent, or speculative.

11. If the application is approved by this office it will be returned to the surveyor general with authority to furnish the necessary estimate to applicants, and, upon proper deposit being made, to enter into contract for the execution of the survey.

12. The surveyor-general will furnish applicants with two separate estimates, one for the field work and one for office expenses. He will estimate adequate sums, and the practice of requiring additional deposits to cover excess costs will be discontinued except when expressly authorized by this office.

13. Upon receiving such estimates, applicants may deposit in a proper United States depository (which should be in the land district in which the township to be surveyed is situated) to the credit of the Treasurer of the United States on account of surveying the public lands and expenses incident thereto, the sum so estimated as the total cost of the survey, including field and office work. If there be no public depository in the land district in which the lands are situated, the deposit may be made in an adjacent land district.

14. Surveyors-general will not, under any circumstances, accept, for the purpose of making the deposit moneys from applicants for surveys, either field or office work, but will instruct the applicants to deposit the amount in accordance with the instructions contained in preceding paragraph.

15. For convenience in the use and application of certificates, the deposit should be made in such sums as that no certificate shall bear a face value of more than two hundred dollars.

16. Applicants must be instructed fully as to the necessity of immediately transmitting the *original* certificate to the Secretary of the Treasury, the *duplicate* to the surveyor-general, and the retention of the *triplicate*.

17. When evidence of the required deposit is furnished in accordance with the foregoing regulations the surveyor-general will invite proposals for the survey by notice posted in his office for a period of thirty days, specifying the survey to be made, and stating that the contract will be let to the lowest responsible bidder (being a practical and reliable surveyor) at rates not exceeding those established by law for surveying the public lands. A copy of such notice will also be transmitted by the surveyor-general to the register and receiver of the land district in which the township to be surveyed is situated, and it shall be the duty of registers and receivers to post such notices conspicuously in their office.

18. The surveyor general will prepare a contract with the accepted bidder, and transmit the same to this office for approval in the usual manner.

19. Triplicate certificates of deposit are receivable from the settlers making the deposits in part payment for the lands settled upon by them, the surveying of which is paid for out of such deposits.

20. The triplicate certificates may be assigned by indorsement and when so assigned may be received in payment for any public lands of the United States entered or to be entered under the laws thereof in the States in which the lands surveyed for which the deposit was made are situated.

21. Such certificates hereafter issued will not be regarded as assignable or receivable until the township for the survey of which the deposit was made has been surveyed, and the plat thereof filed in the district land office.

22. Where the amount of a certificate or certificates is less than the value of the lands taken, the balance must be paid in cash.

23. Where the certificate is for an amount greater than the cost of the land, but is surrendered in full payment for such land, the receiver will indorse on the triplicate certificate the amount for which it is received, and will charge the United States with that amount only.

24. There is no provision of law authorizing the issue of duplicate certificates for certificates lost or destroyed.

EXCESS REPAYMENTS.

25. Where the amount of the deposit is greater than the cost of the survey, including field and office work, the excess is repayable upon an account to be stated by the surveyor-general.

26. The surveyor-general will in all cases be careful to express upon the register's township plat the amount deposited by each individual, the cost of survey in the field and office work, and the amount to be refunded in each case.

27. Before transmitting accounts for refunding excesses the 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 surveyor-general will require the depositor to surrender the triplicate certificate, and will transmit it to this office with the account.

28. No provision of law exists for refunding to other than the depositor, nor otherwise than as referred to in the preceding sections.

ASSIGNMENTS.

29. Certificates "may be assigned by indorsement." The indorsement required is that the person in whose name the deposit is made shall write his name on the back of the triplicate certificate.

30. When there are several parties to, or assignees of, one certificate, the register and receiver will make the proper indorsement on the triplicate certificate, showing the satisfaction of the pro rata share of each party interested. They will make the same notes on the register's certificate of purchase and the receiver's original and duplicate receipts.

31. When the entire amount of a certificate is not satisfied at the same time, the triplicate should be retained by the receiver until satisfied. But such certificate should as far as practicable be satisfied during the current quarter.

32. Certificates are not receivable in payment of fees and commissions chargeable by registers and receivers under section 2238 Revised Statutes of the United States.

REGISTERS' AND RECEIVERS' RETURNS.

33. In their monthly cash abstracts the register and receiver will designate the entries in which certificates of deposit are used and the balance paid in cash, if any, noting on the certificates of purchase and receipt the manner of payment. The receiver in his monthly account-current will debit the United States with the amount of such certificates, and in his quarterly accounts will specify each entry with these certificates, giving number, date, amount for which received, by whom and with whom the deposit was made, and debit the United States with the same.

34. The receiver must write across the face of each accepted certificate the date of its receipt in payment of land, the number of the entry, and description of the tracts sold.

35. Certificates received in payment for lands sold must be forwarded once a month to this office, with letter of transmittal and abstract. (Form 4-543.)

36. Surveyors-general are directed to instruct their deputies that they must designate in the field-notes and plats of their surveys the location of each and every settlement within a township surveyed, whether permanent in character or not, together with the names of such settlers and their improvements, if any.

37. When no settlers are found in a township, the field-notes of survey must expressly so state, and any omission to describe the settlements and improvements, or the absence of one or both in the field-notes and plat, will be deemed a sufficient cause to infer fraud and the accounts of the deputy will be suspended until such omission shall have been supplied. A suspension of the commission of the deputy will in the mean time take place, and all the facts will be reported to this office for consideration and action.

38. In every case of a contract heretofore or hereafter approved which the surveyor-general has reason to believe was fraudulently procured, such contracts and the accounts thereunder must be immediately suspended and the facts reported to this office.

CERTIFICATES ISSUED PRIOR TO AUGUST 20, 1894.

39. Receivers of public moneys in accepting in payment for public lands, certificates issued for deposits made under the provisions of section 2401 (prior to the amendments of said section by the act of August 20, 1894), are guided by the following instructions:

40. The triplicate certificates representing such deposits, are receivable from the settlers making the deposits in part payment for their lands entered under the pre-emption and homestead laws and situated in the township the surveying of which was paid for out of such deposits.

41. The said triplicate certificates may be assigned by indorsements and when so assigned be received in payment for lands "entered by settlers under the pre-emption and homestead laws" of the United States in accordance with the provisions contained in the following paragraphs.

42. Triplicate certificates issued prior to the act of March 3, 1879, can be used only in payment for lands situated in the township the surveying of which was paid for out of such deposits.

43. Triplicate certificates issued subsequent to the act of March 3, 1879, and prior to the act of August 7, 1882, can be used in payment for lands in any land district.

44. Triplicate certificates issued on and after August 7, 1882, and prior to August 20, 1894, can be used in payment for lands only in the land district in which the surveyed township is situated, except when issued for additional deposits upon contracts entered into prior to August 7, 1882.

45. Triplicate certificates issued subsequent to the act of August 20, 1894, for additional deposits to cover costs of surveys under contracts entered into prior to August 20, 1894, can be used only in payment for lands "entered by settlers under the pre-emption and homestead laws" of the United States, and in conformity to existing law at the date such contract was made.

COAL CLAIMANT'S APPLICATIONS.

In addition to the rights of settlers, referred to in the foregoing portions of this circular, sections 2401, 2402, and 2403 U. S. R. S., as amended by the act of August 20, 1894, embrace provisions in favor of "persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof."

The coal land laws contained in sections 2347 to 2352 U. S. R. S., provide methods by which persons properly qualified may become lawfully possessed of coal lands even before the survey of the lands, and be entitled to enter the same after survey. For particular information in regard thereto, reference is made to Departmental circular of July 31, 1882, entitled "Coal Land Laws and Regulations Thereunder." Such parties, in cases where the tracts of which they are lawfully possessed are still unsurveyed, may, under said sections 2401, 2402, and 2403, as amended by act of August 20, 1894, apply to the surveyor general for the surveying district in which the lands are included, for a survey of the township or townships including the land according to the provisions of said sections. Such an application must be accompanied by the affidavit of the applicant or applicants substantially as prescribed for declaratory statements on page 7 of the said circular of July 31, 1882, corroborated by the testimony of two or more witnesses, in which the qualifications of the applicants, the character and location of the land, indicating the township or townships in which it is included as nearly as practicable, and other essential facts must be so

set forth as to satisfy the surveyor general that the case comes properly within the provisions of the law as above given. He will thereupon, if he approves the application, transmit the same to this office, with the required proofs and his report. Subsequent proceedings will be governed by the regulations as hereinbefore given under the head of "Settlers' Applications."

OWNERS OR GRANTEE'S APPLICATIONS.

The same rights accorded to settlers and to persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof are extended also to "the owners or grantees of public lands of the United States under any law thereof," and substantially the same instructions will apply to the last mentioned class of cases, as those above expressed with regard to the other classes of cases. The applicants must produce with their applications proof of their ownership of the land to consist of their own affidavits, corroborated by witnesses, and such other proof as may be available to satisfy the surveyor general of the essential facts, including a showing of the location of the land, in what township or townships situated, as nearly as practicable, the statute making the grant, or other source of title, as well as the identity of the applicants, with the true owners or grantees.

The surveyor general, if he approve the application, will transmit the same to this office, with the proofs and his report, as provided for in the other classes of cases. In regard to subsequent proceedings, the instructions given under the head of "Settlers' Applications" will generally apply.

S. W. LAMOREUX,
Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

OKLAHOMA TOWN LOTS—SETTLEMENT—OCCUPANCY.

L. B. SHAPLAND ET AL.

A portable business stand established in the street in front of a town lot, is not settlement upon, or occupancy of said lot.

Persons entering the territory of Oklahoma prior to the time fixed therefor are disqualified as applicants for town lots; and the improvement, or occupancy of such a person, or a certificate of right issued to him, invests him with no right to a town lot.

The possession and occupancy of the back part of a town lot, entitles the occupant to a deed for the whole lot, in the absence of any qualified prior occupant of said lot.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 8, 1895. (E. E. W.)

STATEMENT.—In this case L. B. Shapland, W. B. Richmond and John F. Way are adverse applicants for deed to lot 3, of block 55, in

Guthrie, Oklahoma, and the town has intervened and is contending that neither of the parties is entitled to deed, and that the lot should be awarded to the municipal government.

The townsite was settled on the day of the opening, April 22, 1889, and surveyed on the 8th of May. Before the survey some of the settlers understood that the lots of block 55 would front north on Oklahoma avenue, but by the survey they were fronted east on Second street.

W. H. Jenkins was one of those who thought the lots would front north, and at two o'clock in the afternoon of the opening day he staked off a lot near the west side of the block, fronting thirty feet on Oklahoma avenue and running back one hundred and forty feet. He occupied this lot until the next day, April 23, and then relinquished his claim to the claimant, L. B. Shapland, who immediately inclosed the rear end, and erected a store on the front, and has continued to occupy it for business purposes ever since. As the block was surveyed this lot lies at right angles across lots 1, 2, 3, 4 and 5, and part of the way across lot 6, a little back of their center.

It is upon the strength of this personal possession and occupancy of this lot fronting north, and a certificate of right issued by the provisional town authorities to Jenkins and assigned to him, that Shapland claims deed.

The claimant, John F. Way, claims through purchase from R. T. Morgan, who entered the townsite the day before the opening, in violation of law and the President's proclamation, and before 12 o'clock of the opening day took possession of the lot 3 as surveyed.

Morgan procured a certificate of right from the provisional town authorities, and continued to occupy the lot until June 7, 1889, when he sold his pretended claim to Way, S. T. Marsh and Van Martin, for \$1500. The testimony shows that these three persons were equally interested in the lot, though the quit-claim deed was to Way alone. Morgan had previously made about \$300 worth of improvements on the lot, and he continued to occupy it, though it is claimed in the testimony that he did so as Way's tenant, and that he paid him \$35 per month rent for a room only eight by twenty feet in size. Shortly afterwards Martin sold his interest to Mrs. Morgan for \$500, but no deed or other instrument of writing was executed. Way has never occupied the lot in person, but claims to have put \$200 worth of improvements on it in addition to the \$300 that Morgan had made, and that Morgan has continued in occupancy as his tenant. This is the basis of his claim.

Richmond's claim is far less tangible. He claims to have had a stock of stationery and guns upon an ordinary canvas sleeping cot, which he set down in the street near the front of lot 3, as a business establishment, in the afternoon of April 23d. He continued in this sort of business for several days, moving his cot short distances as the crowd shifted about in the vicinity. At night he put his cot in a tent across

the street from the lot, and slept at a boarding house. He claims, however, to have driven a few stakes on the lot, but the location of these stakes in the testimony is quite indefinite. When the survey was made he was doing business in the street in front of lot 3, and was required by the police to move. It also appears that he attempted to take possession of the lot and was thrown off.

The townsite board was unanimously of opinion that Richmond had no claim; that Morgan was disqualified by his entrance into the Territory prior to 12 o'clock noon on the opening day, and that his sale to Way, Marsh and Martin was not made in good faith. Two members decided that neither of the parties was entitled to deed, and one member held that Shapland was entitled to so much of lot 3 as was covered by the lot staked out by him fronting north on Oklahoma avenue—that is, a block of lot 3, near the rear end, twenty-five by thirty feet in area.

On appeal, the General Land Office reversed the townsite board, and held that Shapland was entitled to lot 3 as surveyed, and then Way appealed to the Department.

OPINION.—A portable business stand established in the street in front of a lot is not a settlement upon or occupancy of the lot, and in this case Richmond's hap-hazard, unsubstantial staking of the lot, and carrying on of business in the day time on a cot in the midst of the crowd in the street in front of it, and sleeping elsewhere at night, was not sufficient to entitle him to deed, nor to give him any interest in it whatever. He was not in possession of the lot, nor a settler upon, or occupier thereof, but a mere street vender.

By the act of Congress of March 2, 1889, all persons who invaded the Oklahoma country prior to 12 o'clock, noon, April 22, 1889, were disqualified to enter town lots, and in this case neither the improvement and actual occupancy by Morgan, nor the certificate of right issued to him by the town clerk, invested him with any right of the lot; and whether the transaction between him and Way was *bona fide*, or collusive and fraudulent, as from the testimony it appears to have been, it conveyed absolutely nothing to Way. And he is not entitled to anything on the strength of the improvements made after the deal with Morgan, whatever its character, because that was subsequent to Shapland's improvement and occupancy of the lot, and in violation of his rights. Shapland's right attached at the moment of Jenkins' settlement, regardless of the unlawful prior occupancy of the front end of the lot by Morgan.

Shapland's application was for the lot which he staked with front to the north on Oklahoma avenue. The Commissioner of the General Land Office denied the application in that form, but held that his improvement and occupancy of the part of lot 3 embraced therein, being prior to that of any other qualified claimant, entitled him to a deed to the whole of it. That was a correct decision. The law does not prescribe that settlement and improvement shall be made, and

occupancy established and maintained, on any particular part of a lot, and in the absence of any qualified prior rightful occupant of the front part of lot 3, Shapland's possession and occupancy of the back part was possession and occupancy of the whole of it, and entitles him to a deed to the whole of it.

And it is immaterial that Shapland, in obvious ignorance of his rights, applied for a deed that he was not entitled to, and failed to apply for the one to which he had a clear right. His application may be considered as amended, and the record showing that he is now dead, the townsite board will be directed to execute deed to his heirs.

With this modification, the decision of the Commissioner of the General Land Office is affirmed.

ARMED OCCUPATION ACT—PERMIT TO SETTLE.

HAMILTON'S HEIRS *v.* FLORIDA CENTRAL AND PENINSULAR R. R. CO.

A permit to settle on a specified tract is a condition precedent to obtaining title thereto under the act of August 4, 1842.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (G. C. R.)

The Heirs of Mary E. J. Hamilton, by attorney B. F. Hampton, have filed an application for a writ of certiorari directing your office to certify the record in the case involving the application of the deceased, made July 29, 1843, for a permit to settle on SW. $\frac{1}{4}$ of Sec. 14, T. 15 S., R. 22 E., Gainesville, Florida, under the act of August 4, 1842 (5 Stat., 502), known as the "Armed Occupation Act."

A copy of your office decision "F" of April 25, 1893, is filed with the application, from which it appears that the deceased (Mrs. Hamilton) never was granted a permit from the register of the land office to make settlement on the land as required by the first section of said act. Her application was rejected when made (1843), because it then appeared that permits had already been issued in excess of the amount authorized by the act (200,000 acres—Sec. 7). It being the opinion of your office at that time that many permits were rendered void because of failures of permittees to make settlement according to section 3 of the act, it was intimated, in a letter addressed to Hon. Moses Levy (November 3, 1843), that permits might be granted to the full amount of lands authorized by the act (*supra*), if it should be found that a quantity of lands still remains liable to be located, when illegal locations were eliminated. Instructions were accordingly given (November 3, 1843), to withhold the land claimed by Mrs. Hamilton from sale until the same "had been fully reported by them and acted on by the Department."

It further appears that upon a subsequent investigation and computation of the quantity of land taken under the act, it was found that

after all the legal and regular locations had been satisfied and illegal ones rejected, a quantity of land remained more than sufficient to satisfy the claim of Mrs. Hamilton.

But on August 20, 1845, your office held in the case of Gaskins and others, including Mrs. Hamilton, that parties so situated would have to seek relief through Congress, inasmuch as the power of the executive had been exhausted by permits already granted.

The tract in question was afterwards treated as public lands; the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section was entered by one McPherson, August 3, 1867, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the section was entered by one Small, August 3, 1867, and both these entries were canceled by your office letter "C" of July 15, 1867, for failure to make proof within the statutory period.

Under date January 18, 1882, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section was selected by the Atlantic, Gulf and West India Transit Company (now Florida, Central and Peninsular R. R. Co.), and on March 29, 1882, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section was selected by the same company.

It thus appears that your office long since not only rejected Mrs. Hamilton's claim, but thereafter treated the land as public lands of the United States.

That which the act made as a condition precedent to obtaining lands, namely, a permit from the register, was never obtained, but the application therefor was denied.

It is unnecessary to discuss the right of the railroad company to the lands; it sufficiently appears from the copy of your office decision, transmitted with this application, that your office did not err in rejecting the application, and therefore the writ prayed for, even if allowed, could not be of ultimate benefit to the applicant.

The application is therefore denied.

PAYMENT—UNITED STATES COMMISSIONER.

W. J. POTTS.

The payment of the purchase price of a tract of land to a United States Commissioner, by one who executes his final proof before such officer, is not authorized by law, and is at the risk of the entryman.

Acting Secretary Sims to William Clancy, Chicago, Illinois, August 9, 1895. (W. M. B.)

I have considered the matter submitted to the Secretary of the Interior by your several letters and papers transmitted therewith, respecting the action and conduct of John S. Noble, United States Commissioner for South Dakota, in receiving, on September 10, 1894, from W. J. Potts (who submitted final proof before said Noble upon an entry made for a

certain tract of land situate in the Watertown land district, in said State) the sum of \$408.00, purchase money therefor, for the purpose of turning over the same to the receiver of the land office of said district, it being made to appear that Noble has embezzled the amount placed in his hands for the object stated; the said Noble also having received the sum of \$12.50 for and on account of publication and other fees, which it appears from the showing made has never been accounted for by him.

You request to be informed what jurisdiction this Department has over the matter, and if any, to have pointed out to you Potts' remedy under the law.

The law authorizes, under certain circumstances, the making of final proof before a commissioner of the United States court, or the clerk of any court of record, but the rule has been laid down and well established that "the payment of the purchase price of a commuted homestead entry to the clerk of a court, to be forwarded with the final proof, is not authorized by statute, and is at the risk of the claimant." *Vide* case of Bledsoe v. Harris (15 L. D., 64).

In the statement of the case contained in your letter of December 11, 1894, the precise character of the entry made by Mr. Potts does not appear, but the principle enunciated in the above cited case, nevertheless, applies to purchase money for land obtained by or through any kind of an entry under the public land laws, and the government is no more responsible for the wrongful act of the commissioner of a federal court in respect thereto than it is for such act of the clerk of such court, or the clerk of a State court of record.

Although Commissioner Noble was authorized by the proper officers to take the proof in the case, still he had no right to demand or to receive the funds in question, further than his own fees in the case, and when Potts paid him the money he made said commissioner his own agent for the purpose of turning the money over to the proper government officer, to whom alone it was properly payable, the commissioner not being authorized by law, or any authority from this Department, to act as the government's agent for such purpose.

Such recourse, as the facts and law may warrant, can be had against Noble before a proper tribunal.

DESERT LANDS—SELECTION BY STATES.

INSTRUCTIONS.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 10, 1895. (F. W. C.)

I am in receipt of your office letter of July 30, 1895, proposing a certain change in the regulations heretofore issued concerning the selection of desert lands by certain states, under the act of Congress

approved August 18, 1894 (38 Stat., 372-422), which change, you state, is suggested by matters brought out in consultation with the state engineers of Wyoming and Idaho.

Under the seventh paragraph of Instructions, approved November 22, 1894 (20 L. D., 442), the local officers are required to carefully and critically examine all lists of lands selected by the State under this act, and when so examined and found correct they are required to post the selection in ink on the tract-books.

The purpose of the proposed change in the instructions is, as stated in your letter, to explain the effect of the requirements of the circular, so that all may understand that the filing of the map, plat, and list of lands will make a temporary segregation of the lands.

By the proposed change the following is added to paragraph one:

Upon the filing of such map and accompanying plan of irrigation, the lands embraced therein will be withheld from other disposition until final action is had thereon by the Secretary of the Interior. If such final action be a disapproval of the map and plan, the lands selected shall, without further order, be subject to disposition as if such reservation had never been made; and the local officers will make the appropriate notations on the tract books and plat books, opposite those previously made, in accordance with the requirements of paragraph 7.

From a careful review of the matter, I can see no objection to the proposed change and the same is accordingly approved and the circular modified accordingly.

CAGLE *v.* MENDENHALL.

Motion for review of departmental decision of May 16, 1895, 20 L. D., 446, denied by Acting Secretary Sims, August 8, 1895.

PRACTICE—APPEAL—CERTIORARI—APPLICATION.

MEYERS ET AL. *v.* BELL'S HEIRS.

A writ of certiorari will not be denied on the ground that the applicant did not seek relief by appeal, where the General Land Office erroneously denies the right of appeal before an attempt to exercise the same is made.

A writ of certiorari will not issue on behalf of an applicant that is not asserting any specific right under the public land laws, and whose statements, if true, show that he is precluded from asserting any such right hereafter.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (G. C. R.)

Your office letter "G" of June 14, 1895, transmits the petition of Joel B. Meyers, Philander W. Knapp, E. D. Hewett and Stephen R. Crews, asking that the proceedings in the case of said petitioners *v.* Heirs of Louis Bell, involving lot 8, Sec. 24, T. 29 S., R. 18 E., Gainesville, Florida, be suspended and the case transmitted to this Department for action, etc.

The land in controversy is a portion of the abandoned Fort Brooke military reservation, and was the subject of a decision by this Depart-

ment, July 24, 1894 (19 L. D., 48), in the case of Mather *et al.* v. Hackley's Heirs (on review). Referring to the claim of the heirs of Bell to the lot in question, said departmental decision reads as follows:

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

Again, the decision reads: "It will be observed that I have recognized the settlement rights of Bell and others," etc.

With this petition is also transmitted a copy of your office decision of May 1, 1895, from which it appears that in pursuance of said departmental decision Eliza A. Bell, one of the heirs, submitted final proof (December 11, 1894,) before the clerk of the circuit court for Hillsboro county, Florida. The petitioners herein appeared and protested against the acceptance of the proof, on the ground that the same was not made within the statutory period; that the law had not been complied with in the matter of residence, improvement and cultivation; that the settlement was made for speculative purposes, and, finally, that protestants had been holding portions of said lot adversely to Bell, from one-half to five years each, and that a part of the tract had been used and occupied for five years for purposes of trade and business, and is desirable only for subdivision into building sites.

The register and receiver held that the questions raised by the protest were *res judicata*, and no valid adverse claim to the land exists, and, therefore, recommended the dismissal of the protests and the allowance of the final proof.

Your office found that portions of lot 8 were occupied by protestants, but not with the consent of Louis Bell or his heirs, and that this occupancy was subsequent to Bell's settlement; that the lot is worth at least \$1,000 per acre for subdivisions into building sites, and the improvements placed thereon amount to from three hundred to five hundred dollars. Your office also held that the right of the heirs of Bell to the lot, and the questions raised as to the value of the land for trade and business purposes had been settled by this Department in the decision quoted, and were therefore *res judicata*; that the final proof shows satisfactory compliance with the pre-emption law; that the protestants show no interest, present or prospective, in the land in controversy, and have no right of appeal, citing Cyr *et al.* v. Fogarty, 13 L. D., 673, and Susie B. Moore *et al.*, 17 L. D., 298. Your office accordingly dismissed

the appeal, and further held that "no appeal from this decision will be entertained," but advised them of their rights under Practice Rules 83, 84 and 85.

No appeal was taken from your office decision, for the manifest reason that protestants were advised that the same would not be entertained. As a rule, a petition for certiorari will not be entertained, if the applicant has not sought relief by appeal. *Smith v. Noble*, 11 L. D., 558. But where, as in this case, your office erroneously denies the right of appeal before the attempt to exercise that right has been made (*Sanders v. Northern Pacific R. R. Co.*, 15 L. D., 187), the fact that no appeal has been taken will not of itself be allowed to debar the writ prayed for.

The findings of your office, to the effect that Bell and his heirs were the prior settlers on the lot, and that protestants occupied the same without the consent of Bell or his heirs, are not denied in the petition. Petitioners fail to state what interest they have in the land other than that they occupy the same. They fail to state in what way they would be benefited should your office decision be reversed. Indeed, if the matters set up in the petition are true, namely, that "a part of said tract has been used and occupied for five years or more for trade and business," the petitioners could not enter the land, or obtain any rights thereto, except under the townsite laws, and no application of that kind is before me. Upon their own showing, therefore, it is seen that the applicants are not directly claiming any rights to the land under any public land laws, and their statements preclude them from asserting, as individuals, any rights hereafter. Without showing some such rights, either present or prospective, or indicating in some way how they may become legally invested with such rights, they are not in a position to have your office decision reviewed under the writ prayed for.

Again, the petition fails to state in what way petitioners have been injured by the action heretofore taken in the case, and under such circumstances a writ of certiorari will not issue. *Jhilson P. Cummins*, 20 L. D., 130.

The petition is denied.

AGRICULTURAL ENTRY—DISCOVERY OF MINERAL.

ARTHUR *v.* EARLE.

After the purchase of a tract of land, under a commuted homestead entry, and the issuance of a final certificate therefor, a discovery of coal on such land will not defeat the issuance of patent.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (J. I. P.)

By your office letter "M" of May 22, 1894, you transmitted to this Department the appeal of John Arthur from your office decision of

February 1, 1894, dismissing Arthur's contest against commuted cash entry No. 7414 made by Edward P. Earle June 29, 1892, for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 27, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, all in T. 19 S., R. 7 W., Pueblo, Colorado, land district.

The facts are, that Earle, on April 3, 1891, made homestead entry No. 6778 for the tracts above described, alleging settlement thereon March 16, 1891; after due notice, final commutation proof was submitted before the clerk of the district court of Fremont county, Colorado, on June 21, 1892, cash entry No. 7414 being allowed June 29, 1892.

August 13, 1892, Arthur filed a corroborated protest against the issuance of patent upon said cash entry, alleging that the ground covered thereby is more valuable for deposits of coal than for agricultural purposes, and that the agricultural claimant had not complied with the law in the matter of residence upon his claim.

Your office, by letter "H" of August 26, 1892, directed that a hearing be had on said protest, which was finally had before the local office December 21, 1892, both parties appearing and submitting testimony.

July 11, 1893, the local office found in favor of Earle, and recommended the dismissal of the contest; and your office in the decision appealed from affirmed the decision of the local office.

It is found by the evidence, so far as the allegation that the tracts in question are more valuable for deposits of coal than for agricultural purposes are concerned, that some deposits of coal of no commercial value were discovered on the land by the protestant in August, 1892, after the date of Earle's final entry and the issuance of final certificate to him; that two or three shafts were sunk on said tract, and that small veins of coal were found, which are not shown to have been of any commercial value.

At any rate, the discovery, having been made after the purchase of said land and the issuance of final certificate to Earle, would not defeat the issuance of patent; even though said land should have been shown to be more valuable for coal than for agricultural purposes, as the conditions existing at the date of final entry determine whether the land should be excluded from homestead entry on account of its alleged mineral character. (See *Rea et al. v. Stephenson*, 15 L. D., 37; and *Jones v. Driver*, 15 L. D., 514.)

It is shown that Earle had no knowledge whatever at the date of final entry, or prior thereto, that there were any coal deposits of any character on said tract, and that protestant has completely failed to show that the tract was more valuable for its coal than for agricultural purposes. The evidence shows that Earle's homestead entry was made in good faith, and that his residence, cultivation and improvement of said tract were of such a character as to indicate that he had made said entry for the purpose of obtaining a home for himself and family.

Your office decision is therefore affirmed.

PRACTICE—MOTION FOR REHEARING—AMENDMENT.

VILE *v.* MINOR.

A rehearing can not be secured through an amendment of the contest affidavit that essentially changes the nature of the charge.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (J. L. McC.)

Edwin Vile has applied for an order directing your office to certify to the Department the record in the case of said Vile against Charles E. Minor's homestead entry for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 21 N., R. 1 E., Perry land district, Oklahoma.

From the record before me it appears that Vile brought contest against Minor, alleging that he (Vile) was the prior settler. On this allegation a hearing was had, as the result of which the local officers dismissed the contest. The contestant appealed, and your office (on November 24, 1894,) affirmed their decision. On January 30, 1895, the local officers transmitted to your office the contestant's motion for a rehearing, on the ground of newly discovered evidence. He alleged under oath that, since the trial of the case, he had learned that Minor entered the Cherokee Outlet about twenty minutes before noon of September 16, 1893—thus violating the President's proclamation and the law. Affidavits were submitted in support of the motion. Your office, on March 14, 1895, denied the motion, saying:

The contest was prosecuted on the ground of priority of settlement. The matter set up in the motion by Vile constitutes an entirely different cause of action. Vile may possibly institute another contest on the ground of Minor's disqualification by reason of his presence within the country during the prohibited period; but a rehearing can not be granted on that ground. The motion is overruled.

From the above decision Vile attempted to appeal to the Department; but your office refused to recognize his appeal, "for the reason" (he alleges) "that there is no appeal from decisions of this kind." The applicant has not furnished a copy of the decision of which he makes this ambiguous summary; and it is left uncertain whether your office held that he could not appeal from the decision because it denied a motion for a rehearing, or because it held that the so-called amendment constituted an entirely different cause of action. For this failure to furnish a copy of said decision, the application for certiorari might very properly be denied; but under the circumstances this failure will be disregarded. The vital issue in the case is whether an allegation that the defendant entered the Territory prior to the hour prescribed by the law and the proclamation of the President could properly be allowed as an amendment to a contest affidavit alleging that the contestant was the prior settler. It is clear that the new allegation changes essentially the nature of the charge; and that therefore your office was correct in its ruling.

It thus appearing that in case the record were to be transmitted the Department would affirm your decision, it would be needless to direct its transmittal. The application for certiorari is therefore denied.

RELINQUISHMENT—ATTORNEY—APPEAL.

NOVAK ET AL. *v.* CHAMBERLAIN.

The relinquishment of a claim during the pendency of a contest terminates the interest of the claimant therein; and the attorney of such party is thereafter without authority to take an appeal in said case.

A stranger to the record is not entitled to complain of a decision, or be heard on appeal before the Department.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (G. C. R.)

I have considered the petition for certiorari filed by J. D. MacDonell and Frederick N. Weightnovel, asking that the proceedings in the case of Anton Novak *v.* Enoch B. Chamberlain be certified to this Department.

From a copy of your office decision of May 1, 1895, transmitted with and made part of this petition, it appears that the land in controversy is a portion of the abandoned military reservation of Fort Brooke, and is described as lot 11, Sec. 19, T. 29 S., R. 19 E., Gainesville, Florida.

In the case of Mather *et al. v.* Hackley's Heirs (on review), 19 L. D., 48, this Department decided that E. B. Chamberlain settled on said tract July 7, 1883, and that his claim for the lot will be allowed "should there be no other legal obstacle in the way of his perfecting the same." Under this order Chamberlain made homestead entry thereof and submitted final proof thereon November 20, 1894, on which date Anton Novak appeared and filed a protest, alleging improper publication of notice, failure to make proof within proper time, failure to comply with the law as to residence and cultivation, and that the land was entered for speculative purposes.

Testimony was taken, and on February 4, 1895, the register and receiver recommended that the protest be dismissed.

On February 27, 1895, Novak filed a relinquishment of his claim to the land, and requested that his protest be dismissed.

On March 4, thereafter, Smith and Peeples filed an appeal on behalf of Novak, and on the 14th day of that month they filed an appeal in behalf of J. D. MacDonell and Frederick Weightnovel.

Your office, by decision dated May 1, 1895, held that Novak concluded his right to prosecute his case by reason of said relinquishment, and that his attorneys had no right to appeal independently of their client. The appeal was therefore dismissed, the case of Lauritson *v.* Carlson, 15 L. D., 307, being cited as the authority for that action. Your office also held that MacDonell and Weightnovel were never par-

ties to the proceedings, appearing only as witnesses; that they show no interest in the land, either present or prospective, and therefore have no right of appeal, citing *Cyr et al. v. Fogarty*, 13 L. D., 673, *Susie B. Moore*, 17 L. D., 298, and *Abraham v. Cammon*, 11 L. D., 499.

The attorneys for appellants were duly notified of their rights under Practice Rules 83, 84 and 85, and a judgment was rendered upon the record, stating that: "The publication of notice by Chamberlain and the final proof have been found satisfactory."

It is insisted that the appeals taken in the name of Novak and the petitioners should not have been dismissed; also error in deciding that no appeal would be entertained until the parties should undertake to exercise that right.

It is not denied that Novak voluntarily relinquished his claim to the land and dismissed his protest; he undoubtedly had the right to do this, and when done, his attorneys were released from all further duties in his behalf; the appeal taken by his attorneys after he had relinquished all claims to the land and dismissed his protest was without authority. While under Practice Rule 104 attorneys are recognized as "fully controlling the cases of their respective clients," still, when clients of their own motion elect to discontinue proceedings then commenced, it is not in the power of attorneys, who are the mere agents of their clients, to prevent such action.

The petitioners herein were not parties litigant, but only witnesses for the protestant. They may have been interested in the case; they may have paid the expenses of taking testimony on Novak's protest; they may have employed counsel, still the record is silent as to their interests. They made no protest, and for all that appears in the record, they were disinterested in the results. In such case they can not be heard to complain of the decision reached by the local officers, being strangers to the record. *Henry D. Emerson*, 20 L. D., 287.

An application for a writ of certiorari will be denied, if it appears that the applicant has not sought relief by appeal (*Smith v. Noble*, 11 L. D., 558).

In the case at bar, appeals were taken, but were dismissed by your office. This was error. *Price v. Schaub*, 16 L. D., 125.

Although the appeal should have been transmitted, yet it does not appear from anything disclosed by the petition that your office erred on the merits of the controversy. Novak did not appeal from the decision of the register and receiver; his attorneys, as above shown, had no right to appeal after he relinquished; the petitioners herein did not occupy the status of litigants, and as strangers to the record their appeal could not have been entertained, and, finally, your office held that Chamberlain's final proof was satisfactory, and that judgment is not attacked by this petition, or in any manner shown to be erroneous on the merits of the controversy. *Whiteford v. Johnson*, 14 L. D., 67.

The petition is denied.

SETTLEMENT RIGHT—RESIDENCE.

McINNES ET AL. v. COTTER.

One who claims the right to make a homestead entry on account of priority of settlement must show that the alleged settlement was followed by the establishment and maintenance of residence.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 11, T. 47 N., R. 38 W., Marquette land district, Michigan.

The record shows that on May 1, 1889, Donald McInnes and John C. McAlpine made application to enter under the homestead law the above described tract, and at the same time Robert Cotter made like application for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, same section, township and range.

These applications being simultaneous in time, a hearing was ordered to pass upon the priorities of settlement, for though those settlements were made at a time when the land was reserved, and consequently could give the settler no rights as against the federal government, the first settler would have superior equities over the others.

April 9, 1890, the local officers rendered their decision finding that Cotter was the prior settler and recommending that he be allowed to enter the land applied for by him, and that the remainder of the land in controversy be awarded to McInnes. February 12, 1892, your office decision was rendered affirming the finding of the local office, and upon further appeal, December 19, following (15 L. D., 583), the Department affirmed the judgment below.

July 7, 1893, motions for review and rehearing having been filed by McAlpine and McInnes, the Department ordered a rehearing in the case.

The new evidence having been introduced on March 2, 1894, the local officers rendered their decision recommending that the tract involved be awarded McAlpine, and on September 26, 1894, your office decision affirmed the recommendation.

The various parties to this cause allege settlement in the fall of 1887, but it is not deemed necessary to pass upon the sufficiency of the proof of either settlement or residence of the claimant, in view of what the evidence shows to have been the facts at the time of the second hearing in 1893. At that time it appears that McAlpine was residing on the land and had been ever since the commencement of his residence in the spring of 1889; that he had a house and some two acres of land cleared and cultivated. McInnes moved away from the land with his family in the fall of 1889, they having gone upon the land to live in the spring of the same year. During the summer of 1891 his house was burned and has not since been rebuilt, and his family has not lived

upon the land since leaving it in 1839, nor has the claimant himself done anything more than to occasionally visit the land. He frankly states that he was waiting to ascertain whether the land would belong to him or some one else.

Robert Cotter, on August 18, 1894, relinquished all claim to the land in contest, and on the same day made application for repayment of the purchase money paid by him. Though these papers were in the record at the time of your office decision, no notice was taken of them. Counsel for McAlpine admit that Cotter appealed from your decision, but the record shows that such is not the case.

It is maintained by counsel for McInnes that your office decision was in error in considering this case covered by that of Hall *et al. v. Stone* (16 L. D., 199), where it was held, *inter alia* (syllabus):

A homesteader who claims priority of right by virtue of an alleged settlement must comply with the settlement laws, and can not defer the establishment and maintenance of residence until the allowance of his application to enter.

It is maintained that as no entry had been allowed, McInnes was not compelled to keep up residence on the land pending such allowance. This position is not well taken. He must stand either on his application to enter, or upon his settlement. He can gain no superior rights by his application, inasmuch as it was made simultaneously with those of Cotter and McAlpine, and the only ground upon which he can stand being that of prior settlement, it became incumbent upon him, in order to present such a case as would lead to the allowance of his entry, to show not only prior settlement, as settlement in itself confers no rights to any one, but continuous residence. This he has failed to do. It is true that he left the land for a good and satisfactory reason—the illness of his daughter and the necessity of medical attendance—but she was well and had been for two years preceding the second hearing, and his continued absence from the land was without valid reason.

For the reasons given the decision appealed from is affirmed and the application of McAlpine will be allowed.

OKLAHOMA TOWN LOT—CITIZENSHIP—OCCUPANCY.

KELSO *v.* JALONICK.

In the matter of citizenship, as an element of qualification to own and settle upon a town lot in Oklahoma, any citizen of the United States is so qualified.

The occupancy of a town lot may be maintained through the possession and actual occupancy of a tenant.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (C. J. W.)

On June 1, 1892, Isaac Jalonick filed his application before townsite board No. 4, for a deed to lot No. 6, block 81, town of El Reno.

On June 2, 1892, James E. Kelso filed his application for a deed to said lot.

The board fixed upon October 19, 1892, for hearing the contest, and on that day the case was continued by consent to October 25, 1892, at which time it was again continued to November 22, 1892, when the parties and witnesses appeared and submitted their testimony, and on December 3, 1892, said board decided said contest in favor of Jalonick.

On December 12, 1892; Kelso appealed from said decision to your office.

On February 13, 1895, your office passed upon said case, affirming the decision of the board.

On April 16, 1895, Kelso appealed from your office decision and I have the same now before me. Of the grounds of error set forth in said appeal, the following only need be considered:

1st. That it was error to hold that an occupant of a town lot need not be a citizen of the Territory.

2nd. In holding that Kelso was Jalonick's tenant as to the lot or that he was holding anything but the building as tenant.

3rd. In holding in effect that the rule that the tenant cannot dispute his landlord's title, could neutralize the operation of the decision of the Department cancelling Foreman's entry, from whom it is alleged Jalonick derived title.

The other errors specified are mere elaborations of these propositions.

The errors complained of will be considered in the order stated, but before doing so, a summary of the evidence on which your office decision rests will be given.

It appears from the record that one Longfellow was the first occupant of the lot; that he derived title from Foreman, whose entry has since been canceled; that he made some improvements and in June, 1889, sold out to Jalonick, who made further improvements upon it, and leased to other parties who held under him until the fall of 1891. At that time Kelso was occupying the building on lot 7, of the same block as a tenant of Jalonick and using the building as a store room.

Kelso's business was considerable and he erected a building at the rear of said store, which he used as a warehouse. Jalonick desiring to erect a brick building on lot 7, entered into an agreement with Kelso that he (Jalonick) would move the building from lot 7, onto lot 6, and that Kelso could continue business in them at a stipulated rental to be paid monthly in advance.

Jalonick proceeded to remove the store house on lot 7 to lot 6, and with it the warehouse which Kelso had built on lot 7, which he attached to the store. On the 20th of January, 1892, the contract as to terms of occupancy was reduced to writing and signed by both parties; Jalonick leasing to Kelso for the space of twelve months and Kelso covenanting to pay thirty dollars per month, in advance, for the use of the lot and building, and to surrender peaceable possession to Jalonick at the end of the time. He paid the rent as agreed regularly up to and including the month of November, 1892. Jalonick testified that he had a residence both in El Reno and in Wichita, Texas, and was sometimes at the one place and sometimes at the other. That he voted in Texas.

So far as citizenship is an element of qualification to own and settle a town lot in Oklahoma, any citizen of the United States was so qualified. Since Oklahoma had no recognized government up to the time it was thrown open to settlement, it could scarcely be otherwise. In the case of *Hussey v. Smith* (99 U. S., 20), it was held that Hussey (a citizen of Ohio) was entitled to a deed for a town lot in Salt Lake City, Utah.

As to the second ground of error only a question of fact is involved. Did Kelso lease the building alone, on lot 6, or did he lease both lot and building? The written contract says "lot and building" and it is conclusive of the fact.

The important question remains: was Jalonick an occupant of the lot in the meaning of the townsite laws at the time of its entry. Published decisions of the Department seem to contain no precedent directly covering the question. Sec. 2387, Rev. Stat., United States, provides for the entry of townsites by corporate authorities of a town, or where towns are not incorporated, by the judge of the county court, and says such entry shall be—

in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposition of such lots in such town and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

In pursuance of said act of Congress, the legislative assembly of Oklahoma, at its first session in 1890, enacted that—

Any such corporate authorities or judge of the probate court, holding the title to any such lands in trust, as declared in said act of Congress shall, subject to the provisions of this act, by a good and sufficient deed of conveyance, grant and convey the title to each and every block, lot, share or parcel of the same to the person, persons, associations or corporations, who shall occupy or possess or be entitled to the right of possession or occupancy thereof, according to the several rights and interests of the respective claimants in and to the same, as they existed in law or equity at the time of the entry of such lands or to the heirs or assigns of such claimants. Sec. 6627, Stat., Oklahoma, 1890.

It is in the light of the act of Congress and of the act of the Oklahoma legislature, *supra*, that the term occupant is to be defined. It is apparent that this act of the legislature contemplates equitable or constructive occupancy of a lot in contradistinction to its actual personal occupancy. This doctrine is recognized in the case of *Hussey v. Smith* (99 U. S., 20), previously referred to. Applying this principle to the case under consideration it would seem to be relieved of doubt. Jalonick, according to the evidence, enclosed lot 6 with a fence (no one disputing his right), built a house upon it, rented it from time to time, and collected the rent, and finally removed the first house erected, and erected a more commodious one in its stead; whereupon Kelso leased the lot and went into possession of it as Jalonick's tenant, and was so holding it at the date of the townsite entry.

These acts of Jalonick upon the lot, indicate ownership and occupancy, and show that the lot was subject to his dominion, and these are evidences of right and title distinct from the Foreman deed. Under these circumstances Kelso, being in possession of the lot as the tenant of Jalonick, his occupancy is the occupancy of Jalonick, or for his use.

Your office decision is approved.

OKLAHOMA LANDS—SUPERVISORY AUTHORITY OF THE SECRETARY.

BROWN *v.* SHIELDS.

The occupancy of land in Oklahoma, through mistake, but under the authority of the government, by a white man, having an Indian wife, may be properly protected, under the supervisory power of the Secretary of the Interior, through the allowance of a homestead entry on the part of such occupant, notwithstanding the fact that he was occupying the land in question during the inhibited period.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (W. F. M.)

On April 27, 1889, Peter Shields made homestead entry of the NE. $\frac{1}{4}$ of section 5, township 12 N., range 6 W., within the land district of Kingfisher, Oklahoma, and on November 11, 1890, Mathew L. Brown filed an affidavit of contest charging, on information and belief,

that the said Peter Shields did enter and occupy a portion of the lands described in and declared open to settlement by the President's proclamation of March 23, 1889, between the 2nd day of March, 1889, and noon of the 22nd day of April, 1889, contrary to the act of Congress approved March 2, 1889.

The register and receiver rendered a decision, upon an agreed statement of facts, recommending the cancellation of the entry, and the case has now reached this Department on appeal from the decision of your office reversing that of the local office and dismissing the contest.

The agreed facts are that Shields

was upon the land in dispute within the limits of the lands described in the President's proclamation of March 23, 1889, all of the time between March 2, 1889, and noon of April 22, 1889, and that he did not go out of Oklahoma Territory on April 22, 1889, and make any race or run for said lands; the plaintiff expressly agreeing on his part that the facts in relation to the manner in which said Shields located upon said lands are true and correct as stated in the affidavit of Peter Shields and the copies of the records of the Indian Bureau and Land Department thereto attached. It is also expressly agreed and understood that the said Peter Shields is a white man, without any admixture of Indian blood, but is married to an Indian woman as set forth in said affidavit.

The affidavit of Shields, annexed to and made part of the foregoing agreement, discloses that he went into the Indian Territory in 1873, and in 1878 married Josephine Keith, an Arapahoe Indian woman; that shortly after her marriage he settled upon the land in dispute and has lived upon, cultivated and improved the same ever since; that he made his settlement under the direction of the United States Indian

Agent, Miles; that prior to the opening of the Oklahoma country in the spring of 1889, he applied to this Department to know whether he was entitled to remain in that country and retain the land upon which he was located; that the letters attached to the affidavit and made part thereof were received in answer to his application, and that relying upon those letters, he remained in the Oklahoma country on the 22nd of April, 1889, upon the land in dispute, and afterwards went to the Kingfisher land office and made entry of the same and had his wife and children allotted their lands at the same time.

Departmental letter of April 10, 1889, to the Commissioner of Indian Affairs (Records Ind. Div. Vol. 59, p. 343) is here quoted in full as follows:

I have considered your letter of the 4th instant on the subject of certain persons, Indians, half breeds and three white men—Shields, Keith and Hauser—intermarried with the Cheyenne and Arapahoe Indians, and their families, who have heretofore settled upon the Oklahoma lands just east of the eastern boundary of the Cheyenne and Arapahoe reservation, where they located, opening farms for the support of their families, under advice of their agent, believing that the land thus settled upon was within the reservation to which they belonged.

The records of your office and of this Department for a number of years back concerning these persons, clearly show that they settled through mistake and under the advice of a former agent upon the lands in question, where they made valuable improvements, and where they have been suffered since to reside, without, however, having any lawful right conferred upon them to said lands.

The facts and circumstances surrounding this case do not in any sense warrant the holding that they are violators of the prohibition of section 13 of the Indian appropriation act of March 2, 1889, against persons entering and occupying the Oklahoma tract before the taking effect of the proclamation of the President declaring said lands to be open for settlement. You are authorized, as recommended by you, to instruct the Indian agent for the Cheyenne and Arapahoe Agency, Indian Territory, to give this matter his immediate attention, to ascertain at once, the names of the Indians, half breeds and of the three or more white persons who are married to Indians, and who located under the circumstances reported by you, the description of the lands they occupy, and upon which they will be entitled, under the laws applicable, to make settlement, clearly stating the legal subdivisions thereof, and furnish said information to the proper local land officers at once, together with any other data that may be necessary to make said officers to understand the situation of said persons, that they may be permitted to make title to so much of the land as they have improved and which they now occupy as they are entitled to take under the laws applicable thereto. Those of the persons referred to who are Indians should apply for entries to the lands they occupy under the provisions of section 4 of the general allotment law of February 8, 1887 (24 Stat., 388), which law provides for settlement by Indians upon public lands.

The necessary blanks for this purpose should be sent at once to the agent.

These instructions were carried into effect by the Commissioner of Indian Affairs, resulting in the homestead entry of Shields, Keith and Hauser upon the lands settled by them severally, and allotments to their Indian families.

The history of the original locations is concisely epitomized in the case of Amy Hauser *et al.*, on review, 20 L. D., 46, as follows:

Some twenty years ago, Herman Hauser, B. F. Keith and Peter Shields, citizens of the United States, married Cheyenne and Arapahoe Indian wives. Prior to that

time the treaty of 1867 had been made with those tribes, which provided that "if any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation not exceeding three hundred and twenty acres in extent, which tract . . . shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it."

Soon after the marriage of said parties to the Cheyenne and Arapahoe Indian women, each head of a family was placed in possession of 320 acres of land, which was supposed by the parties and by the United States agent of the Cheyenne and Arapahoe reservation to be a part of that reservation. Upon the tracts so selected they located and built homes and otherwise made valuable improvements. Subsequently it was ascertained that they had been erroneously located on lands outside of the Cheyenne and Arapahoe reservation, and the parties continued to reside there and make improvements. Thus matters stood until just before the Territory of Oklahoma was opened to settlement, April 22, 1889, under the President's proclamation. The lands so settled and located upon are within the Territory of Oklahoma as thus opened.

The situation of these people, their occupancy of these lands, and the circumstances under which they settled upon these lands, having been brought to the attention of Hon. John W. Noble, Secretary of the Interior, he directed that the three white men who married Cheyenne and Arapahoe Indian women should be permitted to make homestead entries on 160 acres of the lands which they had settled upon and improved; and that the Indian women, their wives, should apply for entry of the lands they occupied, to the extent of 160 acres each, under the provisions of section four of the general allotment law of 1887 (24 Stat., 388), which law provides for allotments of Indian out of the public lands.

The decision of your office recites in substance the facts as here given and rests its conclusions on the action taken in the matter by Secretary Noble, which is held to be binding until reversed.

The appellant denies that the Secretary of the Interior intended to authorize the entry of Shields, and the other white men similarly situated, unless they were qualified entryman under the act of March 2, 1889, but this contention is fully met and overthrown by the statement in the letter to the Commissioner of Indian Affairs that "the facts and circumstances surrounding this case do not in any sense warrant the holding that they are violators of the prohibition of section 13" of said act. The assignment of error, however, that goes to the marrow of the controversy and evokes really serious consideration, contends—

that the act of March 2, 1889, relative to the Oklahoma lands was operative on all alike and that the act of Congress having made no exception in favor of any one, neither the Commissioner nor the Secretary had the right to make an exception of this contestee, Peter Shields, and to hold that he and Benjamin Keith had rights superior to other white male citizens of the United States, and could rise above the equal action of the law.

The suggestion of the contestant, *in arguendo*, is not without force, and "to hold that a 'squaw man' obtained by his marriage to any Indian woman other or greater rights to non-reservation land than plain unvarnished citizens who had been unfortunate enough to secure

white women as wives would be a novel theory of the law under the constitution." It is to be observed, however, that the decision complained of announces no such "theory of the law" as applicable to all "squaw men" and "unvarnished citizens," but only deals with a particular case in which apparent and unquestionable equities are given effect. The squaw men were allowed to make homestead entries in apparent violation of law, not alone because they were such, but for the reason that the government, through its agent acting in pursuance of the laws of the United States and of a treaty to which they were a party, had placed them in a situation that rendered supervisory and extraordinary action necessary in order to protect equities which grew logically and legitimately out of that situation. While it is accepted as true that the Secretary of the Interior may not wholly ignore a mandatory provision of a law given him to execute, it is not conceived that he is without the authority to mitigate its rigor in a special case; thus, in the case of *Poisal v. Fitzgerald*, on review, 15 L. D., 584, it is held that—

the occupancy of land in Oklahoma by an Indian, located under the authority of the government, is not affected by the provisions of the act of March 2, 1889, prohibiting the acquisition of settlement rights in said Territory prior to the opening thereof in accordance with said act (syllabus);

And so, in the case of *Niels Esperson*, 14 L. D., 235, which was a controversy between a homestead applicant and an Indian allottee, it is said:

It is conceded that as a general rule lands within the ceded territory in Oklahoma cannot be allotted under section 4 of the general allotment act (see 13 L. D., 310), but under the peculiar circumstances, as ascertained by the Office of Indian Affairs, showing that said Hauser entered upon a tract just across the line east of the Cheyenne and Arapahoe Indian reservation, and improved the same, the Department allowed said allotment to be made, which served to except the land from settlement and entry by any other person.

The cases cited are cognate in principle to the one now under consideration, and, in my opinion, should control its decision.

The decision of your office is, therefore, affirmed.

ABANDONED TOWNSITE—HOMESTEAD ENTRY.

JOHN M. RANKIN ET AL.

The right of townsite settlers to make homestead entries of the respective subdivisions on which they are residing and have improvements attaches simultaneously on the abandonment of the townsite, where it appears that the settlements in question were made at the same time and for the same purpose.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 10, 1895. (E. E. W.)

STATEMENT.—This contest is for homestead entry of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, T. 11 N., R. 7 W., known as Union City Townsite, in Oklahoma. John M. Rankin

and George W. Dixon have each applied to enter the entire tract, and Klaus Peben is an applicant for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$.

Immediately after the opening of the Oklahoma country on the 22d of April, 1889, several hundred people, including each of these applicants, settled upon this land as a townsite, founded a town, and named it Union City. A post office was established, some sort of municipal government organized, and at one time the population numbered 550. On the 22d of June, 1889, one N. M. Bacon and others made application, on behalf of these settlers, to enter the land as a townsite.

Before this application was acted upon a railroad was projected through the country, passing a mile from the town, and the inhabitants began to move to a new site on the railroad, and to other places. Seeing that the land was being abandoned as a townsite, the applicant George W. Dixon, applied on the 13th of November, 1890, to enter the entire tract as a homestead. This application was rejected by the register and receiver because it conflicted with the application for the townsite entry.

By the 30th of March, 1891, the land had been abandoned by all the townsite settlers, except these three applicants, and on the 9th of October following Rankin made his application to enter the entire tract as a homestead. This application was suspended for a time, pending appeal on Dixon's application above mentioned. On the 27th of January, 1892, the Commissioner of the General Land Office ordered a hearing to determine the respective rights of the occupants, all of them, including Peben, being made parties. The hearing was had on the 26th of November, 1892, and the decision rendered June 19, 1894. In this decision the register and receiver found for Rankin, holding that he was the first legal applicant; but suggested that in one view of the case it might be proper to allow the applicants to enter the separate subdivisions which they have improved and reside upon, respectively.

From this decision Dixon and Peben appealed to the Commissioner of the General Land Office, who, on the 14th of February, 1895, reversed the judgment of the register and receiver, rejected Rankin's application, also Bacon's application for townsite entry, and directed the local officers, upon proper application within thirty days, to allow Peben to enter the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$; Rankin the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$; and Dixon the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$. From this decision Dixon has appealed to the Department.

These applicants all went on this land in 1889 as townsite settlers, and it was not until abandonment of the place by the rest of the population became evident that they set up their respective claims of homestead settlement.

They reside upon and have improved separate subdivisions—Peben the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$; Rankin the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$; and Dixon the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$. The value of Peben's improvements is about \$500; Rankin's about the same, and Dixon's about \$1,500.

OPINION.—The rights of these applicants to enter the subdivisions upon which they reside and have improvements, respective, attached simultaneously upon the abandonment of the land as a townsite, or the rejection of Bacon's application to enter it as such, and are equal. Their settlements were made upon their respective subdivisions practically at the same time, under the same circumstances, and with exactly the same intentions; and the rights of one, thus acquired, are not paramount to those of either of the others. If the appellant's residence and improvement entitle him to enter his subdivisions, he must concede that residence and improvement have invested Rankin and Peben with the same right as to their respective subdivisions. Contention to the contrary is an attack upon the only right by which he may claim even his own separate subdivisions. If he may enter theirs, why may not they, or any other person, enter his? As we have already said their rights are equal, and it would be unjust to allow either of them to enter the claim of either of the others.

In finding that Rankin was the first legal applicant, the register and receiver seem to have been of the impression that Bacon's application for townsite entry had been rejected or abandoned, and that the land was not then segregated, as it was when Dixon applied. But such was not the case. The land was still segregated by Bacon's application, and therefore Rankin's application was properly rejected by the Commissioner, as Dixon's had been, and it gave him no advantage over either Dixon or Peben.

The decision of the Commissioner of the General Land Office is affirmed.

HOMESTEAD ENTRY—COMMUTATION—RESIDENCE AND CULTIVATION.

DANIEL HARRINGTON.

In computing the period of compliance with law shown by a homesteader, who submits commutation proof, credit can not be allowed for residence and cultivation when the land was not open to settlement.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 9, 1895. (J. L. McC.)

I have considered the case of Daniel Harrington, involving his homestead entry for the NE. $\frac{1}{4}$ of Sec. 31, T. 48 N., R. 7 W., Ashland land district, Wisconsin.

He made said entry on February 2, 1892, and offered commutation proof on July 21, 1892, upon a showing of fourteen months' residence and cultivation after the date of *settlement* alleged by him. The local officers accepted the proof; but your office suspended the same, and directed the local officers to call upon the entryman for supplemental proof showing fourteen months' residence and cultivation subsequently to *entry*—also to furnish the usual non-alienation affidavit.

The entryman replied that he could not furnish such non-alienation affidavit, for the reason that "on or about the forepart of November, 1892," he "contracted to sell the said land and executed a deed of conveyance to one Rosa Young." However, he states, upon receiving notice that he would be required to furnish supplemental proof, he "resumed or continued the occupation of the land, and planted and cultivated a crop in 1893."

Thereupon, your office, by decision of September 19, 1893, held the entry for cancellation.

He appeals, substantially upon the ground that—

it was error to require him to make supplemental proof after the expiration of fourteen months from the date of his entry, when he had maintained a residence on the land for nearly two years prior to his making his commuted cash entry;

And that, inasmuch as he had—

made such commuted cash entry under the advice of the local officers, and with their information that he had a right to commute at that time, he thereby acquired title to the land it being a maxim of law that an entryman shall not suffer injury or loss because of the mistake of an officer charged with the administration of the law.

The fallacy in the preceding statement lies in the allegation that "he had maintained a residence on the land for nearly two years prior to his making his commuted cash entry."

The land is situated within the limits of the indemnity withdrawal made for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, under the act of Congress approved June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66). On the 11th day of February, 1890 (see 10 L. D., 157), Secretary Noble closed the adjustment of the grant, and revoked all withdrawals for indemnity purposes previously made. The land was afterward opened to entry; the full particulars of the action and orders relative thereto may be found fully set forth in the departmental decision in the case of *Newell v. Hussey* (16 L. D., 302). It is sufficient to say here that, by direction of the Secretary, your office informed the local officers at Ashland, and, so far as practicable by newspaper and other advertisement, the general public, that "no right would be recognized by reason of settlement prior to the date of the opening of said lands." It was held by the Department, in its decision in the case of *Newell v. Hussey* (*supra*), that "both of the parties being occupants of the tract before and at the time it was opened for settlement and entry," they could acquire no right by such settlement, "made in direct violation of the orders, directions and instructions of this Department."

Harrington, the entryman in the case at bar, offered commutation proof on July 21, 1892. The land not having been subject to settlement until November 2, 1891, he could not possibly show more than eight months and nineteen days' legal residence upon and cultivation

of the tract. Under no construction of the law can this be considered a compliance therewith.

The decision of your office holding the entry for cancellation is therefore affirmed.

CLASSIFICATION OF LANDS—PROTEST—HEARING.

INSTRUCTIONS.

Acting Commissioner Best to the register and receiver, Missoula, Montana, August 10, 1895.

I am in receipt of your letter of July 29, 1895, which I quote:

In your circular of instructions April 13, 1895, in the matter of Classification of Mineral Lands, Subdivision 4 of paragraph VII, you direct that orders for hearing shall issue to the protestant and be by him served upon all parties in interest in the usual manner.

The Northern Pacific Railroad Co. has signified its intention to file a protest against the acceptance of the June report made by the mineral land commission for this district. Said company has further signified its intention of serving notice when issued upon the officers of this office as representatives of the United States. I have advised said company that such would not be a legal service, but that notice might be served upon the U. S. District Attorney, for this district. I should be pleased to receive any instruction on the subject which you may see fit to communicate.

Paragraph VII, subdivision 4, circular of April 13, 1895 (20 L. D., 350), is as follows:

4. The orders for the hearings provided for by said act shall issue to the protestant, upon his application, and be by him served upon all parties in interest in the usual manner.

The classification of lands under the act may be based upon personal examination of the land by the board of commissioners, upon the testimony, formal or informal, of parties claiming to be familiar with the facts, or upon both personal examination and testimony.

Two classes of cases may arise under the act of February 26, 1895 (28 Stat., 683), on which hearings may be necessary.

1. When land has been classified as non-mineral and protests are filed alleging the same to be in fact mineral in character.

In a case of this kind the order for a hearing must be served by the mineral protestant upon the proper representative of the Northern Pacific Railroad Company.

2. When the land has been classified as mineral and protests are filed alleging the same to be in fact non-mineral.

In all cases where the land has been classified as mineral and protests alleging it to be non-mineral are filed, service of notice by publication, at the expense of the protestant, as in ordinary hearings, must be had with personal service, when possible, upon all parties who are noted in exhibit B of the commissioners' report as having furnished evidence relative to the character of said land.

In these cases, however, you will not fix a date for the hearings until report has been made of the protests filed as contemplated by paragraph IX (a) of the circular of April 13, 1895, upon receipt of which the Secretary of the Interior will designate an officer to be present at said hearings, in accordance with the proviso to section 5 of the act, whose duty it shall be to secure testimony which shall show the *true character of the land involved*.

The circular of April 13, 1895, is modified accordingly.

Approved:

WM. H. SIMS,
Acting Secretary.

RAILROAD GRANT—LISTED TRACT—CERTIORARI.

SWANSON *v.* GALBRAITH.

The "listing" of a tract within the primary limits of a railroad grant confers no right upon the company, if, for any reason, said tract is excepted from the grant. An application to enter a tract so "listed," and rejected for that reason, and pending on appeal, will attach at once, as of the date of the application, on the cancellation of the list as to said tract.

An application for certiorari will be denied, where it appears that the Commissioner's decision, if before the Secretary on appeal, would be affirmed.

*Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (J. L. McC.)*

Oliver Swanson has applied for an order directing your office to certify to the Department the record in the case of said Swanson *v.* James E. Galbraith, involving the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 19, T. 22 N., R. 11 E., O'Neill land district, Nebraska.

The tract described is within the granted limits of the Sioux City and Pacific Railroad; and the line of road opposite the land was definitely located January 4, 1868.

The land was embraced in the homestead entry of one Johnson Emanuel, made on May 23, 1867, and canceled on May 13, 1875.

In March, 1883, the railroad company filed a list of lands, aggregating 2,232 acres, which had been "selected" by the agent of the company. This list the local officers at Neligh forwarded by letter of March 30, 1883. Your office, by letter of May 19, 1884, returned it to the local officers, with instructions "to admit or reject . . . as you find the lands subject to selection or not." In pursuance of said instructions the local officers, on May 23, 1884, rejected the company's application to list the tract in controversy (*inter alia*), because of the homestead entry of Emanuel (*supra*), existing at the definite location of the road. The company appealed to your office, which, on June 30, 1885, affirmed the action of the local officers. It thereupon appealed to the Department, which, on February 17, 1892, affirmed the decision of your office (see L. and R. copybook No. 236, page 122).

On September 3, 1889, James E. Galbraith applied to make homestead entry of the tract in controversy. The local officers rejected his application, on account of (supposed) conflict with the grant to the railroad company. Galbraith appealed to your office, where the matter remained in abeyance for several years, awaiting final action by your office and the Department upon the company's list embracing the tract.

On September 6, 1894, your office took action on Galbraith's appeal, reversed the decision of the local officers, and directed that his application to enter be allowed.

Prior to the last named date, however,—to wit, on May 14, 1892,—Oliver Swanson applied to make homestead entry of the tract. Four days later the local officers rejected said application because of the prior and still pending application of Galbraith.

Swanson appealed to your office, which, on September 6, 1894, affirmed their decision. He filed an appeal to the Department, which appeal your office, on November 20, 1894, returned, on the ground that it had not been filed in time.

Swanson has filed an application for certiorari, insisting that his appeal was filed in time; furthermore, that your office erred (1) in allowing Galbraith's entry while a contest between the government and the railroad company was pending, and (2) in overlooking the charge made by him that Galbraith's entry was made in bad faith, and for speculative purposes.

The appeal from your office to this Department contains this paragraph:

In case the holding of this Department be against this applicant on each of the points above, then this applicant asks that he may be permitted to make proof that said Galbraith did not apply in good faith, but for speculation, as alleged in his (Swanson's) affidavit filed with his application.

Whatever affidavit may have accompanied the appeal, no affidavit of the character above mentioned accompanies the application for certiorari; and of course no hearing on charge of fraud can be ordered where no showing whatever is made in support of the charge.

The application for certiorari states—

The application of Galbraith was made for land which was segregated by an existing *prima facie* valid selection.

Upon this hypothesis counsel for applicant builds his entire argument. But he confounds the "selection" of lands within *indemnity* limits, by which a railroad company may acquire a right to the same, with the "listing" of lands within the *granted* limits, by which it can acquire no right whatever in case the lands were for any reason excepted from the grant. He quotes from the case of Maggie Laird (13 L. D., 502), and cites numerous other cases in support of the doctrine that "no rights are acquired by an application to enter land segregated by an existing entry;" a doctrine which has no bearing upon the case at bar, inasmuch as the land here in controversy was *not* segre-

gated; the railroad company never had any right therein, it having been segregated at the date of definite location by Emanuel's entry—which had been canceled (May 13, 1875), prior to Galbraith's application, leaving the land unappropriated, vacant, and subject to entry at the date of said application (September 3, 1889).

Counsel contends further—"Galbraith offered no contest, and did not even file an affidavit alleging ground for cancellation of the application" (of the railroad company for the land).

That the selection was ultimately rejected was due to no effort of his—not even to any information given by him. . . . He does not claim any preference right, based on contest, and presents no merits whatever.

It is true that Galbraith offered no contest, because there was nothing to contest; he alleged no ground for cancellation, for there was nothing to cancel; there was simply an erroneous listing by the railroad company of certain tracts that never had been granted—which list, so far as it was erroneous, was disallowed, wholly irrespective of Galbraith.

Galbraith applied to enter the tract at a time when it was legally subject to entry. His application was properly rejected, however, because the land was embraced in a pending list; but as said listing was erroneous and improper, upon its cancellation his right at once attached as of the date of his application.

From this it will be seen that, if Swanson's appeal from your office decision (of September 6, 1894, *supra*.) had been granted, the Department would have affirmed it. Therefore, if the present application for certiorari were allowed, it would avail Swanson nothing; hence, it should not be granted (*Howden et al. v. Woodward Townsite*, 19 L. D., 331).

In view of the conclusions herein reached, the question as to whether the appeal from your office decision was filed in time need not be discussed.

The application is denied.

SIoux HALF BREED SCRIP—CONTEST—LOCATION.

STRONG *v.* PETTIJOHN ET AL.

- A contest against a location of Sioux half breed scrip, on unsurveyed land, will not be dismissed on the ground that prior to the survey of the land, and adjustment of the location, such a contest is premature, where a hearing has been had, and the evidence submitted clearly shows the invalidity of the location.
- A location of said scrip, made without improvement of the land, by, or on behalf of the half breed, and in the interest of parties to whom the scrip had been assigned by double power of attorney is invalid, and must be canceled.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (J. I. P.)

This controversy involves certain unsurveyed public lands which, when surveyed, it is alleged, will be the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec.

29 and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 30, Twp. 62 N., R. 10 W., in the Duluth, Minnesota, land district.

Your office, by letter "H" of February 10, 1894, transmitted to this Department the joint appeal of Buck, Betts and Little, and the separate appeals of Pettijohn and W. H. Adams from your office decision of November 24, 1893, holding for cancellation the Sioux half breed scrip location of Pettijohn on the tracts above described, made June 3, 1887. The hearing in this case was had by order of your office of October 21, 1891, on the contest affidavit by Strong.

After the decision of the local officers, and appeal therefrom, Pettijohn, under the plea that he had been misled by the contestant's attorneys, filed an application to have the case re-opened, and to be permitted to intervene and to submit testimony as to his rights in the premises; also the application of W. H. Adams was filed asking that the case be re-opened, and that he be permitted to intervene and introduce testimony as to his rights in the premises as the grantee of the tracts in controversy, by conveyance from Pettijohn. Both of said motions were overruled, for want of jurisdiction, by the local officers. Your office decision held, in effect, that neither of said motions had any merit, and they have appealed.

The appeal of Buck, Betts and Little, without setting forth *seriatim* their assignments of error, presents, in substance the following:

That the contest of Strong against said scrip location is at this time premature, because the lands involved are unsurveyed; that the Department has no jurisdiction to entertain a contest against a location of said scrip on unsurveyed lands until said lands are surveyed, the plat thereof filed in the local office, and said location adjusted thereto.

On the day of the hearing before the local officers, Buck, Betts, and Little, claiming said lands as the remote grantees of Pettijohn, appeared specially, by attorney, and moved to dismiss the contest, on the same grounds, substantially, as those stated in the appeal, and when the evidence of the contestant was all in, they rested, without presenting any testimony.

The act of July 17, 1854 (10 Stat., 304), under which this scrip was issued, authorizes, in terms, its location on unsurveyed lands, on which the scribee has first made improvements.

Rule 1, Rules of Practice, provides—

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

This is certainly "a claim under a law of Congress relating to the public lands."

It has been the policy of this Department to hold where the question was presented before hearing, that a contest against a pre-emption filing or other evidence of inchoate interest in the public land, was premature prior to final proof or final entry. But where a hearing has been had,

as in this case, and the evidence adduced clearly shows the invalidity of the filing or location, the Department has considered the same, and canceled the filing application or location in question, apparently on the theory that a multiplicity of suits should be avoided, rather than encouraged, by dismissing the contest for prematureness, and thus deferring the same controversy until after final proof and entry.

The evidence in this case shows that prior to the location of said scrip on the land in question there had never been any improvements made thereon by the scribee, nor by any one authorized by him, nor with his knowledge and consent; that said location was not made in the scribee's interest, as required by the statutes and the regulations of this Department, but that it was made in their own interest, by parties to whom he had, in fact, assigned said scrip, by a double power of attorney, one to locate and one to sell, and should be canceled. *Allen et al. v. Merrill et al.* (12 L. D., 138).

Your office decision is affirmed.

HOMESTEAD ENTRY—RESIDENCE—MARRIED MAN.

MUNSON *v.* CUSHING.

The fact that a homesteader's wife does not reside with him on the land covered by his entry, but lives apart from him, and at their former place of residence, does not prevent him from establishing and maintaining the requisite residence under his homestead claim.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (C. W. P.)

This is a motion for review by D. Munson in the above entitled case of the decision of the Department of April 18, 1895, which reversed the decision of your office of December 16, 1893, and dismissed his contest against the homestead entry, No. 3558, of Michael P. Cushing, of the NE. $\frac{1}{4}$ of section 18, T. 18 N., R. 10 W., Oklahoma land district, Oklahoma.

In this motion for review it is assigned as error that the decision—

(1) fails to take into consideration the facts shown by the record, that, the defendant is and was a married man and has wholly failed to bring his family upon the land or to make an effort so to do;

(2) That the decision

is contrary to law in this, that it finds and holds that a married man can maintain and establish residence elsewhere than at the home and abode of his family, and that he can comply with the homestead law by going upon the homestead and staying there a very few nights in person, while his family are at all times residing at his former home, and by personally being absent from the land twenty-nine-thirtieths of the time from the date of entry to date of hearing, and never returning thereto thereafter, and his family at all times residing at the old home.

In the decision of the Department no reference is made to the fact that the entryman is a married man, for the reason that the defendant's appeal from the judgment of your office turned upon the question of his personal residence upon the land, upon which your office had placed its decision reversing the judgment of the local officers dismissing the contest.

The evidence showed that the defendant had been separated from his wife and family for about five years. It is true that a husband and wife, while they live together as such, can have but one and the same residence. (Thomas E. Henderson, 10 L. D., 266). But the home of the wife is presumptively with her husband. (Bullard v. Sullivan, 11 L. D., 22). And the fact that the wife continues to reside at the former residence, apart from her husband, does not prevent him from establishing and maintaining a residence at another place. It merely raises a presumption against the *bona fides* of the change of residence, which may be rebutted by proof (B. F. Heaston, 6 L. D., 577), and was rebutted in this case by the uncontradicted evidence of the entryman.

For these reasons I am of opinion that this motion does not show proper grounds for review, and it is denied.

HOMESTEAD ENTRY—OKLAHOMA LAND—QUALIFICATION.

BRUCKER v. BUSCHMANN (ON REVIEW).

In determining whether a homesteader is disqualified by the ownership of land, the grant of a railroad right of way across the same can not be regarded as diminishing the acreage held in fee by the homesteader.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (C. J. W.)

I have considered the motion forwarded with your office letter of August 7, 1895, for review of departmental decision of June 13, 1895, in the matter of the contest of Daniel Brucker v. William Buschmann, involving NE. $\frac{1}{4}$, Sec. 32, T. 13 N., R. 3 W., I. M., Oklahoma City land district, Oklahoma Territory.

Buschmann's entry was made November 11, 1892.

February 22, 1893, Brucker filed affidavit of contest alleging, in substance, that Buschmann was the owner of 160 acres of land at the time he made the entry of the land in dispute, which he fraudulently conveyed, but still owned, and that he was therefore disqualified as a homestead entryman.

The local officers found in favor of the contestant.

On appeal of Buschmann to your office on February 24, 1894, your office affirmed the finding of the local officers, whereupon Buschmann appealed from your office decision and on June 13, 1895, said appeal was considered and passed upon here, affirming your office decision,

and it is said last named decision which movant now prays may be reviewed.

I have carefully considered said motion and find that it presents one question not specifically passed upon in the decision complained of. It is urged by counsel for Buschmann, that one ground of his appeal from your office decision was that the tract of land conveyed by Buschmann to Pfeiffer was less than one hundred and sixty acres, by reason of a railroad right-of-way passing through the quarter section, and that this insistence did not receive consideration in said departmental decision, and that if considered, the result of the decision would have been different.

I have, therefore, carefully considered the question as to whether or not the grant of a right-of-way to a railroad company through lands, touches the fee. I find in the case of Pensacola and Louisville R. R. Co., *ex parte* (19 L. D., 386) it was held—

That a statutory grant of a railroad right of way is a grant of an easement and the lands over which the right of way is located may be disposed of by patent to others, subject to whatever right the company may have in the same.

See also *Smith v. Townsend* (148 U. S., 490), where the same doctrine is stated.

I have no doubt of the correctness of this holding. A review of the decision in question could do the movant no good on this proposition. The motion presents no other question not fully considered when the decision was rendered, and the motion is denied.

HOMESTEAD ENTRY—COMMUTATION.

HOWARD G. ROBBINS.

A homestead entry made after the amendatory act of March 3, 1891, can not be commuted without a showing of fourteen months' residence and cultivation after the date of said entry.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (J. L. McC.)

Howard G. Robbins has appealed from the decision of your office, dated February 21, 1893, rejecting the commutation proof offered by him upon his homestead entry for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 37 N., R. 9 E., Wausau land district, Wisconsin.

The entryman made his original entry on July 21, 1891, and commutation proof and final entry on October 15, 1891—two months and twenty-four days later.

The ground of the rejection of said proof was, that it failed to fulfill the requirements of section 2301 of the United States Revised Statutes, as amended by section 6 of the act of March 3, 1891, which permits the commutation of a homestead entry only after fourteen months from the date of the original entry.

The appeal of the entryman alleges that he—

initiated his homestead entry by actual settlement on the 20th day of December, 1890; and under the act of May 14, 1880, all of appellant's rights as a settler dated back to the day of settlement; that his original commutation proof showed continuous residence and cultivation from the 20th of December, 1890, to the day of said commutation, a period of more than six months, which period of six months was all that was required, inasmuch as all his rights, including that of commutation, related back to date of original settlement.

Section 2301 of the Revised Statutes, as amended, reads:

Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of Sec. 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor upon making proof of settlement, and of residence and cultivation, for such period of fourteen months.

Section 2289 of the Revised Statutes is the section providing for homestead entries. Robbins "availed himself of the benefits of" said section when he applied, on July 21, 1891, to make homestead entry of the tract in question. This was not until after the passage of the amendatory act of March 3, 1891. In his case, therefore, commutation could be made only under the act in force when he made his entry—which requires settlement, residence, and cultivation for fourteen months after entry.

I therefore concur in the conclusion of your office that Robbins has failed to comply with the requirements of the homestead law, and affirm your office decision demanding that he furnish supplemental proof showing residence and cultivation for a period of fourteen months subsequently to the date of his original entry.

EXTENSION OF TIME FOR PAYMENT—CASES MADE SPECIAL.

GEORGE W. ROBINSON.

Under the joint resolution of September 30, 1890, the right to an extension of time for payment should be accorded, where the claimant is unable to pay for the land on account of any failure of crops for which he is in no wise responsible. Cases involving the question of the right to an extension of time for payment should be made special.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (G. C. R.)

George W. Robinson filed his declaratory statement for lots 2 and 4, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 2, T. 27 N., R. 18 W., Valentine, Nebraska, July 31, 1890, alleging settlement April 23, 1890. He submitted final proof August 4, 1893, which appears to be satisfactory as to residence, cultivation, etc. September 4, 1893, he made an affidavit, duly corroborated, stating that on December 26, 1890, he was badly burned in a very destructive prairie fire; that as a consequence of the

burn, he lost one eye and almost the sight of the other, so that he was unable to do any work during the season of 1891, and scarcely any work during the season of 1892, and consequently did not raise any crops on the land during those two years; that he lost all he had, except what was in his house; that for these reasons he was unable to pay for the land, and asked an extension of time in which to make payment, under the provisions of the joint resolution of September 30, 1890 (26 Stat., 684).

Your office, by decision dated November 22, 1893, denied the application, and an appeal brings the case here.

In his appeal (which is sworn to), he sets forth more fully the disastrous consequences of the fire, stating that his stable, out-buildings, two horses, one mule, two cows, three calves, and about thirty chickens—all his property—were burned; that being unable to work, his neighbors, during the seasons of 1891 and 1892, put in and cultivated crops on his land, but owing to the drouth and hail he realized but little.

The facts now presented would certainly entitle the claimant to the extension applied for.

The joint resolution of 1890 authorizes an extension of time, not exceeding one year, to make payment for the land, when "any settler on the public lands by reason of a failure of crops for which he is in no wise responsible is unable to make the payment," etc. This resolution is remedial, and should have a liberal construction. Nathaniel Woodiwiss, 15 L. D., 339; Edward W. Sheldon, 16 L. D., 390.

Failure of crops for which the applicant is in no wise responsible, when properly shown, forms a basis upon which the application should be allowed.

Failure of crops from natural causes, as drouth, hail, wind storms, etc., is the usual averment upon which the application is based; but the failure need not be from natural causes to justify a favorable consideration of the application. Any failure for which the applicant is in no wise responsible is sufficient.

It was shown in the first affidavit, and duly corroborated, that in December, 1890, the claimant was badly burned in a destructive prairie fire; that as a consequence he was unable to leave his bed until April, 1891; that one of his eyes was entirely put out in the fire and the other eye almost blinded; that as a result he could do no work in 1891, and scarcely any in 1892, and therefore raised no crops of any consequence in those years; in addition to the loss of his sight, he alleges that he lost in the fire nearly everything he had, except what was in the house.

The resolution being remedial in character, and therefore to be liberally construed, and the averments made by claimant showing that the failure of crops for 1891 and 1892 resulted from a cause for which he was in no wise responsible, I think the extension of time asked for should have been granted.

The appeal, moreover, shows an additional reason for granting the application—namely, that owing to the drouth and hail during the seasons of 1891, and 1892, scarcely anything was raised on the land cultivated by his neighbors.

The second section of the act of July 26, 1894 (28 Stat., 123), provides:

That the time of making final payments on entries under the pre-emption act is hereby extended for one year from the date when the same becomes due, in all cases where pre-emption entrymen are unable to make final payments from causes which they can not control, evidence of such inability to be subject to the regulations of the Secretary of the Interior.

This act shows the growing liberality of Congress to settlers on the public domain, who from unavoidable circumstances are unable to pay for the land upon which settlement has been made.

Had the applicant been allowed the time asked for in the first instance, payment would have been due September 4, 1894; he has therefore obtained more by his appeal than he asked for in his application. To avoid this condition cases involving the question of the right for an extension of time in which to make payment will, in the future, be made special.

Claimant will be called upon to make payment within sixty days from date of notice hereof.

The decision appealed from is reversed.

REPAYMENT—DOUBLE MINIMUM LAND—ACT OF JUNE 8, 1872.

CLINTON GURNEE.

Repayment of alleged double minimum excess on canceled cash entries made under the act of June 8, 1872, on the ground that the Secretary of the Interior, in fixing the price of the land, erroneously supposed it to be within the limits of a railroad grant, can not be allowed, it not conclusively appearing that the Secretary was controlled by the reason alleged.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 29, 1895. (E. W.)

Clinton Gurnee, by Horace F. Clark, his attorney, has appealed from the decision embodied in your office letter of February 23, 1894, and assigns error therein upon the following grounds:

1. Error in holding that at the date of entry of these lands, located with Chipewa half-breed scrip, the price was \$2.50 per acre;
2. Error in holding that the price paid was proper, without regard to the situation of the lands as to railroad limits;
3. Error in not reimbursing the claimant for the excess of \$1.25 paid for the lands, which are outside the limits of any railroad grant;
4. Error in denying repayment.

Wherefore the said Clinton Gurnee prays that said decision of February 23, 1894, be reversed, and the Hon. Commissioner be directed to adjust his account.

Gurnee applied for repayment of \$1.25 per acre on San Francisco, California, cash entries Nos. 6174, 6175, 6996, 6997, and 7282, for S. $\frac{1}{2}$

of NW. $\frac{1}{4}$ Sec. 1; W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 12; W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, sec. 12; lots 2 and 3, Sec. 13, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 12, Tp. 31S., R. 12 E., M. D. M. The various cash entries mentioned above, were, as the records of your office show, located with Chippewa half-breed scrip, all of which were subsequently canceled. Your office letter which denies the application of claimant, erroneously describes the scrip as Sioux half-breed.

It appears that certain scrip issued in this Department based upon the 7th clause of Article 2 of the Treaty of September 30, 1854, 10 U. S. Statutes at Large, page 1110.

It appears further that subsequent to this the supreme court of California decided that said scrip issued without authority of law.

The lands in controversy are included in those which were located with claims arising under the 7th clause of said treaty.

On June 8, 1872 (17 Stat., 340), Congress passed an act authorizing the Secretary of the Interior to permit the purchase with cash or military bounty land warrants of such lands as are included in the category herein above mentioned.

Gurnee is seeking to avail himself of the provisions of said act of June 8, 1872, and his contention is that whereas he purchased said land at the double minimum price fixed by the Department, he is entitled to repayment upon the ground that the Secretary of the Interior at the time he fixed the price did so under the misapprehension that said lands were within the granted limits of the Atlantic and Pacific Railroad Company.

He contends further that it was ascertained in 1886 that said lands were not within the limits of said railroad grant.

In an elaborate and carefully prepared brief, counsel for claimant sets up certain reasons in support of his contention, that the Secretary of the Interior fixed the double minimum price of the lands in controversy under the misapprehension herein above referred to.

Secretary Delano, who passed the order fixing the price in 1873, makes use of the following language:

Said act is in my judgment broad enough to cover these cases and afford the relief asked. . . . Under the authority vested in me by the said act, and in view of the strong equities attaching to the case under consideration, I would recommend that the price of these lands be fixed at \$2.50 per acre, that being the highest standard of value affixed by general laws to the public lands.

There is nothing in the above quoted words of the Secretary to support the contention that he erroneously supposed the lands to be within the granted limits of the railroad.

While the reasons assigned by counsel for claimant might justify the inference that the Secretary was laboring under a misapprehension, I am of the opinion that it should be conclusively shown that he was in error before the Department will be justified in ordering the repayment as contended for.

Your office decision is therefore affirmed.

RAILROAD GRANT—SETTLEMENT CLAIMS—RELINQUISHMENT.

FLORIDA CENTRAL AND PENINSULAR RY. CO.

Lands embraced within entries at the dates of the general relinquishments executed by the company should not be listed under the grant, where such entries have been canceled, in the absence of evidence that, at the dates named in said relinquishments, there were no actual settlers on the lands entitled to the benefit of said relinquishments.

Acting Secretary Sims to the Commissioner of the General Land Office,
(J. I. H.) August 29, 1895. (F. W. C.)

I am in receipt of a letter from C. W. Holcomb, Esq., attorney for the Florida Central and Peninsular Railway Company, requesting a modification of the directions given in departmental letter of November 26, 1892 (15 L. D., 528), in which it was held that—

Lands covered by entries intact at the date of the general relinquishments executed by the Florida Railway and Navigation Company for the benefit of *bona fide* settlers, should not be subsequently listed on account of the grant, where such entries have been canceled, in the absence of satisfactory evidence that the entrymen were not entitled to the benefit of said relinquishments. (Syllabus.)

It is claimed by the company that the mere fact that the records showed a homestead entry covering a tract at the dates named in the general relinquishments executed by the company did not cause the relinquishment to attach to such tract, but it was necessary that the person claiming such entry be shown to be an actual settler entitled to equitable relief.

This is nowise in conflict with the position taken in the decision which it is sought to have modified.

If the entries were still of record and the company was seeking to select them, would it not be incumbent upon it to show that the entrymen were not included in the terms of the relinquishment?

It has been repeatedly held that if the conditions necessary to the attachment of the relinquishment once existed the subsequent abandonment of the claim by the settler would not cause the right of the road to again attach to the land.

The records show the entries intact at the dates named in the releases; that they have since been canceled and the lands selected by the company, but as to whether the lands were in the possession of actual settlers at the dates named in the releases, the record is silent.

The company has perhaps acted upon the record showing in some instances, and made selections in lieu of tracts embraced in pending entries, which entries were afterwards canceled.

If so, would it accept unquestioned a holding that such cancellation worked an abrogation of the selection?

It is not proposed to put the company to an unnecessary hardship in this matter, but before these lands can be safely listed it must be shown

that, at the dates named in the releases, there were no actual settlers upon the lands entitled to the benefits of the relinquishments.

Where the company desires to make a showing as to the actual condition of the land at the dates named in the releases, such tract being covered by an entry of record at those dates, it should publish notice for a period of thirty days, naming a date on which such showing would be made, and in the event no one appears to contest, the showing might be made by affidavit, but when any one appears, the case must be disposed of in the usual manner, following the rules providing for hearings in contest cases.

You will advise the company hereof.

ACT OF JUNE 3, 1878—PUBLISHED NOTICE OF APPLICATION.

EDWIN BONNELL.

The published notice of intention to purchase a tract of land under the act of June 3, 1878, is sufficient, where it contains the statutory requirements, and is made on the form issued by the Land Department.

Acting Secretary Sims to the Commissioner of the General Land Office,
(J. I. H.) *August 29, 1895.* (A. E.)

This is an appeal from your office decision of March 6, 1894, suspending the cash entry of Edwin Bonnell made May 8, 1893, for the NW. $\frac{1}{4}$, Sec. 9, Tp. 31 N., R. 10 E., Susanville, California. This entry was made in accordance with the act of June 3, 1878 (20 Stat., 89).

The suspension was made because—

The published notice does not give the name of the officer before whom, nor the date when, proof was to be taken; and the names of the witnesses are omitted; the non-mineral affidavit is also omitted.

An examination of the notice which your office holds to be defective shows that the same contained all that the act required, and was a duplicate of the notice posted by the register in the local office. Further, the notice used was the printed form issued by your office for cases of this kind, and in a letter of August 2, 1892, your office informed the local officers at Susanville, that said notice which omitted the names of witnesses was sufficient.

In view of this, and that the applicant has in other respects complied with the law, your office decision is reversed, and you will issue patent in accordance with the provisions of the act.

PRACTICE—APPEAL—INTERLOCUTORY ORDER—CERTIORARI.

JOHNSON ET AL. *v.* BEAUFORT ET AL.

An order of the local office directing a rehearing in a case on which final action has not been taken by said office, is interlocutory in character, and an appeal therefrom will not lie to the Commissioner; nor will an appeal be entertained from the Commissioner's decision denying the right of appeal from the local office.

If an appeal is not wrongfully denied, certiorari will not be granted, unless the facts set out show that the applicant is entitled to relief under the supervisory authority of the Secretary.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 29, 1895. (C. W. P.)

Vincent Johnson and others have filed a petition for an order under Rules 83 and 84 of Rules of Practice, directing your office to certify to the Department the papers in the case of Vincent Johnson *et al.* against Henry Beaufort and the Pontiac Mining Company, concerning their protest, claiming to be interested in the Iowa, Joplin and Cascade lode claims against mineral entry, No. 306, made June 6, 1890, by Henry Beaufort upon the Snow Storm No. 2, and Rainstorm No. 2, lode claims, Glenwood Springs land district, Colorado.

From the petition it appears that on January 11, 1895, the register and receiver at Glenwood Springs ordered a re-hearing in said case. From which order petitioners herein appealed to your office. March 25, 1895, your office decided as follows:

It is accordingly held that the case is yet before your office for final action, and that in allowing the order for a re-hearing you acted within your discretion, and such order being interlocutory no appeal would lie therefrom.

On May 24, 1895, the petitioners appealed from the decision of your office.

On June 4, 1895, your office decided that--

as an appeal did not lie from the interlocutory action of the local officers, no appeal would lie from said office letter of March 25, 1895, as the case is still before the local office, and the action of this office was not a decision on the merits of the case,

and you dismissed the appeal.

In my opinion your decision is supported by the authorities. In *Piper v. State of Wyoming* (15 L. D., 93), it is said

Had the application (to open the case) not been made until after they (the local officers) had taken final action in the case, the rule would have been different, but even then, I think it would have presented a case where you would have had a right to exercise your discretion by advising a further investigation under the last clause of Rule 72 of Rules of Practice.

In *Horn v. Burnett* (9 L. D., 752), referred to in the case of *Piper v. State of Wyoming*, *supra*, it is said:

Regarding your office decision of June 28, 1886, I am of the opinion that the same is erroneous. Burnett made his motion to be allowed to introduce testimony for the

defence at a time when the case was still undecided by the local officers; they had rendered no decision and their report was not forwarded to the General Land Office; the case was still before them and it was resting in their discretion, whether to allow more testimony to go in or not. See rule 72 of the Rules of Practice. I do not think that in this instance the discretionary power of the local officers was abused. Besides the order granting to Burnett the privilege to put in his testimony was interlocutory, it was not final action or decision within the meaning of Rule 43 of the Rules of Practice.

There being no doubt of the jurisdiction of the local officers, and that their action was not subject to appeal, the only question for consideration is whether the local officers were guilty of an abuse of their discretion in ordering a re-hearing.

The grounds for the application for a certiorari, as set out in the original petition, are:

First. In not directing the local officers to transmit the full record of the hearing in order to enable him to determine whether or not there had been any abuse in the exercise of their discretionary powers.

Second. In not holding that the action of the local officers granting a re-hearing in this cause, was an abuse of their discretionary powers, and is therefore reviewable on appeal.

Third. In dismissing our appeal from the decision of the local officers and denying our right of appeal from his decision.

Fourth. In not dismissing said application and denying the right of the Pontiac Mining Company to a re-hearing.

The supplementary petition is not verified, and is therefore dismissed.

If the appeal is not wrongfully denied, certiorari will not be granted, unless the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary (*Nichols v. Carlson*, 15 L. D., 126).

No reason being shown why the supervisory authority of the Secretary should be exercised in this case, the application for certiorari is denied.

RAILROAD GRANT—SETTLEMENT CLAIM—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. CO. *v.* STEINER.

The residence upon, and cultivation of a tract at date of definite location excepts the land so occupied from the operation of a railroad grant.

An uncanceled pre-emption filing excepts the land covered thereby from the operation of a railroad grant on the definite location thereof.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 29, 1895. (J. L. McC.)

I have considered the case of the Northern Pacific Railroad Company *v.* Theodore Steiner, involving the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 19, T. 13 N., R. 19 E., North Yakima land district, Washington.

The tract is within the primary limits of the grant to said railroad. On March 16, 1878, one Henry Y. Owen filed pre-emption declaratory

statement for the tract, alleging settlement March 1, 1878. Said filing remained of record uncanceled at the date of the filing of the map of definite location of the road, May 24, 1884.

Steiner made homestead entry for the land on March 8, 1886, claiming to have established residence thereon January 1, 1882. On January 27, 1887, he made commutation proof, and cash certificate issued thereon.

The company did not appear at the time of the offer of proof, but afterward moved that the proceedings be vacated. The motion was denied, and the company appealed. The case was brought before the Department on said appeal by your office letter of June 7, 1887; and on July 11, 1892 (248 L. & R., 135), the Department rendered a decision holding that, in the absence of an allegation of a continued claim under Owen's filing to the date of definite location, the same must be presumed to have been abandoned prior to that date; and ordered a further hearing to afford all parties opportunity to offer testimony as to the status of the land at said date of definite location.

Such hearing was had on the 8th of December, 1892. As the result thereof, the local officers found that, "it appears very clear from a preponderance of the evidence that the homesteader, Steiner, was, with his family, residing upon and cultivating the tract in question at the date of definite location." The railroad company appealed to your office, which, on April 13, 1895, arrived at the same conclusion. The company has appealed to the Department.

I have examined the testimony carefully, and concur in the conclusion reached by the local officers and your office that the tract was excepted from the grant by Steiner's settlement and residence.

The company contends that Steiner was not a legal settler, and could not make a legal settlement on the land, in 1884, prior to the company's definite location; and that if he was upon the land, it was as a tenant of the company, and not as a settler under the public land laws.

These are questions that need not be discussed. If the land was not excepted by Steiner's settlement and residence, it was by Owen's pre-emption filing, uncanceled at the date of definite location. (*Whitney v. Taylor*, 158 U. S., 85.)

The decision of your office rejecting the company's claim and holding Steiner's entry intact, is hereby affirmed.

APPLICATION TO SET ASIDE PATENT—MINING CLAIM.

BUTTE AND BOSTON MINING COMPANY.

Where a petition is addressed to the General Land Office asking for a suit to set aside a patent, the matter should be reported to the Department with an expression of opinion as to the advisability of ordering a preliminary hearing. .

A lode or vein within a placer claim, and known to exist at date of the placer entry, is, by the terms of the law, excepted from the operation of the placer patent, and a lode patent may thereafter issue for the excepted lode or vein, on due proof of compliance with law.

The United States should not attack its own patents, duly and regularly issued, without a clear and convincing showing that fraud was committed in procuring its issuance.

Acting Secretary Sims to the Commissioner of the General Land Office,
(J. I. H.) August 29, 1895. (F. L. C.)

An application has been filed in behalf of the Butte and Boston Mining Company for certification to this Department, for supervisory action, under rules 83 and 84 of practice, of the record in the matter of the petition of John Sloan and Margaret D. McRae to have suit brought to vacate patents issued on placer mineral entries, Nos. 491 and 597, Helena land district, Montana. Said petition is opposed by the Butte and Boston Mining Company as the present owners by purchase of said patented mineral lands.

The grounds for the petition for suit are:

1st. That at the dates of filing the placer applications upon which patents subsequently issued, the land embraced therein contained known lodes or veins of mineral bearing rock.

2d. That the applicants and entrymen had failed to comply with the law in the matter of expenditure upon or for the development of said placer mining claims.

Petitioners asked that a hearing be ordered to prove the truth of these averments, and thus lay the proper foundation for suit.

The request for hearing was granted by your office letter of March 6, 1894. A motion was filed by the Butte and Boston Mining Company and the Boston and Montana Smelting Company that the order for hearing above mentioned be revoked. This was denied by your office letter of June 14, 1894.

By telegram from your office, dated June 19, 1894, the order for hearing was suspended to await further instructions.

By your office letter of February 8, 1895, this suspension was removed, and direction was given that the hearing proceed. From said order the Butte and Boston Mining Company then sought to appeal, and by your office letter of March 2, 1895, the right of appeal was denied. Hence the application for certiorari.

In this connection, it may be observed that the order for hearing was made by your office on its own responsibility, and without consulting or asking the advice of the Department.

Petitions for suit to set aside patents are usually addressed to the Department, which, before taking action thereon, requests a report and recommendation from your office. In this case the petition was addressed to the Commissioner of the General Land Office, and the Secretary of the Interior, and your office by letter of March 2, 1895, denying the right of appeal, attempted to justify its action in ordering a hearing for the purpose herein indicated without consulting the Department.

It is suggested that it would be better practice, in every case where suit is asked to set aside patent, to first report the matter to the Department, with expression of view as to the advisability of ordering a preliminary hearing with a view to requesting suit. If hearing is then had, it is on the concurring judgment of your office and this Department, and there can be no ground for complaint. Such course can cause but little delay, and should the petition in any instance present such a prima facie case as in the opinion of your office would warrant the ordering of a hearing with a view to suit, and the Department think differently, parties in interest would be saved the trouble and expense incident to a hearing.

Recurring now to the case in hand, a further brief recital is necessary in order to intelligently consider the questions presented by the application for certiorari, and to determine whether the hearing ordered by your office should proceed.

December 5, 1878, James A. Talbot and seven others located a placer mining claim in township 3 north, range 7 west, Helena, Montana, covering one hundred and sixty acres of land. January 30, 1879, application for patent was filed by the locators, and on April 13, 1879, mineral entry No. 491 was made for substantially the same ground, embracing 151.57 acres. May 31, 1880, patent issued on said entry.

June 8, 1880, James A. Talbot and Richard S. Jones located as a placer other land in the same section, containing 28.85 acres. August 9, 1880, they filed mineral application, and on November 2, 1880, mineral entry No. 597 was allowed. March 31, 1882, patent issued thereon.

The proofs upon which these entries were made appear to have been in all respects regular, and were deemed satisfactory by the local office and by your office. They and the patents issued upon them stood unassailed until this petition for suit was filed upon which your office, in 1894, ordered a hearing.

The entire record, including the original entry papers on which the patents are based, has been forwarded by your office, and is now before me, and to that extent the application for certiorari has already served its purpose. The showing made by said application is such as, in my judgment, to warrant examination of the record and consideration of the merits of the petition for suit.

With reference to the first point made by petitioners, to wit, that the land embraced in their placer patents contained lodes or veins known to exist at the date of entry and of patent, it is sufficient to say that if such lodes did exist as alleged, they are reserved from the operation of

the placer patent by the terms of the law itself (Sec. 2333, Revised Statutes), and lode patent may issue therefor upon due proof of compliance with law. (South Star Lode, on review, 20 L. D., 204.)

In this connection it may be noted that certified copies of certain court records, on file in the case, show that in December, 1888, the Butte and Boston Mining Company (the applicant now here for certiorari) brought suit in the district court of the second judicial district in and for Montana Territory, county of Silver Bow, for possession of certain land, evidently that now claimed to be known lodes, within the boundaries of the tracts covered by the placer patents issued to Talbot *et al.*, and for damages. One of the petitioners in this case was a defendant in that suit. The trial was by jury and the finding was for plaintiff. This finding and judgment were affirmed by the supreme court of Montana, April 29, 1895. These judicial findings, while not binding upon this Department, would be regarded as highly persuasive, were it necessary now to consider the question as to the character of the lands claimed as lodes, and are referred to as a part of the history of the litigation between these parties relative to these lands during the past years.

The only question now left for consideration is that as to the alleged failure of the placer claimants to comply with the law in the matter of expenditure upon and for the placer mining claims.

As before stated, the proofs under the applications for patent were regular, and made in accordance with law and the regulations. They were found satisfactory by the local office and your office, and were not, when offered, challenged by any one. Not until a dozen or more years were they attacked before this Department. During that time there had been numerous transfers of title, until it now rests in the present applicant for certiorari, the Butte and Boston Mining Company, and that company has made large outlay (estimated at more than \$800,000) in the erection upon the ground of smelting and concentrating works, etc. These purchases and extensive improvements were made on faith of the title passed out of the government as evidenced by its patents, which title should not be lightly disturbed.

There are in the record numerous affidavits for and against the bona fide character of the proofs made by the entrymen preliminary to the issuance of patent. A reading of these affidavits leaves the mind in grave doubt as to whether there was a bona fide compliance with law in the matter of expenditure.

The government should not attack its own patents, duly and regularly issued, without a clear and convincing showing that fraud was committed upon it in procuring the issuance. Especially is this true where, as in this case, many years have elapsed since the issuance of patent.

As has been said, the title under the patents in question is now in the Butte and Boston Mining Company, and has been since 1888. There is no showing that said company was other than a bona fide pur-

chaser—nothing to connect it with a fraud on the part of the locators, if such fraud existed. On the other hand, the facts and circumstances indicate very clearly the bona fide character of its purchase. There are affidavits from the company on that point, and to that effect; and, besides, it is not to be presumed, if said company was a party to or had knowledge of any fraud in connection with the entry of the land in question and the procurement of patent therefor, that it would have risked the expenditure in improvements of nearly a million of dollars, for it would have known that every dollar so expended was in peril and liable to be lost.

After a full and careful consideration of the whole matter as presented by the certiorari and by the petition for suit, I am of the opinion that there is not such showing as warrants an order for hearing with a view to bringing suit. The order of your office is therefore annulled and set aside, and the petition of Sloan and McRae is denied.

PRACTICE—MOTION FOR REVIEW.

JAMES McVICAR.

A decision of the Department will not be reversed on review on the ground that the departmental rule followed therein has been reversed by the supreme court, where said decision, when made, was in accord with the rulings of the Department.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 31, 1895. (F. W. C.)

I am in receipt of your office letter of July 19, 1895, enclosing a motion filed on behalf of James McVicar, for the review of departmental decision of January 22, 1895 (20 L. D., 62), which affirmed your office decision in denying his application for the repayment of the double-minimum excess required to be paid upon his entry covering the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 47 N., R. 10 W., Ashland land district, Wisconsin.

This land falls within the indemnity limits of the grant made by the act of June 3, 1856 (11 Stat., 20), to aid in the construction of the road now known as the Chicago, St. Paul, Minneapolis and Omaha railroad company.

By the act of May 5, 1864 (13 Stat., 66), said grant was increased from six to ten sections per mile and this tract fell within the enlarged granted limits.

By the same act a grant was made to aid in the construction of a railroad now known as the Wisconsin Central railroad. This tract also fell within the granted limits of said grant so that it was within the common ten mile granted limits of the two roads under the act of May 5, 1864, *supra*.

Within said enlarged common limit it has been the previous holding of this Department that the grant made was of a moiety on account of each of the roads, but as the lands had been previously reserved for

indemnity purposes on account of the grant of 1856, they were thereby excepted from the operation of the grant for the Central company, leaving the United States and the Omaha company tenants in common as to the odd numbered sections within such conflicting limits. (See 10 L. D., 63 and 147; also 11 L. D., 515.)

In the adjustment of the Omaha grant said company was required to make selection of lands within the common limit equal to its moiety, to which it was given full title, the remaining lands being held to apply to the moiety for the Central company's grant, which being defeated by the reservation under the act of 1856, as before stated, were opened to entry. The land in question is a portion of that restored, and in completing entry therefor, McVicar was required to pay at the rate of \$2.50 per acre or the double minimum price.

By the fifth section of the act of May 5, 1864, *supra*, it is provided:

That the sections and parts of sections of lands which shall remain to the United States within ten miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold.

In the decision under review it was held that:

The land in question being within ten miles of the Omaha road, and remaining to the United States, for the reasons before named was properly rated at double the minimum price, and your office decision rejecting the application for repayment on account thereof was proper and is hereby affirmed.

The motion under consideration calls attention to the recent decision of the United States supreme court in the case of the Wisconsin Central R. R. Co. v. William O. Foresythe, June 3, 1895, in which the court holds, in effect, that the withdrawal made for indemnity purposes under the act of 1856 did not serve to defeat the attachment of rights under the grant made by the act of 1864, either as to the portion of the grant made by that act and claimed by the Omaha railroad company, or that claimed by the Wisconsin Central railroad company, thus reversing the previous decisions of this Department upon that question.

It would seem therefore that within the common ten mile limits under the act of 1864, each company was entitled to a moiety, and as to that portion which was opposite the unconstructed part of the Wisconsin railroad, the moiety belonging to said grant was forfeited and restored to the United States by the general forfeiture act of September 29, 1890 (26 Stat., 496).

As before shown, however, this was not the rule of construction adopted by this Department at the time McVicar's application was acted upon.

The decision made upon said application was proper and in accord with the rulings then prevailing, and the fact that such ruling has been changed is not sufficient reason for reviewing and reversing the decision previously made.

The motion must, therefore, be denied.

This action is taken without prejudice to McVicar's rights under a new application.

PRACTICE—APPEAL—REVIEW—CERTIORARI.

HOSKING v. PEARSON.

Where on motion for review new facts are set up and a hearing thereon asked, and the motion is denied by the Commissioner, an appeal therefrom may be properly taken, and if refused, the right of the applicant, on due showing made, may be reviewed under a writ of certiorari.

Acting Secretary Sims to the Commissioner of the General Land Office
August 31, 1895. (W. M. B.)

I have considered the application of counsel for George Hosking, dated April 29, 1894, to have certified to this Department, under Rules 83 and 84 of Practice, the record of the proceedings in the case of the cancellation of said Hosking's pre-emption entry, made July 5, 1890; final proof September 27, 1892; and final certificate October 1, 1892, for the "N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 9," and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 10, T. 63 N., R. 9 W., Duluth land district, Minnesota, petitioner's said entry having been held for cancellation by your office decision of November 29, 1893, whereupon a motion was, on February 8, 1894, filed for a review of your said office decision, and upon the ground of newly discovered evidence petitioner filed an affidavit of contest against the alleged entry of Pearson for the land in question, and asked for a hearing to determine an issue, which could not be otherwise adjudicated.

On March 23, 1894, your office refused to require Pearson to show cause why the entry credited to and allowed him by the decision thereof—in so far as respects the land (N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 9) involved—should not be canceled, or to allow the contest and order the hearing petitioned for, to that end, which motion being denied, Hosking, on March 27, 1894, appealed from said (latter) decision of your office.

You held in effect that the time in which Hosking was allowed to file appeal began to run from date, December 9, 1893, of notice of your first office decision, and had, therefore, under the limit prescribed by the Rules of Practice, expired at date, March 27, 1894, of filing of the same.

Petitioner claims that whereas affidavit of contest against Pearson's alleged entry of the tract was filed with motion for review, and that as said motion set up newly discovered evidence as the basis for the hearing asked for, and that as the allegations contained in the motion and affidavit of contest introduced new elements into this case—thus making a new case—that said motion should have been allowed and not refused, as it was, by your office decision of March 23, 1894, as stated.

In view of the fact that the motion and affidavit of contest did present newly discovered material facts, which had not been previously considered, for the reason that their existence was not known, and since their introduction into the case makes a new case—with the question passed upon by the former decision of your office still left open—I hold that

appeal was properly taken, and should have been allowed and forwarded, from the *latter* decision of your office, as the same was filed only four days subsequent to your office decision of March 23, 1894, being within the limit of time prescribed by the Rules of Practice.

The petitioner makes a *prima facie* showing that he is entitled to relief, and that your office decision of March 23, 1894, was erroneous for the reason, as alleged, that there are grounds, based upon trustworthy and competent evidence, for believing that Pearson never, at any time, made entry of the said N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 9, and it is further asserted that if there could possibly be any mistake as to his filing upon said tract, that there can be no doubt as to his failure to make settlement and improvement upon any portion of the same; that your office was asked by said petitioner to order a hearing that these facts might be proved, and petitioner's superior claim and right established to and in this land, and that the right to a hearing was improperly denied by your office.

As the record before me shows that there is reversible error in your office decision refusing to order the hearing for the purpose stated, and to forward appeal therefrom, you are hereby ordered to certify to this Department the complete record in this case that the questions and facts involving and affecting the rights of the petitioner may be determined.

RIPIARIAN RIGHTS—SHORE LINE OF LAKE—MEANDER.

GEORGE W. STREETER ET AL.

Land formed between the meander and shore line of Lake Michigan, through the acts of persons or corporations, is not the property of the government, or subject to the jurisdiction thereof, under the public land laws.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 31, 1895. (G. C. R.)

On May 5, 1895, George W. Streeter presented his application at your office to make homestead entry for "the piece or parcel of land lying east of the south half of fractional section 3, and east of the north half of fractional section ten, T. 39 N., R. 14 E., of the 3d Principal Meridian, of Illinois, containing 150 acres, more or less." Your office declined to receive the application or allow the same to be placed on file, because the tract applied for appears to be identical with the tract upon which "George W. Streeter attempted to locate a military bounty land warrant, said application to locate having been denied by this office on March 29, 1894, for the reason that it is not public land, and is not subject to disposal by the United States."

On the same day Peter T. Johnson applied to make homestead entry for the same tract of land, and your office rejected his application for the same reason.

The applicants have joined in an appeal to this Department, alleging error in refusing to receive said applications, and insisting that they were entitled to make the entry under the law and facts disclosed in their applications.

Accompanying the applications is a plat of a private survey of the lands, and a description thereof by metes and bounds, also affidavits that the applicants are occupants of the land, and that the same—

is a portion of the filled in land between the meander line as established by the government survey and the present water line of Lake Michigan; that the land comprising said tract is formed by filling in and displacing the waters of Lake Michigan by sand, soil and debris deposited during a long period of time, and that such filling, etc., is the acts of human and not natural agencies, and was done by various persons that Peter T. Johnson has lived in a house on piling for sixteen years, and that George W. Streeter in the year 1886 was shipwrecked upon the bar or bed of Lake Michigan, several rods from the original shore line as shown by 1821 United States survey; that George W. Streeter and his family lived in his boat for some two years; that the land formed around this boat in the navigable waters above water level; that in addition to the land formed around the stranded boat, a large quantity of land (being the largest portion of the above described tract) was filled and deposited in the lake by various persons (unknown);

that the land so made by filling, etc., and claimed by applicants, covers an area of about one hundred and eighty-six (186) acres.

The plat of the official survey of said fractional township was approved May 16, 1831, the survey having been made in the year 1821. This survey shows said fractional section ten to be composed of two parts, one part north of Chicago river, covering 102.29 acres, and the other part south of that river covering 57.52 acres. The part of the section north of the river was, on March 9, 1837, patented to Robert A. Kenzie, under the pre-emption law.

The whole of section three of said township was, among other lands, selected by the Commissioner of the General Land Office, in pursuance of the act of Congress approved March 2, 1827 (4 Stat., 234), granting a quantity of land to the State of Illinois for canal purposes, and the public survey shows that both section three and section ten are bounded on the east by Lake Michigan. The land sought to be entered is confessedly to the east of the meander line between these two fractional sections and the lake, and since the lake itself, and not the meander line, is the east boundary of the two fractional sections, as shown by the public survey, the land has long since been disposed of, and there is no land left of which this Department has jurisdiction.

If, as alleged, the lake has been filled in until a large quantity of land has appeared that was formerly covered by water, this made land does not belong to the government. The State of Illinois holds the title to the lands under the navigable waters of Lake Michigan, within its limits; and the fact that any person or corporation, not the owners of the shore lands, has, by filling in, extended the land out into the lake, does not give to such person or corporation any riparian rights. (Illinois Central R. R. v. Illinois, 146 U. S., 387.)

Without discussing the question as to the true ownership of the made or filled in lands formerly covered by the waters of the lake, it is sufficient to say that such lands do not belong to the government, and, therefore, this Department has no jurisdiction to direct their survey or disposal.

The decision appealed from is affirmed.

WERDEN *v.* SCHLECHT ET AL.

Motion for rehearing in the case above entitled (see 20 L. D., 523), denied by Acting Secretary Sims, August 31, 1895.

TOWNSITE—SECTION 22, ACT OF MAY 2, 1890—SCHOOL FUND.

NORTH ENID.

The jurisdiction of the Secretary of the Interior over money derived from the sale of land for townsite purposes, under section 22, act of May 2, 1890, terminates when the money is paid to the authorities of the town.

Acting Secretary Reynolds to George E. Armstrong, North Enid, Oklahoma, September 5, 1895. (G. B. G.)

I have your letter of the 25th inst., calling my attention to the fact that mandamus proceedings have been instituted to compel the town council of North Enid, Oklahoma, to make a disposition of certain moneys in the hands of said council in violation as is alleged of Sec. 22 of the organic act of Oklahoma Territory. This money, amounting to the sum of \$1,496, was derived from the sale of land for the townsite of North Enid, and by departmental order has been paid to the town by virtue of that part of Sec. 22 of the organic act of Oklahoma Territory which provides that:

The sums so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized to be used by them for school purposes only.

The jurisdiction of the Secretary of the Interior over this matter determined when the money was paid to the authorities of the town, and you will have to look to the courts for protection against any attempted diversion of the fund.

WITHDRAWAL OF PUBLIC LAND—SCHOOL SELECTION.

CURRIE *v.* STATE OF CALIFORNIA.

An order of withdrawal, made for a public purpose, takes effect on the date of its issue, regardless of the time it may reach the local office.

Lands embraced within an executive order of withdrawal are not subject to selection as school indemnity.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 20, 1895. (I. D.)

The State of California appeals from your office decision of December 29, 1893, wherein you hold Currie's homestead entry intact for the NW. $\frac{1}{4}$ of Sec. 13, T. 8 S., R. 23 E., M. D. M., and hold for cancellation the school indemnity selection of the State for said tract, and also for the W. $\frac{1}{2}$, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 12, in the same township, Stockton land district, California.

Currie made homestead entry for the NE. $\frac{1}{4}$, Sec. 13, on February 15, 1892, alleging settlement July 18, 1890, before survey, and continuous residence thereon until said entry.

The plat, including the Currie tract, was received in the local office November 20, 1891. December 11, 1891, the State of California selected all of the lands above described to compensate for specific losses of other lands.

Your office, October 10, 1892, instructed the local officers to call upon the State to show cause why its claim for said NW. $\frac{1}{4}$ of Sec. 13, should not be canceled for conflict with Currie's homestead entry. The State thereupon charged that Currie never resided, in good faith, on said land as a homestead settler, and that he never established a *bona fide* residence thereon prior to the filing of the plat aforesaid in the local office.

The evidence at the hearing was undisputed and plain that Currie had bought a cabin from a prior settler, and, in July, 1890, established his residence on the land, improved the cabin, fenced three-quarters of an acre of garden, cleared some ground, cut trees for a larger house in 1890 and 1891, and built a house early in 1892, besides fencing about ten acres more and maintained a continuous residence thereon. He was, therefore, a *bona fide* settler on the land at the time of the order of withdrawal and before the State sought to make selection, and his homestead entry is held intact.

The case, as appealed from the local office, relates solely to Currie's land, but your office decision says:

There is another reason for holding the claim of the State to this land, for cancellation, viz: On November 5, 1891, T. 8 S., R. 23 E., M. D. M., with other townships, was withdrawn from disposal by authority of this Department, with a view to creating a public reservation; and afterwards, by proclamation of the President, under date of February 14, 1893, such reservation was established and is known as the Sierra Forest Reservation.

Therefore, applications made by the State of California, after November 5, 1891, to select lands in the townships so reserved, are inadmissible. And this being the case the whole of said selection, R. and R., No. 117, embracing the W. $\frac{1}{2}$, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 12, and the NW. $\frac{1}{4}$ of Sec. 13, T. 8 S., R. 23 E., M. D. M., being 640 acres, made December 11, 1891, to compensate for deficiencies of school land in Sec. 36, T. 13 S., R. 16 W., and in fractional townships 13 S., R. 15 W., and 14 S., R. 14 W., S. B. M., is hereby held for cancellation as invalid.

The appeal on behalf of the State from this branch of the case, urges that the order of November 5, 1891, was not received at the local office until after the selection made by the State on December 11, 1891; and also, that inasmuch as applications for several tracts of land covered by the withdrawal were afterwards received under the timber and stone act, and passed to patent, that the State should be treated the same as other entrymen.

The order of withdrawal being for public purposes became effective on the date of its issue, regardless of the time it may have reached the local office.

The cases holding that an order of withdrawal takes effect from its receipt at the local office were all orders of withdrawal for the benefit of a railroad grant and were construed most liberally in favor of the public. The same construction applies here and the interest of the public is that the order for a public purpose should become effective instantly. As to the patents issued upon applications filed subsequently to the date of the order of withdrawal, that were not predicated on rights existing on that date, they were issued by mistake and can form no precedent for permitting other lands, selected after the date of withdrawal, to be patented.

Your office decision is affirmed.

SETTLEMENT CLAIM—RAILROAD LANDS.

INGRAHAM *v.* SPRAY.

An allegation of settlement with a view to purchasing from a railroad company, made on behalf of an applicant under the forfeiture act of September 29, 1890, is disproved by the fact that the alleged settler entered the tract involved under the timber culture law.

Acting Secretary Sims to the Commissioner of the General Land Office,
August 31, 1895. (J. L.)

Abram L. Spray, executor of John C. Spray, deceased, has appealed from your office decision of December 5, 1893, modifying the decision of the local officers, and cancelling A. L. Spray's cash entry, No. 3032, dismissing Ingraham's contest, and holding intact John C. Spray's timber culture entry No. 2764.

The land involved is the NE. $\frac{1}{4}$ of section 35, T. 3 S., R. 24 E., Willamette meridian, The Dalles land district, Oregon.

The records of your office show that said tract of land is within the limits of the legislative withdrawal for the Northern Pacific Railroad Company which took effect August 13, 1870; and it was not again made subject to entry until the passage of the forfeiture act of September 29, 1890 (26 Stat., 496).

On April 13, 1883, one S. S. Beales filed her preemption declaratory statement for said tract, alleging settlement on April 9, 1883. Said filing was cancelled by your office on November 13, 1889.

On November 17, 1887, John C. Spray (now deceased) was erroneously allowed by the local officers to make timber culture entry, No. 2764, of said tract.

On June 11, 1891, A. L. Spray as executor of said John C. Spray, filed a declaratory statement for said land under the act of September 29, 1890, alleging settlement by his testator on October 27, 1887.

On December 28, 1891, he filed an application to purchase said land under the act of September 29, 1890, alleging in substance,

That his testator settled on the said tract of land on November 1, 1887; that his testator until his death on February 27, 1891, and he afterwards, had been in full and peaceable possession of all of said tract ever since the date of said settlement to the (then) present time, except one acre fenced by another prior to that time; that his testator settled upon said tract with the expectation of purchasing the same from the Northern Pacific Railroad Company if they (the company) should obtain title to the same.

That the whole of said tract was under fence by my father, John C. Spray, (except one acre) from November 1, 1887. In the spring of 1889 about ten acres was fenced inside the fence of J. C. Spray in the same corner with the one acre above named. All the rest of the tract has been in full and free possession of J. C. Spray and myself, as executor, since November 1, 1887.

On January 5, 1892, John S. Ingraham filed an affidavit of contest against John C. Spray's timber culture entry, No. 2764, and against Abram L. Spray's application to purchase said land, alleging in substance,

1. That he, said Ingraham, in the month of April, 1884, made entry upon said tract, and made improvements thereon with the intention of acquiring title thereto from the Northern Pacific Railroad Company.

2. That he began a contest against J. C. Spray's timber culture entry, made in the year 1887; but was denied a hearing, for the reason that said entry was null and void.

3. That Abram L. Spray, when he made his application to purchase, well knew that Ingraham claimed and had been in possession of said land ever since the month of April, 1884, and that he intended to purchase the same under the act of September 29, 1890.

Nevertheless, the local officers allowed A. L. Spray, executor, to purchase said land, and on January 12, 1892, issued to him final cash receipt and certificate No. 3032.

Your office, by letter "H" of April 23, 1892, directed a hearing, which was had on June 18, 1892. On April 28, 1893, the local officers found that the tract had been settled upon and partly cultivated since 1884

by the contestant, and that he had the prior right to enter said land under the act of September 29, 1890, and recommended that Spray's cash entry, No. 3032, be cancelled.

Spray appealed, and on December 5, 1893, your office modified the decision of the local officers; held that neither Ingraham nor Spray was entitled to purchase said tract under the act of September 29, 1890; held Spray's cash entry for cancellation; dismissed Ingraham's contest, and permitted John C. Spray's timber culture entry, No. 2764, to stand subject to proof of compliance with law, or to contest on any sufficient grounds:

for although illegal when made, the bar to its allowance was removed by the act of September 29, 1890, restoring the tract to the public domain, at a time prior to the repeal of the timber culture law by the act of March 3, 1891.

A. L. Spray has appealed to this Department. The case is closed as to Ingraham who has not appealed from your office decision.

I concur in the opinion of your office that John C. Spray was not entitled to purchase under the act of September 29, 1890. His timber culture entry of November 17, 1887, is proof that he did not settle with *bona fide* intent to secure title by purchase from the company.

Your office decision is hereby affirmed.

APPLICATION TO ENTER—PAYMENT OF FEES.

JOHN F. SETTJE.

An application to enter, accompanied by a worthless check in payment of the fees required by law, confers no right upon the applicant; nor are the local officers bound to take notice of such an application.

*Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 5, 1895. (C. J. W.)*

John F. Settje who made timber culture entry No. 116 for the SW. $\frac{1}{4}$ of Sec. 26, T. 28, R. 52 W., Colorado, on November 12, 1892, appeals from your office decision of January 20, 1894, holding said entry for cancellation.

Settje had brought contest against the prior timber culture entry of Brower, for the said land, and Brower's entry was canceled March 11, 1890, as the result of the contest. Settje claims to have filed application to enter at the time of filing contest. That about the 13th day of December, 1890, he received by mail the first notice given him of the cancellation of Brower's entry, whereupon, about December 27, 1890, he made the necessary affidavits and application to enter said land, and forwarded the same by mail within thirty days after notice of the cancellation of Brower's entry. This application and affidavits were forwarded to the land office at Akron, Colorado. The register and receiver at that office, rejected the application for two reasons: the

bank check forwarded to pay fees was worthless, being on a broken bank; and because the tract was covered by former entry of Brower, the cancellation of which had not been noted.

Settje claimed to have had no notice of the rejection of this application. Afterwards, on September 19, 1892, Settje was notified, through the land office at Akron, of the cancellation of Brower's former entry and, on November 12, 1892, Settje made entry.

Your office held that the fact that Settje may have been acting under the belief that his application of December 27, 1890, had been allowed, the filing of such application did not have the effect of preserving in him the right to perfect his claim after the repeal of timber culture act, and further, that his failure to make his entry now in question, within thirty days after final notice of the cancellation of Brower's entry, lost him his preference right as the successful contestant of said entry.

These rulings are assigned as error. Evidently, the application of the 27th of December, 1890, accompanied by a check on a broken bank, for the fees required by law to be tendered with the application, amounted to no tender at all, and the local officers were not bound to take notice of such application. It could not have the effect of clothing the applicant with any equitable right, even though he may not have received notice of the rejection of such application. He had made no legal application to enter. See Clewell and Marsh, 2 L. D., 320.

If any right had survived which would bring his claim within the proviso to the act repealing the timber-culture laws, he would still be bound to take steps to perfect such defective entry within thirty days from formal notice of the cancellation of the prior entry of Brower. This notice he had on September 19, 1892, and he failed to make his entry until November 12th thereafter, more than thirty days after such notice.

Your office decision is approved.

RAILROAD LANDS—SETTLEMENT RIGHTS—SECTION 5, ACT OF MARCH 3, 1887.

MALLON ET AL. v. BROWN ET AL.

A claimant will not be heard to assert a settlement right, where by his own laches he has allowed the rights of others to intervene, and by his own acts recognized such intervening rights.

Purchasers under section 5, act of March 3, 1887, are not required to establish and maintain residence on the land included within their purchase.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 5, 1895. (G. C. R.)

On February 10, 1890, cash certificate No. 4241 was issued to Hiram Brown and Charles H. Page, for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 5, Tp. 1 S., R. 3 E., W. M., Oregon City, Oregon, under section 5 of the act of March 3, 1887 (24 Stat., 556).

Under examination of this entry your office (November 19, 1890), required the claimants to publish notice of their intention to submit proof, and to show that the land had not been settled upon subsequent to December 1, 1882, by any person claiming rights under the settlement laws, the evidence then on file, as to the sale by the company to one Corsen, being held sufficient.

Notice was duly published, fixing March 16, 1891, for submitting the required testimony, and the claimants filed affidavits, stating that no one had settled on the land subsequent to December 1, 1882, except one Kornstad, who had subsequently relinquished his claim.

On March 16, 1891, Owen P. Mallon filed his protest against the allowance of Brown and Page's entry on the grounds that he had settled on the land in December, 1890, claiming the same under the settlement laws.

E. O. Corsen also filed a protest against all parties, except Brown and Page. Maxwell Young filed his protest, alleging fraud and collusion on part of claimants, and John Long filed his protest, on the grounds that he had been instrumental in clearing the records of a filing by one Ross in 1861; that he had applied to make an additional homestead entry upon the land in 1870; that his application had been denied, but that he continuously asserted claim to the land.

A hearing was had, and the local officers dismissed all the protests. On appeal, your office by decision, dated January 27, 1894, affirmed that action.

Of all the protestants, Long only has appealed. He insists that it was error to have held him guilty of laches in not appealing from the decisions of the register and receiver rejecting his applications, and in holding that he has no claim to the land which interferes with defendants' right of purchase; also in holding that the land is properly subject to purchase under the 5th section of the act of March 3, 1887.

The 5th section of the act of March 3, 1887, under which the purchase was made, reads 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 occupations have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement

laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

It appears that the land is within the primary limits of the grant for the benefit of the Northern Pacific and Oregon and California Railroads. It is of the numbered sections prescribed in the grant, and is also coterminous with the constructed parts of the last named road since December, 1869.

The appellants are shown to be naturalized citizens of the United States, and purchased the lands from a grantee of the company under warranty deed, and also direct from the company.

The lands were in fact settled upon subsequent to December 1, 1882 (i. e. in 1886), by one claiming the same under the settlement laws, and such settlement would, under the second proviso to the section, have defeated the purchasers from the company from obtaining title thereto from the government, had such settler complied with the laws; but this settler (Kornstad) relinquished all his right to the land (October 10, 1889), and its status was then the same as if no entry or settlement had been made, and the land was thus left subject to the operation of the statute just quoted.

A declaratory statement filed by J. Ross, May 21, 1861, for the land (being then unoffered), served to except it from the operation of the grant.

It thus appears that claimants' right to the land is paramount, unless such rights were defeated by the claims of appellant.

It appears that in July, 1870, Long, the appellant, sought to enter the land in controversy, also an adjoining tract, being the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 6. These were the tracts upon which Ross made his filing in 1861. Such proceedings were had as to clear the records of the filing, and Long applied to enter the whole quarter section. He was not permitted to enter the land in Sec. 5, on account of the claim of the company, but did enter that in Sec. 6, upon which he afterwards received patent. He states that the local officers "flatly refused his application for the whole of the tract."

One Fitzsimmons entered the land March 25, 1872, and his entry was canceled February 3, 1873. Long testifies that he then applied to enter the land, and his application was refused because of the company's claim. He further testifies that when he offered final proof upon his entry made for the land in Sec. 6, he "asked the receiver if he would not give the patent for the 160"; that the receiver said he could not on account of the company's claim; that he again applied for the land as an additional homestead, and his application was rejected for the same reason. That he again (about 1886) went to the local office to apply for the land, and found that Kornstad had filed for it.

This testimony shows that Long honestly endeavored to obtain title to the land, and that the local officers erred in refusing his applications. His remedy was by appeal, but he appears to have acquiesced in the

decisions of the local officers. His reason for not appealing or prosecuting his alleged rights (to use his own words) was that he "hadn't the means to follow it up." The fact, however, that he was one of Kornstad's final proof witnesses when, on April 19, 1887, the latter offered his pre-emption final proof for the land, shows that he had abandoned all claims to the land, and he can not now be heard to assert rights which he might have obtained in the first instance, by employing proper legal means, when by his own laches he has allowed other rights to intervene; indeed, he is completely estopped from asserting any such claims by his voluntary act in becoming a proof witness for a junior claimant.

The decision appealed from is affirmed.

Since Long's appeal herein was filed, one Joseph Boyd has filed a contest against the entrymen, on the grounds that

you nor either of you have resided upon, cultivated or improved the tract of land, and the purpose of the contest is that I may have the privilege of entering or filing upon the said described tract, or, failing so to do, through no fault of mine, desire that a hearing be ordered to decide the validity of said cash entry.

Sundry affidavits in support of this application have also been filed, and notice thereof served on the entrymen.

It is sufficient to say that purchasers under the 5th section of the act of March 3, 1887, are not required to make their residence on the land, as do homestead or pre-emption claimants. It results, therefore, that if the alleged facts in support of this application were proven, the entry would still not be affected. The application is therefore denied.

SCHOOL LANDS—LEASE—SUB-LEASE.

JOHN F. SHAFFER.

Under the regulations, and form of lease, required by the Department, school land leased for agricultural and grazing purposes, can not be sub-let for the purpose of establishing a brick yard thereon.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 5, 1895. (W. M. B.)

I have considered the appeal of John F. Shaffer from your office decision of April 30, 1894, wherein was rejected his application to sub-let, for brickyard purposes, ten (10) acres of the SW. $\frac{1}{4}$ of Sec. 36, T. 26 N., R. 6 W., Indian Meridian, Enid land district, Oklahoma.

The record shows that William C. Renfro, as governor of the Territory of Oklahoma, on March 26, 1894, leased the above described quarter section of land to the said Shaffer, for purposes of "agriculture and grazing" for the term of three years (at \$250 per annum) from January 1, 1894, under provision contained in section 36 of the act of Congress

approved March 3, 1891 (26 Stat., 1043), to be found in the following words, to wit:

That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress may be leased for a period not exceeding three years for the benefit of the school fund of said Territory by the governor thereof, under regulations to be prescribed by the Secretary of the Interior.

Your office decision denying Shaffer the right to make the proposed lease is based upon the ground (1) that in the contract of lease it was stipulated that the lessee was not to under-let any portion of the leased premises; and (2) that the entire quarter section had been leased to lessee solely for the purposes of "agriculture and grazing."

It is disclosed by the record that the ten acres proposed to be under-let is to be used for the purposes of a brick plant—more commonly known as a brick-yard—being for a purpose and use quite different from that for which the land was leased to Shaffer, as shown by the rental contract.

Appellant substantially bases his appeal upon the ground—

That public policy and prosperity in the vicinity of that portion of the Cherokee Outlet in which the above described premises leased by applicant is situated demand that the lands surrounding and included therein should be utilized to the end and for the purpose for which they are best adapted and that said tract of ten acres is "suitable for no other purpose than that mentioned (brick-yard) in plaintiff's application."

In his application to sub-let the tract above designated appellant alleges that he had such action in view, for the stated purpose, before and at the time of executing the lease, under which he holds the land, and his attorney contends that such right and privilege should be granted him since he (appellant) "is a farmer and has no time nor has he the skill to utilize this particular portion of his land for the purpose aforesaid, and he can not utilize it for any other purpose."

Admitting all of the above averments to be true, yet the best and highest evidence of the rights of the lessee under the written contract is the covenants therein contained.

No matter what may have been the intention and purpose of the lessee prior to and at the date the lease was actually executed and approved, respecting the uses to which the land was to be put, still the government can in no way or manner be bound by such intention or purpose of the lessee, its obligation and responsibility to said lessee only being measured by the terms of the contract of lease entered into by the lessor and lessee.

Some of the material conditions or covenants contained in the regulations prescribed by the Secretary of the Interior under section 36 of the act of March 3, 1891, and embodied in the lease, are in words as follows—

The said party of the second part covenants with the said party of the first part, that he will not cut or remove, or permit to be cut or removed any timber from said land, that he will not quarry or remove, or permit to be quarried or removed, any

building or other stone from said land, except such as may be necessary for the foundations for buildings thereon; that he will not mine or remove, or permit to be mined or removed, any minerals therefrom; that he is leasing said land for agricultural and grazing purposes, and that he will cultivate the same in a husband-like manner; that he will not assign this lease, nor underlet any portion of the leased premises; and that he will not commit any acts of waste upon or to said land.

It will be observed from the above that not only building material—such as timber and stone suitable for building purposes—is included in the prohibition relating to removal, but that said restriction applies equally to all stone other than that suitable for such building purposes. By the express terms of the paragraph, last above quoted, building stone found upon the premises could only be used for the *foundations* of buildings erected thereon; but, as stated, could not, as well as stone suitable for such purpose, be removed from the land.

While it might not be necessary, perhaps, in any instance for the sub-lessees to remove any of the clay, in its original form or state, from the rented premises, yet when the clay is reduced to the form of bricks for building and other purposes, such brick would necessarily be removed therefrom. The clay from which the bricks are made partake as much of the realty of the leased tract as do the timber and stone thereon, and the preservation and retention of the former upon the tract seems as equally desirable as the latter, especially where there is a scarcity of brick clay in the neighborhood, and use of the clay for the desired purpose would be a breach of the contract, resulting in an act of waste upon and to the land.

Sections 16 and 36, reserved by Congress in the Territory of Oklahoma for school purposes, are held in trust by the government for the object intended, and it is proper that such policy respecting the use thereof should be pursued and adhered to as will best preserve and increase the value of such lands during governmental supervision and control thereof, as is sought to be done by existing departmental regulations, as embodied in that portion of the lease contract above set forth.

To lease these lands for grazing purposes can in no wise injure them, and to let them for agricultural purposes, with stated restrictions, will undoubtedly increase their value; but to sub-let any portion of the same for the purpose designated in Shaffer's application, would necessarily create "waste," result in the removal of a very valuable portion of the realty therefrom, which might ultimately, if not now, impair the usefulness of the tract in question, and lessen the value of the same.

Under the prescribed regulations, and the clear intent of the covenants of the lease, Shaffer himself would not be permitted to use the land, proposed to be sub-let, for the purpose indicated, and it is evident that he can not give authority to any one to do that which he can not do in person.

For the foregoing reasons your office decision, declining to approve appellant's application to sub-lease any portion of the tract leased by him, is hereby affirmed.

RIVER—AUTHORITY TO CHANGE THE CHANNEL.

S. C. BURNHAM ET AL.

The Secretary of the Interior is without authority to grant an application for a permit to change the channel of a river, the boundary of lands reserved by executive order for an Indian reservation, where such action is not required for the care and disposal of the public lands, or for the protection of the Indians in the use and enjoyment of the reservation.

Assistant Attorney-General Hall to the Secretary of the Interior, September 6, 1895. (E. E. W.)

I have the honor to state that I have received and carefully considered the petition of S. C. Burnham, P. N. Collyer and C. J. Collyer, for permission to change the channel of the San Juan River in Sec. 14, T. 29 N., R. 15 W., in New Mexico, which was submitted to you by the Commissioner of Indian Affairs in his letter dated May 9, 1895, and referred to me by Acting Secretary Sims, on the 17th of August, 1895, for an opinion in the matter.

The authority asked for is to change the channel of the San Juan River in the section named by putting a canal straight across a bend. At this point the San Juan River is the north boundary line of the Navajo Indian reservation, made so by executive order dated April 24, 1886. All of the land of the Navajo reservation in the said section fourteen is public land, and was only placed in reservation for the Indians by the executive order aforesaid.

The petitioners represent that they own all the adjoining land on the north side of the river, and that the Collyers also own about thirty acres in the bend on the south side. They also represent that in time of high water the river is constantly cutting further into their land on the north bank, and will in a few years take in their houses and completely destroy their farms, which are in a high state of cultivation, and contain valuable orchards and vineyards. They say the encroachments are so serious that the Collyers have to keep up a regular system of brush cribs for some distance along the river front to prevent their house from caving in. They also represent that the proposed change would not interfere with any irrigation canal, or other water right, or otherwise injure any person on either side of the river. The agent for the Navajo Indians corroborates all of these representations, and recommends that the prayer of the petitioners be granted.

OPINION.—The Secretary of the Interior is nowhere empowered in express terms to authorize any interference with the channel of a stream, either navigable or non-navigable, in either a State or a Territory; and if he is invested with such power at all it is by implication. He is charged with the supervision of the public business relating to the Indians and the public lands. Obviously this includes the power to perform or authorize any act necessary to the care and disposal of the public lands as the statutes direct, and to protect the Indians in the

use and enjoyment of their respective reservations. Manifestly the changing of the channel of the San Juan River as prayed for by the petitioners, however imperative for the protection of their property, is not necessary to the accomplishment of either of these purposes, and power to authorize such a change does not seem to be implied in the general power conferred upon the Secretary for the supervision of these or any other branches of the public business.

There is no allegation in the petition as to whether the San Juan is a navigable or non-navigable river. If it were necessary, however, or would alter the case, I think the Secretary could properly take judicial notice that it is a non-navigable stream. If it were a navigable river, unquestionably it would be under the exclusive control of Congress, though if it were situated in a State the legislature thereof might exercise jurisdiction in some cases in the absence of Congressional action.

Jurisdiction over non-navigable streams is vested in the legislatures of the States in which they are situated. Undoubtedly the legislature of a Territory may also authorize the changing of the channel of a non-navigable stream in some cases, but not where it would interfere with an Indian reservation, as in this case.

Therefore, I conclude that the authority prayed for by the petitioners can only be granted by Congress.

Approved.

JNO. M. REYNOLDS,
Acting Secretary.

APPLICATION TO ENTER—SEGREGATION.

MCCREARY *v.* WERT ET AL.

An application to enter should not be allowed for land included within the prior pending application of another.

An application to enter conflicting in part with the prior entry of another may be allowed as to the part not in conflict, and rejected as to the remainder.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 7, 1895. (C. W. P.)

I have considered the appeal of James Logan from the decision of your office of February 24, 1894, cancelling his entry, No. 4940, of lots 7 and 8 of section 8, T. 11 N., R. 7 W., Oklahoma land district, Oklahoma Territory, and of Annie Maney, from the same decision, dismissing her contest against the entry of S. H. Wert.

April 21, 1892, Wert made homestead entry, No. 3576, of lots 5 and 6, of section 8, T. 11 N., R. 7 W., and on the same day made application to amend his entry to the NW. $\frac{1}{4}$ of said section 8, alleging mistake in making his entry.

April 21, 1892, Sadie E. McCreary made application to enter lots 5, 6, 7 and 8 of said section 8, which the local officers held suspended during the pendency of Wert's application to amend his said entry.

July 7, 1892, Annie Maney filed her affidavit of contest against Wert's entry, alleging prior settlement.

July 16, 1892, Logan made his said entry, No. 4940.

October 26, 1892, Mrs. McCreary filed affidavit of contest, alleging settlement on lots 5, 6, 7 and 8 on April 19, 1892, and abandonment by Wert of lots 5 and 6 covered by his entry.

A hearing was had. Mrs. McCreary, Logan and Miss Maney appeared, but Wert made default. The register and receiver recommended that Logan's entry of lots 7 and 8 of section 8 be cancelled; that the homestead entry of Wert of lots 5 and 6 of section 8 be also cancelled; that the contest of Annie Maney be dismissed, and that the right to make homestead entry of lots 5, 6, 7 and 8 of section 8 be awarded to Sadie E. McCreary.

On appeal your office affirmed the judgment of the local office. The appeals from this decision bring the case to the Department.

The findings of fact are concurred in by your office and the local officers.

It is claimed that you erred in holding, that Logan's entry of lots 7 and 8 was improperly permitted, while those lots were covered by the pending application of Mrs. McCreary.

It is true, it is a well settled doctrine that an application to enter land covered by the existing entry of another confers no rights upon the applicant. *Walker v. Snider*, on review (19 L. D., 467), *Maggie Laird* (13 L. D., 502). But in the case of *Goodale v. Olney* (13 L. D., 498), it is said

It will be seen from an examination of these cases that the mere application to enter land covered by a homestead entry or other reservation, does not of itself withdraw the land or in any manner affect its status for the reason, land so reserved is already segregated, nor is it the equivalent of an entry. It is only the equivalent of an entry "so far as applicant's rights are concerned," and it has merely the effect "to withdraw the land from other disposition," that the right of the applicant may be protected, but such right is dependent upon his showing that the land was subject to entry at the date of his application.

And in *Mallet v. Johnston* (14 L. D., 658), it is held that a pending application to make homestead entry protects the right of the applicant as against the subsequent claims of others.

Mrs. McCreary's application to enter lots 7 and 8 of section 8 (which were not covered by Wert's entry) was pending at the time Logan applied to enter those lots, consequently his application should not have been allowed. Because Mrs. McCreary's application for lots 5 and 6 conflicted with Wert's homestead entry, it did not follow that her application to enter lots 7 and 8 should have been rejected. Her application as to lots 7 and 8 might have been allowed to stand, and rejected as to lots 5 and 6, upon her relinquishment of those lots.

I find no error in your affirming the decision of the local officers in dismissing Miss Maney's contest.

Upon the whole, I approve and affirm your decision.

OKLAHOMA LANDS—SETTLEMENT CLAIM.

MCMURRAY *v.* DARBRO.

One who is within the Territory of Oklahoma prior to the act of March 2, 1889, and within a few days thereafter leaves said Territory, and remains outside during the rest of the prohibited period, is not by such presence disqualified as an entryman, where the facts in the case do not raise any question as to advantage gained by the claimant through his presence in the Territory.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 10, 1895. (F. W. C.)

I have considered the appeal by J. F. McMurray, from your office decision of April 29, 1893, dismissing his contest against the homestead entry of Wm. Darbro, covering lots 4 and 5 and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 9, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma.

On April 30, 1889, Darbro filed soldiers' declaratory statement for the land above described and on October 23, 1889, he made homestead entry of the land.

On February 24, 1891, McMurray filed an affidavit of contest against said entry alleging that Darbro entered upon and occupied said land and other lands in said Oklahoma country and Territory after March 2, 1889, and prior to and before the hour of twelve o'clock, noon, of the 22d of April, 1889, in violation of the act of Congress and of the President's proclamation of March 23, 1889, opening lands in the Oklahoma Territory for settlement.

Hearing was regularly held upon said contest, both your office and the local officers finding in favor of the defendant.

At the trial of the case defendant admitted that he went within the Oklahoma country in the month of January, 1889, and remained therein until the 7th or 8th of March following, when he left the Oklahoma country and remained outside until the 22d of April, 1889, when he rode on the railroad train which started from Purcell, immediately after twelve o'clock, noon, on the day of the opening.

In his testimony he states that he learned of the passage of the act of March 2, 1889, two days prior to the time he left, but does not swear that the knowledge thus gained was the cause of his leaving.

The contestant attempts to show that Darbro did not in fact leave the Oklahoma country at the time alleged, the early part of March, 1889, and that if he did he was again within the inhibited country during the latter part of that month and even up to the day of opening.

Both your office and the local officers found that the testimony does not sustain the contestant in this matter, but that the weight of the testimony is in favor of the defendant and that he was not within the Territory after leaving it upon the 7th or 8th of March, 1889.

From a review of the testimony I see no reason to disturb the concurring decisions of your office and the local office upon this question of fact.

The sole question for consideration therefore is as to whether defendant's presence in the Territory between the 2nd and 7th or 8th of March, under the circumstances shown in this case, are sufficient to bring him within the class of persons disqualified by the provisions of the act of March 2, 1889, from making entry within the Oklahoma Territory.

While it was undoubtedly unlawful for Darbro to be within this country, even prior to the passage of the act of March 2, 1889, yet as he seems to have left the country soon after the passage of the act and within two days after learning of the same, I do not think he comes within the spirit of the act in so far as to hold that he is disqualified thereby from making entry of lands within the Oklahoma country.

The question of advantage gained by knowledge acquired during the period of his stay within this country after his entrance in January and prior to leaving in March, 1889, is not raised in this case, for the reason that his selection and settlement were not made until three days after the opening, and his claim stood undisputed and unquestioned for nearly two years after his filing had been made.

The testimony shows that he moved his family upon the land in October following the making of his entry, and that up to the date of hearing they had continuously resided thereon, making improvements valued at \$1,000.

From a careful examination of the entire record I find nothing to question in defendant's good faith in the matter of his connection with his claim made to this land, and therefore affirm your office decision, and direct that Darbro's entry be permitted to stand, subject to future compliance with law.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

METZ *v.* SEELY.

One who is rightfully within the Territory during the prohibited period but goes outside prior to the hour of opening, and gains no advantage over others by his presence in the Territory during the prohibited period, is not by such presence disqualified as an entryman.

Acting Secretary Reynolds to the Commissioner of the General Land Office
September 10, 1895. (E. M. R.)

This case involves the SW. $\frac{1}{4}$, Sec. 2, T. 18 N., R. 2 W., Guthrie land district, Oklahoma Territory.

On May 8, 1889, Albert Seeley made homestead entry for the above described tract; on March 1, 1890, John Metz filed his affidavit of contest against the entry of Seeley, alleging that he, the entryman, had violated the acts of Congress and the proclamation of the President by entering the lands in Oklahoma Territory between the second day of

March and the 22d day of April, at the hour of noon, 1889, inasmuch as he, the said Albert Seeley, had on the 22d day of April and prior to the hour of noon, which was the time fixed for the opening of the land, entered and occupied land in the Territory upon the morning of that day.

July 27, 1891, the local officers rendered their decision wherein they held for cancellation the entry of Seeley and sustained the contest of Metz. Upon appeal, your office decision of July 22, 1892, reversed the findings of the local officers, and upon further appeal by the contestant, the case is now before the Department.

The evidence shows that Albert Seeley went into the Territory of Oklahoma in May, 1888, in the employ of the Atchison, Topeka and Sante Fe Railroad company, conducting an eating and boarding house in its interest, and was in such employ on April 21, 1889, when, as the result of a conversation with a lieutenant in the army, he went outside of the Territory upon that day, and re-entered at the hour of noon on the 22d. During his absence his family remained at Mudhall and the land he subsequently settled upon was distant about one mile from his residence at Mudhall.

There is some testimony that he entered the Territory prior to the hour of noon but it is not of a legal or competent nature.

On his return he came to Alfred or Mudhall, where he had lived during his stay in the Territory, and proceeding about the distance of a mile settled upon the land now in controversy.

The question at issue is: was such entry and presence in the Territory a disqualification under the acts of Congress of March 1 and 2, 1889 (25 Stat., 757, 759, and 980)?

The act of March 1, 1889 (25 Stat., 757-759), ratified and confirmed an agreement with the Muscogee (or Creek) Indians in the Indian Territory whereby their land was ceded to the general government. The second section of that act was as follows:

That the lands acquired by the United States under said agreement shall be a part of the public domain but they shall only be disposed of in accordance with the law regulating homestead entries and to the persons qualified to make such homestead entries not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of Sec. 2301 of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any persons who may enter upon any part of said lands in said agreement mentioned, prior to the time the same are opened to settlement by act of Congress shall not be permitted to occupy or make entry of lands as lay any such claims thereto.

In the act of March 2, 1889 (25 Stat., 980), it is said:

And provided further, That such entry shall be in square form as nearly as practicable and no person be permitted to enter more than one quarter section thereof, but until said lands are open for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any rights thereto.

The President issued a proclamation dated March 3, 1889, in which he said:

Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour of 12 o'clock, noon, of the 22d day of April, A. D. eighteen hundred and eighty-nine hereinbefore fixed will ever be permitted to enter any of said lands or acquire any rights thereto; and the officers of the United States will be required to strictly enforce the provisions of the act of Congress to the above effect.

These acts and the proclamation of the President have been construed by the supreme court in the case of *Smith v. Townsend* (148 U. S., 490). There the court says:

The evident intent of Congress was by this legislation to put a wall about this entire Territory and disqualify from the right to acquire under the homestead law any tract within its limits every one who was not outside of that wall on April 22, when the hour came the wall was thrown down and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

In the case of *Laughlin v. Martin et al.* (18 L. D., 112), it was held:

Presence within the Territory during the greater part of the period from March 2, 1889, to the hour fixed for opening disqualified a person so present as a homesteader unless it appears that he was lawfully within the Territory.

In the case of *Smith v. Townsend, supra*, Smith was inside the Territory at the hour of opening and though lawfully there at that hour, had not conformed to the evident intent of Congress that he should be outside the wall at the hour of noon on April 22, 1889, and was, therefore, held to be disqualified as an entryman in the Territory. In the case at bar Seeley was inside the Territory, as he alleged lawfully, and was outside at the hour of opening.

The Atchison, Topeka and Santa Fe Railroad Company, as a duly organized corporation, had purchased the right of way from the Indians and had an easement upon that portion of the land covered by the right of way through Oklahoma Territory. The agent and employes were rightfully within the Territory, and being rightfully there, do not come within the prohibition of the section quoted, provided they were outside when the hour of opening came.

The crucial tests in these cases, when a *prima facie* showing is made that a person had violated the letter of the law by going inside the territorial limits, are: first, was such entry lawful? second, was the party so coming within the letter of the law outside at the hour of opening? third, did his presence inside the Territory during the prohibited period result in giving him advantage over others in reaching and selecting the land settled upon?

This last seems to be the important inquiry to be made in Seeley's case. The land selected was near his place of residence during the prohibited period and the presumption naturally arises that his presence gave him an advantage over others who had not been there in selecting and reaching it. This presumption, if not overcome by affirmative proof, would stand, and disqualify him.

Your office found that this presumption was overcome by proof and sustained Seeley's entry. In addition to his uncontradicted testimony that he had never seen the land before his settlement on it, and that he had no knowledge of it, is this very significant fact, that although the tract was in a mile of his residence, it was half past two o'clock p. m. of the 22d of April, 1889, before he reached it and made his settlement. I think the evidence authorizes the conclusion in this case, that Seeley gained no advantage over others by reason of his presence in the Territory during the prohibited period, in making his settlement on the tract in controversy.

Your office decision is accordingly approved.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

MCCORMICK *v.* TURNER.

Residence within the Territory of Oklahoma (under permit from the War Department) and presence therein during the prohibited period, does not disqualify a settler as a claimant for lands in said Territory, where by such presence no advantage is gained over others, and the claimant is outside the boundary line at the hour of opening.

*Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 12, 1895. (C. W. P.)*

I have considered the appeal in this case, involving the NE. $\frac{1}{4}$ of section 5, T. 12 N., R. 8 W., Oklahoma land district, Oklahoma Territory.

The record shows that April 19, 1892, James Turner, by agent, filed soldier's declaratory statement, No. 270, for said land, and that on April 25 following, Lizzie H. McCormick made homestead entry, No. 3788, for the same tract. October 11, 1892, Turner made actual entry of the land.

A hearing was had on the protest of Miss McCormick against Turner's entry, alleging that she settled upon the land before Turner's declaratory statement was filed. The register and receiver decided in favor of the plaintiff, recommending the cancellation of Turner's entry. On appeal, your office affirmed the judgment of the local officers. Turner has appealed to the Department.

There are two questions in the case: Priority of settlement; violation of the law and of the President's proclamation, opening the Oklahoma Territory to settlement.

Your office concurred with the local officers in their finding of facts—holding that the testimony shows that for several years before the country was opened to settlement, the father of the plaintiff resided at Fort Reno, within the Territory, under a permit of the Secretary of War, as the dairyman at the fort; that the plaintiff resided with him, assisting him in conducting his dairy; that she was not acquainted with the land in controversy, although it is situated about three miles

from the fort, because, as the plaintiff testifies, she always stayed close around the fort, unless she was away at El Reno; that during the forenoon of April 19, 1892, accompanied by her sister and both mounted on fleet horses, she rode from the military reservation of Fort Reno to the line of the Territory, and when the signal was given they joined in the race for lands; that at the end of twenty-six and a half minutes she stopped, dismounted, stuck a stake in the ground and placed her glove and veil upon it. She also dug a hole with a hatchet, and, finding her horse very warm, unsaddled and led it around. That afternoon some one brought her a tent, bedding and provisions. She slept in the tent that night, and has since made her home on the land, in apparent good faith, to the exclusion of a home elsewhere, not being away for any length of time and but a few times; that she had a small house, a well and a tent, and has about six acres broken and two acres cultivated. The records of the local office show that Turner's soldier's declaratory statement, was filed at least one and a half minutes after Miss McCormick reached the land and initiated her claim under the homestead laws. The land in controversy is in that part of Oklahoma Territory, which was opened for settlement April 19, 1892, by the proclamation of the President of April 12, 1892 (27 Stat., 1018).

Pending the consideration of Turner's appeal here, it seems that he has filed a relinquishment of his homestead entry, No. 72852, for the land in controversy, which disposes of his rights, but the question of McCormick's qualification to make entry remains. She resided with her father inside the Territory during the inhibited period up to the morning preceding the opening. She passed out on that day before noon and was outside when the signal was given. By the letter of the law she is disqualified.

The local officers and your office seem to have concurred in finding that she obtained no advantage over others by reason of her residence and presence in the Territory during the prohibited period and therefore did not violate the spirit of the law. As this finding is based on affirmative proof—which is not contradicted—it must stand.

Your office decision is accordingly approved.

HOMESTEAD CONTEST—DESERTED WIFE.

CROSBY *v.* THOMPSON.

Where a homesteader has established a residence, and placed his wife on the land, no one but his wife shall be heard to allege desertion in proof of his abandonment or change of residence, during the lifetime of his entry, provided the wife maintains a residence on the land.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 13, 1895. (G. C. R.)

Your office decision of March 5, 1894, affirmed the action of the register and receiver in recommending the dismissal of the contest filed

by George Crosby on February 14, 1893, against the homestead entry, made August 29, 1888, by Simon Thompson, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 3, Tp. 5 N., R. 12 E., Montgomery, Alabama.

The evidence has been carefully examined, and the same is substantially stated in the decision appealed from.

It is very clear that Thompson has deserted both his wife and the land, but the testimony shows that at the time this contest was filed, the deserted wife was living on and cultivating a few acres of the land.

Appellant insists that so long as Mr. and Mrs. Thompson are husband and wife that Mrs. Thompson has no right "to resist a contest of a third party against the entry of her husband."

The reverse of this proposition is true, namely, that when the entryman has established a residence and placed his wife on the land, no one but his wife shall be heard to allege the desertion in proof of his change of residence or abandonment during the period of seven years from date of the entry, provided that she maintains a residence on the land. (*Bray v. Colby*, 2 L. D., 78.)

In this case the husband made entry of the land, and did some work thereon; but he appears soon after to have been charged with the crime of larceny, was shot by the sheriff, and left the State, his whereabouts not being certainly known, not even by his wife. Before this contest was filed, his wife caused a house to be build on the land, and moved into it, and has since continuously occupied it, with another family whom she induced to live with her.

Thompson has, indeed, deserted the land, and the averments in the contest affidavit were sustained; but the plea interposed by his deserted wife, namely, that she was residing on and cultivating the land in good faith when the entry was attacked, was sustained; in such cases, the contest must fail.

The decision appealed from is affirmed.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

KOLLAR *v.* MCDADE.

Where the evidence shows that the claimant was within the Territory during the inhibited period, it is incumbent on him to show that his purpose was not to acquire an advantage over others, and in fact did not.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 18, 1895. (C. W. P.)

On April 27, 1889, Thomas McDade made homestead entry, No. 292, of lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 7, T. 12 N., R. 6 W., Oklahoma land district, Oklahoma Territory.

On July 7, Thomas Kollar filed his affidavit of contest in which he charged that McDade's entry was made "in violation of the President's proclamation of March 23, 1889, in that he (McDade) entered upon and

occupied a portion of the lands described and declared open in said proclamation prior to 12 o'clock noon, April 22, 1889."

A hearing was had before the local officers on September 1, 1892. They dismissed the contest. On appeal your office reversed their judgment and held the entry for cancellation. McDade has appealed to the Department.

The claimant, in his testimony, swears that during the year just prior to the 22d of April, 1889, he was residing at Darlington, a point about two miles from the line of the Oklahoma country, in the Cheyenne and Arapahoe Indian country, engaged in gathering cattle for the U. S. Indian agent and others, and admits that, while acting in this capacity, he went into the Oklahoma country sometime during the month of April, 1889, to attend a "round-up"; that this round-up was held about four miles southeast of the land in controversy, but he says he did not see it; that he went there in the morning and came back in the evening; that he had a written permit to enter the Oklahoma country, given to him by G. D. Williams, U. S. Indian agent; that he only made this one trip in April into the Oklahoma country.

Your office found that McDade was at or near the land in controversy during the prohibited period. Sidney Falkner in his deposition testified that he met McDade three or four times inside the Territory during the inhibited period, and that he was hunting for land-corners in near proximity to this land, and that to the best of his knowledge he examined this tract.

Charlie Keith testified that, as he and McDade passed near this land during the inhibited period, McDade made inquiry of him if he knew of any good claims and he pointed out this land they were passing and said it was good land.

The testimony of these witnesses received no notice or explanation. If McDade can be said to have replied to it, it was only in a general way, when he states that he was only inside the Territory, one time in April before the opening, and did not select the land in question or learn anything about it. He does not deny that he sought information.

I think this testimony demanded explanation and that it was incumbent on him to show (his presence during the inhibited period being admitted) that his purpose was not to get information about land and that he did not seek or obtain such information. While he did not make his formal entry of the tract until April 27, 1889, his own testimony is that he reached it and commenced his settlement on it between twelve and one o'clock on the day of the opening, which indicates a straight and speedy run to the tract, and does not suggest former ignorance of its location.

Your office decision is approved.

HOMESTEAD CONTEST—ABANDONMENT.

TOMLINSON *v.* SODERLUND.

Engagement in public service will not be construed into an abandonment of residence, so long as such efforts are made to maintain improvements as manifest good faith.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 18, 1895. (C. J. W.)

This case comes before me on the appeal of James H. Tomlinson from your office decision of March 7, 1894, in which the decision of the local officers, which was in favor of the contestant, was reversed.

On March 27, 1888, Soderlund made homestead entry No. 1648 of E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 20, T. 47 N., R. 10 W., Ashland land district, Wisconsin.

On June 27, 1893, James H. Tomlinson filed affidavit of contest, alleging that the defendant "had wholly abandoned said tract and changed his residence therefrom for more than six months since making said entry, and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law."

The case was heard on June 10, 1893, with parties in court in person and by attorney.

On September 22, 1893, the register and receiver rendered their decision in which they found that Soderlund's occupancy was not in good faith and recommended the cancellation of his entry.

On appeal from that finding by Soderlund, your office on March 7, 1894, reversed the same.

Tomlinson is the appellant from that decision, and the error assigned is that the evidence does not justify the conclusion reached.

The chief question seems to be: Did Soderlund establish residence on this claim? If he did not, it is useless to consider his explanation of his absence from the claim.

The evidence is meager on this subject and comes almost exclusively from Soderlund and his witnesses. It shows, however, that Soderlund made the entry soon after his majority; that he was unmarried and was weakly and not able to do heavy work; that he put a log house, fourteen by sixteen, on the claim soon after his entry and that he occupied it most of the time, until he accepted the position of letter carrier at West Superior, which he still held at the time of the hearing. During his occupancy he had hired labor and had some clearing done, covering a period of about one year. In November, 1890, he was appointed letter carrier and from that time up to filing contest, visited the place and occupied the house for some days at a time, about four times a year, continuing to have some clearing done and planting a small patch near the cabin in potatoes each year. Some of the land was seeded to grass. The cost of all improvements estimated at \$350.00.

Your office held that the proof was sufficient to establish his legal residence on said claim and the evidence seems to warrant such finding.

Was the absence of Soderlund from the claim while in service as a letter carrier such abandonment of his residence, as requires the cancellation of his entry?

In the case of *Reeves v. Burtis* (9 L. D., 525), it was held "that when a *bona fide* settler has established a residence and is afterwards called away by official duty, such absence will not work a forfeiture of his rights." Engagement in public service will not be construed into an abandonment of residence, so long as such efforts are made to maintain and keep up improvements, as manifest good faith upon the part of the entryman. The efforts at improvement in this case are feeble, but in the absence of evidence of bad faith on the part of the entryman, your office decision is approved.

SOLDIER'S DECLARATORY STATEMENT—SETTLEMENT.

WOOD ET AL. v. TYLER.

The filing of a soldier's homestead declaratory statement does not exhaust the homestead right if a superior claim exists.

A homesteader can not claim the privilege of a soldier's declaratory statement and a settlement at the same time.

*Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 18, 1895. (A. E.)*

On August 24, 1895, was transmitted a motion by George F. Wood, one of the parties to the above-entitled cause, that an order be issued directing your office to certify the record in said cause to this Department. The land involved is the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 11 N., R. 7 W., I. M., Oklahoma, Oklahoma Territory.

In support of said motion the mover thereof alleges that your office has remanded said case for a further hearing to enable Tyler to make proof of such settlement as he could, your office holding that a settlement claim can be asserted under a soldier's declaratory statement provided the soldier's declaratory statement is filed within three months from date of settlement.

The ground for this holding appears to be that Tyler's filing exhausted his rights, and hence he should be allowed to show his settlement in support of his claim.

This argument would be conclusive but for the fact that the premise is untrue. The filing of a declaratory statement does not exhaust the right if a superior claim be in existence, and from the decision of your office there is reason to believe such a claim existed in this case.

In view of this, and the ruling of the Department that an applicant can not claim the privilege of a soldier's declaratory statement and a settlement at the same time, Wood has good ground for his application

for a writ, and the same is granted, and you will certify all the proceedings in said cause to this Department that the same may be considered and such action taken as will do equity.

PRIVATE LAND CLAIMS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 18, 1895.

Registers and receivers of United States district land offices in the Territories of New Mexico, Arizona and Utah, and the States of Colorado, Nevada and Wyoming.

GENTLEMEN: Your attention is called to the provisions of sections sixteen and seventeen of the act of Congress approved March 3, 1891, entitled "An Act to establish a Court of private land claims and to provide for the settlement of private land claims in certain States and Territories" (26 Stats., 854), as amended by the act approved February 21, 1893 (27 Stats., 470).

As the object of said act is the final adjudication of all private land claims in the States and Territories aforesaid, so the object of said sections sixteen and seventeen is the final adjudication of that class of private claims, or "small holdings", therein described, and to furnish the means whereby title thereto can be perfected by the claimants thereof.

Section sixteen relates to "small holdings" situate in those parts of said States and Territories over which the township surveys had not been extended at the date of the passage of said act; and section seventeen relates to the same class of claims situate in township which had been surveyed at that time.

By section sixteen, the right to receive patent for the land occupied is recognized in any person, who has through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous, adverse, actual, *bona fide* possession of any tract of land, which does not in itself, or in connection with other tracts so held by him, exceed one hundred and sixty acres, for twenty years next preceding the time when the survey of the township in which such tract is situate shall be made, and provision is made for the survey of such land, and the issuance of patent therefor; *provided* that no person shall be entitled to confirmation of, or to patent for, more than one hundred and sixty acres in his own right by virtue of this section.

By section seventeen, all persons who have been in the actual, continuous, adverse possession, through themselves, their ancestors, grantors, or those under whom they claim, of tracts of land not exceeding one hundred and sixty acres each, for twenty years next preceding the time

when the survey of the township in which the land is situate was made, are permitted, upon making proof of such possession, and of the further fact that they, or their ancestors or grantors, or those under whom they claim, became citizens of the United States by reason of the treaty of Guadalupe Hidalgo or the terms of the Gadsden purchase, to enter, without payment of purchase money, fees or commissions, such subdivisions, not exceeding one hundred and sixty acres, as shall include their said possessions; *provided*, that no person shall be entitled to enter more than one hundred and sixty acres in one or more tracts in his own right under the provisions of this section.

In order that these claims may be adjudicated, you will secure from the surveyor-general, as soon as a township containing such claims shall have been surveyed, a list of the claims therein, with the names of the claimants, and if possible their post-office addresses. In case of townships already surveyed, you should be furnished a list of those claims that have been filed with the surveyor-general, that conform to legal subdivisions, and where it is necessary to survey the claims, the list should be furnished you as soon as the surveys of said claims are approved.

When this information has been received, you will notify each of the claimants that he will be allowed ninety days to submit proof of his possession and occupation in accordance with the following instructions:

1. Each of the claimants under the provisions of section *sixteen*, who was in the actual, adverse, *bona fide* possession of his claim twenty years prior to the survey of the township in which the land is situated, and has so occupied and held the same, continuously, from that time on to the making of such survey, will be required to make affidavit to that fact; stating therein the character and origin of his claim, and the material facts relied upon to show such possession.

2. Each of the claimants under the provision of said section sixteen who was not in the actual, adverse, *bona fide* possession of his claim twenty years prior to the survey of the township in which the land was situated, but who bases his claim upon the actual adverse, *bona fide* possession of those under whom he holds, will be required to make affidavit to that fact; stating therein the name of the person so occupying the land claimed twenty years prior to such survey, and the name of each of his successors in such occupancy during the said period of twenty years; the respective periods, as near as may be, that the land was so held by each of such successive occupants; the material facts relied upon to show such possession during said period; and giving a complete history of his title to such claim, from the first of the occupants mentioned down to the present claimant.

3. Each of the claimants under the provisions of section *seventeen* will be required to make affidavit in accordance with the foregoing instructions 1 or 2, as the case may be, stating therein the additional facts necessary to show that he became a citizen of the United States

by reason of said treaty of Guadalupe Hidalgo or the terms of the Gadsden purchase, or that some former occupant or claimant of said land from whom he derived his title or possession, so became a citizen of the United States; and in the latter case, giving a complete history of the title to his claim from the ancestor or grantor so naturalized down to the present claimant.

4. If documentary evidence of the title of such claimants is in existence, such evidence or duly authenticated copies of the documents must be produced and filed by them.

5. Every material fact set forth in the claimant's affidavit, or necessary to the validity of his claim, not established by competent documentary evidence, must be substantiated by the affidavits of not less than two disinterested witnesses having a personal knowledge of the facts.

As the proof submitted must depend upon the character of the claim, no blank forms can be prepared applicable to all cases.

When such proof has been filed in your office, you will examine the same in each case, and if found sufficient, in your opinion, to establish the title of the claimant to the tract applied for, you will approve the same and issue a joint certificate of the form hereto attached, a supply of which will be sent you as soon as practicable.

These entries should be accounted for in a separate series, commencing with No. 1, and may be accounted for on any of your abstracts with the necessary change of heading to indicate the class of claims, and referring to the acts cited.

It will be noticed that section 17 of said act allows entry under said section without payment of purchase money, fees or commissions, and as section 16 does not provide for any payment entries will be allowed thereunder without fees, or commissions.

The proof required by these regulations must be made before one of you, or before one of the officers designated by the act of May 26, 1890 (26 Stat., 121).

Section 18, act of February 1, 1893, *supra*, limits the time of filing such claims with the surveyor-general to two years after the first day of December, 1892, and under this provision claims not filed, on or before December 1, 1894, should be rejected by you.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Approved:

JNO. M. REYNOLDS,
Acting Secretary.

Certificate, acts of March 3, 1891, and February 21, 1893.

No. ———]

LAND OFFICE AT ——— ———,

————— 18—.

It is hereby certified that, pursuant to the provisions of sections 16, 17 and 18 of the act of Congress, approved March 3, 1891, as amended by the act approved February 21, 1893, entitled "An act to amend an act establishing a court of private land claims and to provide for the settlement of private land claims in certain States and Territories", ——— of ——— has made satisfactory proof to the Register and Receiver of the continuous adverse possession by him, or his ancestors, grantors, or their lawful successors in title or possession, for a period of twenty years next preceding the survey, of ———, section No. ———, in township No. ———, of range No. ———, ——— meridian, containing ——— acres.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office, the said ——— shall be entitled to a patent for the tract of land above described.

————— Register.

————— Receiver.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

DEWEY *v.* JACKSON.

One who voluntarily and unnecessarily enters the Territory during the prohibited period, and is within said Territory at the hour of opening is disqualified as a settler therein.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
September 12, 1895. (C. J. W.)

April 23, 1889, Ambrose F. Jackson by his agent, Ed. Phillips, filed soldier's declaratory statement, No. 24, for NW. $\frac{1}{4}$, Sec. 28, T. 12 N., R. 3 W., I. M., Oklahoma. Jackson made homestead entry for same land July 13, 1889. Affidavits of contest were filed against this entry by C. W. Price, A. B. Moore and John L. Bassett, all charging that Jackson was disqualified from holding land in Oklahoma by reason of his having entered the Territory during the prohibited period. These contests having been dismissed Jackson on June 14, 1892 made final proof, and final certificate, No. 84, was issued thereon.

June 15, 1892, F. S. Dewey filed application to contest. The local officers refused to accept said application, whereupon Dewey appealed to your office, and by letter "H" of December 9, 1892, your office sustained said appeal, and directed the register and receiver to order a hearing on said affidavit of contest. Hearing was accordingly had, and closed June 14, 1893.

July 31, 1893, non-concurring opinions by the local officers were rendered; the register holding that Dewey had sustained his allegations of contest, and recommending that Jackson's entry be cancelled, and the

receiver holding that, while Jackson was inside the Territory during the prohibited period, that he was excusable under the circumstances.

August 30, 1893, both plaintiff and defendant appealed to your office; plaintiff alleging error in receiver's holding, and defendant alleging error in the decision of the register. March 12, 1894, your office passed upon the appeals together, and sustained the finding of the register, holding said homestead entry and said final certificate for cancellation. On May 2, 1894, defendant appealed from your said office decision, and I have the same now before me.

The appeal undertakes to specify nineteen separate grounds of error, which need not be set out here, since they are resolvable into the proposition, that the conclusions of law found by your office, on the admitted state of facts, are erroneous.

The register and receiver did not disagree as to the facts, but only as to the legal effect of the facts. There is no defined issue of fact raised by the appeal. The facts in substance are about these:

The defendant was at Oklahoma Station in March, 1889, and without any license for being there, and while there he made inquiry as to the location of the best lands. Leaving Oklahoma he returned to his home in Minnesota, and subsequently went to Arkansas City, arriving there several days prior to the opening of the Territory. While in Arkansas City he employed Ed. Phillips to file a soldier's declaratory statement. He was instructed to file a short distance from Oklahoma, as the boomers would want the land near the station; that any tract in sections 27 or 28 would suit him. Jackson says his plan was to go through the Territory to Purcell and return from there at 12 o'clock, noon, for Oklahoma. With that view he procured passage on the freight train in the evening of April 21, 1889, having been informed that the train would reach Purcell in time for him to take the incoming passenger train; that owing to delays over which he had no control, he was at 12 o'clock, noon, April 22, 1889, at Edmond in Oklahoma. That when the train reached the trestle at Deep Fork, he heard some of the train-men say that the north bound passenger train would reach Oklahoma before the freight on which he was a passenger. That his friend got off at this point, and not feeling well, he got off with his friend. He denies that he went upon the land. The register finds that from this point he went towards the land. At 4 o'clock A. M., April 22, 1889, he crossed the north line of the Territory, and continued inside, being at Edmond Station at 12 o'clock, noon, and a short time thereafter reached Deep Fork, where he got off and went toward the land in question. It will be seen that he entered the Territory before 12 o'clock, noon, of April 22d, 1889, and after March 2d, 1889, and that he was inside at the hour of the opening. It is strenuously insisted by his counsel that it was the fault of the railroad, or the result of accident, that the train was delayed inside the Territory, and that consequently Jackson's presence was involuntary and against his will and

that he is not responsible. His selection of a train, the business of which was to carry freight and not passengers was his own voluntary act, and he took all risk of being found inside at 12 o'clock, noon of the opening day. It is by no means clear that any unusual or unexpected delay of the train occurred, but this is immaterial, since he unnecessarily and voluntarily went into the Territory for the purpose, as he says, of getting out again before the hour of opening, but failed to do so, and voluntarily left his train in the neighborhood of the land, when he had the option of remaining on it, and reaching Oklahoma a little later. I know of no instance in which presence inside the Territory at the hour of opening has been excused in one entering to secure a homestead. This case comes clearly within the rule laid down in *Smith v. Townsend*, 148 U. S., 490, and the question as to whether he derived advantage over others by reason of such premature entry is not material.

Your office decision is accordingly approved.

RAILROAD GRANT—FINAL ADJUSTMENT—ACT OF MARCH 3, 1887.

ST. LOUIS AND SAN FRANCISCO R. R. CO.

A railroad company will not be heard to say that by a certain decision the grant was finally adjusted, where subsequently thereto the company files additional lists of selections.

That patents have been issued under a railroad grant, in accordance with departmental rulings then in force, will not bar proceedings for the recovery of title to lands so conveyed, if it appears on adjustment, that said lands were erroneously certified or patented under the decisions of the United States Supreme Court.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (J. I. H.) (F. W. C.)

I have considered the answer made by the St. Louis and San Francisco railroad company to the rule served by your office upon said company to show cause why certain tracts embraced in lists A and B, amounting to about 10,000 acres, which were shown by the adjustment of said grant to have been excepted therefrom by reason of claims to the land existing either at the date of the passage of the act making the grant or at the date of the definite location of the road, should not be reconveyed to the United States as contemplated by the act of March 3, 1887 (24 Stat., 556).

The answer made by the company rests upon two grounds: first, that departmental decision of February 6, 1889 (8 L. D., 165), was an adjustment of the grant and therefore that further inquiry with a view of suit under the act of 1887 can not be entertained; and second, that the matter of the patenting of these lands was made many years ago in accordance with rulings then in force, and that the same is now *res adjudicata*.

An examination of departmental decision of February 6, 1889, *supra*, will show that the only question under consideration in said decision was as to the amount of deduction to be made from the grant of July 27, 1866 (14 Stat., 292), on account of the previous grant made by the act of June 10, 1852 (10 Stat., 8), and the discussion in said decision is confined to the lands falling in the conflict or overlap of the two grants, and was not intended as a final determination or adjustment of the grant of 1866, under which the company claims.

That it was not so treated by the company is clearly shown from your report under consideration in which it is stated—"That since the last decision of the Department of February 6, 1889, the company has filed two lists of selections, namely: July 1, 1889, of 5,926.01 acres, and January 16, 1890, of 5,166.29 acres."

I am, therefore, of the opinion that the grant in question is an unadjusted grant and the question as to the erroneous patenting of lands on account thereof, can be properly considered with a view to the recovery of the same under the provisions of the act of March 3, 1887, *supra*.

As to the second ground of answer, namely, that the patents were issued many years ago and in accordance with rulings then in force, it has been repeatedly held by this Department that such fact will not bar the recovery of title where, upon an adjustment, the lands are shown to have been erroneously certified or patented under the decisions of the supreme court.

Under date of September 18, 1894, Messrs Britton and Gray, attorneys for the company, requested to be allowed the usual time within which to make any further showing deemed necessary. Nothing further has been filed, however.

The lands sought to be recovered are embraced in two lists, A and B; list A covering lands embraced in homestead entries at the date of the grant and the definite location of the road, and list B those tracts which were embraced in pre-emption filings at the date of the grant and definite location of the road. These were subsisting claims and, under the decisions of the supreme court, served to except the lands covered thereby from the operation of the grant, and upon the cancellation or abandonment of the same, the lands inured to the United States and it was erroneous to have patented them on account of the grant to the said company.

I have, therefore, to direct that demand be made upon said company as contemplated by the provisions of the act of March 3, 1887, *supra*, and at the expiration of the time allowed in said act in which to comply with said demand, that report be made to this Department of the action taken by said company to the end that such further action may be taken in the premises as the facts may warrant.

PRACTICE—NOTICE OF HEARING.

HART *v.* HECTOR.

In computing the period of notice given by personal service of a hearing before the local office, the day on which service is made should be excluded, and the time counted as beginning to run on the next succeeding day.

Acting Secretary Reynolds to the Commissioner of the General Land Office, September 12, 1895. (J. L. McC.)

Lorenzo W. Hector has filed a motion for review of departmental decision of December 14, 1894, in the case of Isaac Hart against said Hector, holding for cancellation the homestead entry of the latter for the SW. $\frac{1}{4}$ of Sec. 32, T. 30 S., R. 30 E., Visalia land district, California.

The principal allegation of error, and the only one that need be here considered, is the one which contends that proper notice of the hearing was not given the defendant, and therefore jurisdiction was not acquired.

Rule 7 of Practice says:

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

According to the record, as set forth in your office decision of June 17, 1893,

Personal service of the notice of contest was made on the defendant on the 15th day of November, 1892. On the 15th of December the case came on for hearing. . . . Omitting the 15th of November, the day on which notice was served on defendant, and counting the 15th of December, the day of trial, the defendant had thirty days' notice.

The proper method of computing time in case of service of notice of a decision rendered was discussed in the case of *Dober v. Campbell* (17 L. D., 139), and again, more fully, in the case of *Shields v. McDonald* (18 L. D., 478).

The language of Rule of Practice 77, therein discussed, and of Rule 7, now under consideration, are sufficiently similar to justify a parallel method of computation, based upon the general rule set forth in *Endlich's Interpretation of Statutes*, (Sec. 390):

The weight of authority seems to be that one of the terminal days should be excluded, and that, in general, this should be the first day.

In the case at bar, omitting the first day, November 15th, and accounting time as beginning to run on November 16, on December 15th the defendant had had thirty days' notice.

No reason appears for disturbing the decision heretofore rendered. The motion for review is therefore dismissed, and transmitted herewith.

RAILROAD GRANT—PRE-EMPTION FILING.

FISH *v.* NORTHERN PACIFIC R. R. CO.

An uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (J. I. H.) (J. L. McC.)

George Fish has appealed from the decision of your office, dated November 22, 1893, sustaining the action of the local officers in rejecting his application to file pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 20 N., R. 4 E., Seattle land district, Washington, because of conflict with the grant to the Northern Pacific Railroad Company, which listed the land, per list No. 34, on June 30, 1888.

The land is situated within the primary limits of the grant to said company, by the act of July 2, 1864, on its branch line. The map of general route was filed August 20, 1873, and map of definite location on March 26, 1884. It is also within the primary limits of the grant, by the joint resolution of May 31, 1870, to said company on its main line—the map of general route of which was filed August 13, 1870, and map of definite location May 14, 1874.

It appears from the record that one Edward Davis, on January 13, 1870, filed pre-emption declaratory statement for the tract, alleging settlement December 21, 1869. The action of your office was based upon the ground that Davis's pre-emption filing had never been perfected into an entry, and that at the date of the grant to the branch line (July 2, 1864,) there was no entry or filing or record, and at the date of the definite location of said branch line (March 26, 1884,) Davis's declaratory statement (filed January 15, 1870,) had expired.

The Department has hitherto held that an "expired" pre-emption filing, although remaining of record at the date when the grant became effective, would not of itself except the land covered thereby from the grant. (*Northern Pacific Railroad Company v. Stovenour*, 10 L. D., 645; *Meister v. St. Paul, Minneapolis and Minnesota Railway Company et al.*, 14 L. D., 624; and many other cases.)

The supreme court has recently, however, rendered a decision in the case of *Whitney v. Taylor* (158 U. S., 85), bearing upon this question. The land in that case was situated within the granted limits of the Central Pacific Railroad. A map of general route was filed June 30, upon which withdrawal was ordered August 2, 1862. The map of definite location was filed March 26, 1864. The company subsequently included the tract in a list of lands for which it asked that patent issue; but the records showed that, on May 28, 1857, one H. H. Jones had filed declaratory statement for the land, alleging settlement on January 16, 1854. The company offered testimony before the local officers

tending to show that Jones had never resided on the land, and they so decided. That decision was affirmed by the Department on July 17, 1888, on the authority of the case of *Malone v. Union Pacific Railroad Company* (7 L. D., 13). On August 28, 1888, one Frank C. Taylor made homestead entry of the tract, which he commuted to cash entry on July 1, 1889. On January 14, 1889, the company presented a list, containing this tract only, to the local officers—which they rejected on the authority of the departmental decision in the *Malone* case. On appeal the case came to the Department, which on August 19, 1890 (11 L. D., 195), held that, as Jones's pre-emption filing "was of record and *prima facie* valid at the date the company's rights attached, it served to except the tract from the operation of the grant, under the ruling in the *Malone* case (*supra*). The supreme court, before which the question was subsequently brought, also holds that the tract was excepted from the grant by virtue of Jones's pre-emption filing—but base their decision upon somewhat broader ground. It says that, in case of a pre-emption filing, the same as in case of a homestead entry—

The entry being made, and the certificate being executed and delivered, the particular land entered becomes thereby segregated from the mass of public lands, and takes the character of private property. . . . So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the land as segregates it from the public domain, and therefore precludes it from subsequent grants. . . . When in the local land office there is an existing claim on the part of an individual under the homestead or *pre-emption* law, which has been recognized by the officers of the government, and has not been canceled or set aside, the tract in which that claim is existing is excepted from the operation of a railroad land-grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion. . . . The acceptance of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the pre-emption claim. While the cases of the *Kansas Pacific Railway Company v. Dunmeyer*, and the *Hastings & Dakota Railway Company v. Whitney*, *supra*, involved simply homestead claims, yet, in the opinion in each, pre-emption and homestead claims were mentioned, and considered as standing in this respect on the same footing. . . . This declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is, to place on record an assertion of an intent to obtain title under the respective statutes. . . . At any rate, Congress has seen fit not to require an affidavit to a declaratory statement, and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law; and that is all that is necessary to except the land from the scope of the grant.

From the tractbooks of your office it appears that in the case at bar Davis's declaratory statement has not ever yet been canceled, but remains intact upon the records. The supreme court decision in the case of *Whitney v. Taylor*, quoted from above, would appear to apply to the case at bar; and for the reasons therein given, the decision of your office is reversed; the claim of the railroad company is disallowed; and if no other objection appears, Fish will be permitted to file his declaratory statement for the tract.

HOMESTEAD CONTEST—RESIDENCE—FINAL PROOF.

FYFFE *v.* MOOERS.

Residence having once been established under a homestead claim will not be regarded as thereafter abandoned on account of absences made necessary by the nature of the claimant's occupation and condition in life, where the intention of returning to the land is manifest at all times from the cultivation thereof, and maintenance of improvements thereon.

A charge that a homesteader has failed to submit final proof within the statutory period will not be entertained, where the entryman has given notice of his intention to submit his proof before the contest is filed.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (J. I. H.) (W. F. M.)

On April 1, 1886, Timothy Mooers made homestead entry of the NE. $\frac{1}{4}$ of section 18, township 147 N., range 40 W., within the land district of Crockston, Minnesota.

On May 24, 1893, Alexander Fyffe filed an affidavit of contest alleging

That the said Timothy Mooers has wholly abandoned said tract; that he has changed his residence therefrom for more than four years last past since making said entry; that said tract is not settled upon and cultivated by said party as required by law, that he never established or maintained a residence on said land in good faith; that he has failed and refused without any excuse to make final proof therefor within seven years after making said entry; that he has advertised on April 11, 1893, to make final proof therefor on May 23, 1893, and has without any excuse and without sufficient reason failed and refused to make final proof in accordance with said notice, also further, that affiant is informed and believes that the said entry was not made for the benefit of the said Mooers; that said Mooers has made a contract for the conveyance of said land and the transfer of the title thereto to another person; that before making said entry the said Mooers entered another one hundred and sixty acres of land under the homestead act and made proof therefor and acquired title thereto and had the full benefit of the homestead act prior to making this entry.

Mooers gave notice on April 11, 1893, of his intention to make final proof, and on June 14, 1893, the date fixed therefor, Fyffe appeared and protested against the acceptance of the proof. The claimant and his witnesses were cross-examined by the protestant, who also introduced other testimony. In August following a hearing was held on the contest, and by agreement between the parties the two proceedings were consolidated and the evidence taken in both was considered together.

The register and receiver, in a joint decision, recommended that Mooers' proof be approved and that the proceedings against his entry be dismissed. The decision of your office, now on appeal before this Department, reverses that of the register and receiver, and holds Mooers' entry for cancellation.

The appellant's assignments of error are directed entirely to the findings of fact in the decision appealed from, and need not be specified here.

Mooers settled on the land in 1883, and soon thereafter filed a pre-emption declaratory statement. He held it under this filing until April 1, 1886, the date of his homestead entry. The evidence shows

that his improvements were not extensive, but his house was at least habitable, and I think there is no doubt that he established his residence therein. The question as to whether or not he has maintained such a residence upon the land as to bring him fairly and reasonably within the spirit of the law presents greater difficulties of solution. The testimony is full of conflict throughout its voluminous extent, but it may be here observed, generally, of that of the contestant, that it is largely negative in character.

It is not denied that the claimant has been in the employ of S. C. Bagley, a near neighbor, for many years, and that he has for the most part taken his meals and slept at Bagley's house. Occasionally, from time to time, however, he slept and ate on his claim, and he swears that all his personal belongings, his trunk, papers and clothing, chewing and smoking tobacco, with provisions, were always and continuously kept there. There were about eighty acres in cultivation which it appears Bagley has for some years farmed on shares. Mooers is shown to have been an unmarried man without appreciable means, elderly, if not old, and latterly of indifferent health. It is not possible to ascertain from the testimony just what proportion of the time he staid on his claim. The contestant's witnesses go no further than to testify of their more or less frequent visits to the claim and to Bagley's place, and that the claimant was seldom seen at the former and frequently at the latter. There is also testimony respecting the condition of the claim, as tending to show it to have been uninhabited and deserted. Several persons were found to swear to Mooers' reputed home as being at Bagley's place, and that if it were desired to see him they would look for him there, day or night. On the other hand Mooers testifies that the longest period he was absent from the land was fourteen days while in attendance at the local land office at Crookston engaged in the trial of a contest case, and that, with that exception, he was not absent from his home more than a week at any one time. Numerous other persons testify that he always claimed his homestead as his home, notwithstanding he was absent from it a good deal of the time at work on Bagley's farm near by.

The decision appealed from finds that claimant's "house has not been improved or repaired since it was completed in 1883, and has become quite rotten," but I do not think the testimony justifies the statement. The house is shown to have been whitewashed twice during the seven years next preceding the trial, and while one witness swore that he discovered evidence of decay by piercing one of the logs with a knife, certainly there is nothing in the record to warrant the statement that the house "has become quite rotten." So far as anything appears to the contrary the house was comfortably habitable at the date of the hearing.

I do not think abandonment has been shown. Residence having been once established, the law does not prescribe how much an entryman shall stay at home. After that date the question becomes one of

intent rather than of actual and uninterrupted residence, though the intent must be accompanied and evidenced by such improvement and cultivation of the soil as will in each particular case, give effect to the law. A citizen does not lose his residence or domicile by leaving home so long as there is present in his mind an intention to return, neither can it consistently and on principle be held that one who has entered upon the public lands and established a residence thereon with the view of acquiring a home from the government, abandons his purpose when he is called away by the nature of his employment, by the necessities of his condition, or by other contingency, and there is ever present in his thoughts the *animus revertendi*.

The register and receiver found that "the claimant is a single man over sixty years of age, and although somewhat eccentric in manner and language, his appearance on the stand, and general demeanor while giving his testimony in the case indicates an honesty of purpose," and in conclusion, "from a careful examination of the testimony in the case," they say, "as well as the character and demeanor of the several witnesses on both sides of the case, a reasonable preponderance of evidence tends to show the claimant's good faith."

My own impressions, opposed to the view of your office decision, are thus supported and strengthened by the favorable situation of the local officers for judging of the credibility of the witnesses.

As to the charge that Mooers failed to submit final proof within the seven years allowed by the law, even conceding the dignity of an adverse right to Fyffe's pretensions, the initial step to making proof was taken on April 11, 1893, by publishing notice of intention, more than a month prior to the filing of contest.

The decision of your office is reversed, and the contest will be dismissed, with reservation of any judgment here upon the validity and sufficiency of Mooers' final proof.

RELINQUISHMENT—CANCELLATION—NOTICE—FINAL PROOF.

LAMBERT *v.* LAMBERT.

The fact of relinquishment may be accepted as established, though the record may fail to show such action, where abandonment of the land by the entryman is shown, and where, from the action of the local office, it would appear that the entry in question was regarded by said office as having been extinguished by relinquishment.

An order of cancellation is not effective in the absence of notice thereof to the entryman.

The statutory period within which final proof should be submitted under a homestead entry does not run during the pendency of an order suspending the official survey of the land.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (P. J. C.)

The land involved in this controversy is described by recent surveys as lot 6, Sec. 3, and lots 6 and 7, Sec. 4 (formerly described as the N. $\frac{1}{2}$

of the NE. $\frac{1}{4}$ of Sec. 4), T. 35 N., and lot 3, Sec. 34 and lot 10 Sec. 33 (formerly described, with other land, as the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33), T. 36 N., R. 9 W., Durango (formerly Lake City), Colorado, land district.

On July 1, 1880, one Riley Lambert made homestead entry of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 36 N., and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 4, in the then Lake City, Colorado, land district. On February 9, 1881, W. H. Lambert made homestead entry of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33 and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 4. This application was sent by mail. There was thus in conflict between these two entrymen, who are shown to be brothers, the land first entered by Riley.

It appears that one Sarah J. Campbell, on October 4, 1880, had filed her pre-emption declaratory statement for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 33, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 4, together with other lands. W. H. Lambert's homestead entry, therefore, conflicted with hers to this extent. These parties entered into a written agreement, however, by which she relinquished the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 33, and he relinquished the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 4, whereupon she, on July 5, 1890, made cash entry of the last described forty, together with other lands. (See Sarah J. Campbell, 16 L. D., 177.) This tract, therefore, will not be further considered.

It appears that the plat of official survey of T. 35 W. was filed in the Del Norte office April 27, 1877, but was suspended July 6, 1882; amended plat was filed November 28, 1883, but Sec. 4 and other sections were excepted from entry. The records of your office show that the corrected plat was finally approved December 21, 1891.

The plat of T. 36 was also filed April 27, 1877; was suspended November 9, 1886; and, it is stated, was restored June 27, 1889. But the records of your office show that the corrected plat was not filed till September 22, 1891, and it is stated on that that it "supersedes plats of April 24, 1877, and August 4, 1888." So that it will be seen that T. 35 was suspended from July, 1882, till December, 1891, and T. 36 from November, 1886, to September 22, 1891.

On November 24, 1884, your office directed the local office at Lake City to notify W. H. Lambert that he would be allowed sixty days within which to show cause why that part of his entry in conflict with Riley's entry should not be canceled. It would seem that no response was received by your office from this letter, and on April 21, 1887, the local office at Lake City was addressed, calling its attention to the former letter. On April 29, following, the register replied "that the record shows that a copy of your letter of November 24, 1884, was mailed to the address of said Lambert December 2, 1884, and that no reply thereto has ever been received."

On May 7, 1887, your office canceled W. H. Lambert's entry as to the conflict with Riley's, and directed the local office to so note on their records.

On November 17, 1888, W. H. Lambert wrote your office, stating that he had recently learned for the first time of the cancellation of his

entry; that just prior to making his application he mailed to the local office his brother Riley's relinquishment of his prior entry, "and the Register and Receiver acting upon (it) allowed my filing (entry) but as it now appears made no record of his relinquishment;" that Riley died in November, 1883, and at that time was a resident of another county. He requests that the matter be referred to the Durango land office for investigation, as the land is in that district, and that in the meantime the order for cancellation be suspended. Your office, under date of January 19, 1889, called on the office at Durango to report whether the "records show the cancellation by relinquishment" of Riley's entry, and the register reported that it did not. W. H. Lambert was then informed by your office letter of March 9, 1889, that before his entry could be reinstated it would be necessary to clear the records of the conflicting entry by contest or otherwise.

On August 15, 1889, the register sent notice to Hugh Lambert, "father and heir of Riley Lambert, deceased," to the effect that final proof had not been made of Riley's entry within seven years from entry, and to show cause within thirty days why it should not be canceled for non-compliance with the law. On the same day W. H. Lambert made application to make final proof of all the land in his entry, except that included in the Sarah J. Campbell entry.

In reply to this notice to show cause, Hugh Lambert, on the back of said notice, signed the following:

SEPT. 1, 1889.

RICHARD MCCLOUD,
Register, Durango, Colo.

DEAR SIR: This notice duly received; and I return it to you with the information that I have no interest in the matter. My son Riley Lambert abandoned the land long before his death, and had not resided on it for six or seven years before his death. I know that he endeavored to relinquish it in favor of his brother, W. H. Lambert, long before his death, and that he thought he had relinquished it. W. H. Lambert filed on it long before Riley died, and has lived on it ever since, Riley knowing it, and agreeing to it, and believing that he had properly relinquished it, and that W. H. Lambert's filing was good. I have no claim to the land, and don't want any, and if I have any I hereby release and relinquish it to W. H. Lambert.

(Signed)

HUGH LAMBERT.

On November 4, 1889, your office informed the local office that Riley Lambert's entry had been canceled because proof was not made within the statutory period, and to so note on the records, and in reply to the request of the local office for instructions as to how they should proceed under the application of W. H. Lambert to make final proof, your office, by letter of November 13, 1889, informed them that he could only submit proof on that part of his original entry that was intact; that his entry had been canceled as to the land covered by Riley's entry by letter of May 17, 1887.

Under date of January 4, 1890, the register reported that W. H. Lambert had died since filing his notice to make final proof, and that notice of your letter of November 13, 1889, had been served upon all parties in interest, including "Mrs. Irena Lambert, divorced wife of

W. H. Lambert, and guardian of minor daughter of W. H. Lambert;" also that "the Commissioner's letter "C" of May 17, 1887, ordering the cancellation of one-half of said (W. H. Lambert's) homestead application was never received at *this* office, and no service of same was made by this office on said W. H. Lambert, and your letter of November 13, 1889, was the first knowledge this office had of the decision of May 17, 1887." Your office thereupon, on February 18, 1890, forwarded a copy of the decision of May 17, 1887, instructed them to make notation on their records of the cancellation of W. H. Lambert's entry, and "as the statutory period has elapsed and proof not submitted, you will proceed under instructions of circular December, 1873," etc.

Under date of April 20, 1890, the local officers report that notice under the circular was served on the parties in interest; that they have canceled the entry in accordance with order of May 17, 1887.

On April 15, 1890, Irena A. Lambert, as guardian of Minnie Lambert, filed an affidavit in the nature of a motion to reinstate the entry of W. H. Lambert, and asked that she be permitted to make final proof in behalf of said minor heir. She alleges that she was married to W. H. Lambert in 1872, and lived and cohabited with him until 1886, when she left him and procured a divorce; that Minnie Lambert is the issue of said marriage, and the affiant is her legally appointed guardian. She alleges that W. H. Lambert lived on said land continuously from date of his entry until his death; she sets up his improvements, alleges that Riley Lambert abandoned the land and never lived upon or claimed any portion of it after W. H. Lambert's entry; that he never had any notice of the cancellation of his entry.

On April 22, 1890, Joe Prewitt filed an application to have said entry reinstated and he be permitted to make final proof on the ground that W. H. Lambert executed a deed of trust on the same in which he—Prewitt—was the beneficiary.

On July 28, 1890, Henry J. Arnold filed an appeal from the decision of the local office rejecting his homestead application for the land as described in the original plats. This was rejected, for the reason that it was impossible to locate the land applied for by the description, and because the land applied for was included in the homestead entry of W. H. Lambert, then pending on an application for review and reconsideration, made by his minor heir.

Your office again, on November 6, 1891, directed the local office at Durango to report immediately what their records show respecting the manner in which notice of the decision of November 24, 1884, was served on W. H. Lambert, cancelling his entry as to conflict with Riley's, and on March 22, 1892, the register replied that "we have no record in this office showing manner of service of letter of November 24, 1884."

On March 7, 1892, Hugh Lambert presented his application to make homestead entry under section 2 of the act of March 2, 1889 (25 Stat.,

854) of the land included in W. H. Lambert's entry, except that included in Sarah J. Campbell's cash entry, and describing it as it was originally. This was rejected because of the pending appeal of Irena Lambert, guardian, etc., the prior applications of Prewitt and Arnold, and because of improper description. Hugh Lambert appealed, and with his appeal filed an affidavit in which he avers that he is father and heir of both Riley and W. H. Lambert; that Riley died intestate in December, 1883, without wife or descendent; that W. H. Lambert died in October, 1889 intestate "and left no wife or legitimate children nor their descendents;" "that the said Minnie Lambert mentioned in the decision from which appeal is taken is not the daughter of said William H. Lambert, deceased," "but that if she is the daughter of the said William H. Lambert she was not born in wedlock, and her parents did not subsequently intermarry;" that in October, 1891, he settled upon the land and has resided there with his family; that he is the only person entitled to make entry of said land, and asks for a hearing at which "to prove the matters contained in this affidavit."

Counter affidavits are filed by Irena Lambert and Minnie E. Sweet, *nee* Lambert, in which the former recites her marriage to William H. Lambert April 26, 1872, and the birth of their daughter Minnie "in the fall of the year 1873;" also copies of her complaint in the divorce proceedings, together with a stipulation and the decree. This stipulation is that she waives all right of alimony; "that the custody of the female child, the issue of the marriage between plaintiff (Irena Lambert) and defendant (W. H. Lambert), said child being named Minnie Emma, and more than fourteen years of age, shall not be sued for by plaintiff or defendant, or awarded to either by the court, but she, the said child, shall elect her own guardian and custodian as between the parties hereto." The court, in rendering the decree, says—"that a contract of marriage was solemnized between the plaintiff and defendant at Paola, Kansas, on or about April, A. D., 1872." Affiant further says that the child lived part of the time with her and part with her father, and was living with the latter at the time of his death.

Your office, by letter of September 28, 1893, considered this complication in its entirety, and decided that "the presumption is reasonable that the relinquishment said to have been made by Riley Lambert was in fact made by him, and that the same has in some unexplained way been lost;" the entry of W. H. Lambert was therefore reinstated. It having been shown that Minnie E. Lambert was then twenty years of age and married, you directed that she or her guardian be allowed thirty days within which to amend the application of W. H. Lambert so as to describe the land as it now appears on the official plats of September 22 and December 22, 1891, and that the record of the local office be corrected accordingly, "and return the application to this office." The rejection by the local office of the several applications of Arnold, Prewitt and Hugh Lambert was sustained, whereupon they prosecute their several appeals.

When these appeals were received in your office it was found that the appellants had not served on each other copies of the same, as required by rule 70 of the Rules of Practice, as restored September 21, 1893 (17 L. D., 325). They were therefore returned, with instructions to allow appellants fifteen days in which to make such service. A motion is made to dismiss these appeals, because "service of notice of said appeals was not made in accordance with the rules of practice."

It will be remembered that prior to the restoration of rule 70, by circular of September 21, 1893, it had not been the practice to serve notices of appeal on parties whose applications to enter land had been rejected, for the reason that the Department had, by circular of October 26, 1885, declared that rule 70, and others, were "*not* applicable to appeals from decisions rejecting" such applications. The several appeals were filed November 28, December 14, and December 23, 1893, and it is stated by one of the parties under oath "that he is informed and believes" that the order restoring Rule 70 had not at the time the appeals were taken been received at the local office; hence they were ignorant of the change in the practice. This is not at all improbable. But be that as it may, I do not think, under my view of this case, that this failure to serve notice under the circumstances is such a fatal error as would warrant the dismissal of the appeals. The motion is therefore overruled.

All the circumstances related above, together with all the statements made by the parties in interest, seem to sustain the correctness of your office decision in holding that Riley Lambert had relinquished his entry. The fact that the local officers allowed the entry of W. H. Lambert would indicate that they must have had satisfactory evidence before them of Riley's relinquishment. They are presumed to know the law and rules of the Department, and to perform their duties in accordance therewith. Two homestead entries upon the same tract of land are not permitted. The statements of all parties to this controversy, whether made under oath or otherwise, is that Riley did not live upon the land, and abandoned his entry thereof; also that the general understanding was that he had relinquished his entry in favor of his brother. In addition to this, Hugh Lambert, who was the heir of Riley, when notified of the cancellation of the latter's entry for failure to make proof within the statutory period, disclaimed all interest in the land as heir of his son, and in terms relinquished whatever right he might have to the claimant, W. H. Lambert. It is true that Hugh Lambert, by affidavit of November 22, 1893, accompanying his appeal to this Department, swears that he did not know the contents of the statement made by him September 11, 1889, to the effect that Riley had endeavored to relinquish the land to his brother, or that he—Riley—had abandoned the land. But I am disposed to doubt the correctness of the statement made in his affidavit, and I think the facts he details therein are contradictory of the position he now assumes. He says

that there was a trade between Riley and W. H., by which the former was to relinquish the land, and the consideration therefor was four head of horses, to be delivered to Louis Lambert, and one hundred dollars to be paid to Riley; that he—W. H.—“delivered the 4 or 5 horses” to Louis and took possession of the land, but did not pay the one hundred dollars, as agreed, and the relinquishment was never made and filed. If it be admitted that these statements would be competent evidence, it is apparent that there was a substantial compliance with the agreement between them.

Hugh, the heir of Riley, was prompt to disclaim any interest in his son's entry when he received notice to show cause why it should not be canceled, and the statements made in so doing seem to be so in accord with all the facts disclosed that I cannot escape the conviction that he did so with deliberation and should not now be heard to deny the statements made then, on the pretext that he did not know the contents of that statement. So that it seems to me, in view of all the circumstances, your judgment affirming the cancellation of Riley Lambert's entry should be affirmed.

It does not affirmatively appear from the record that W. H. Lambert did have notice of the orders of November 24, 1884, and May 17, 1887, cancelling his entry, and it needs no argument to show that neither he nor his heirs are bound by the action taken. His entry being therefore a valid one, and having the same force and effect as though no cancellation had been ordered, it follows that the subsequent applications of Arnold, Prewitt and Hugh Lambert were rightfully rejected. Moreover, the statutory period within which to make final proof had not expired in W. H. Lambert's entry, because the land was suspended from 1886 to 1891. During that period proof could not be made; hence it should be deducted from the life of the entry.

The record being thus cleared of conflicting claims, the only remaining question is as between the heirs of W. H. Lambert. Section 2291 of the Revised Statutes, provides that in case of the death of the entryman, or his widow, proof and entry may be made by the “heirs or devisee” of the deceased entryman. The divorced wife of the deceased is not making any claim to the land in her own right, and so far as the Department is advised, the only heir under the laws of Colorado is the daughter of the entryman (see Chap. XXVIII, General Statutes of Colorado). The father disputes the legitimacy of his son's daughter. It must be assumed that the court, in the appointment of the guardian, was fully advised, and that Minnie E. Sweet, *nee* Lambert, was adjudged to be the daughter of W. H. Lambert. If there was any doubt about her legitimacy, it would be removed by the stipulation entered into between W. H. Lambert and Irena Lambert in the divorce proceeding, wherein he acknowledges her as being “the issue of the marriage between” them.

By your said office judgment of September 28, 1893, you directed the application of W. H. Lambert to be amended, and then returned to

your office. This amendment was made October 26, 1893, and is in the files before me. The order therefore will be that this application be accepted as amended and the record changed in accordance therewith; that proof and entry shall be made in the name of Minnie E. Sweet, sole heir of W. H. Lambert, or in the name of her guardian for her use, as she may elect.

The judgment of your office is thus modified.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

FULLER v. GAULT ET AL.

By the terms of the act of March 2, 1889, the provisions of that act with respect to excluding claimants from the Territory until the hour of opening were made a general prohibition applicable alike to the lands acquired from the Creek and Seminole Indians.

Entrance within the Territory in the prosecution of his ordinary business will not disqualify a settler, where he appears to have derived no advantage therefrom, and was outside the boundary at the hour of opening.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895.
(J. I. H.) (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 33, T. 18 N., R. 3 W., Oklahoma City land district, Oklahoma Territory.

Samuel Crocker made homestead entry for the above-described tract on April 24, 1889.

On May 1, 1889, Frank M. Gault filed an affidavit of contest alleging prior settlement for the quarter section and the disqualification of Crocker by reason of his having entered the prohibited Territory prior to April 22, 1889. Subsequently, in consideration of the sum of \$5,000, he released his claim to the S. $\frac{1}{2}$ of the quarter section to the town of Oklahoma.

Randall Fuller filed affidavit of contest July 10, 1889, alleging that he settled upon the land April 22, 1889, and further that Samuel Crocker and Gault, the first contestant, were disqualified by reason of having entered the Territory during the prohibited period.

The local officers held for cancellation the entry of Crocker, dismissed the contest of Fuller and found in favor of Gault. Upon appeal, your office decision of February 17, 1893, sustained the findings of the local officers, which was re-affirmed by your office decision of July 29, 1893. Upon further appeal by the parties the case is now before the Department.

The voluminous record in this case has been carefully and laboriously examined in order that the Department may intelligently pass upon the various questions of fact raised by the appeal.

The testimony in the case is contradictory beyond hope of reconciliation. It is not possible for a decision to be rendered that will harmonize the evidence. My conclusions upon the facts are as follows:

That Samuel Crocker was inside the Territory at the hour of noon on April 22, and is therefore disqualified as a homesteader therein. *Smith v. Townsend* (148 U. S., 490); *Dereg v. McDonald* (17 L. D., 364), and *Turner v. Cartwright* (17 L. D., 414). That Frank M. Gault did not use a relay of horses in reaching this land on the 22d of April, and that he did not enter the Territory on that day prior to the hour of noon.

It was urged by counsel in the oral argument of this case, that while it is possible that he did not use the relay of horses, or enter the Territory on the 22d day of April, prior to the hour for entrance, that he did enter into a conspiracy with one Cook, who, the evidence shows, used a relay of horses in entering the Territory to the end that said Cook was to hold the land until Gault arrived.

There are many suspicious circumstances surrounding the conduct of Gault in arriving at this land. It is remarkable, for instance, that three of his party and three of his uncle McClure's party, starting sixteen miles away, should have gained tracts adjoining one another on the north side of Oklahoma City, but I do not feel myself justified in holding that there was a conspiracy between Cook and the contestant, Gault, inasmuch as, among other reasons, it does not appear that there was a sufficient consideration why Cook should have so conspired. I fail to see why Cook should have voluntarily given this land—one of the most valuable tracts in the whole country—to Gault, if he was the first settler upon it, and as it appears that it was his opinion, and also that of McClure and his party, that the use of a relay of horses was not unlawful.

I do not deem the riding of sixteen miles in an hour and ten minutes, as described by Gault, impossible in view of the testimony in the case.

Counsel urge that upon this question there has been no finding of fact by the local officers, or by your office, but counsel have no right to assume that because there was no specific finding that the question was not considered by them and especially by your office where it was specifically urged.

I, therefore, am led to hold that there was no conspiracy between Cook and Gault, and that Gault did nothing on the 22d that was in violation of the acts of Congress opening this land to settlement.

It is in evidence that Gault crossed from the Pottawattomie land to Purcell on the 17th of April, and possibly was within the Territory at one other time during that month. It does not appear from the record for what purpose Gault went to Purcell, other than that it was his general place of business and that he was accustomed to do some shipping and receive his mail there.

This brings me to a discussion of the question whether such an entrance and presence in the Territory was such a violation of the acts of Congress as would disqualify him as a homesteader.

In the first place, it is urged by counsel that there are two bodies of land in the Oklahoma Territory which were opened to settlement by different acts, the act of March 1, in reference to the Creek lands, concluding as follows:

Any person who may enter upon any part of said lands in said agreement mentioned prior to the time the same are opened to settlement by act of Congress, shall not be permitted to occupy or make entry of such lands, or lay any claim thereto (25 Stat., 759).

And that portion of section thirteen of the act of March 2, in reference to the Seminole lands is as follows:

That each entry shall be in square form as nearly as practicable, and no person shall be permitted to enter more than one quarter section thereof, but until such lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The contention is, that the inhibition in the two acts refers in each case to entering and occupying and subsequently laying claim to the Indian lands so entered and occupied; that is to say, that if the entry during the prohibited period was in the Seminole lands, the person was thereafter forever prohibited from acquiring title to lands embraced in the Seminole country, but that it was lawful for one to enter the Seminole lands, as did Gault in this case in his journey to Purcell, and yet make entry of the Creek lands. That the two purchases and two tracts of country acquired thereby were as distinct and separate as were the purchases of Florida and Louisiana.

In the last portion of section 13 of the last act referred to the following appears:

That all the foregoing provisions with reference to lands to be acquired from the Seminole Indians including the provisions containing the forfeiture, shall apply to and regulate the disposal of lands acquired from the Muscogee or Creek Indians.

I deem that this language conjoins the two acts and was intended for the very purpose of answering the question now urged by counsel. Congress intended by this to show that it was treating the Seminole and Creek lands as one body of land, and that the inhibition of entering the land referred to in the separate acts in reference to each separate tract, was, by this clause, made a general prohibition to the two bodies of land collectively.

To sustain the position of counsel would be to emasculate the statute. If the contention were right it would follow that large numbers of prospective settlers could go into the country and all that would have been necessary at the hour of opening would have been to cross the line from one country to the other. In so doing they could have appropriated the improvements of one another, if any, and within a few

minutes after the hour of 12 o'clock, noon, of April 22, 1889, could have been housed and firmly established to the exclusion and injury of those who had, in accordance with the plain meaning of the statutes, remained outside.

In the recently decided case of *Curnutt v. Jones* (21 L. D., 40), whilst no general rule was laid down—each subsequent case being left to its own particular facts for adjudication.—the controlling idea is, did the unlawful entry redound to the advantage of him entering? Or to state the proposition conversely, a mere entry where no advantage was gained would not disqualify the person so entering from acquiring a homestead in the Territory. Applying that doctrine in the case at bar, there being no evidence that Gault secured an advantage by his knowingly entering the Territory on April 17, 1889, his technical violation on that day being disconnected by great distance from his entrance of the Territory on April 22d and the location of the land he now claims, I am led to hold that such entry was not in violation of the intent of Congress as expressed in the acts *supra*, and does not amount to a disqualification under the penalty in the law as set out.

In this connection it is well to note that the decision of *Curnutt v. Jones*, *supra*, criticises only the cases of *Turner v. Cartwright* and *Laughlin v. Martin*, as these were the only two cases that arose under the Oklahoma law; but under the act opening the reservoir lands in Wisconsin, an examination of authorities shows that the cases of *Dereg v. McDonald* (17 L. D., 364), *Box v. Dammon* (18 L. D., 133), *Kyes v. McGinley* (18 L. D., 550), and *Thielman v. McDonald* (18 L. D., 581), are subject to the same criticism, inasmuch as the principle involved was the same, the prohibition being similar to that opening the Territory of Oklahoma.

The decision appealed from is therefore affirmed.

SUIT TO VACATE PATENT—RIGHT OF GOVERNMENT.

EAST OMAHA LAND COMPANY.

The right of the government to begin proceedings for the vacation of a patent, depends upon the same general principles which would authorize a private citizen to apply for relief against an instrument obtained by fraud, or deceit, or any of those practices which are accepted to justify a court in granting relief.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (J. I. H.) (G. B. G.)

I am in receipt of your office letter of February 19, 1894, transmitting the petition of the East Omaha Land Company, asking that the proper officer of the United States be instructed to institute proceedings to have the patent for fractional section 16, T. 75 N., R. 44 W., 5 P. M., in the State of Iowa, issued to C. S. Lefferts on December 26, 1893, cancelled; also offering to pay the costs and expenses incurred

in such litigation, and to employ counsel to assist the government in prosecuting such suit.

The petition recites that on December 28, 1846, the State of Iowa was admitted into the Union, and that there was granted to that State Section number 16, in every township thereof of the public lands, and where such section had been sold, or otherwise disposed of, other lands, equivalent thereto, and as contiguous as may be, for school purposes.

That afterwards the lands of Iowa were surveyed by the United States government, and township 75 north, range 44 west, fifth principal meridian, was found to be fractional, being made so by the Missouri River. Said township was found to contain 11,514.52 acres, and it was ascertained by such survey that section 16 was made fractional by the river, and contained 11/100 of an acre.

That subsequently, to wit, on August 1, 1853, Lysander W. Babbitt, register of the land office at Kaneshville, said State, certified to the Department of the Interior that one Nelson T. Spoor, School Land Commissioner of Pottawattamie County, Iowa, in which said township is located, had filed in his office, a recommendation that the west half of the south-east quarter, and the south-west quarter of section 24, and west half of the south-west quarter of section 25, in said township, and comprising three hundred and twenty acres, be selected in lieu of the sixteenth section in said township, for school purposes, and that he concurred in such selection, and submitted the same for the approval of the Secretary of the Department of the Interior.

That subsequently, January 27, 1854, this selection was approved by the Secretary, subject to any valid legal right that may have existed thereto at the time it was made known to the Land Office by the proper authorities of the State.

That such selection, certification and approval were pretended to be made by virtue of the act of Congress of May 20, 1826, entitled, "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for."

That the so-called lieu-lands, as aforesaid, were afterwards disposed of by the State of Iowa. That the school section 16, above referred to, and containing 11/100 of an acre, was, by the survey of the United States, located upon the Iowa side of the Missouri River, and that about the time the survey was made, the river at that point commenced to cut away the Nebraska lands opposite, and to form accretions to said section, as well as to other adjoining water lands, and this continued until 1877, when the river had so changed as to be located nearly a mile north of where it ran at the time of the Iowa survey.

It is further set out in the petition, that the East Omaha Land Company was organized in 1887, under the laws of Nebraska, for the purpose of buying, selling and improving real estate, building factories, houses, and to aid in all works necessary to improve this land; that it acquired by purchase the title to a large tract of land, comprising

nearly two thousand acres, and that in this tract is located the fractional section 16, aforesaid.

That these lands were acquired in 1887, and 1888, and at that time were in a condition of waste. That they had been for years practically abandoned for all purposes, covered with willow growth, under brush, poplar trees, subject to overflow, and were considered useless, and of little value, and that said company, being advised that section 16, or what there was of it, had been appropriated or granted to the State of Iowa for school purposes, purchased it of the State, and received a deed or patent therefor.

That upon acquiring the lands aforesaid, the company proceeded to improve them, and in that behalf has expended upon the whole tract vast sums of money. That it has not only redeemed them from the ravages of the Missouri River, but it has platted them into lots and blocks, streets, avenues and alleys, paving some of the streets with granite, and grading others; constructed railway lines upon many of the streets, secured the location of large factories and business institutions on said grounds; built houses; has procured the construction of a bridge across the Missouri River, all at a cost of upwards of two millions of dollars.

That it has also litigated the question of fact and of law involving its right of accretions, at great expense, and that by reason of the afore said improvements, and of the establishment of the principles of law with relation to accretions along the Missouri River, the lands now owned by it have become very valuable.

The petition further represents that said company on the 22d day of January, 1894, for the first time learned that the said C. S. Lefferts had filed for record in Pottawattamie County, Iowa, a patent to said fractional section 16, issued by the United States to him on the 26th day of December, 1893. That the petitioner has been advised as a matter of law, that the patent covers in the neighborhood of twenty acres of land of great value, claimed by said company, and that the said Lefferts obtained the said patent for the sum of \$1.10; that he represented to the Land Department, by affidavit and otherwise, that the said fractional section was unoccupied by any person other than himself, having color of title, and that the land was not suitable for agricultural purposes, whereas it has been occupied and improved by said petitioner, under a deed from the State of Iowa since 1887, and that a large portion, perhaps all of said tract, except that which lies within streets, is enclosed with fences, and that the original 11/100 of an acre is covered mostly by avenue M., upon which is located one of said company's railroad tracks, and that a large portion of the land had been cultivated by said company.

It is further alleged that said Lefferts well knew all of the facts and circumstances, as herein stated, at the time he made his application to purchase the said section 16, and his whole proceedings was conducted

by him, with a view of defrauding said company of its property and rights.

In consideration of the foregoing premises, the Department is asked to investigate the matters and things set out, and that the proper law officer of the government be instructed to institute proceedings in the courts of the United States to have the patent, as aforesaid, issued by the government to said O. S. Lefferts, set aside and cancelled.

The patentee, Lefferts, answering admits the substantial allegations of the petition, except the charges of fraud and misrepresentation in obtaining the patent, joins issue on the petitioner's conclusions of law, and for affirmative answer and defense, submits that the said East Omaha Land Company is estopped from having or claiming any right, title, interest or estate in said fractional section 16.

The first question that arises is whether such a case is presented as will, in any event, justify the government in the institution of a suit to set aside Lefferts' patent in the interest and for the benefit of the East Omaha Land Company; and for the purposes of this inquiry it may be assumed that Lefferts acquired the patent aforesaid through misrepresentation and fraud.

A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel or annul a patent for land, issued in its name, on the ground that it was obtained by fraud or mistake. But the right to bring such a suit exists only where the government has an interest in the remedy sought by reason of its interest in the land or when the fraud has been practiced on the government and operates to its prejudice, or it is under obligations to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action.

When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land and the Government has no interest in the matter the suit must fail. *United States v. San Jacinto Tin Company* (125 U. S., 273).

Assuming that the petitioner is correct in its statement of facts and contentions of law, it does not present such a case as would justify the government in instituting an action in its behalf. In that event the government certainly has no interest in the subject-matter of the controversy or in the remedy invoked, nor is it under any obligation to make the company's title good. If, as alleged, the section 16 in controversy was granted to the State of Iowa for school purposes, and other lands were subsequently selected by said State in lieu of said section, because of its being fractional in quantity, then the title to the said section 16 reverted to the United States, and any subsequent conveyance of said land by the State of Iowa, could not operate to divest the government of title, or to put the government under any obligation to the vendee of said State to assist him in perfecting the same.

The petitioner's remedy would seem to be against the State of Iowa. However this may be, there is no such case presented as would authorize or justify the government in instituting a suit in its behalf.

It remains to be seen if suit should be brought to set aside the patent to Lefferts by the government in its own behalf. This may be done if there was either fraud or mistake in the issuing of the patent.

Fraud in equity includes all wilful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained. (2 Pomeroy's Equity Jur.—1882—873).

It may consist either in the statement of what is false or in the concealment of what is true, but the misrepresentation must be of a matter of fact and not of law, and it must be relied upon by the person to whom it was made or whose action it is intended to influence, and the concealment must be of material facts which one party is under some legal or equitable duty to communicate to the other.

The sixth and seventh paragraphs of Lefferts' answer are in the nature of admissions, in substance, that he is the purchaser of the land and holds the government's patent for the same; that it contained $\frac{11}{100}$ of an acre according to the government survey; that as a matter of law it contains 20 acres or more, and that he paid \$1.10 for the same. These admissions contain the only facts on which there may be predicated a charge of fraud against Lefferts so far as the government is concerned.

There were no misrepresentations or suppressions of any matter of fact to the disadvantage of the government. The government surveys and plats show that said section is fractional and contains $\frac{1}{100}$ of an acre. That as a matter of law said fractional quarter-section embraces twenty or more acres of land and is covered by Lefferts' patent may or may not be true. This is a conclusion of law based on the rights of riparian proprietorship, and the underlying fact, that section 16 was part of the original ground to which was thrown a large body of land in the nature of accretions by the ravages of the Missouri river on the Nebraska bank was an open and notorious one, which both parties are presumed to have known, for the reason that it was equally within the reach of both.

The price paid by Lefferts for the land in controversy, while merely nominal and wholly inadequate, is not a badge of fraud in this case, for the reason that the land was duly and regularly offered at public sale, as an isolated tract under Sec. 2455 of the Revised Statutes, and Lefferts became the purchaser as the highest and best bidder, and there is no evidence, nor is it alleged, that he was guilty of any trick or artifice or collusion to prevent a sale at the full market value of the land.

Nor was it such a mistake as would warrant the setting aside the patent on that ground. A mistake of law affords no ground for relief,

and if a mistake of fact is relied on, it must be such fact as the complainant could not by reasonable diligence get knowledge of, when put upon inquiry. When the fact is known to one party and unknown to the other, the ground for relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken by the concealment. If the parties act fairly, one not being bound to communicate the facts to the other, a court of equity will not interfere.

These are the general principles that govern contracts between individuals in the matter of impeachment for fraud or mistake, and I know of no rule of law that would make them inapplicable to a contract to which the Government is a party.

The right of the government of the United States to initiate a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those practices which are admitted to justify a court in granting relief. *United States v. San Jacinto Tin Co., (supra).*

I am therefore of opinion that the United States is without remedy in this matter, and the application of the East Omaha Land Company is denied.

SWAMP LANDS—MEANDERED LAKE.

STATE OF ILLINOIS.

The claim of the State under the swamp grant may be recognized for lands included within the meander line of a lake, where it appears by subsequent official survey and investigation that such line was not properly established, and in fact included lands of the character granted.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (J. I. H.) (G. C. R.)

Your office decision of January 13, 1894, held for rejection the claim of the State of Illinois, made through its agent, Isaac R. Hitt, for certain lands in Lake county, township 46 N., range 9 E., in said State. An appeal from that judgment brings the case here.

It is the contention of the State that the lands are of the character contemplated in the act of September 28, 1850 (9 Stat., 519), known as the swamp land act.

The township was first surveyed in 1839, and the official plat thereof was approved December 17th of that year. This plat shows an area in the township of 15,061.51 acres of public lands, and an estimated area of 5,834.11 acres covered by Fox River and Pistakee Lake, which was meandered and designated on the plat as "Pistakee Lake, navigable."

In September, 1875, Clarence A. Knight made application for the survey of the lands lying within the meandered lines of said lake, alleging that the lake had nearly dried up from natural causes; that

the waters had receded so that nearly all the area was then fit for cultivation and agricultural purposes. The subdivisions, or where such would be found if the survey were extended through the meandered lakes, were described, showing the amount of dry land thereon. His statement (sworn to) was duly corroborated by several witnesses.

The application was allowed, and, on December 4, 1875, one Alexander Wolcott, of Chicago, Illinois, was appointed deputy surveyor, and directed to make the survey applied for, which he did, commencing December 16, 1875, and completing it January 18, 1876. The plat of this survey was approved March 23, 1876, by the Commissioner of the General Land Office, as ex-officio surveyor-general.

Conflicting statements relative to the Wolcott survey having been filed in your office, on one side, to the effect that no durable land marks were placed in the ground; that the survey could only have been made on the ice on account of the depth of the water; that there were only about three hundred acres of dry land within the original meanders of the lake, and, on the other side, that the surveyed lands had in a great measure become dry and fit for agricultural purposes, and the survey was actually made as shown by the return of the field notes, and not on ice as alleged, your office, on June 5, 1877, appointed Jacob B. Bousman, of this city, a special examiner of surveys; he was instructed to report upon the condition of the survey made by Wolcott, and especially upon the nature of the lands over which the Wolcott survey was extended (being the meandered lake aforesaid), the quality of soil, and amount and kind of timber; that his examination must be thorough and the report full.

Bousman made his examination, commencing June 19, 1877, and ending four days later. He went over the same grounds as did Wolcott, made field notes, and filed the same. He identified the land marks made by Wolcott in all cases, and reported, under date of June 26, 1877, that Wolcott had made a careful and correct survey in accordance with his instructions. Among other things, Mr. Bousman reported that Fox river has a rise and fall between the extremes of high and low water of five feet, and that at the time he made the examination the water was two feet above the low water line; that at that time some 1700 acres were submerged in sections 14, 15, 22, 23, 26, 27, 34, and 35, forming what is generally known, and also shown upon the map of Lake county, as "Grass Lake," it not being considered a part of Pistakee or Fox Lake; that bounding this Grass Lake, on the east, north and west, is a wide margin of natural marsh meadow land, covering about 1,900 acres, subject to annual overflow to the depth of from two to three feet, all which is embraced within the meander lines of the survey of 1839, and represented in that survey as a part of a navigable lake; that large thrifty oak trees and trees of other varieties are found in the margin of the marsh lands at elevations of one to three feet above the marsh lands; that in sections 23 and 26 about one hundred acres of

rolling land, some of which is cleared and in cultivation, the remainder well timbered (this land was represented by the survey of 1839 as being a part of the navigable lake); that the quarter section corner, on the north line of section 14, stands about forty feet above the level of the marsh meadow lands to the west of it. This point is also represented in the survey of 1839 as a part of the lake; that one Garwood had farmed lands for many years also represented by the survey of 1839 as navigable lake.

This agent concludes that the disputes connected with the possessory rights of lands in said township had their origin in the misrepresentations which appear in the original survey of 1839, and that the meander lines did not even follow the boundaries of the marsh meadows, but cut across bold high lands which must at that date have been covered with timber; the agent concludes that the original meander lines of the survey of 1839 are entitled to no consideration whatever, except at their intersection with the section lines.

In addition to these statements, Mr. Wolcott's field notes state that "The timber land in section 14 is very heavy and consists of hickory, black walnut, white and burr oak, white ash, and bass wood, and is about forty feet above the lake." All but 10.38 acres of this section is represented on the survey of 1839 as part of Lake Pistakee.

The decision appealed from assumes that the survey of 1839 properly represented the area of Lake Pistakee as then meandered; that from the affidavits accompanying the application for the Wolcott survey, and others filed attacking that survey, what was designated in the plat of survey of 1839 as "Pistakee Lake" existed as a lake for a number of years subsequent to 1850. Although the Wolcott survey of the meandered lake disclosed land which might then have been properly designated as swamp and overflowed, yet, if as a fact such lands were on September 28, 1850, covered by the waters of Lake Pistakee, then apparently a permanent body of water, they would not inure to the State under the swamp land act.

But from what is above seen, the survey of 1839 was not an accurate one. The field notes of the survey of both Wolcott and Bousman, and the special report of the latter, show conclusively that the plat of the survey of 1839 misrepresented the facts; there were navigable lakes on a part of the land; but the later survey shows that much of the land represented as "navigable lake" was in 1876 covered with a large growth of timber, and forty feet above the marsh meadow lands. That being true, such lands could not in the nature of things have been covered by a navigable lake, or by water of any depth of a permanent character in 1850 or even in 1839. There may have been some recession of the waters of the lake from 1839 to 1876, but from the facts above given by the two surveyors, together with other evidence in the record, I am convinced that the plat of the survey of 1839 did not represent the real facts, and that both in 1839 and 1850 there were lands, meandered as a lake, which were then high and dry. That being true, there

were doubtless more or less of the lands which were of the character contemplated in the swamp land act.

An examination of the records of your office shows that much of this land, over which the surveys were extended in 1876, has been patented to sundry persons under the act of June 8, 1872 (17 Stat., 333), granting additional homestead rights. It also appears that several of the tracts claimed by the State have been entered, and other tracts claimed have been already patented.

The Department has no jurisdiction over the tracts patented. If, in fact, such tracts belonged to the State under the swamp land act, the State's only remedy is in the courts. If the lands applied for are shown by the field notes of the survey of 1876 to be of the character contemplated in the swamp land act of 1850, they *prima facie* belong to the State.

In case the field notes of the Wolcott survey show that any tract or tracts in said body of land are of the character contemplated in the swamp land act, and such tract or tracts have been entered, you will call upon such entrymen to show cause why their entries should not be canceled. If in answering this rule in the time given an entryman makes a *prima facie* showing that the land entered was not in fact swamp and overflowed within the meaning of the act of 1850 (*supra*), you will so advise the agent of the State, who will be given an opportunity, if he so desires, to have the issues tried at a hearing before some officer duly qualified to administer oaths. The evidence will be taken in the presence of an agent of your office, who will have general supervision of the hearing and will see to the proper transmission of the evidence for a judgment upon the merits. Let such hearings be had at as nearly the same time and place as practicable.

The decision appealed from is reversed.

PREFERENCE RIGHT OF CONTESTANT—APPLICATION.

MAYERS *v.* DYER.

Under the rule enunciated in *Allen v. Price*, regulating the disposition of land subject to a contestant's preferred right of entry, an application to enter, tendered by a stranger to the record, during the period accorded to the contestant for the exercise of his right, and held in abeyance under said rule, will take effect on the land covered thereby, not taken by the contestant, to the exclusion of a subsequent application of another therefor.

In considering the validity of an application to enter it may be fairly presumed that the proper tender of money was made therewith, where the record is silent as to such tender, and the application is rejected for a reason not involving any question with respect to the tender of money.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895.

(J. L.)

This case involves the N. $\frac{1}{2}$ of section 29, T. 1 N., R. 2 W., Salt Lake City land district, Utah, containing three hundred and twenty acres.

One Christen J. Bang contested one James Peacock's desert land entry of the whole of said section 29. On August 8, 1893, his contest was sustained and said entry was cancelled. On August 15, he was notified of the cancellation and of his preference right of entry within thirty days; said right being limited by the act of August 30, 1890 (26 Stat., p. 391) to three hundred and twenty acres, one half of the section aforesaid.

On August 21, 1893, William C. Dyer filed his desert land application for the north half of said section. In obedience to the Circular of March 30, 1893 (16 L. D., 334) the local officers received said application, and held the same in abeyance to await the action of the contestant Bang, "and the filing of the same was duly noted on the record."

On September 14, 1893 (the thirtieth day after notice), Bang and Albert Mayers appeared at the local office. Bang made entry of the south half of the section. And immediately Mayers offered his application to make desert land entry of the north half. His application was rejected by the local officers "for conflict with Dyer's application, filed on August 21, 1893 subject to the preference right of entry by Bang."

Dyer was notified that his application was no longer in abeyance; and on September 16, 1893, he made desert land entry, No. 3643 of the N. $\frac{1}{2}$ of section 29 aforesaid.

On October 13, 1893, Mayers filed an appeal to your office; but did not serve on Dyer notice thereof.

On December 6, 1893, your office affirmed the action of the local officers rejecting Mayers' application; and Mayers appealed to this Department.

On March 19, 1895, I affirmed your office decision. A motion for review filed April 23, 1895 was entertained; notice thereof was served on Dyer, and arguments of counsel on both sides have been filed in accordance with Rule of Practice, No. 114. The whole case is now before me for reconsideration.

In his appeal to your office dated October 12, 1893, James M. Denny Esq., attorney for Mayers, alleged:

1. That on September 14, 1893, Mayers tendered to the register and receiver the sum of twenty-five cents per acre for said land amounting to the sum of eighty dollars, and they refused to receive it.
2. That Dyer did not on August 21, or at any other time prior to September 16, pay, deposit, or tender the sum of twenty-five cents per acre, or any other sum.

In his motion for review the same attorney insists, that said allegations "should be taken as true", because the register and receiver in whose office the appeal was filed, did not deny or controvert the allegations therein contained. I cannot allow any such claim. There is no evidence that the local officers ever read the appeal. The probability is that they did not. Until the appeal was filed there was no allegation or proof that Mayers tendered any money. The silence of the

record about money indicates that the subject was not pressed by either Dyer or Mayers. Apparently it was presumed that both were ready to pay when the time came.

In the case of *Thomas v. Blair* (13 L. D., 207), it was said that "the initial act in establishing a desert land claim is the payment of twenty-five cents per acre." For the word "initial" the word "essential" should be substituted. By the Circular of June 27, 1887, respecting desert land entries (5 L. D., 706), the local officers were instructed, *first*, to take the declaration and affidavits of the applicant and his witnesses; and *second*, "When proof of the character of the land has been made *as above required* to the satisfaction of the district officers, the applicant will pay the receiver the sum of twenty-five cents per acre. The register will receive and file the declaration, and the register and receiver will jointly issue in duplicate a certificate acknowledging the receipt of the twenty-five cents per acre, and the filing of the declaration." The first step (see paragraphs 4 to 8 of the Circular aforesaid), is to file a proper declaration under oath and the corroborating affidavits of two reputable witnesses, in order to establish the desert character of the tract, and the quantity of land to be paid for. Until this is done, the applicant and the receiver cannot know how much money, (if any), is to be paid and received. The payment of the money is, and must be necessarily, the last thing done, to make the entry and secure a duplicate receipt.

Since the case of *Fraser v. Ringgold* (2 L. D., 69), it has been conceded that the successful contestant of a desert land entry acquires a preference right of entry under the act of May 14, 1880 (21 Stat., 140).

In the case of *Welch v. Duncan* (7 L. D., 186), it was held that on the cancellation of a contested entry the land is at once open to settlement and entry, subject only to the preference right of the successful contestant; and that during the thirty days allowed him within which to exercise that right, the application of another may be allowed subject to the right of the contestant. The following good reason was assigned for said decision:

The law does not confer on the successful contestant a right to control such land for thirty days after notice; nor the right during such period to select a particular person, and by waiver of his preference right at an opportune moment, confer on such person the benefits conferred by law on the successful contestant alone. Such a doctrine is not sanctioned by law or by sound public policy. The right conferred on a successful contestant by section 2, of the act of May 14, 1880, is a personal right which cannot be transferred to another; either directly, or by evasion. (7 L. D., 189).

Then the practice was for local officers to allow an entry to be made (i. e. consummated by payment of money and issuance of duplicate receipt), subject to contestant's right for thirty days; and when contestant appeared to exercise his right, to serve a rule upon the entryman to show cause why his entry should not be cancelled. This course of procedure subjected the successful contestant to additional delay, vexation and expense. It was only to prevent such "hardship and

loss to the successful contestant," that Secretary Noble, on November 15, 1892, in the case of *Allen v. Price*, (15 L. D., 424), modified the practice and directed that:

Should an application to enter the land be presented by a stranger to the record it can be held *in abeyance* to await the action of the contestant within the time allowed: Should a waiver of the preference right of entry duly executed by the contestant be filed, the tract should be held subject to entry; meaning plainly the entry held in abeyance as aforesaid.

This regulation was subsequently embodied in the circular of March 30, 1893, printed in 16 L. D., 334.

When Bang, on September 14, 1893, elected to make his entry of the S. $\frac{1}{2}$ of section 20, he waived and relinquished his preference right as to the N. $\frac{1}{2}$ of said section, which thereby became subject to entry by Dyer, whose application filed August 21, 1893, was held in abeyance. It was not the purpose or effect of Secretary Noble's decision to modify the excellent rule and reason propounded in the case of *Welch v. Duncan* above cited. It did not give Bang the right to control the whole section (640 acres) for thirty days. It did not give him the right to select a particular person (Mayers) to meet him at the land office at an opportune moment, and then and there confer on such person the benefits conferred by law on Bang alone. It did not authorize Bang to transfer to Mayers his personal right under the act of May 14, 1880. There is no ambiguity about the phrase "held in abeyance." (See *Anderson's Dictionary of Law*,—*Abeyance*.) An estate is in abeyance when there is no person *in esse* in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest when a proper owner appears. (2 *Blackstone's Commentaries*, 107). Abeyance means waiting; in expectation; in suspense; subsisting in contemplation of law, (4 *Kent's Commentaries*, 260). Dyer's right to make entry of public land existed under the land laws. His application to be allowed to exercise that right was received, duly noted on the records of the district office, and held in abeyance for twenty-four days, to await an event which must happen within that time, and determine whether his application would attach to the whole 320 acres, or only to 160 acres, to wit: the NE. $\frac{1}{4}$ or NW. $\frac{1}{4}$ of section 29. If Bang had selected either the W. $\frac{1}{2}$ or E. $\frac{1}{2}$ of the section, he would have left for Dyer's entry the NE. $\frac{1}{4}$ or the NW. $\frac{1}{4}$ of the section. Until the happening of the event waited for, it could not be known whether Dyer should pay for 320 or 160 acres. The local officers, after being satisfied that the character of the land made it subject to desert land entry, might properly have told Dyer to wait for the end of Bang's thirty days before paying his money; and hold his application in abeyance.

For the purposes of this decision I assume that Mayers did tender eighty dollars; not because his appeal says so; but because no question about it was raised by the local officers in the record, and because they rejected his application for a reason, which would make a refer-

ence to a tender of money immaterial and unnecessary. I assume that the local officers, in substance, if not in terms, told Dyer that they would not receive his money, inasmuch as the receipt of money would have consummated his entry, which they intended to hold in abeyance.

After reconsideration, I concur in your office opinion, that the new regulation promulgated by Secretary Noble in *Allen v. Price*, "meant something"; and that its application to this case justified the local officers in rejecting Mayers' application on September 14, and in allowing Dyer to perfect his entry on September 16, 1893.

For the reasons above stated your office decision is hereby re-affirmed; and the motion for review is hereby denied.

TIMBER CULTURE CONTEST—PREMATURE CHARGE.

COX *v.* ORR.

In case of a timber culture contest where the charge as laid practically covers the year and the usual planting seasons embraced therein, and where the notice of the contest is served after the expiration of the year, and the hearing is after its expiration, evidence should not be excluded as to said year because it has not quite terminated at the date of filing contest.

A timber culturè entryman who entrusts the care of his claim to an agent is bound by the negligence or default of such agent.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (J. I. H.) (C. J. W.)

This case comes before me on the appeal of George Cox, contestant, from your office decision of February 8, 1894, in which the finding in his favor by the register and receiver was reversed.

The record shows that on March 11, 1887, Mathew Orr made timber culture entry 10,614, embracing the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 23, T. 12 S., R. 30 W., Wa-Keeney land district, Kansas.

March 2, 1893, George Cox filed affidavit of contest against said entry alleging that said Orr has failed, since date of entry, to break, "plow or cultivate ten acres of said tract of land as required by law; that there is no timber growing on said land and never has been since date of entry and all of said failures still exist."

May 4, 1893, the case came on for hearing before the register and receiver and testimony was submitted by both parties. August 4, 1893, the register and receiver rendered their decision, in which they found that the entryman had failed to comply with the law as to plowing and cultivation during the years 1891 and 1892, and recommended the cancellation of the entry.

The appeal from your office decision reversing said finding, specifies two grounds of error:

1. That the finding of facts is against the weight of the evidence.
2. That it was error to consider evidence of good faith upon the part of defendant, as an excuse for not complying with law.

The evidence shows that eight acres of the land in controversy had been broken when Orr made his entry, and that the required number of acres were plowed and cultivated during the year 1889; that during the year 1890 five acres were planted to tree seeds and subsequently cultivated, and the remainder of the ten acres cultivated in crop. There seems to be no cause of complaint against the entryman as to these years. The controversy was narrowed to what was done in the years 1891 and 1892.

The register and receiver commented severely upon the bad culture and negligence of the entryman during the year 1892, and evidently their conclusions were based chiefly on the testimony relating to the work of that year. This was the sixth year of the entry and the contest was filed before the expiration of that year.

Your office held that the period covered by that year was not put in issue by the affidavit of contest, and that the evidence of what was done on the land during the year 1892, was not to be considered against the entryman.

I am not prepared to say that the evidence of imperfect and negligent planting and cultivation in 1891, was sufficient to demand the cancellation of the entry, as there was considerable conflict in the testimony. I can not, however, concur in the conclusion reached by your office that the default of 1892 is not in issue. It is true that the entryman's year is not necessarily the calendar year, but it is to be reckoned from the date of the entry, yet where the affidavit of contest practically covers the year and the usual planting seasons embraced in it, and where service of notice of the contest is after the expiration of the year and the date of hearing after its expiration, the evidence should not be excluded because the year has not quite closed at the date of filing contest. *McClellan v. Crane* (13 L. D., 258).

The sixth year of this entry expired on the 11th of March, 1892.

The above case cited decides that—

An objection as to the sufficiency of an affidavit of contest can only be raised by the defendant, and not by him prior to the day set for hearing. A contest is not prematurely initiated where the pay fixed for the hearing is subsequent to the expiration of the year in which the default is charged, and the notice is not served until after the expiration of said year.

In the case under consideration, Cox filed affidavit alleging the non-residence of the defendant and an order was issued directing service to be perfected by publication. The affidavit of the publisher of the notice shows that it commenced to run on the 9th day of March and ceased on the 6th of April, 1893. The date of service was therefore subsequent to the expiration of the year in which the affidavit of contest was filed and brings this case clearly within the rule laid down in the case cited.

Your office having excluded all testimony relating to work of 1892, it remains to be determined whether or not, under the testimony cover-

ing that year, such default was shown as required by the cancellation of the entry. The evidence shows that the only work done on the claim in 1892 was on the 30th day of June, when the ground was dry and hard, and covered with a growth of weeds and grass, twelve to fifteen inches high. On that day two hands worked on the claim; one simply furrowed out the land with a plow, and the other, following the plow, dropped tree seeds and covered them with his foot. There was no further care for, or cultivation of, the land during that year. No trees resulted from this planting. None could be expected.

Orr testified that he was not present when this work was done, but that he had instructed his agent to do what was necessary to be done. It is clear that the agent paid no attention to the requirements of the law and put in peril the interests of his principal, for it is equally clear that the principal (entryman) who puts a claim of this sort in the hands of an agent, is bound by the negligence and default of such agent. *Smith v. Smart* (7 L. D., 63).

If I am correct in my opinion that this evidence was admissible and should have been considered, it follows that your office decision excluding it from consideration is erroneous. Said decision is accordingly reversed and timber culture entry No. 10,614 canceled.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

BROWN *v.* ANDERSON ET AL.

The right of purchase accorded by section 3, act of September 29, 1890, to persons holding under a deed, written contract, or license from a railroad company, is limited to those whose evidence of title was executed prior to January 1, 1888. The mere possession of railroad land can not be regarded as occupancy under a license within the meaning of said act.

One claiming under an alleged license, on the ground that an application to purchase the land from the company had been made, must also show, to make his claim good, the acceptance of said application.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (E. M. R.)

The record shows that on June 28, 1892, Henderson Brown made application to purchase under the third section of the act of Congress approved September 29, 1890 (26 Stat., 496) the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 5, T. 14 S., R. 7 E., San Francisco land district, California.

August 1, 1892, E. A. Brown made homestead entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the above described section.

On April 10, 1893, A. S. J. Anderson made homestead entry for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the same section.

A hearing having been ordered on October 4, 1893, the local officers rendered a joint opinion in which they held that Henderson Brown on September 29, 1890, was in actual possession of the land claimed by him, under license, and permission from the Southern Pacific Railroad Company, and that he is entitled to purchase the same under the act of September 29, 1890. They therefore recommended the cancellation of the entry of Anderson and that portion of the entry of Brown which was in conflict with the application of Henderson Brown to purchase.

Upon appeal your office decision of April 7, 1894, reversed the action of the local officers and upon further appeal the case is now before the Department upon appeal by Henderson Brown, the grounds of error alleged being as follows:

The Commissioner erred in holding that Henderson Brown was not in possession of said land September 29, 1890, under a license from the railroad.

The Commissioner erred in holding that the certificate of Jerome Madden, land agent of the Southern Pacific Railroad Company, was not competent testimony and was the act of a private individual.

The Hon. Commissioner again erred in holding that the testimony does not show any intent upon the part of Mr. Brown to acquire title to this and other lands purchased from the Southern Pacific Railroad Company.

The Hon. Commissioner erred in giving the preference to the homestead entryman in this case as they were not on the land when the forfeiture act took place, and not until years after they made claim thereto. Henderson Brown was the only one in possession when the act was passed.

Despite the fact that there is no specific assignment of error of fact in the decision sought to be reversed, an examination has been made of the rather voluminous record in the case which shows that the only question here for disposition is one of law upon the facts apparent in the record, and those in the testimony, about which there seems to be no controversy.

It is admitted by Anderson and Brown, the homestead claimants, that they were not in possession of the land at the date of the passage of the act of September 29, 1890 (26 Stat. 496). Section three thereof is as follows:

That in all cases where persons, being citizens of the United States, or who have declared their intentions to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant, and hereby resumed by and restored to the United States, under deed, written contract with, or license from the State or corporation to which such grant was made, or its assignees, executed prior to January 1, 1888, or where persons may have settled 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 act of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre at any time within two years from the passage of this act, and on making said payments, to receive patent 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, 1888, 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 purchase, and make claim on said lands under the homestead law, and as provided in the preceding section of this act.

It will be noted that there are two classes provided for in this section: those who are in possession

Under deed, written contract with, or license from the State or corporation for which such grant was made, or where persons may have settled said land 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 act of Congress.

There is no allegation of settlement upon the part of Henderson Brown. His claim to the land is therefore asserted under that portion of the statute quoted that provides for the first class mentioned. Henderson Brown's application to purchase sets out the following:

That in 1881 the deponent went into possession of the S. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 5, T. 14 S., R. 7 E., M. D. M., and has held possession thereof ever since; that at the time of going into possession of the land deponent purchased the land from parties then in possession who had purchased from six others, and who had applied to purchase said lands from the Southern Pacific Railroad Company as early as 1872. That deponent purchased said lands for a valuable consideration and with the intention of purchasing them from said Southern Pacific Railroad Company as soon as the land should be subject to sale. That deponent has been ready and anxious to purchase at all times since 1881; that deponent has two houses upon said land and has it enclosed with other and adjoining land and has used it for pasture purposes since 1881.

The evidence shows that Henderson Brown went into possession of the land July 1, 1878, by purchase from one John H. Carlisle; that he, together with others, neighbors living on adjoining tracts, had built a fence around the land; that it had been used by him for the purpose of pasture; that it was his intention to purchase the land from the railroad company; that his immediate grantor, John H. Carlisle, did not make an application to purchase this land from the railroad company, but that one Nathaniel L. Dryden, one of his grantors did make application for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, on March 27, 1875.

Henderson Brown, on March 2, 1888, made application to purchase all of section five. He does not claim possession by deed from the Southern Pacific Railroad Company to the land in question, nor does he claim any written contract with that company, but under the circumstances of the case, as already set out, he claims to be there with license from the railroad company. It is sufficient to say that his application, made in March, 1888, for the tract of land can be of no avail to him inasmuch as the act provided that such a deed, written contract or license from the State or corporation, should be "executed

prior to January 1, 1888," and he must, therefore, stand or fall upon his acts, and those of the company done prior to the first of January, 1888.

He does not assert any specific license. His case rests entirely upon its being an implied license. The mere fact of his being in possession can not be held by the Department to be a license within the meaning of the forfeiture act.

In the case of *Eastman v. Wiseman* (18 L. D., 337), it was held, *inter alia* (syllabus):

The provisions of section three of the forfeiture act of September 29, 1890, according a preference right of entry to persons who are in possession of forfeited lands "under license" from a railroad company, extends to one who takes possession of and improves such land under the circular invitation of the company and in accordance with said circular applies to purchase said lands of the company.

But that case materially differs from this, inasmuch as it appears that Eastman went on the land under the general invitation to settlers by the Northern Pacific Railroad Company and that one Russell made application to the railroad company to purchase the land and received from the railroad company a communication which was held by the Department to be a license from the railroad company to the said Russell, who subsequently conveyed all of his rights in and to the land to the contestant, Eastman.

In this case it appears from the certificate of Jerome Madden, the land agent of the Southern Pacific Railroad company, that among those who had made application to purchase the land in Sec. 5, was Nathaniel L. Dryden for the portion of this tract before described. No evidence is furnished of what reply, if any, was made to Dryden at the time of his making the application.

It does not appear that Henderson Brown made an application to the Southern Pacific Railroad Company for the land he now seeks to purchase, prior to January 1, 1888. It does appear, as has been set out, that an application was made by Dryden for a portion of the land that Henderson Brown now wishes to purchase, and that he is one of the grantors of Henderson Brown. But it does not appear that there was any acceptance on the part of the railroad company of the application of Dryden. If there had been, it was the duty of Henderson Brown to furnish evidence of it. It was the test of his right to purchase under the act under consideration and having failed to do so, I am constrained, under the authority of the *Eastman v. Wiseman* case, *supra*, which has gone as far as the Department deems proper upon this question of license, to hold that Henderson Brown, at the date of the passage of the act of September 29, 1890, was not in possession of the land in question under a license from the railroad company, and is therefore not entitled to purchase the same.

It therefore becomes unnecessary to consider the other questions raised by the record.

Judgment affirmed.

COAL LAND—ADVERSE CLAIMANTS.

PAIRE *v.* MARKHAM.

As between two claimants, both claiming the land on account of the coal therein, priority of application and good faith in improvements should govern the award.

Secretary Smith to the Commissioner of the General Land Office, September 24, 1895. (J. I. H.) (P. J. C.)

The land involved in this appeal is lots 6 and 7 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 13 S., R. 10 E., Salt Lake City, Utah, land district.

The record shows that Spencer S. Markham filed coal declaratory statement for said tract November 28, 1892, at 10 o'clock A. M., alleging possession November 26, preceding, and on said November 28, at 11:35 o'clock A. M., William W. Paire filed a similar statement for the same tract, alleging possession November 1, preceding.

On January 12, 1893, Markham submitted proof and application to purchase. Notice of this proceeding was accepted by Paire January 13, and a hearing was had before the local officers, beginning February 16, 1893, and as a result thereof they decided that

While we are of the opinion that the north line of the land is south of the lower Markham workings, yet the development work at the upper workings, taken in connection with the evidence of good faith is a sufficient showing to warrant a recommendation that the proof be accepted, and we so recommend.

Paire appealed, and your office, by letter of January 27, 1894, reversed their action, whereupon Markham prosecutes this appeal, assigning error both of law and fact.

There is a dispute between the parties as to the exact location of the northwest cornerstone marking the land, which also involves the north boundary line of the tract. I am satisfied that the defendant's survey and location of the corner and north line is the correct one. The United States deputy surveyor, who made the original government survey and set the corner in 1881, and who again in 1889 identified it while making a survey of land immediately adjoining this on the north, testified in behalf of the defendant, and located the original corner and made his plat therefrom. It is admitted by the claimant that at the point where he places the northwest corner the stone or monument was not found, and that he relied entirely on hearsay as to its location on the ground. So, for the purpose of this case, the defendant's survey will be accepted as correct as to the northwest corner, and the north line. This would throw a part of the work done by Markham north of the north line of the quarter, including his cabin. It is clear from the testimony, however, that Markham believes in good faith that these improvements were on the land. They were south of the line as fixed by his surveyor. In my view of the issue this is immaterial as it is conceded that he did do work within the true boundaries, and did have

a discovery of coal there. It is true that it is not an extensive working, and perhaps there is not disclosed therein a vein of coal that would pay for working. Yet the work has been done, and coal has been found by him. All that the law and rules require in opening and improving a coal mine is that "the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant," and not a mere matter of form. As between several claimants for land, both claiming it as coal land, "priority of possession and improvements shall govern the award when the law has been fully complied with by each party." (Circular 1 L. D., 687.) Markham is the prior applicant. Paire alleges a prior possession in his declaratory statement.

The testimony of Paire is that he began work on the land about June 10, 1892, and that it was then unoccupied; that he has had work done thereon "from time to time" up to the date of the hearing. He had been upon the land twice himself during that period, once just before the filing, but "could not tell just how long" before, but swears he had "work done in coal" prior to filing. It appears that there was an old abandoned tunnel on the ground that had been driven in about fifty feet. Paire swears that he had not discovered paying coal outside of this tunnel; that he had cleaned it out and driven it sixty-one feet further, making one hundred and eleven feet in all, and that he had disclosed a four and one-half foot vein of merchantable coal. On cross-examination he says that he heard from the man working for him by letter in December, 1892, and at that time he had not found coal in paying quantities. Paire went to the land at that time and says that he found nothing that would warrant the belief that he would open a valuable coal vein. He then returned to Salt Lake City and went back to the land on January 27, 1893; he then removed his workman from the point where he was, and started to work on the old tunnel. About seven or eight days' work had been done there just prior to his arrival by an employee of the Pleasant Valley Coal Company. It is claimed by this witness that prior to January 28, he thought this old tunnel was not on the land in controversy, but on the land belonging to the said coal company; that when the north line of the land was fixed that day by the surveyor and he found it on his claim he started to work in it. He had never examined it prior to that date. It was in this tunnel and after January 28 that he discovered the vein of merchantable coal.

It will thus be seen that Paire did not file his declaratory statement for said land within sixty days from date of possession, as required by section 2349, Revised Statutes. He had possession June 10, and did not file his statement until November 28, in the meantime having "more or less" work done in prospecting for coal, and no discovery of merchantable coal was made by him until after the application to purchase by Markham, and after notice of this proceeding.

The presence of coal on this tract has been demonstrated. Both parties are seeking it for coal. As between these claimants I take

it that the quantity of coal cuts but little figure, or the amount of expenditure, provided it is shown they or either of them are acting in good faith. The rule would be different if one of them was claiming the land for any other purpose, for instance, for agricultural purposes. It would then have to be shown that it was more valuable for coal as a present fact than for agriculture. But such is not the issue here.

I am of the opinion that Markham being the prior applicant for the land, and having exhibited good faith in exploring the same, has the prior and better right to purchase.

Your office judgment is therefore reversed, and that of the local office will stand.

PATENT—EFFECT OF ISSUE—JURISDICTION.

STEIN *v.* WOGAN.

When a patent has been signed, sealed, countersigned, and recorded, the entryman is entitled to have it delivered to him, and the Department has neither the power to cancel it, nor the right to withhold it from him.

Secretary Smith to the Commissioner of the General Land Office, September 25, 1895. (E. E. W.)

On the 18th of September, 1893, Maurice A. Wogan made homestead entry of the NW. $\frac{1}{4}$ Sec. 7, T. 22 N., R. 6. W., at Enid, Oklahoma, and on the 28th of May, 1894, he commuted that entry to a cash entry for townsite purposes. The patent was signed, sealed, countersigned and recorded on the 20th of July, 1894, and transmitted to the register and receiver at Enid, for delivery to him, on the 23d of July.

On the 8th of August, 1894, George S. Stein filed a protest against the issuance and delivery of the patent, and asked that the entry be cancelled, and he allowed to enter.

As ground for this protest, Stein alleged that prior to the commutation of the homestead entry several persons, including J. J. S. Hassler, receiver of the land office at Enid, formed a company, which they called the Kenwood Investment Company, for the purpose of procuring title to the land in question, for speculation; that Wogan, prior to submitting his proof, contracted with this company that he would commute his homestead to a townsite entry; that the company advanced the money with which this entry was made, and that in consideration thereof it was to receive a portion of the land.

On the 27th of August, 1894, the Commissioner of the General Land Office dismissed this protest, holding that, as the patent had been issued, the matter had passed beyond his jurisdiction, and thereupon Stein appealed to the Department.

The decision of the Commissioner of the General Land Office was correct. When a patent has been signed, sealed, countersigned and recorded, the entryman is entitled to have it delivered to him, and the

Department has neither the power to cancel it, nor the right to withhold it from him. *United States v. Schurz*, 12 Otto, 378.

In this case the patent had been signed, sealed, countersigned, recorded, and transmitted to the register and receiver for delivery to the entryman, before the protest was received. Therefore the protest came too late, and the protestant has no recourse now, except to the courts of the country.

The decision of the Commissioner of the General Land Office is affirmed.

COMMUTED HOMESTEAD ENTRY—EQUITABLE ACTION.

HERBERT H. AUGUSTA (ON REVIEW).

A commuted homestead entry, allowed after the amendment of section 2301 R. S., on a showing of less than fourteen months' residence and cultivation from the date of the original entry, may be equitably confirmed, where it appears that the term of residence and cultivation, if computed from settlement, is in substantial compliance with said amended section, and, that after the allowance of said commuted entry the land was sold to a purchaser in good faith.

The case of Francis A. Lockwood, 20 L. D., 361, modified.

Secretary Smith to the Commissioner of the General Land Office, September 26, 1895.
(J. . H.) (J. L. McC.)

Counsel for the transferees of Herbert H. Augusta has filed a motion for review of departmental decision of August 16, 1894 (19 L. D., 114), affirming the decision of your office, dated April 1, 1893, rejecting as premature his final proof, under the commutation provision of the homestead law, for the SE. $\frac{1}{4}$ of Sec. 7, T. 48 N., R. 8 W., Ashland land district, Wisconsin, and requiring him to furnish supplemental proof showing residence for a period of fourteen months subsequently to the date of his entry—May 13, 1891.

The land described was formerly within the limits of the withdrawal made for the benefit of the grant to the Wisconsin Central Railroad Company, made May 5, 1864 (13 Stat. 66); and of course during the existence of said withdrawal was not subject to entry under the public land laws. That portion of the grant opposite the land in question was forfeited by the act of September 29, 1890 (29 Stat., 496). The second section 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.

Under instructions from your office, the lands, after due notice by newspaper publication, were opened to entry on February 23, 1891. Just prior to the last named date, however--to wit, on February 18,

1891—Congress passed an act extending the time within which persons who were *bona fide* settlers on September 29, 1890, would “be entitled to a preference right to the same under the provisions of the homestead law and this act,” to six months from the date of the Commissioner’s promulgation of instructions to the local land officers directing the manner of the disposition of said lands. This extended until July 16, 1891, the period within which preference right could be exercised.

Augusta alleges that “he went to the local office at Ashland on February 23, 1891, the very day the land was restored to entry, for the purpose of making his filing, but was unable to present his said application, on account of the great rush of applicants, until the next day, February 24, 1891.” On February 24, 1891, one M. W. Miller made homestead entry of the tract. Augusta alleges that he contested Miller’s entry, and procured its relinquishment—but the record of this contest is not before me. At all events, Miller relinquished on May 13, 1891, and on the same day Augusta made homestead entry. This was within the six months afforded to *bona fide* settlers within which to make due claim for said lands under the homestead law.

The next day—May 14, 1891—Augusta filed a notice in the local office that he intended making final proof on July 8, 1891. After due newspaper publication of such intention, he made entry on the date last named.

His final proof showed that he settled upon the land in July, 1888; that he established residence thereon, with his wife and two children, on July 17, of that year; that he and his family continued to reside thereon until the date of making final proof; and that he had made improvements on the tract to the value of about three hundred dollars. This proof was accepted by the local officers, and final certificate issued.

The papers were transmitted to your office, which rejected the final proof, and required Augusta to furnish supplemental proof showing residence and cultivation for a period of fourteen months from the date of entry.

This Augusta could not do, for the reason that, at some date subsequently to making final proof, he had disposed of the land. Thereupon the transferees filed an appeal.

The Department, on August 18, 1894, affirmed the action of your office.

The transferees (George N. Hauptman and Fred P. Bowers and Sons) have filed a motion for review.

The sixth section of the act of March 3, 1891 (26 Stat., 1095), amended section 2301 of the Revised Statutes so as to read:

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.

Whilst the departmental decision heretofore rendered seems to be in accordance with the strict letter of the law, yet inasmuch as it is alleged that Augusta, after the issuance of final certificate, sold the land, and therefore can not now submit supplemental proof showing fourteen months residence after *entry*, as required by your office, a case of great hardship is presented for the consideration of the Department, if that allegation be true, and there be no question about the good faith of the purchasers. The entryman has certainly complied with the spirit, if not the letter, of the law, as to length of residence—having resided on the land for three years. The transferees purchased on the faith of the certificate of the register and receiver. In view of these facts, if it is within the scope of the equitable jurisdiction of the Department to protect said transferees without violation of law, I think such protection should be extended.

The sale of land by the entryman, the consequent fact that it would be impossible for him to return to the land and reside thereon for fourteen months from and after the date of entry, and the question of the rights of the transferees, were not passed upon or referred to in the decision under review.

By letter of April 25, 1877 (see General Circular of February 6, 1892, page 209), the Department transmitted to your office Rules 17 to 27 relative to suspended entries and the submission of the same to the Board of Equitable Adjudication, in the course of which it was stated:

Special cases, not covered by these rules, in which equitable relief should be afforded, will probably arise. Such cases will be submitted as special, with letters of explanation.

The case at bar appears to be one of the class of cases, the precise character of which could not at that time be foreseen so that a rule applicable thereto could be formulated; but inasmuch as there has been a substantial compliance with the requirements of the law as to length of residence and there is no adverse claim, I think it may properly be referred to the Board of Equitable Adjudication for confirmation, if the fact of purchase and the good faith of the purchasers be satisfactorily shown to you.

The departmental decision of August 18, 1894, is hereby recalled and suspended, pending the decision of the questions above suggested as to the fact and character of the alleged transfer. Should these be found satisfactory to your office, and the case be by you submitted to the Board of Equitable Adjudication, you will notify the Department, and an order finally revoking said departmental decision will be issued.

The ruling in the departmental decision in the case of Francis A. Lockwood (20 L. D., 361), is hereby modified in so far as it conflicts with the case at bar.

On July 18, 1895, the Department denied a motion for review in the case of Frank E. Brown, an applicant to enter lands in the immediate vicinity, within the limits of the same grant, and forfeited by the same

act. The case at bar differs from that case in the fact that Brown did not allege settlement on the land claimed by him until after the date of the act of forfeiture; and that only about eight months elapsed between the date of his alleged settlement and that of his final proof—instead of three years, as in the case at bar.

SETTLEMENT RIGHTS—RESERVOIR WITHDRAWAL—COMMUTATION.

CHARLES E. TOMPKINS ET AL.

Settlement claims valid but for the withdrawal authorized by the arid land act of 1888, are protected by the amendatory acts of August 30, 1890, and March 3, 1891, in so far as the lands are not actually required for the purposes of said withdrawal.

A homestead entry made after the amendment of section 2301, R. S., and commuted on less than fourteen months residence from date of the original entry, may be equitably confirmed, where the period of residence, if computed from settlement, is in substantial compliance with law, and since commutation the land has been sold to a purchaser in good faith.

Secretary Smith to the Commissioner of the General Land Office, September 26, 1895.
(J. I. H.) (J. L. McC.)

The Smith Brothers Sheep Company, claiming as transferee of Charles E. Tompkins have filed a motion for review of departmental decision of December 4, 1894 (unreported), holding for cancellation the homestead entry of said Tompkins for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 26, T. 8 N., R. 10 E., Helena land district, Montana.

The ground of the decision was that the entry was made after the amendment of sec. 2301, Revised Statutes, and could not be commuted without residence on, and cultivation of the land for fourteen months from the date of the entry, even if *settlement* had been made prior to the passage of the amendatory act.

The departmental decision heretofore rendered was merely a formal affirmance of the decision of your office, dated August 15, 1893; but a succinct statement of the facts of record in the case would now seem to be appropriate.

The land in question was (with other lands) withdrawn for reservoir purposes by the Secretary's order of March 13, 1890, under the act of October 2, 1888. On September 20, 1890, Tompkins applied to file pre-emption declaratory statement for the tract; but the application was rejected because of such withdrawal. The withdrawal was revoked as to the land in question and the remainder of the township in which it was situated, by Secretary's order of November 15, 1891. On February 1, 1892, Tompkins was allowed to make homestead entry of the tract. On March 22, 1892, he made final proof, showing settlement August 12, 1890, at which time he began putting up a house on the tract; and actual residence in said house since the 10th of December, 1890.

It will be seen that at the date of making final proof (March 22, 1892), there had elapsed since Tompkins's settlement on the land (August 12, 1890), eighteen months and ten days; since his establishment of residence (December 10, 1890), fifteen months and twelve days; and since the revocation of the order withdrawing the land for reservoir purposes (November 13, 1891), four months and nine days.

The controlling question in the case is, can the entryman be allowed credit for settlement made and residence established on the land, after the withdrawal for reservoir purposes, and prior to the date of the revocation of that withdrawal?

It appears that many persons, in ignorance of the withdrawal, or of the exact limits of the lands selected for reservoir purposes, settled thereon after such withdrawal. For the relief of such settlers, Congress incorporated the following provision in the sundry civil appropriation act of August 30, 1890 (26 Stat., 371-391):

So much of the act of October second, eighteen hundred and eighty-eight, entitled "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," as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed; and all entries made, or claims initiated, in good faith, and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, 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.

Again: the act of March 3, 1891, "to repeal timber-culture laws, and for other purposes," provides, in section 17 (26 Stat., 1095-1101):

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.

In the case at bar, the claimant originally filed upon one hundred and sixty acres, including the forty acre tract now in question; the other one hundred and twenty acres have been taken for reservoir purposes. His claim is one that would have been "valid but for said act" withdrawing land for reservoir purposes; he was an "actual settler at the date of the location of said reservoir"; hence his claim is one that should "be recognized, and may be perfected in the same manner as if said law had not been enacted."

There would be little difficulty in sustaining the contention that Tompkins could properly claim settlement and residence from August 12, 1890, were it not that, at the date of his making final proof (March 22, 1892), the act of March 3, 1891 (26 Stat., 1095), had been passed, the

sixth section of which amends section 2301 of the Revised Statutes so as to read:

Nothing in this chapter shall be 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.

Whilst the departmental decision heretofore rendered seems to be in accordance with the strict letter of the law, yet inasmuch as the entryman, Tompkins, after the issuance of final certificate sold the land, a case of great hardship is presented for the consideration of the Department. There is no question as to the good faith of all parties concerned, the entryman has certainly complied with the spirit, if not the letter, of the law, as to length of residence. The transferee purchased on the faith of the certificate of the register and receiver. There is no adverse claim. In view of these facts, I think Tompkins's entry should be referred to the Board of Equitable Adjudication for confirmation, as held in the case of Herbert H. Augusta, decided by me of even date herewith; and I so direct.

The departmental decision of December 4, 1894, which affirmed the decision of your office in holding Tompkins's entry for cancellation, is hereby recalled and revoked.

SECOND HOMESTEAD ENTRY—ARID LANDS.

JAMES LAWTON.

One who makes a homestead entry of arid land in the belief that he will be able to irrigate the same, through the use of water to be obtained from a proposed government reservoir, and abandons the land so entered, on account of its worthless character, is not entitled to make a second homestead entry, either under the general terms of the homestead law, or the special provisions of the act of December 29, 1894.

Secretary Smith to the Commissioner of the General Land Office, September 26, 1895. (P. J. C.)

The record before me shows that James Lawton made application to make homestead entry of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 24 S., R. 66 W., Pueblo, Colorado, land district, which was denied by the local office January 25, 1893, for the reason that he had, on March 7, 1889, made a homestead entry of other lands in the same land district. Your office, by letter of November 28, 1893, affirmed their decision; whereupon Lawton prosecuted this appeal.

Accompanying Lawton's application is his affidavit, in which he sets forth that in the spring of 1889 a party of surveyors, known to the affiant and the people generally in that locality to be in the employ of the

government, were making surveys in that part of the country for the purpose, it was said, of establishing sites for reservoirs on the public lands, "and affiant was by them informed that undoubtedly in the near future reservoirs would be constructed in that neighborhood;" and further informed that they had surveyed a site for a reservoir some five miles up the creek from Graneros Station; that the proposed reservoir site was pointed out to the affiant, and it was perceived by affiant that if the reservoir should be built, the lands lying below it could be irrigated therefrom; that it was generally believed by the settlers that the government would construct such reservoirs; "that affiant does not personally know upon what such general belief is based, except that it was taken for granted that the presence of the government surveyors making said surveys and the statements of said surveyors as to the object of their mission meant that the government had undertaken the work;" that thereupon he made homestead entry of a quarter section of land in said land district; that the land was elevated, barren and desert in character and was so situated as to lie under the proposed reservoir; that said land was worthless for farming without water, because the soil would produce nothing, and because the lack of water destroys its value or utility for any practical object or purpose; that he erected a dwelling house on said land and lived there from time to time, but he was compelled to abandon said tract for the reason that the reservoir was not constructed, and that the project has been abandoned. He therefore asks to be permitted to make the homestead entry now under consideration, claiming that he will be enabled to sufficiently irrigate the same and make it productive.

As the law stood at the date of your office decision, there could be no question, in my opinion, as the correctness of your office judgment. Pending Lawton's appeal, however, the act of December 29, 1894 (28 Stat., 599), was passed, and it has been suggested that the entry under consideration can, under the terms of that act, be allowed. It provides—

That section three of the said act of March second, eighteen hundred and eighty-nine be amended by adding thereto the following provision: That if any such settler has heretofore forfeited his or her entry for any of said reasons, such person shall be permitted to make entry of not to exceed a quarter-section of any public land subject to entry under the homestead law, and to perfect title to the same under the same conditions in every respect as if he had not made the former entry.

The act of which this is amendatory (section 3 of the act of March 2, 1889 (25 Stat., 854), reads as follows—

That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such a settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

It will be observed that this section was intended to excuse the claimant from residence upon the land for a given period on account of "a total or partial destruction or failure of crops, sickness, or other unavoidable casualty." Whether there was a total or partial failure of crops, is not shown in the case at bar. The claimant does not allege that he ever attempted to raise any crops upon the land he has applied to enter, and I think it may be assumed that he did not, because he alleges that the land was known to him to be arid at the time he made his entry. Sickness is not alleged as the ground; hence it could only come under the other reason for granting leave, viz, "unavoidable casualty."

In the case of John Riley (20 L. D., 21), the words, "other unavoidable casualty," as used in the act of March 2, 1889, have been construed as applied to the facts involved in that case. It seems that Riley's application for a leave of absence was based on the fact that he could not procure water for domestic use; that he had commenced an artesian well for that purpose, but had been unable to obtain a supply; that there was no water within two miles of the land, and that it was impossible to reside there with his family under those conditions. The Department said—"His failure to get water on the land, however earnest his efforts to do so, cannot be regarded as a 'casualty' within the meaning of the statute." The meaning of the word casualty is then given as found in Worcester and Webster. It then proceeds—"He simply failed after an earnest effort, to succeed in a laudable enterprise. His failure may be a misfortune; it cannot be regarded as a positive event coming without design and not to be guarded against, and therefore it is not a casualty." His application for leave was therefore denied.

It seems to me that the reasons against allowing Lawton's second entry are stronger than those in the Riley case, in which Riley's application for a leave of absence was refused. Lawton knew this land was arid when he took it up. He relied upon rumor as to what the government intended doing in regard to the location of reservoirs, and availed himself of the homestead privilege with the full knowledge of the doubt and uncertainty surrounding that venture.

It may be said that in the Riley case his failure was of a latent nature, one that he could not, probably, have certainly foreseen; it was not a contingency depending upon any human effort; whereas in the case at bar it was at best but a matter of speculation on Lawton's part as to whether the land he entered originally would ever be available for the purpose for which he desired it. In my judgment, this cannot be construed as an unavoidable casualty, as contemplated by the statute quoted.

Your office judgment is therefore affirmed.

STATE OF CALIFORNIA.

Motion for review of departmental decision of July 6, 1892, 15 L. D., 10, denied by Secretary Smith, September 27, 1895.

APPLICATION TO ENTER—CONFLICTING ENTRY.

WILL *v.* WILLIAMSON.

An application to enter, rejected on account of partial conflict with a prior entry, does not operate to reserve the land not in conflict, where instead of appealing from said rejection the applicant contests the prior entry; nor does the pendency of said contest reserve the tract not in conflict for the benefit of the applicant.

Secretary Smith to the Commissioner of the General Land Office, September 27, 1895. (J. I. H.) (C. J. W.)

This case comes before me on the appeal of Nelson Williamson from your office decision of March 18, 1894, in which Williamson's homestead entry is canceled.

The record shows the following facts:

On May 2, 1889, Henry W. Carter made homestead entry No. 662, of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 27 and E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 28, T. 17 N., R. 1 W., Guthrie, Oklahoma Territory.

On December 2, 1889, Simon C. Will made application to enter the SW. $\frac{1}{4}$ of Sec. 27, T. 17, R. 1, which was rejected because of conflict with Henry Carter's homestead entry embracing the W. $\frac{1}{2}$ of said quarter section, with other land.

On the same day Will filed his contest against Carter's said entry, alleging that Carter was a disqualified entryman and subsequently on June 7, 1890, Will alleged in amended contest that he had been a settler on said land since August 5, 1889.

On April 30, 1890, Nelson Williamson made homestead entry No. 6906, E. $\frac{1}{2}$ of said SW. $\frac{1}{4}$. On May 20, 1890, Will protested against the allowance of said entry. On November 1, 1890, Will filed a dismissal of his contest against Carter's entry, which was an abandonment of his application to enter the W. $\frac{1}{2}$ of said SW. $\frac{1}{4}$, embraced in Carter's entry. On August 17, 1891, the contest of Will against Williamson was dismissed by the register and receiver.

On the appeal of Will to your office it was held January 18, 1892, that when Williamson made his entry for E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 27, there was then pending the application of Will for said SW. $\frac{1}{4}$ and that Williamson's entry was irregularly allowed, and directing that Williamson be called upon to show cause why his entry should not be canceled and Will's application allowed.

On consideration of Williamson's showing the register and receiver held the same to be insufficient and recommended his entry for cancellation.

From this finding Williamson appealed to your office, and the finding of your office adverse to him on said appeal is the one of which he now complains.

His contention is that your office erred in holding that pending the contest of Will against Carter, which involved only a part of the quarter section for which Will had applied, the application and contest had the effect of holding the land in abeyance and not subject to entry until said controversy was settled and therefore rendered Williamson's entry, made during that time, irregular.

By way of supporting this ground of complaint it is insisted that upon the refusal of Will's application to enter, on account of conflict with Carter's entry, his remedy was by appeal from the decision refusing his application and not by contest.

If Will had pursued this course the only effect of appeal would have been to have obtained a hearing before the local officers as to the validity and legality of Carter's entry.

When Will applied to enter the quarter section there was no obstacle in the way of his making entry of the half quarter-section subsequently entered by Williamson, except the one that he did not make application for leave to do so. On the rejection of his application to enter the whole quarter, the half quarter not covered by Carter's entry remained open and subject to entry by any qualified entryman, subject only to Will's right of appeal from the decision rejecting his application. No such appeal being taken, there was no obstacle in the way of Williamson's entry.

It was, therefore, error to hold that the litigation growing out of objections to Carter's entry had the effect of segregating the half quarter not covered by the entry, pending such litigation.

If, however, such had been the effect, upon the dismissal of Will's contest everything dependent upon it went with it. I can not see that Will had any surviving claim to the half quarter covered by Williamson's entry, and your office decision is accordingly reversed. Will's protest will be dismissed and Williamson's entry held intact.

REPAYMENT—SECOND HOMESTEAD—FEES AND COMMISSIONS.

JENS C. HANSEN.

Where a second homestead entry is allowed repayment of the fees and commissions paid on the first entry will not be granted, in the absence of such error on the part of the government in allowing said entry as would defeat its confirmation.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1895. (E. M. R.)

The record shows that Jens C. Hansen made homestead entry, September 17, 1892, for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 14, T. 22 S., R. 6 E., Salt Lake City land district, Utah.

On June 15, 1893, the local officers transmitted to your office his application to make second homestead entry to embrace the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 30, T. 13 S., R. 10 E., in lieu of the above described entry. Accompanying the application was their joint recommendation that the same be allowed.

It appears from the evidence that an error was made in attempting to describe the land selected by the claimant, owing to the fact that the marks of the survey had become obliterated and the land embraced in the entry was rocky and wholly unfit for agricultural purposes, while that intended to be entered was covered by the homestead entry of one Willard Peacock.

On February 14, 1894, your office decision canceled the entry and allowed Hansen thirty days within which to make entry of the tract applied for.

On April 11, 1894, your office decision, having under consideration the application of Hansen for the repayment of fees and commission paid for the first entry, refused it; from which action Hansen appealed.

This Department, in a decision rendered on June 13th of the present year (Elizabeth Zenker, 20 L. D., 551), held that fees and commissions would be repaid only where the entry "was canceled for conflict, or because of any fault of the government in allowing it, or that it was erroneously allowed and could not be confirmed."

In this connection it has been decided by the Department that the words "erroneously allowed" refer to the action of the local officers in accepting the application and do not mean an error made by the entryman himself.

This question was considered at length in the case of Arthur L. Thomas (13 L. D., 359), where the general proposition is laid down (syllabus):

There is no statutory authority for the repayment of purchase money, fees, or commissions where the entry failed through no fault or error on the part of the government.

On page 363 it is said:

The action of Thomas in entering the land was voluntary; it may have been the result of an erroneous impression, or it may have been the result of an erroneous information given him, but the entry was not erroneously allowed so far as the records of the Land Office show, and neither the law nor the government interpose any obstacle to the confirmation of said entry by the performance of acts necessary to confirm the same. The fact that it may not have been advantageous or practicable to reclaim the land . . . (as appears to be the case here) does not prevent the confirmation of the entry made by the claimant.

* * * * *

In *ex parte* John Carland (1 L. D., 531), an officer of the United States army, made a homestead entry under the supposition that he was not required to reside on the land. On being informed of his mistake he relinquished his entry and made application for repayment of fees and commission. This was refused by my predecessor, Secretary Teller, who in his opinion said: "The act of June 16, 1880, allowed such repayment in cases where the entry has been canceled for conflict, or has been erro-

neously allowed and could not be confirmed. The present case, so far as appears, is not within either of these provisions. There was no conflict; the entry was not erroneously allowed, and might have been confirmed. As there has been no fault or error on the part of the government this Department is without authority in the matter (1 L. D., 532)."

In the case of Sarah J. Tate (10 L. D., 469), the Department held (syllabus):

On the allowance of a second homestead entry the applicant is not entitled to credit for the fees and commissions paid on the first, but repayment may be allowed on due application.

That case is in direct conflict with the cases in 13 L. D. and 20 L. D., *supra*, and is in effect by them overruled and is therefore without authority.

The test is: Was there error upon the part of the government which would prevent the confirmation of the entry? The good faith of the entryman, in the absence of such error, can avail him nothing.

Your office decision is therefore affirmed and repayment is denied.

CONTEST—AFFIDAVIT—CORROBORATION—EQUITABLE ACTION.

GAGE *v.* ATWATER ET AL.

A contest affidavit setting forth "upon information and belief that said homestead entry was not made in good faith, but was made for the purpose of speculation and sale," states a cause of action, and is sufficient to put the defendant on notice of the charge to be met.

A corroboratory affidavit based on personal observation is sufficient.

Where a desert entryman has in good faith reclaimed such portions of the land as are susceptible of reclamation, the non-irrigable character of a part of the land will not defeat his right to a patent, or justify cancellation of his entry.

Reclamation of desert land is effected when an adequate supply of water is brought to the land, and due provision made for its proper distribution when needed.

The right of a desert entryman, who has shown due diligence from the first to equitable action on his entry, where he, through obstacles beyond his control, is unable to effect reclamation within the statutory period, is not defeated by a contest, charging such failure, begun while he is engaged in curing his default.

Secretary Smith to the Commissioner of the General Land Office, September 26, 1895. (C. J. W.)

I have before me the petition of Matthew Gage, in which he prays for the re-review of the case of Wm. Atwater, Johannes Gunther and Otto H. Newman *v.* said Matthew Gage, which was decided adversely to him by First Assistant Secretary Chandler on August 1, 1892, in which Gage's desert-land entry was canceled, and have also before me the appeals of said Gage from your office decision adverse to Gage, as a contestant of the homestead entries of Atwater, Gunther and Newman, rendered on August 4, 1894, involving the same land. He asks

that his petition and appeals be considered together. As the parties and subject-matter of litigation are the same, it seems that they may be so considered.

The record shows that Matthew Gage made desert-land entry of Sec. 30, T. 2 S., R. 4 W., Los Angeles, California, land district, March 1, 1882.

On January 23, 1886, Wm. E. Atwater, Otto H. Newman and J. J. Gunther, each filed affidavit of contest against said entry alleging that Gage had not reclaimed said section, or any part thereof, by conducting water upon the same within three years from the date of his entry, and that said land had not been reclaimed according to the spirit and tenor of the desert-land act up to the date of said affidavits.

They also made applications at the same time to make homestead and timber-culture entries for various portions of said section. These applications were rejected pending another contest involving the same land, which was subsequently decided in Gage's favor.

On January 25, 1887, your office ordered a hearing on the charges made in the suspended contests of Atwater, Gunther and Newman. The cases were, by agreement of the parties, consolidated and heard together. The local officers, on the hearing, found that Gage had acted in good faith but had failed to reclaim the land within the statutory period, and recommended the cancellation of the entry.

Gage appealed from this finding to your office, and on consideration of the same your office found on May 27th, 1890, that Gage had acted in good faith, but reversed the finding of the local officers as to the cancellation of his entry, and found that his final proof submitted on the 9th of February, 1887, should be referred to the Board of Equitable Adjudication and the contests dismissed.

From this decision of your office the contestants appealed, and on August 1, 1892, First Assistant Secretary Chandler passed upon said appeal, reversing the decision of your office, rejecting Gage's final proof, and directing that his entry be cancelled. 15 L. D., 130.

Afterward, Gage, through his counsel, made a motion for review of this decision, which on March 3, 1893, was passed upon by Secretary Noble and the motion refused.

September 23, 1892, Newman made homestead entry, No. 6793, for lot 3, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$; Gunther made homestead entry, No. 6794, for lot 2, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{2}$, and Atwater made homestead entry, No. 6795, for lot 1, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and N. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section 30.

The record shows that the homesteaders had published a consolidated notice of their intention to make commutation proof before the county clerk of Riverside county, California, on November 28, 1893.

On the day set the parties accompanied by their witnesses and an attorney appeared before said officer and submitted testimony relative to their compliance with the homestead law, using the usual blank forms.

Gage also appeared by attorney at the same time and place and filed three contest affidavits, one for every entry, and then deposited ten dollars to pay expenses of taking additional testimony.

The attorney for the entryman objected to Gage's appearance on the ground that he was not a party to the record and had not filed a sufficient protest.

Gage's attorney then proceeded to cross-examine the claimants and their witnesses relative to the testimony found in their proofs. When Gage's attorney had completed his examination of the witnesses he asked to have the case continued to such time as might be appointed for the purpose of allowing the protestant to submit testimony in rebuttal.

Attorney for the claimant objected to any continuance on the ground that Gage was not a party to the case, and had not filed an affidavit which would entitle him to cross-examine the defendant's witnesses or produce testimony in rebuttal, and also that no affidavit for continuance had been filed as required by Rule 20 of Practice.

An affidavit for continuance was executed by Gage November 30, and filed in your office December 7, 1893.

December 15, 1893, the attorney for claimants filed a brief.

December 28th, Gage's attorney filed a brief in which he asked to have the protest proceedings merged into a contest and a day set for hearing on the charge found in his contest affidavit filed with the officer taking the testimony.

February 16, 1894, the local officers rendered their joint decision dismissing the case.

March 16th, Gage's attorney filed an appeal on his behalf, in which it is stated that if the local officers "considered the affidavit of contest defective they erred in passing upon the case before giving him the option of either amending his complaints or standing upon them."

The appeals of Gage from your office decision of August 4, 1894, will be first considered, and as the same issues are involved in each, will be considered together.

The local officers as well as your office held Gage's contest affidavits to be fatally defective in that they do not state a cause of action and are based on information and belief. In each of his affidavits is the following allegation, viz: "and alleges upon information and belief that said homestead entry was not made in good faith but was made for the purpose of speculation and sale."

I do not concur in your view as to the sufficiency of this affidavit. I think it does state a cause of action. It alleges that the entry was not made in good faith, but was made for the purpose of speculation and sale. Such affidavit states a proposition of mixed law and fact, which it seems to me renders it a proper predicate for a hearing. It contains something more than a conclusion of law, and it is sufficient to put defendants on notice of the change to be met.

It is insisted, however, that it is not properly corroborated and that the affidavit intended as a corroborative one, comes within the rule laid down in the case of *Buckley v. Massey* (16 L. D., 391). The purpose of this decision could hardly have been to enlarge or add to rule three of practice, and should be read in connection with the peculiar wording of the affidavit in that case. As construed, it afforded no measure of support to the affidavit of contest and was condemned for that reason. The language of the affidavit now under consideration is as follows:

Also appeared at the same time and place Alexander Campbell, who, being duly sworn, deposes and says that he is acquainted with the tract described in the within affidavit of Matthew Gage, and believes from personal observation that the statements therein made are true.

It seems to me that this affidavit is not subject to the criticism that it affords no support to the affidavit of Gage. Its reasonable interpretation is, that from personal observation affiant believes that the entry of defendant was not made in good faith, but was made for the purpose of speculation and sale. The ground of affiant's belief is not secondary but from personal observation. (15 L. D., 300, *Epps v. Kirby*.)

But if there was doubt about the sufficiency of these affidavits as basis for a contest, they were good as protest proceedings, and plaintiff should have been allowed the option of amending, so as to put himself in the attitude of a contestant, or of allowing the case to proceed and be heard as a case under protest proceedings. If the charges made in Gage's affidavits are true, the entries of the defendants should be cancelled without reference to any rights of Gage present or prospective. The title to the land is still in the government. (4 L. D., 41; 8 L. D., 2; 9 L. D., 391; 10 L. D., 615; 15 L. D., 447; 5 L. D., 658 and 6 L. D., 299.) Your office decision is accordingly reversed, but no further hearing will be necessary in view of the disposition hereinafter made of the entries in question.

There remains for consideration the petition for review of the decision of First Assistant Secretary Chandler (15 L. D., 130), which, if permitted to stand as the law in this case, disposes of all Gage's interest in the land in controversy.

The decision in question is out of accord with the current of decisions in reference to desert land entries in at least two important particulars: it treats actual reclamation of each smallest subdivision of the entire tract as necessary, notwithstanding such reclamation as to parts may be impracticable, and holds that the system of applying the water conducted to and upon the land, must be perfect and complete and ready for instant application.

The whole tenor of the decision indicates a tendency to adopt rules of strict construction of the law in reference to desert land entries, which is at variance with former departmental decisions on that subject. It has been held in a number of cases that when the entryman

acted in good faith and reclaimed such parts of the land as were susceptible of reclamation, that the non-irrigable character of a part would not defeat his right to patent or justify the cancellation of his entry. In the case of John C. Coy *ex parte* (10 L. D., 495), this doctrine is discussed, and a number of other cases cited in its support. In the case of David Gilchrist (8 L. D., 48), only 400 acres out of 640 were reclaimed and yet patent issued for the whole tract. The same principle is recognized in the case of Levi Wood (5 L. D., 81), and in the case of Andrew Leslie (9 L. D., 204). In the case of Rider *v.* Atwater (20 L. D., 449), which is the latest reported case on the subject, it was held that although the claimant did not own a sufficient water supply to reclaim all the land entered, yet the entry would stand as to the part reclaimed and be cancelled as to remainder. The principle here recognized would entitle Gage to the greater part if not all of the section reclaimed. It seems to me Gage has been denied rights uniformly granted to other litigants (doubtless through mere oversight), and that the supervisory powers of the Secretary should be exercised to correct the error.

Turning from the decision itself to the evidence as disclosed by the record at the time it was rendered, it appears that the first years of Gage's entry were spent by him in efforts to obtain a sufficient water supply by a system of artesian wells, upon which he expended a large sum of money. When this plan was demonstrated to be impracticable he turned his attention immediately to other methods for obtaining water, and finally succeeded in securing an abundant supply from the Santa Anna river, twelve miles distant from the land. This appears to have been the nearest available supply to be obtained. He expended upward of \$300,000 in the purchase of water, right of way, and construction of his canal and reached the land with an abundant supply of water after the three years had expired, but before any adverse claim had intervened.

The canal was constructed to and through the land. It was located upon the greatest elevation upon it deemed practicable by experts. About one hundred and sixty acres of the six hundred and forty entered lay above the canal level and could not be irrigated from it by ordinary methods. About four hundred and eighty acres lay below the canal and were easily accessible from it. Bulk-heads or gates in the canal banks were constructed at intervals through the tract, and from these, small lateral ditches led out for some distance.

Below and connecting with these, the remainder of the tract was run off in large furrows opened with a plow at intervals of about ten feet apart.

Upon completion of the canal the water was turned upon that part of the section lying below it and about four hundred and eighty acres were flooded for twenty-four hours. It was then turned off, temporarily, to repair tunnels which had fallen in. This antedated the order that a hearing be had on the formerly rejected affidavits of contest, which order seems to be the first official recognition of said affidavits.

The evidence also disclosed that water could be conducted to and distributed upon any subdivision of ten acres lying below the canal in twenty-four hours. Affidavits before me state that this can be done now.

These facts being conceded, it seems that there was practical reclamation of about four hundred and eighty acres of this tract, and although it did not occur until after the expiration of the prescribed time, it clothed Gage with equities which it was his right to have passed upon by the Board of Equitable Adjudication, under rule 30 for the government of that board. (6 L. D., 800.)

When the proof submitted shows reclamation as to a part of the land entered, and failure to effect proper irrigation of the remainder, the entry may be approved as to the tracts reclaimed, and cancelled as to the remainder. (20 L. D., 449.)

On the subject of Gage's good faith, the register and receiver found that he had acted in good faith and they based their recommendation that his entry be cancelled solely upon the legal proposition that the reclamation of the land was out of time. Your office found that he had acted in good faith and directed that he go before the Board of Equitable Adjudication with his final proof.

If there is any assault upon his good faith it is to be found in the decision complained of and in this it is barely suggested. The facts that he purchased more water than was necessary to reclaim section thirty, and that he constructed a larger canal than was necessary for this purpose, and that he sold the surplus water to reclaim other desert lands, are mentioned seemingly to his discredit. These do not strike me as evidences of bad faith.

His undertaking was to reclaim section thirty. He did reclaim it as far as it was practicable to do so. That in doing so he contributed to the reclamation of other desert lands was in accord with public policy and not against it.

The evidence shows that in order to secure water needed for the reclamation of section thirty he had to purchase more than was necessary for that purpose. Having purchased it he might sell the excess without hurt to the government.

It is apparent that the land in controversy would be valueless as homesteads to the present entrymen or others, but for the presence of the canal constructed by Gage.

The date at which water was turned on the land from the canal is November 10th, 1886.

The date of the order of your office that a hearing be had on the contest affidavits of Atwater, Gunther and Newman is 25th of January, 1887.

The date at which these affidavits were first offered is 23d of January, 1886.

They were, therefore, offered before actual reclamation occurred, but while the work on the canal was in progress.

In your office decision of 27th of May, 1890, it was held that these affidavits did not constitute the parties adverse claimants within the meaning of the law. In the decision under review your office decision was reversed, and these affidavits treated as evidence of an adverse claim from the date at which they were offered, to wit, January 23, 1886.

If this is the law, Gage may be remediless. It is therefore necessary to determine the legal effect and significance of these contest affidavits before going further. In doing this it is necessary to understand the status of the parties, as well as of the land, at the time they were offered. The record shows that much time had been consumed in securing rights-of-way and making preliminary surveys, but in September, 1885, all mere preliminary work was completed, and a contract let to construct and complete the canal. On the 5th of October, 1885, the actual construction commenced, and seems to have been pushed vigorously and continuously. Atwater, Gunther and Newman were in the vicinity, and witnessed Gage's extraordinary efforts to complete the canal, up to January, 1886. At that date, if we are to credit the testimony, Gage was spending money lavishly on the work, using a large force of hands, and part of the time using a night force. It must have been apparent that he would succeed in reaching section 30 before many months. It is to be borne in mind that it is while this sort of effort upon Gage's part to cure his default is in progress that these affidavits of contest are presented. It is to be observed also that these affidavits present but two facts; one that the three years of the entry had expired, and the other that reclamation of the land had not been effected; both of which facts were already known to the Government. There was no charge that the entryman was not engaged in curing his default. In the case of *Meads v. Geiger*, 16 L. D., 366, it is held that the desert land statutes make no specific provision forfeiting the rights of the entryman in the event that reclamation is not effected or final proof submitted within the period designated. In the same case it is held that—

The right of a desert land entryman, who fails to effect reclamation within the statutory period, to perfect his claim is not defeated by the intervention of a contest, where from the first the entryman has shown the utmost diligence and good faith, and the default is due to a mistake which the entryman is engaged in rectifying when the contest is initiated.

In the case of *Thompson v. Bartholet*, 18 L. D., 96, it is held that

The rights of a desert land entryman, who fails to effect reclamation within the statutory period, to equitable action on his entry, is not defeated by the intervention of a contest charging such failure, where there is no want of diligence or good faith on the part of the entryman, and his default is due to obstacles he could not control and where he is engaged in curing said default, when his entry is attacked.

Looking to the voluminous record before me, I find in the person of Gage a suitor beset from the inception of his entry with vexatious liti-

gation, hindered and crippled in his work of reclamation by conspirators, (sometimes including his trusted agents,) exhausted in fortune and resources, by expenditures made in reaching the land covered by his entry with an adequate supply of water; but finally successful in effecting practical reclamation of it; untouched in honor and good faith, but guilty of being too late, if time is of the essence of his contract. What shall be done with him? In my opinion he presents a case where technical requirements must give place to that substantial justice which recognizes equity as one of its elements.

I therefore conclude and find that Atwater, Gunther and Newman predicated no claim to the land in controversy by the filing of their affidavits of contest, except such as is subordinate and subject to Gage's right to have his equities passed upon by the Board of Equitable Adjudication.

In further support of the finding that he reclaimed the land, I quote from 18 L. D., p. 16, *Dickinson v. Auerbach*:

Reclamation is an accomplished fact where the water in sufficient volume is brought on the land and so disposed as to render it available when needed.

From affidavits before me it appears that the only crops raised on the land are by means of waste water from this canal. The final proof of the homestead entrymen shows their improvements to be of very little value. They had all the time knowledge of Gage's equities upon which he is now insisting. Collusion between these entrymen and Gage's engineers is charged, and a number of affidavits accompany Gage's petition as newly discovered evidence. These may not of themselves justify the re-opening of the case, but I have considered them in connection with the errors alleged to have been committed.

The case is one of difficulty. I recognize the necessity for the observance of the rules intended to fix definite limits within which litigation must cease, but I cannot lose sight of the fact that it is even more important that it should not cease until substantial justice is meted out to the parties.

The doctrines of *stare decisis* and *res adjudicata* have additional weight and import where new interests have sprung up and new parties have intervened. In this case the subject-matter of litigation is the same, and the parties are still the same.

From a view of the whole case, I am impressed with the conviction that a just conclusion has not yet been reached. In its present status, justice to all parties, it seems to me, will be secured by re-opening said cases to await final action upon Gage's final proof heretofore offered.

It is accordingly directed that Gage be allowed to carry said final proof before the Board of Equitable Adjudication to be passed upon by them, and that in the meantime homestead entries, Nos. 6793, 6794, and 6795 stand suspended to be disposed of as shall be indicated by the finding of said board.

MINING CLAIM—EFFECT OF APPLICATION.

ANDREW J. GIBSON.

A mineral application properly filed and duly followed by notice thereof by publication and posting, is *per se* a segregation of the land covered thereby, and when it is afterwards sought to relocate said land, on the ground of abandonment, the relocater should be first required to establish the fact of abandonment.

Secretary Smith to the Commissioner of the General Land Office, September 27, 1895. (J. I. P.)

I am in receipt of your office letter "N" of May 28, 1895, in which you request, for reasons therein stated, that the decision of this Department, dated May 16, 1895, in the above entitled case "be recalled and be not promulgated."

The decision concerning which said request is made reversed the decision of your office in said case of February 6, 1894, with instructions to you to direct the local officers to receive and file Gibson's mineral application for lots 43 and 44, Marysville, California land district, which the records of your office and the local office show to be covered by mineral application No. 100, made February 20, 1874, by the Buckeye Quicksilver Mining Company, and to proceed in relation thereto in accordance with the statutes in such cases made and provided.

It is not deemed necessary to state here the grounds upon which said decision was based. Suffice it to say that your office letter "N" of May 28, *supra*, furnishes the information that subsequently and pending a decision in the matter in this Department, Gibson adopted the suggestion contained in your said office decision and secured a hearing for the purpose of proving the abandonment of said mineral application No. 100, and upon the information adduced at said hearing the local officers decided such abandonment to have been proved.

No appeal having been taken, the case was considered by your office as quasi contest No. 951, and by your office decision of March 29, 1895, the decision of the local officers was affirmed, under Rule 48, of Practice; and said mineral application No. 100 was rejected.

In view of those facts, departmental decision of May 16, 1895, is not necessary for the establishment of Gibson's rights; but for the guidance of your office it is hereby held, that, a mineral application, properly filed and duly followed by notice thereof by publication and posting, as required by Sec. 2325 (R. S. U. S.) is *per se* a segregation of the land covered thereby, and that when it is afterwards sought to re-locate the land covered by said application because of abandonment, the better practice would be to have the re-locator first establish the fact of abandonment, in such manner as may be required by the statutes in such cases made and provided, and the rules of practice of this Department.

Said departmental decision, therefore, of May 16, 1895, is hereby recalled and will not be promulgated.

SCHOOL LANDS—SETTLEMENT BEFORE SURVEY.

STATE OF NEBRASKA *v.* THE TOWN OF BUTTE.

The act of February 28, 1891, amending sections 2275 and 2276, Revised Statutes, supercedes the provisions of section 24, act of March 2, 1889, so far as the same is in conflict with prior statutory provisions protecting settlement rights on school lands, acquired prior to survey, and leaves the rights of the State and settlers, in such cases, to be adjusted under the general provisions of the law.

Secretary Smith to the Commissioner of the General Land Office, September 27, 1895. (J. I. H.) (G. C. R.)

The board of trustees of the town of Butte, Nebraska, through its chairman Eugene R. Maxam, has appealed from your office decision of June 19, 1894, holding for cancellation, cash entry No. 146, made June 19, 1893, by the board of trustees for said town, for the SE. $\frac{1}{4}$ of Sec. 16, T. 34 N., R. 13 W., O'Neill, Nebraska.

It appears that on June 28, 1893, A. R. Humphry, commissioner of public lands and buildings for the State, filed a protest against the entry, claiming that the land involved belongs to the State of Nebraska, under its grant for school purposes, and is not subject to disposal by the United States. Your office sustained that protest in the decision appealed from.

The specifications of error are substantially as follows:

1. In finding that sections 16 and 36 in each township of the lands opened for settlement were reserved for the use of the public schools; that no grant of school sections was made to the State by the act of March 2, 1889 (25 Stat., 888), restoring the reservation to the public domain.

2. In finding that whether surveyed or unsurveyed, said sections were not subject to claim, settlement or entry under the act of March 2, 1889, or of the land laws of the United States.

The tract in question is within that part of the Great Sioux Reservation, added to the State of Nebraska by the act of Congress of March 28, 1882 (22 Stat., 35). It was restored to the public domain by section 21 of the act of March 2, 1889 (25 Stat., 888).

The said act of March 28, 1882, extended the northern boundary of Nebraska, "so as to include all that portion of the Territory of Dakota lying south of the 43d parallel of north latitude and east of the Keyapaha River, and west of the main channel of the Missouri River." This included the land in question. Subject to certain conditions, which were afterwards performed, the jurisdiction over said lands was

Ceded to the State of Nebraska, and subject to all the conditions provided in the act of Congress admitting Nebraska into the Union, and the northern boundary of the State shall be extended to said 43d parallel as fully and effectually as if said lands had been included in the boundaries of said State at the time of its admission into the Union; reserving to the United States the original right of soil in said lands and of disposing of the same.

The act organizing the Territory of Dakota (12 Stat., 239), reserved sections sixteen and thirty-six for school purposes after such sections were designated by the public surveys.

The act of April 19, 1864 (13 Stat., 47), admitting Nebraska into the Union, granted sections sixteen and thirty-six in each township for the support of common schools, and other lands equivalent thereto were granted as indemnity where the granted sections "have been sold or otherwise disposed of."

When Nebraska afterwards accepted the jurisdiction of the ceded lands, subject to all the conditions and limitations provided in the act of Congress admitting that State into the Union, sections sixteen and thirty-six in each township in the added territory became after survey the property of the State, for school purposes; and for the same reason the State became entitled to select indemnity for such sections or parts of section of the school lands as were found to have been sold or otherwise disposed of. State of Nebraska, 18 L. D., 124.

The act of 1889, restoring the lands to the public domain, does not appear to contain any clause granting lands for school purposes. The previous legislation on that subject, relating to the State of Nebraska (above referred to), rendered such legislation unnecessary.

The board of educational lands and funds for the State of Nebraska (under section 1, article VIII of the Constitution of the State having general management of all lands and funds set apart for school purposes) admits that the tract in question "was claimed by the village of Butte for townsite purposes prior to the survey thereof, and that settlement and improvement was (were) made thereon in good faith for the purpose of taking out patent thereon under the townsite laws."

Such an admission sufficiently settles the question of such prior occupancy.

It is held in general that claims under the townsite laws are pre-emptions. *Fraser v. Ringgold*, 3 L. D., 69. That fact being determined, the remaining question relates to the effect of such occupancy upon the land in question.

The 24th section of said act of 1889 (p. 898), provides as follows:

That sections sixteen and thirty-six of each township of the lands open to settlement under the provisions of this act, whether surveyed or unsurveyed, are hereby reserved for the use and benefit of the public schools, as provided by the act organizing the Territory of Dakota; and whether surveyed or unsurveyed said sections shall not be subject to claim, settlement or entry under the provision of this act or of any of the land laws of the United States: *Provided, however*, That the United States shall pay to said Indians out of any moneys in the Treasury, not otherwise appropriated, the sum of one dollar and twenty-five cents for all lands reserved under the provisions of this section.

Your office, in the decision appealed from, sustained the protest by reason of the statute above quoted.

The act of February 26, 1859 (11 Stat., 385), afterwards incorporated as section 2275 of the Revised Statutes, provides that:

Where settlements with a view to pre-emption have been made before the survey of the lands in the field, which were found to have been made on sections sixteen and thirty-six, those sections shall be subject to the pre-emption claim of such settler; and, if they or either of them have been or shall be reserved or pledged for the use of schools or colleges, in the same state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors, etc.

This act was a general provision, applicable alike to all the states and territories. John W. Bailey *et al.*, 5 L.D., 216; L. H. Wheeler, 11 L.D., 381; Sharpstein *v.* State of Washington, 13 L.D., 378.

This was the law when the said act of March 2, 1889, was passed, opening the lands in question to settlement, and applied to Nebraska to which the lands were added, and to Dakota from which they were taken.

The act of April 19, 1864 (13 Stat., 47), admitting Nebraska to statehood, granted sections sixteen and thirty-six in every township for the support of the common schools; it also granted other lands equivalent thereto, "where such sections have been sold or otherwise disposed of by an act of Congress."

The act of 1859 (*supra*), having made provisions for those persons who had made settlements, "prior to survey upon the school sections, with a view to pre-emption," and appropriated to the State a like quantity of other lands for school purposes, the State of Nebraska would undoubtedly be entitled to select lieu lands, equivalent to those lost to the grant by reason of such settlement.

It is thus seen that the State of Nebraska obtained its grant of the school sections in the reservation from the act of March 28, 1882 (*supra*), adding the reservation to the State, "subject to all the conditions and limitations provided in the act of Congress admitting Nebraska into the Union." Among those "conditions and limitations," under which it took the grant of the school sections, was one which required the State, if it would claim its full quota of school lands, to select lieu lands equivalent to those which had been settled upon prior to survey.

The 24th section of the act of 1889 (above quoted) neither makes a grant of the school sections, nor provides indemnity for their loss; neither do I think it was intended by that section to repeal the general provisions of the statute, which were enacted for the purpose of protecting bona fide settlers, who chanced to make their improvements upon land afterwards designated by the public surveys to be in a school section.

However this may be, subsequent legislation can leave no doubt as to the intention of Congress on this question.

The act of February 22, 1889 (25 Stat., 676), providing for the admission into the Union of North Dakota, South Dakota, Montana and

Washington, and to make donations of public lands to those States, has a provision in section 11 thereof similar in terms to section 24 of the act of 1889 (*supra*), in that it provides that

All lands herein granted for educational purposes 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.

This provision was in apparent conflict with the general act of February 26, 1859, *supra* (sections 2275 and 2276, Revised Statutes), which preserved settlement rights upon the school sections when made prior to survey, and gave the State indemnity for the lands so settled upon.

In view, however, of the latter act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, re-enacting anew the provisions validating the claim of a settler who, prior to the survey in the field, had made a settlement upon a school section with a view to pre-emption, and appropriating and granting other lands of equal acreage to the State in lieu of the lands so settled upon, the Department, in its instructions to your office dated April 22, 1889 (12 L. D., 400), held that in so far as the said act of February 22, 1889, conflicted with the general provisions contained in sections 2275 and 2276 as amended, the same are superseded by the later act, and that the grant of lands to the new States mentioned in the act of February 22, 1889, "are to be administered and adjusted under the provisions of the general law."

The said act of February 28, 1891, being a general law, applies to the lands in question, and substantially maintains the provisions made by the act of 1859 (*supra*), protecting settlement rights made on school sections prior to survey, and granting other lands of equal acreage to the States in lieu thereof.

The lands in question were surveyed September 6, 11, 1890, and the survey was approved June 30, 1891.

It having been shown that the land was claimed by the village of Butte prior to the survey, and that settlement and improvements were made thereon in good faith, for the purpose of taking out a patent under the townsite laws, and it appearing that there was a sufficient number of inhabitants, the entry was properly allowed, and patent will accordingly issue.

Your attention is called to an error in the description of the land, as shown upon the register's final certificate. This should be corrected.

The decision appealed from is reversed.

SETTLEMENT RIGHTS—ADJUSTMENT OF CONFLICT.

GAY *v.* DICKERSON.

One who induces another to settle on a tract of land is thereby estopped from alleging a prior settlement right in himself.

Conflicting settlement rights acquired prior to survey may be adjusted by allowing one of the parties to make entry of the tract in dispute on condition that he enters into a contract with the other to convey to him, after patent, that portion of the land covered by his occupancy.

Secretary Smith to the Commissioner of the General Land Office, September 27, 1895. (W. F. M.)

On May 29, 1888, Richard B. Dickerson made homestead entry of lot 3, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 14, township 46 N., range 2 W., Boise meridian, within the land district of Coeur d'Alene, Idaho.

On the same day Eugene Gay made application to enter, as a homestead, lots 2, 3, and 4, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the same section.

This application was "refused for the reason that the same conflicts with the homestead of R. B. Dickerson so far as concerns lot No. 3.

On July 27, 1888, Dickerson applied to be allowed to amend his entry on the ground

That he had made a mistake in the legal subdivisions intended to be entered through errors of the United States surveyors, in placing his house upon the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ instead of upon lot 3; that he intended to enter lot 3, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 14, township 46 N., range 2 W., B. M., which he has resided upon and improved for the last three years and upwards.

The application having been duly transmitted to your office, the amendment was allowed by letter "C" of October 12, 1888.

On October 29, 1888, Gay filed an amended affidavit of contest alleging that he

Settled upon and improved lot 3, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said tract prior to the settlement upon the same by said Richard B. Dickerson and that said affiant is prior in right and settlement and has occupied and improved the same ever since the 30th day of October, 1884, and that said Dickerson did not lay claim to any portion thereof till some time in year 1886.

After a hearing held in May, 1889, the register and receiver rendered a decision recommending that the contest be dismissed on the ground that Dickerson "made the first settlement upon said lands and had the prior right thereto."

Gay appealed to your office, and the decision there rendered, in affirming that of the local office, concludes in the following words:

I think it clear that Gay, by his failure to appeal from the rejection of his application and by his failure to initiate contest until after the expiration of so long a period of time did not exercise such promptness in the assertion and maintenance of his rights as the exigencies of the case demanded. To have protected his rights he should have brought his contest in a reasonable time. He did not do so.

In a motion for review of this decision it was for the first time brought to the attention of your office that Gay had filed in the local office an affidavit of contest immediately after the rejection of his application to enter on May 29, 1888. This was admitted by Dickerson, but he also filed an affidavit by Robert E. McFarland, the register of the local office at that time, to the effect that Gay's original affidavit was afterwards withdrawn by him and not again returned to the files of the office. Upon this showing the case was remanded with directions that testimony be taken upon the question thus brought in issue, or upon "any matter which may explain any action taken by this plaintiff in relation to any contest affidavit offered or filed by him subsequent to May 29, 1888, and prior to October 28, 1888."

The register and receiver found, after hearing testimony, that Gay did file an affidavit of contest on May 29, 1888, but that it was afterwards withdrawn.

The decision of your office of March 17, 1893, reverses that of the local office, and finds that a preponderance of the evidence shows that Gay did, on or about May 29, 1888, file an affidavit of contest of the Dickerson entry as to lot 3; that the affidavit was not withdrawn by Gay or his attorney, and that, while the said original affidavit is not to be found among the papers comprising the record, the responsibility for its disappearance does not rest with Gay or his attorney. It is held, therefore, that Gay was not guilty of laches as set out in the decision of May 29, 1892, that he did take proper and prompt measures to assert his rights in and to the tracts for which he applied May 29, 1888, and that he and Dickerson should make joint entry of lot 3.

Meanwhile, on February 9, 1891, Gay had made application to enter the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 23, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 2, 3 and 4 of section 14, township 46 N., range 2 W., which application was rejected by the register, and on appeal, also by your office, for conflict, in part, with Dickerson's entry and with the Northern Pacific railroad grant, and on the further ground that the application embraced land lying within the bed of the St. Joseph river. It was, therefore, further held in the decision of March 17, 1893; that, under the ruling of *Hughey v. Dougherty*, 9 L. D., 29, Gay "waived whatever claim he had in and to said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 14, from the fact that he did not embrace that tract in his application of February 9, 1891."

The lands in controversy were first surveyed prior to 1888, and became subject to entry in May of that year. The entry of Dickerson as well as the application of Gay was made with reference to that survey. Certain of the lands embraced within the applications of each lay on both banks of the St. Joseph river, which was not, in that survey treated as a navigable river, all entries bordering thereon were suspended and a resurvey ordered, with directions that both banks of the river be meandered. The plats of this survey were approved by the surveyor general of Idaho on October 6, 1892, and filed in the local

office on March 3, 1893. It appears that certain subdivisions of the land claimed by both Gay and Dickerson under the old survey, lie, with reference to the new survey, on opposite sides of the St. Joseph river, and for that reason, the decision of March 19, 1893, suspends Dickerson's entry and requires him to elect as between certain lots, and rejects Gay's application as to certain others.

On review it was held, under the authority of James Shanley, 5 L.D., 641, Matilda Strohl, 8 L.D., 62, and Mathias Ebert, 14 L.D., 589, that, Dickerson's entry and Gay's application having been made under a then existing survey which had not meandered the St. Joseph river, the doctrine of those cases applied thereto, and the decision of March 17, 1893, was accordingly modified; it was further held that Gay and Dickerson be allowed to make joint entry of lot 3 and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 14, and directs a hearing as between Gay and the Northern Pacific Railroad Company to determine the rights of each as to that part of the land covered by his second application that conflicts with the company's grant.

In pressing his appeal before this Department Gay insists upon the relegation of the parties to their status of May 29, 1888, the date of the presentation of their first applications, each to be awarded the land he then sought to enter, with the exception of lot 3, of which a joint entry should be allowed, according to the lines previously agreed on; or, in the alternative, that he be allowed to enter the tract in conflict with the railroad grant without the expense and delay of a further hearing.

A brief statement of the facts established by the two hearings held will clearly indicate the equitable relations of the parties.

Dickerson and A. D. Reed made settlements on the St. Joseph river, on adjoining tracts, at the same time, about April 1, 1884, and established a boundary between them. Their personal relations soon became unpleasant, so that Dickerson determined to rid himself of Reed as a neighbor. Accordingly, upon the repeated and earnest insistence of Dickerson, in the month of October, 1884, Gay purchased Reed's improvements, established himself and family upon the land and has resided there continuously since. At that time the lands had not been surveyed; but immediately upon the completion of the survey and the filing of the plats in the local office both appeared there at the same instant of time and presented their homestead applications to the register, who, however, received that of Dickerson into his hands first, and placed the entry of record. There was no conflict in the two applications except as to lot 3, upon which the homes of both parties are situated. For that conflict Gay's application was rejected as an entirety, and he at once instituted contest proceedings, which he has never abandoned either by the withdrawal of the affidavit, as charged, or otherwise. All his rights are, therefore, preserved intact, as of the date of May 29, 1888, unless forfeited, waived or otherwise lost by some subsequent voluntary act.

The decision appealed from construes Gay's application of February 9, 1891, as an abandonment of his original application, citing as authority, *Hughey v. Dougherty*, 9 L. D., 29, and while the facts of that case differ widely from those of the case at bar, it is not deemed necessary to controvert the general proposition therein laid down. It would be going to an extreme length, however, to hold that in all cases, and in all circumstances, a subsequent application, is, *ex proprio vigore*, a waiver of all antecedent claims. The better rule is to allow the facts of each case to control it. And so, in Gay's case, it is to be remembered that his first application, and his affidavit of contest in support of it, were ignored by the local office and by your office for very nearly three years; that he was treated precisely as if he had no rights in the premises whatever as based thereon, and that he was probably driven to the second application in despair of having his rights upon the first adjudicated. It is pertinent also to bear in mind that the second application, in so far as it varies from the first, at this date stands rejected, or suspended, pending a hearing the expense and delay of which he now desires to avoid.

Leaving out of view, therefore, the conflict between the original applications of Dickerson and Gay as to lot 3, I think the conclusion is warranted that their respective rights should be tested by their status at the date of those applications, to wit, May 29, 1888, and that their entries should be allowed as of that date. As to lot 3, I concur with the decision of your office that joint entry should be allowed. It is true that Dickerson's settlement antedates that of Gay some six months, but he is estopped from reaping any advantage from that fact by reason of the circumstance of his having induced Gay to come upon the land with the express understanding that he should acquire it when it became subject to entry. This conclusion gives effect to the principle of equitable estoppel which prohibits a man to take advantage of his own wrong.

The evidence does not indicate with certainty the line between Dickerson's and Gay's improvements on lot 3, but I am convinced from the testimony that it is easily ascertainable. *Certum est quod certum reddi potest.*

It is ordered, therefore, that Gay be allowed to make entry of the lands covered by his application of May 29, 1888, to wit, lots 2, 3 and 4, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 14, on condition that he enter into contract with Dickerson, his co-settler, to convey to him, after the issuance of patent, that part of lot 3 upon which his, Dickerson's, improvements are situated, being all that part of said lot east of the line heretofore and originally agreed on by and between them.

It is further ordered that Dickerson be allowed to enter the lands covered by his application of May 29, 1888, except lot 3, namely, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 14, and that

his entry now standing of record in so far as it conflicts herewith, be canceled.

It is further ordered that, in the event of Gay's failure to comply with the condition hereby imposed, Dickerson be permitted to enter lot 3, subject to the corresponding condition on his part that he enter into contract to convey to Gay that part of the said lot which lies west of the said line, and in the event neither shall comply with the condition, then joint entry of lot 3 will be allowed under the first clause of section 2274 of the Revised Statutes.

Throughout this decision, in order to avoid confusion, the lands involved have been described with reference to the survey of 1888, under which the entries are allowed, but it is apprehended that no difficulty will arise on that account.

POWER OF ATTORNEY—SOLDIERS' ADDITIONAL HOMESTEAD—SETTLEMENT RIGHTS.

RAYMOND ET AL. v. REDIFER'S HEIRS ET AL.

A power of attorney that does not contain the name of the appointee is not invalid, where it appears that it was purposely so executed, with the intention that the party using the same should insert his own name, and the authority so conferred was thereafter duly exercised.

A soldier's additional homestead entry, made by the purchaser of a certificate of right, is confirmed by the act of August 18, 1894.

The occupancy of land, by transient miners, as a mining camp, does not reserve it from homestead entry, where such occupancy is not for the purpose of trade and business, within the meaning of the statute, and where such occupants take no legal steps to assert their rights under the townsite laws.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (J. I. P.)

By your office letter "N" of June 1, 1894, you transmitted to this Department the appeal of the heirs of W. W. Redifer, deceased, by trustee, in the above entitled cause, from your office decision of March 2, 1894, holding for cancellation soldier's additional homestead entry made November 27, 1888, for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 23, T. 36 N., R. 4 E., N. M. P. M., Del Norte, Colorado, land district.

In order that the issues presented by said appeal may be clearly understood, a brief recital of the facts involved here are deemed necessary.

On November 27, 1888, there was filed in the local land office at Del Norte, Colorado, an application to make soldier's additional homestead entry for the tract above described. This application was rejected by the local office because the land involved was probably mineral land; because a rich mining camp then being opened in that vicinity rendered necessary the use of a large portion of this land for townsite purposes, and because the citizens of said camp had protested in person and by

letter against the allowance of any filing or entry upon said land. An appeal was taken to your office from that action of the local office rejecting said application.

Your office, by letter of January 3, 1889, directed the local officers to allow said entry as applied for, and thereupon to immediately order a hearing to determine whether each and every smallest legal subdivision of the land involved is more valuable for agricultural than for mineral purposes.

Subsequently, it appearing that the Platora Town Company had filed a declaratory statement for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ here involved, alleging settlement thereon November 1, 1888, and asking that a hearing be ordered to determine as to the priority of right to said tract of land, your office, by letter of March 28, 1889, extended the scope of the hearing ordered so as to determine the priority of possession of the tract in controversy. Afterwards the townsite claimants filed an appeal from your office decision allowing the additional homestead entry, and while that appeal was pending before this Department, a motion was made to dismiss it. That motion, after due consideration, was sustained by the Department, and the entry was held intact, for the reason that such entry could not have been made after the heir of the deceased soldier had attained his majority, and for the further reason that the rights of the parties could be fully and properly ascertained by the investigation proposed in the hearing ordered; that all those matters which might properly have been investigated prior to the allowance of the entry should be particularly inquired into. The facts hereinabove detailed are set forth in the case of *Platora Townsite v. Redifer's Heirs* (10 L. D., 424).

After notice to all parties in interest a hearing was finally had before the receiver of the Del Norte land office (the register being disqualified because of an interest in the subject matter in controversy), on October 10, 1892, and on February 21, 1893, the receiver held from the record before him that the additional homestead entry made November 27, 1888, upon the tracts here involved was illegal and void, because of the fact that it had been sold and transferred by the real party in interest, and because of the fact that the right to make a soldier's additional entry was a personal right and could be exercised only by the real party in interest, citing numerous authorities of the Department in support thereof. He further held that the Platora Townsite Company did not proceed in accordance with the statute providing for the acquiring of townsites; that it had made no showing in the case to sustain or support its alleged interest in the tract in controversy, and that it had no rights under the law and excluded it from any further consideration. He further held, in view of the facts as above stated, that it was unnecessary to pass upon the character of the land.

On appeal, your office held, by decision of March 2, 1894, that section 2380 of the Revised Statutes of the United States provides three

methods for securing government title to land used for townsite purposes; but that it was not shown that the inhabitants of the town of Platora have complied with any of the provisions of the law; and that consequently the question of the townsite rights cannot be taken into consideration in this case. Your office further held that the right to make a soldier's additional homestead entry is not assignable, citing numerous authorities in support of said holding, and for the reason that the soldier's additional homestead entry here involved was not made for the use and benefit of the minor W. P. Redifer, heir of W. W. Redifer, deceased, the real party in interest, and that the right to make said entry had in effect been sold by the guardian, you held said additional homestead entry for cancellation, and for the reasons above stated you also deemed it unnecessary to pass on the character of the land.

On May 27, 1879, your office issued a certificate of right to George W. Redifer and William P. Redifer, minor heirs of W. W. Redifer, deceased, to make an additional homestead entry of not exceeding one hundred and twenty acres, as provided in section 2306 of the Revised Statutes of the United States. The guardian of said heirs, duly appointed by the probate court of Hickory county, Missouri, on February 29, 1888, executed an irrevocable power of attorney, for a valuable consideration, to one L. C. Black, of Cincinnati, Ohio, to locate an additional homestead under the provisions of section 2306 of the Revised Statutes of the United States; said power of attorney also contained the following provision: "and I do hereby release unto my said attorney all my claims to any of the proceeds of any sale or lease of said premises."

On June 11, 1888, Black sold and transferred said certificate of right to one David M. Hyman, and executed a power of attorney by way of substitution with the name of the attorney in fact left blank. On November 27, 1888, one J. D. McCarthy, as attorney for Hyman, appeared before the local officers at Del Norte and offered to locate said scrip upon the tract here involved. The local officers called his attention to the fact that the substitution under which he assumed to act was not perfect, in that the name of the attorney in fact did not appear in said instrument. McCarthy at once wrote his own name in the blank as the attorney in fact for the Redifer heirs, and again offered said scrip for location, which was rejected by the local officers, as hereinabove detailed. It appears from the record, however, in the shape of affidavits from Black and Hyman, that said power of attorney was purposely left blank by Black, with directions to Hyman to insert any name therein that he might see fit, and that McCarthy, when he went to the local office to locate said scrip, was instructed by Hyman to insert his name therein as the attorney in fact.

This Department held, in the case of *Hartman v. Warren et al.* (19 L. D., 64), that

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

So that when McCarthy presented the scrip in question for location at the local office, as above stated, it was with the authority from Hyman to insert his name therein as the attorney in fact, and with the authority from Black to Hyman to direct the insertion of any name therein that he might see fit, and hence the scrip, when presented, was not imperfect, and should not have been rejected for that reason.

It is true, as was held by your office, and by the local office, this Department has frequently held that the right to make a soldier's additional homestead entry is not transferable, and that such entry can only be made by the party to whom the certificate of right is issued. But by the act of August 18, 1894 (28 Stat., 397), Congress legislated in reference to entries made on certificates of right that had been assigned, as follows—

That all soldier's additional homestead certificates heretofore issued under the rules and regulations of the General Land Office, under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, or the Commissioner of the General Land Office, shall be, and are hereby declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been, or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by purchasers shall be approved, and patent shall issue in the name of the assignees.

It is evident to my mind that the entry here in question is clearly confirmed by that act, and that if the land was properly subject to homestead entry at the date said entry was made, it should be allowed to stand. Hence it becomes a leading question in this case, whether the tract here involved was subject to homestead entry on November 27, 1888.

The town of Platona at the date last above mentioned was located principally west of the west line of the tract here involved. It was simply a mining camp, and nothing more. It is shown that there were on the tract in question six or eight log houses constructed and in process of construction, in one of which was a meat market, a small stock of general merchandise and an assay office. There were living on the tract not to exceed thirty people, most of whom were transient miners. No effort was made, however, by the town of Platona to acquire title from the Government to the tract here in question under the townsite laws. The only effort made was, as stated the filing of the preemption declaratory statement on January 15, 1889. With the exception of one or two families that occasionally kept boarders, the only occupation of said tract for trade and business was as above stated, in the one building mentioned.

In the case of Francisco Mirabal (20 L. D., 348), the facts in which are very similar to those in the case at bar, the Department held as follows—

In the case of *Keith v. Townsite of Grand Junction*, on review (3 L. D., 431), it was held on the authority of the ruling in the case of the townsite of Superior City (1 Lester, 432), that it was manifestly not the object of the law to withhold from pre-emption such lands as individuals might designate or select without authority, as a site for a probable or prospective city or townsite. And in the case of *Bickel et al. v. Irvine* (10 L. D., 205), the homestead entry by Irvine was sustained, although a portion of the land was shown to have been occupied for a number of years prior to the making of the entry there in question, the settlement being known as Carson Camp. In that case it was stated by your office decision that—

“The occupants or residents of the tract in controversy never in any manner indicated that they desired to obtain title to the tracts from the government under the townsite or other laws. . . . At the date of Irvine’s entry the townsite protestants had acquired no rights against the United States and there was no appropriation of the public lands by the settlement they had made.”

In the departmental decision in that case it was stated that the contestants took no legal steps to enter the lands covered by their settlement under the townsite law, nor do they now ask it; and since it is not shown that any part of the land was settled upon and occupied for purposes of trade and business at the time of Irvine’s entry, I concur in the conclusions expressed in your said office decision.

I think the decision in that case upon the facts there presented controls here. While a portion of this land was occupied at the time the application to make said soldier’s additional homestead entry was made, yet it does not appear to have been used, within the meaning of the statute, for the purposes of business or trade, and as the occupants have taken no legal steps to enter the land covered by that settlement under the townsite laws, I am disposed to hold that their occupancy was not sufficient to withhold that land from disposition under the homestead law.

I have examined with care the voluminous record in this case, to ascertain whether or not the land was in fact more valuable for mineral than for agricultural purposes, because, in view of the holdings, as hereinabove made, that question becomes a controlling one. There is an absolute failure, in my judgment, to show that the tract is of any value whatever for mineral purposes. On the contrary, it is shown that the character of the whole of said tract is alluvial deposits, covered by a black loamy soil from two to three feet deep, and that it is well adapted to the growth of grass and hay, and is, in fact, more valuable for that purpose than for any other, and that it has been used for grazing purposes by the inhabitants of Platora since the date of the application to make the entry here involved, and prior thereto.

In view of the fact that the only parties to this controversy are the government and this entryman, and for the reasons hereinabove stated, I am therefore disposed to hold, and do hold, that said soldier’s additional homestead entry made November 27, 1888, for the tract here involved, should be held intact.

Your office decision is therefore reversed.

DESERT LAND CONTEST—AMENDATORY ACT OF MARCH 3, 1891.

TILLOTSON *v.* LINDSTROM.

There is no requirement in the amendatory desert land act of March 3, 1891, that an entryman, who at the passage of said act has an entry under the act of 1877, and elects to proceed under the amendatory act, should at the time of election file a map showing the intended plan of irrigation. The right of the entryman, in such case, is sufficiently protected if he formally elects to proceed under the later act, and gives notice of such election.

The rule requiring claimants, who elect to proceed under the amendatory act, to file a sworn statement of the intention to so elect will not be held retroactive.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (E. M. R.)

This case involves the NW. $\frac{1}{4}$, Sec. 26, T. 9 N., R. 23 E, North Yakima land district, Washington.

The record shows that on June 9, 1890, Gustave Lindstrom made desert land entry for the above described tract and that on June 10, 1893, Roland Tillotson filed an affidavit of contest against this entry, alleging failure to reclaim within the statutory period.

The case came up for hearing before the local officers on August 11, 1893, and on September 25, 1893, they rendered their joint opinion, recommending the dismissal of the contest. The case being before your office upon appeal on March 12, 1894, your office decision was rendered reversing the action of the local officers, and holding for cancellation the entry of Lindstrom and awarding the preference right of entry to the contestant, Tillotson.

An examination of the evidence shows that no reclamation has been attempted, nor has there been any effort made to make final proof, but it does appear that prior to the expiration of the three years granted under the original act of 1877, the entryman gave notice that he would prove up under the act of March 3, 1891 (26 Stat., 1095), and it seems probable that within that time the entryman will succeed in getting water on the land.

I see nothing in the amendatory act referred to that prevents the entryman from pursuing this course. As soon as he elected to proceed under the act of 1891 it, doubtless, became his duty to conform to that act in so far as it may have been practicable, and within the year the amendatory act was applicable, to show that he had expended on the land the amount required in the latter act. The statutory requirement is that this must be done sometime in each year.

It is required by the fourth section of said act—

That at the time of filing the declaration hereinbefore 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, and shall also show the source of the water to be used for irrigation and reclamation.

By reference to the act of March 3, 1877 (19 Stat., 377), it appears that the declaration here alluded to was that required at the time of entry. But here the entry was in existence when the act of 1891 was passed, and certainly it could not require the doing of something prior to the date of its passage. It is evident that the map required under the amendatory act would have to be made at the date of entry, should one desire to enter desert lands subsequent to its passage; and it is equally evident that the entryman, under the old law, who seeks to complete his entry under the new law, and by so doing secure the additional year therein granted, must comply with its provision so far as practicable. But this does not mean that he must do that which is impossible, and without now passing upon the question of whether it is necessary for one who desires the benefits of the act of 1891, and who made entry under the act of 1877, to file a map showing the manner of the contemplated irrigation, it is enough now to say that there is no requirement in the former act that such a map must be filed at the date of election to proceed under it. It is sufficient to protect the entry, if the entryman formally elects and gives notice of an intent to so proceed.

The effect of the right granted entrymen under the act of March 3, 1877, to prove up under the act of March 3, 1891, was, while imposing certain burdens upon them, to give them an additional year in which to reclaim the land. Under the act of 1877, all that was necessary was to reclaim the land in the three years of the lifetime of the entry.

The case of John Herbert (17 L. D., 398) and Poyntz *v.* Kingsbury (19 L. D., 231), are not in contravention of the disposition made of this case, because the rule laid down by them was not promulgated until after the election made by Lindstrom, which was satisfactory to the local officers and which was not in opposition to any then existing rule.

The rule requiring a sworn affidavit should not be held to be retroactive.

The decision appealed from is therefore reversed.

PRACTICE—APPEAL—HOMESTEAD—TOWNSITE CLAIMS.

MATHIESON *v.* TEMPLIN.

The notice of an appeal is sufficient where a copy of the specifications of error, which is entitled "appeal to the Secretary," and in the body thereof "prays an appeal," is duly transmitted by registered mail to the appellee, and receipt thereof is not denied.

Where in a contest a judgment of the General Land Office awards to one of the parties the right to elect as between two tracts, an adverse party, who is asserting a claim to one of such tracts is entitled to be heard on appeal from such judgment.

An additional townsite claim set up to defeat a homestead entry cannot be recognized, where it appears that there is no necessity for additional townsite territory, that the tract is not embraced within the limits of the townsite, and there is no actual settlement on the land for townsite purposes.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895.
(J. I. H.) (P. J. C.)

The tracts involved in this controversy are lots 2 and 3 of Sec. 34, T. 5 N., R. 31 E., B. H. M., Pierre, South Dakota, land district. These lots are in the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 34, and are made fractional by reason of the meandering of the Missouri River on the east and what is known as the "mile square" on the north, which was set apart for town site purposes by section 22 of an act of Congress approved March 3, 1891 (26 Stat., 1095).

The record shows that Charles F. S. Templin made homestead entry of said land August 13, 1891. On July 16, 1892, Richard W. Mathieson, mayor of Fort Pierre, South Dakota, filed an affidavit of contest against said entry, alleging that at the time of entry and prior thereto the land was embraced in the corporate limits of Fort Pierre; that there were municipal improvements on it; that Templin had knowledge of these facts; that his entry was fraudulent and collusive, and made for the purpose of securing title to the land for others, and that he (Mathieson) as mayor of said town is authorized to secure the land for the benefit of the occupants thereof.

On the same day the said Mathieson presented his declaratory statement for the entry of said land for townsite purposes, under United States statutes, alleging that the land was contiguous to the city of Fort Pierre, and included within the corporate limits thereof, the same having been surveyed and platted into blocks, lots, streets and alleys, and together with that which the city now has title to, is not in excess of the area to which said city might claim right under section 2389 of the Revised Statutes; that improvements had been made for municipal purposes by grading streets and erecting buildings thereon; that the entry is made for the several use and benefit of the occupants of said land, according to their respective interests.

The city of Fort Pierre is located on and includes all the "mile square" above referred to, embracing 548.70 acres. It was entered as a townsite September 22, 1891, under an application filed by the mayor August 1, 1891, and patent issued September 12, 1892.

A hearing on the contest was had before the local officers, and as a result thereof they filed dissenting opinions, the register holding that.

The tract in controversy having been under the municipal government of Fort Pierre at the time Templin made his homestead entry, and said city being now, as it was then, fully qualified to enter the same, and Templin having had no prior legal right thereto, I am of opinion that the homestead entry made by Mr. Templin was at the time invalid, and that the same should be canceled.

The receiver found that

Templin, the claimant, having made settlement upon this land before Fort Pierre was incorporated, and being the only actual *bona fide* resident that has ever been upon the land, and having made valuable improvements and faithful residence, I believe his claim in equity and justice to be superior to that of Fort Pierre, and recommend that the contest be dismissed.

The record was thereupon forwarded to your office, which, after examination and consideration thereof, rendered the decision of December 21, 1893, now before the Department on appeal.

In that decision it was stated, among other things, that in addition to the application for the land here in question, and previously thereto, to wit, in January, 1892, the city of Fort Pierre had by its mayor applied to enter, as an addition, lots 3, 4, and 8, in Sec. 28, and lot 1, in Sec. 27, in said township and range, containing 53.40 acres, and that your office had directed the local office, by letter "G" of March 8, 1892, to reject said application, because the land in question was a part of the land in controversy between Black Tomahawk and Jane E. Waldron (13 L. D., 683, and 17 L. D., 457).

By the decisions cited the claim of Waldron was disposed of adversely to her, and it appears from your office decision of 1893, under consideration, that the interest or claim of Black Tomahawk was disposed of by your office letter of November 11, 1891, to the register and receiver. Said decision of 1893 further found that at the date of the hearing (August 29, 1893), no one was living on the land in question but Templin and his family; that the town was not entitled under the provisions of section 1 of the act of March 3, 1877 (19 Stat., 392), to enter all the land within its corporate limits, and held that since the claims of Waldron and Black Tomahawk had been disposed of, the city of Fort Pierre should be allowed to elect, as provided in section 3 of the act of 1877, *supra*, what portion of the land embraced in said corporate limits, in compact form, shall be withheld from entry.

The order to the local officers was to notify the town authorities that they would be allowed sixty days within which to file proper evidence of such election in their office, and report to your office the action taken. This order to elect gave the town the privilege of taking the land claimed by Templin, and he therefore appealed.

A motion was made to dismiss this appeal, on the grounds that no notice of the same was served upon the contestant, and the further ground that this was not such a final judgment as warranted an appeal, inasmuch as the contestant was only required to elect which land he would take under his entries.

It is shown by the post office receipt that a copy of the specifications of error was mailed to the contestant, and receipt thereof is not denied. This is entitled "appeal to the Secretary of the Interior," and in the body "prays an appeal," etc. This is a sufficient notice of appeal under the rules.

As to the other point suggested by the motion, I think your judgment was such as entitled the defendant to have it reviewed.

The city of Fort Pierre filed simultaneously an affidavit of contest against Templin's homestead entry and an application to take as an additional townsite the land covered by said city. This clearly showed the purpose of the city to take said land for townsite purposes should

it succeed in procuring the cancellation of Templin's entry, and therefore justified appeal by him from your office decision, the effect of which was to hold his entry subordinate to the right of the town to select for townsite purposes. Said decision was a judgment affecting adversely the rights of Templin, and his appeal will be entertained, and the case will be considered on its merits.

It is with some difficulty that the true status of affairs as depicted in this controversy can be ascertained from the record, and were it not for the records of your office in relation to the townsite of Fort Pierre, it would be impossible from the voluminous testimony and the almost innumerable exhibits to arrive with any degree of certainty at the facts.

I do not think the charge of collusion between the entryman and one Steere is sustained. In fact, the contestant, upon whom rests the burden of proof, did not offer any testimony on this point in the case in chief. That which he did produce was in rebuttal, after the positive denial by both Steere and the entryman of any compact between them.

In order to intelligently understand all the complications that seem to have arisen by the entry for townsite purposes of the land included in Fort Pierre, its applications for additional entries, and their affect upon Templin's entry, it will be necessary to recite as briefly as possible the history of the townsite.

Under date of May 3, 1890, the records of the board of county commissioners of Stanley county, in which the land is situated, show that a petition was presented by the residents of said county, praying for the incorporation of land as therein described. It is impossible from any data in this case to ascertain with any degree of accuracy the quantity of land described. It is set forth in the proceedings of the county commissioners by metes and bounds, and there is a plat offered which claims to mark the boundaries, but from the testimony of the engineer who made the plat I do not think it is shown with any degree of satisfaction that the land in controversy was included within the area. The engineer says in his testimony that he can not state how far south the line runs. I am therefore satisfied that the extension of the south line of description as made by the surveyor on exhibit "Z," which would include a part of the land in controversy, is a mere arbitrary line, and that the south boundary at this point can not be fixed with any degree of definiteness by any testimony before the Department at this time.

Under the order of the county commissioners an election was held under the laws of the State of South Dakota, with the result that the said city was incorporated. This was done on June 2, 1890. It appears that at this time the land sought to be incorporated had not been surveyed and the township plat approved by the surveyor-general of South Dakota was not filed until May 21, 1891.

It appears that on March 16, 1891, there was presented to the said council of Fort Pierre a petition, among the signatures to which was that of Templin, requesting the city council to extend the corporate

limits of said Fort Pierre over certain lands in the SW. $\frac{1}{4}$ of Sec. 34, to be known as "South Side Addition to Fort Pierre," and also a tract north and east of the northeast corner of the city, and adjacent thereto, within the limits of the "mile square," Merian's Island. This petition was granted, and the mayor was instructed to enter said lands as an addition to Fort Pierre, for townsite purposes.

It seems that on June 25, 1891, application was made by the mayor, but was rejected by the local officers,

For the reason that the application is not for the entry of the whole tract within the mile square, and for the further reason that the Commissioner has instructed this office to receive no more filings upon the mile square until further advised.

The instructions of the Commissioner referred to by the local officers in this rejection is under date of June 8, 1891, in which it is said that "the description given of the land was undoubtedly obtained from the surveys made in the field in that locality, but inasmuch as said surveys have not been approved, nor the plats thereof filed, the land is not subject to filing or entry," and they were directed to reject said townsite filing, and at the same time to advise the residents of Fort Pierre that this action does not affect their rights to make a townsite filing after the township plats have been approved and filed.

The "mile square" referred to is a parcel of land which Congress, by section 22 of the act of March 3, 1891 (26 Stat., 1095), declared should be entered for townsite purposes only, as follows—

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) approved March second, eighteen hundred and eighty-nine, shall be subject to entry under the townsite law only.

To go back a little in the history of this land, I find that your office, by letter "G" of July 13, 1891, addressed a letter to the register and receiver of Pierre, South Dakota, in answer to a letter written by one George P. Waldron, of Fort Pierre, dated August 25, 1889, stated that Fort Pierre was a town of six hundred inhabitants, and that, although in the Sioux Indian Reservation, it had been surveyed and platted in 1883. He was informed in October, 1889, that no action could be taken by the residents until after the Indian lands had been opened to settlement by proclamation of the President, which was issued February 10, 1890. October 29, 1890, the local officers asked for instructions as to the proper action that should be taken in passing upon the application of the town of Fort Pierre to make entry by metes and bounds of four hundred acres of land for townsite purposes, for which a plat of an unofficial survey had been filed while the published notice of intention to make proof and entry was being given. This survey not having been made or approved, the local officers were informed that a special survey could not be accepted.

It seems that on November 29, 1890, as stated by said letter, proof and entry of said town by metes and bounds were made, but the same

was rejected by your office. It is said in your office letter, of July 13, 1891, "No further action was then taken, however, because of certain contemplated or pending legislation affecting the land applied for." This entry was for lands which lie "mainly within what is commonly known as the mile square, a tract of about six hundred acres originally reserved for the benefit of the Dakota Central Railroad Company," and the legislation referred to was the act of March 3, 1891, quoted above. The land was surveyed and the survey approved. "The 'mile square' being surveyed and made subject to entry under the townsite law only, it therefore remains for me to point out the irregularities in the entry before me and to suggest a remedy." These irregularities were pointed out, and your office suggested that

Therefore, the first steps necessary to be taken by said town in order to qualify its mayor to make entry of its site, or to make entry of any portion of its site, as will more fully appear hereafter, is to extend its corporation over the whole of that portion of the "mile square" north of Bad River.

The entry under consideration was therefore suspended, and your office directed that the local officers

Require the mayor of said town to make a new and correct publication of notice, townsite proof, and entry of the 384.5 acres of land north of Bad River and within the "mile square," and that the record evidence must show that the corporate limits of said town have been extended so as to embrace the whole of said 384.5 acres.

The application to enter as a townsite could not possibly have included the land in controversy, for the reason that the application seems to have been for that part of the "mile square" north of Bad River; while there is probably one-quarter of the area of said "mile square" south of Bad River. (No part of the land in controversy is a part of the "mile square.")

It seems also that your office, on July 13, 1891, the date of the letter above quoted from, addressed a letter to the register and receiver at Pierre, stated that there had been transmitted a plat of "South Pierre, South Dakota," purporting to embrace all the lands south of Bad River, that is, what is commonly known as the "mile square." Their attention is called to your office letter of that date in relation to the townsite of Fort Pierre. Said application and plat was rejected,

And the land covered thereby is held subject to entry *as a whole* at such time as it can be shown that the population, business and municipal improvements thereon are in number and character sufficient to warrant the allowance of an entry thereof.

It appears that on September 12, 1892, townsite patent issued covering the following described tracts of land, as appears upon the tract books of your office—part of S. $\frac{1}{2}$, Sec. 28; part of SW. $\frac{1}{4}$, Sec. 27; part of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 34; and all of NE. $\frac{1}{4}$, part of NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 33, T. 5, R. 31; 548.70 acres. This, as I understand it, is within the "mile square," as it appears on the plat in your office. The description in the patent is given by metes and bounds, but it is stated that it covers the original "mile square" only.

The application for this patent was made by the mayor on August 1, 1891, and proof and entry made September 22, 1891. Thus it will be seen that notwithstanding the former action of the city council in its attempt to extend its jurisdiction over the land in controversy, and also that in section 28, prior to the date of application, yet as a matter of fact it did not apply for and secure title to either of these tracts. It seems to me that unless there is some good and sufficient reason shown why the land in controversy should be taken for municipal purposes, the city must fail; because I take it that at the time the application and entry were made they had full knowledge of the situation, and the desirability for any greater territory, and would have included it in the original application if it had been found necessary. It is true, of course, that by section 4 of the act of March 3, 1877, a town which had theretofore made entry of less than six hundred and forty acres may make an additional entry of contiguous tracts sufficient in amount to make up its full quota of six hundred and forty acres.

On November 5, 1891, a petition was presented to the city council, asking that lots 3, 4 and 8 in Sec. 28, and lot 1 in Sec. 27, lying immediately north of the "mile square" be incorporated within the limits of said town of Fort Pierre, to be known as the "First Addition to the City of Fort Pierre, South Dakota." This petition was granted, and under the laws of South Dakota an election was had by the owners of said land, and application was made June 4, 1891, by the mayor of said city, to enter the tracts described. The acreage of these tracts was 53.30. As heretofore said, this application was rejected by your office on March 8, 1892, because of the controversy between Black Tomahawk and Jane E. Waldron.

The history of Templin's connection with the land in controversy, as I gather it, is that in May, 1890, he bought some lots from a so-called town company, who had had the tract platted under the name of "South Fort Pierre." It seems that prior to this time a number of parties had purchased a squatter's right of a halfbreed, who was occupying the land. They had caused the same to be platted on paper (I do not understand that stakes had been set marking lots, blocks, streets and alleys); they had gone through a form of electing a full set of city officers; all this had been done prior to Templin's purchase of these lots. The only thing that was done by this so-called town company was to construct what was called the city hall, which, as I understand it, was a rather temporary affair, erected partly on the land in controversy and partly on that immediately south, and some grading was done on one street known as "Main Avenue;" this grading, however, was not sufficient to open the street, as was their evident intention, to the river, where they had gone through the form of making what they called a boat landing. The testimony shows, however, that this boat landing was never used for that purpose, and that the street had grown up with brush.

Templin built a house on the three lots that he purchased, and otherwise improved them, and established his residence there in the latter part of April, 1890, and has continued to live there with his family ever since, having put some twelve hundred dollars' worth of improvements on the tract. There were no other residents on the land, either at that time or subsequently. There were two houses partly built, and one of them in its unfinished state was temporarily occupied by two men. These houses were afterwards removed.

It seems that when the application to enter this part of the town as the "South Side Addition to Fort Pierre" was rejected by the local officers on June 26, 1891, those who were interested in the land of the so-called town company began to devise means by which they could secure title to it, and there is some evidence tending to show that there was originally an agreement made or an understanding had by which Templin was to homestead the land and commute it to cash entry, and deed it to the parties according to their several interests, and in pursuance of this agreement it is shown that Templin, with one of the parties, went to Pierre, where the land office is located, and had a consultation there with an attorney, who was also interested in the matter; in regard to making this entry. It appears that Templin was not familiar with the matter of entering public lands, and did not know the character of the affidavit necessary for the entryman to make in such cases. On examination of the same he concluded that he could not make the entry as suggested, without committing perjury, and then he concluded that he would take up the land in his own name, for his own use and benefit, as a homestead, and accordingly, the next morning (August 13) he went to the land office and made the entry.

There is an attempt made to show that immediately after this entry was made, and on the same day, he promised these parties to carry out the original agreement, but I do not think the testimony is sufficient to warrant this conclusion; it shows to my satisfaction that he, at that time, informed them that he had taken the land in good faith, for himself, and would thus hold it. The parties threatened at the time to cause him trouble over it, and to defeat his entry if possible.

I do not think there is any testimony in this case that shows that the town of Fort Pierre ever extended its jurisdiction over the land in controversy. This being true, and there being no other residences upon the tract, it would seem as if the land was subject to the entry of Templin. He certainly was maintaining his residence thereon at that time in good faith. It is true that prior to this time he had joined in a petition to have the land made a part of the city, but this application had been rejected; there was no claim of record against the land, and I see no reason why his entry should be impeached, even although at the time he established his residence thereon it was not for the purpose of entering the land under the public land laws. At some moment of time prior to his entry, and while the land was thus subject to entry, he made up his mind to take it as a homestead, and in pursuance thereof, did so.

It seems to me that this contest proceeding and application to enter this land on behalf of the mayor was not made in good faith, or from an honest desire to acquire additional territory for the city, as it is shown by an agreement made between the officers of the city and the former claimants of lots on the land in controversy, that the latter paid all the expenses of this contest, and that the city was put to no cost therefor whatever.

It will be remembered that your office held in its decision of December 21, 1893, before me on appeal, that the city authorities would be allowed sixty days within which to elect whether they would embrace within their corporate limits that part of the land described in sections 28 and 27, or the land in controversy. It seems that the mayor of the city of Fort Pierre, Mathieson, on February 27, 1894, made entry of lots in sections 28 and 27, north of the "mile square", after making final proof thereon.

In the record of the city council proceedings of February 15, 1894, I find this resolution: "Be it resolved, that there being no petition before the council relating to lots 2 and 3 of Sec. 34, T. 5 N., R. 31 E., B. H. M., and there being a probable adverse claim to some portion of said lots 2 and 3, it is not deemed advisable to now apply for entry of any portion thereof." It would seem from this that there was not even a petition before the city council asking that the corporate limits be extended over this ground.

This final proof and record of council proceedings have been filed in this office since the appeal was taken.

There is no apparent necessity for additional territory to Fort Pierre. The tract was not embraced within the limits of the townsite, and there was no actual settlement on the land for townsite purposes. It is not the intent of the law to withhold from settlement and entry "such lands as individuals might designate or select without authority as the site for a probable or prospective site or town." (Keith v. Grand Junction, 3 L. D., 356; same on review, Id., 431; same, 6 L. D., 633.)

Your office decision is therefore reversed, the contest dismissed, and the entry of Templin held intact.

SWAMP LAND GRANT—SELECTION.

STATE OF OREGON v. ROBER.

The Department has no authority to enter into and determine controversies arising between adverse claimants for swamp lands under the statutes of a State.

The ruling of the Department in 1880 that the failure of the State to select the lands claimed under the swamp grant within two years from the adjournment of the legislature of the State at its next session after the date of the act of March 12, 1860, as required by section 2, of said act, did not defeat the title of the State under said grant, cited and followed, under the doctrine of *stare decisis*.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (J. I. H.) (J. L.)

Baptist Rober has appealed from your office decision of December 18, 1893, holding for cancellation his homestead entry, No. 10,046, as to lots 3 and 4 of section 3, T. 6 N., R. 10 W., Oregon City land district, Oregon, and awarding said lots to the State of Oregon as swamp and overflowed lands under the act of March 12, 1860 (12 Stat., 3).

On July 6, 1892, Rober made entry of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 2, and lots 3 and 4 of section 3, of the township and range aforesaid. On August 12, 1892, in pursuance of notice under Circular of December 13, 1886, the State of Oregon by C. W. Carnahan, attorney in fact, and Fulton Bros., attorneys at law, appeared and filed a protest against said entry, and an application for a hearing to prove the swampy character of lots 3 and 4 aforesaid. After the hearing the register found that said lots were on March 12, 1860, such swamp and overflowed land as would pass to the State of Oregon, and recommended that Rober's entry be cancelled as to said lots, and held intact as to the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Section 2 aforesaid. The receiver found that lots 3 and 4 were not on March 12, 1860, such swamp land as could be rightfully claimed by the State, and recommended that the contest of the State of Oregon and C. W. Carnahan, "transferee," be dismissed, and that Rober's entry be allowed to remain intact.

Both of said decisions were appealed from; and on December 18, 1893, your office affirmed the decision of the register, and held Rober's entry for cancellation as to lots 3 and 4.

Rober's appeal presents six specifications of error, which are in substance as follows:

1st. That a certain deed, exhibited in evidence, dated February 28, 1889, signed by the governor, the secretary and the treasurer of the State of Oregon acting as a board of commissioners, and purporting to convey to C. W. Carnahan the aforesaid lots 3 and 4 (together with other lands), was null and void, for want of authority in the signers under the laws of Oregon.

2d. That lots 3 and 4 did not pass to the State under the terms of the grant, because the State did not make selection of them, within two years from the adjournment of the legislature of the State at its next session after the date of the act of March 12, 1860, as required, by the second section thereof.

3d. That the State of Oregon by an act of her legislature passed February 25, 1889, had granted all her estate and interest in swamp lands to homestead settlers thereon.

4th, 5th, and 6th. That your office erred in finding as matter of fact that lots 3 and 4 were swamp and overflowed lands within the meaning of the grant.

All of said propositions have been elaborately argued by counsel on both sides.

I think that the State of Oregon has proved that the tracts in contest, lots 3 and 4, were on March 12, 1860, swamp and overflowed lands made unfit thereby for cultivation; and I concur in your office finding on that point.

Carnahan is not a party in this case. He appears in it by authority of a power of attorney executed by the governor under the seal of the

State. It appeared in evidence that Carnahan claims the lots as purchaser from the State. Rober also claims them (if they be swamp lands), as grantee under the State. This Department has no authority to entertain any controversy that may arise between Carnahan and Rober under the statutes of Oregon. The legislature of that state cannot confer jurisdiction or impose duties on this Land Department. Congress has not attempted to require the Secretary of the Interior to study and execute the statutes of the many swamp land states, or to supervise and enforce the administration of the trusts which accompany the swamp-land grants. My sole function in the matter is "to make out an accurate list and plats of the lands described, and transmit the same to the governor of the State; and at the request of said governor to cause a patent to be issued to the State therefor." Parties aggrieved by the action of the State authorities must seek redress in the courts.

The question raised by the second specification of error was, on June 4, 1880, in the case of the State of Oregon *v.* the United States, carefully considered, and finally adjudicated by Secretary Schurz adversely to the contention of Rober's counsel in this case. That decision was published on pages 158 to 163 of the Report of the Commissioner of the General Land Office for the year 1880, and the attention of Congress and the State of Oregon, and of all persons interested, was thereby called to the construction placed by this Department on the second section of the act of March 12, 1860. For fifteen years that construction has been recognized and followed, and many titles rest upon it. Whatever might have been my personal opinion in respect to the question in the first instance (and I refrain from expressing any), I feel bound to stand by the uniform decisions of my predecessors.

Your decision is hereby affirmed.

DESERT LAND CONTEST—AMENDATORY ACT OF 1891.

RUDKIN *v.* COOPER (ON REVIEW).

Where the election of a desert entryman to proceed under the amendatory act of 1891 is to the satisfaction of the local officers, and prior to the promulgation of the rule requiring a sworn statement as to such election, the rights of the entryman under the later law should be treated as duly protected, though the sworn statement as to his intention is not made as required by said rule.

The decision herein, of March 19, 1895, 20 L. D., 218, recalled and vacated.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (J. T. H.) (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 20, T. 10 N., E. 22 E., North Yakima land district, Washington.

The record shows that John R. Cooper made desert land entry on June 4, 1889, for the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of Sec. 20, T. 10 N., R. 22 E., and on June 3, 1892, relinquished the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the above described entry.

John J. Rudkin filed affidavit of contest against the SW. $\frac{1}{4}$ of said entry, March 27, 1893, alleging failure of defendant to comply with the law in reference to the reclamation of said land.

This case was tried before the local officers May 11, 1893, and on May 23d following, they rendered their joint opinion directing the dismissal of the contest.

Upon appeal, your office decision of November 18, 1893, reversed the holding of the local officers, sustained the contest, and recommended the cancellation of the entry involved.

Upon appeal to this Department, on March 19, 1895, 20 L. D., 218, the decision of your office was affirmed. A motion for review having been filed on June 5, 1895, this Department determined to entertain the motion, and it is now before the Department for final action on review.

The facts in the case, as shown by the evidence, are admitted, and are substantially as follows: That the land at the date of contest was unreclaimed, no money had been expended nor any work done towards reclaiming it, and it was at that time grown up to sage brush. The defendant testified that at that time the main ditch of the Northern Pacific, Yakima and Kittitas Irrigation Company was completed within a mile of the land in controversy, and that he had made arrangement with the company to let him have enough water to irrigate the land; that the register had informed him in the spring of 1892 that he had four years within which to prove up, and that he gave notice that he would prove up under the act of 1891, instead of that of 1877, under which he made his entry.

It will be noticed that this entry had been in existence under the old law for eighteen months when the new act was passed, and that the three years allowed from date of entry within which he was required to reclaim the land would expire on June 4, 1892, and it was his privilege at any time during the existence of his entry, and subsequent to the passage of the amendatory act of 1891, to elect to proceed under it.

The act of March 3, 1877 (19 Stat., 377), does not require any yearly expenditure, but under that act it was sufficient that the tract so entered as desert land was reclaimed by conducting water upon it within three years after entry.

In the act of March 3, 1891 (26 Stat., 1095), it was required by the terms of the statute that an expenditure of one dollar per acre each year should be shown until the full amount of three dollars per acre had been expended in the reclamation of the land.

In the case of *John J. Rudkin v. Henry J. Bicknell*, where the facts were essentially similar to the case at bar, the entry of Bicknell was sustained. (See *Tillotson v. Lindstrom*, (21 L. D., 233).)

All that the act requires is that the entryman shall formally elect to proceed under the amendatory act, and give formal notice to the local officers of such intention. This it appears from what has been already set out, John R. Cooper has done. The local officers noted on their

records the fact that he had elected to proceed under the amendatory act. From the date of such election it became the duty of the entryman to comply with the terms of the amendatory act in so far as they were applicable to his case. That is to say, it would become his duty each year thereafter, to file the map showing the expenditure required by the amendatory act; and it seems that in the case at bar, inasmuch as the three years under the old act would have expired on June 1, 1892, and as this affidavit of contest was filed on March 27, 1893, that the first yearly proof that would be required of John R. Cooper might be offered at the time of his making final proof for the land involved.

Neither the case of John W. Herbert (17 L. D., 398), nor that of Poyntz v. Kingsberry (19 L. D., 231), should control the case at bar, since the election to proceed under the act of 1891 was made by the entryman in this case to the satisfaction of the local officers and at a time when the rule requiring the sworn affidavit, which is demanded in the cases cited, had not been promulgated. These cases should not be held as being retroactive, for by so doing the entryman would be deprived of rights given him under the language of the statute.

The former decision of this Department is therefore recalled, revoked, and set aside and the contest of Rudkin is dismissed.

RAILROAD GRANT—FORFEITURE—SETTLEMENT RIGHTS.

NEW ORLEANS PACIFIC RY. CO. v. BROWN.

The forfeiture act of July 14, 1870, operated to restore to the public domain the lands affected thereby free from the grant of June 3, 1856, and the certifications thereunder.

Section 2, act of February 8, 1887, does not protect a claimant whose settlement, on indemnity lands, is not made till after selection by the company, and who claims no interest through a prior settler.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (F. W. C.)

I have considered the case of the New Orleans Pacific Railway Company v. Peter Brown, involving the SE. $\frac{1}{4}$ of Sec. 15, T. 6 S., R. 1 E., New Orleans land district, Louisiana, on appeal by the company from your decision of April 19, 1890, holding for cancellation its selection of said tract.

This land is within the indemnity limits of the grant for said company, under the act of March 3, 1871 (16 Stat., 573), and was selected on December 28, 1883.

On October 7, 1859, it was certified to the State under the act of June 3, 1856 (11 Stat., 18), for the benefit of the New Orleans, Opelousas and Great Western Railroad, the grant for which company was forfeited by

the act of July 14, 1870 (16 Stat., 377), and the lands were formally reconveyed to the United States on February 21, 1888.

On October 14, 1887, Brown applied for this land, alleging settlement in 1886, and that it had been continuously occupied since 1867.

Upon said application hearing was had, the testimony consisting of depositions taken under amended rule 35 of practice. These depositions show that the land has been continuously settled upon and cultivated for fifteen or twenty years, but do not show that these parties possessed the requisite qualifications to make entry of the land under the settlement laws, nor that Brown, the present claimant, is the heir or assignee of such prior settlers.

Your decision holds the company's selection for cancellation, for the reason that at the date of selection the land was covered by the outstanding certification for the New Orleans, Opelousas and Great Western Railway Company, and also on account of Brown's claim under the 2d section of the act of February 8, 1887 (24 Stat., 391).

In the case of the New Orleans Pacific Railway Company *v.* Sancier (14 L. D., 328), it was held that the forfeiture act of July 14, 1870 (*supra*), operated to restore the lands to the public domain free from the grant of June 3, 1856 (*supra*), and the certifications thereunder; hence, the lands were subject to selection in 1883, unless the claim urged by Brown defeated such right of selection.

Brown settled in 1886, three years after the company had made selection of the land, but he relies upon the protection intended to be granted to settlers by the proviso to section 2 of the act of February 8, 1887 (24 Stat., 391).

Said section, in confirming to the New Orleans Pacific Railway Company a portion of the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad by the act of March 3, 1871 (*supra*), provided:

That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

The definite location of that portion of the road opposite the land in question is held to be on November 7, 1882, and, while a settler on the land at that date, or his assignee, would be protected by said section, a settlement made, as in this case, long after selection by the company by one claiming no interest through any prior settler is not protected thereby.

I must therefore reverse your decision, and reject the application presented by Brown.

The company's selection will stand, unless it can be shown that said selection was improperly made, or that the land was, for any sufficient reason, not subject to such selection when made.

REPAYMENT—SOLDIERS' ADDITIONAL HOMESTEAD.

SOLOMON JEWETT.

Under section 1, act of June 16, 1880, fees and commissions paid by one who in good faith purchases certificates of soldiers' additional homestead rights, and locates the same, may be repaid, where the entries so made are thereafter canceled on the ground that they were based on spurious and forged papers.

Secretary Smith to the Commissioner of the General Land Office, September 25, 1895. (J. I. H.) (G. B. G.)

This is in the matter of the application of Solomon Jewett, assignee, for repayment of the fees and commissions paid by Wm. F. Hundley *et al.*, on December 11, 1875, January 6, February 5, and March 18, 1876, on soldiers' and sailors' additional homestead entries, covering five hundred and twenty acres of land in the Visalia land district, California.

On July 24, 1893, your office submitted the matter for the consideration of the Department, with the recommendation that "from the testimony submitted by the applicant, he appears to be entitled to the relief applied for." The application received the approval of Assistant Secretary Sims on July 31, 1893.

On September 12, 1893, by letter of that date, your office referred the matter back to the Department, with an expression of opinion that said application should not be allowed, and advised a re-examination of the papers, to determine whether the said Jewett is an innocent party, under the law, and whether the said Jewett can be recognized as the party who paid the fees and commissions, within the meaning of the act of June 16, 1880.

Section one of said act of June 16, 1880, is as follows (21 Stat., 287):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior, that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An act to amend an act entitled 'An act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States,' and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon cancelled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions, and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase-money on lands erroneously sold by the United States.

The entries hereinbefore referred to were canceled by our office letters "C", of August 8, 1878, March 31, 1877, and April 2, 1877, "for the reason that said entries were found to be based upon spurious and forged papers."

The amount paid on these illegal entries is \$138.00, and this is the amount applied for herein.

To follow more closely the language of the act cited, it appears that fees and commissions amounting to the above named sum of \$138.00 have been paid upon the location of claims on public lands, under the act approved March 3, 1873, that said claims were, after such location, found to be fraudulent and void, and entries thereon canceled.

It remains to be seen who has paid such fees and commissions, and whether such person is an "innocent party," within the meaning of the act cited.

The ostensible transaction is set forth in the affidavit of Jewett, accompanying his application, as follows:

STATE OF CALIFORNIA, *County of Kern*, ss:

Solomon Jewett, being duly sworn, deposes and says: That he is a native born citizen of the United States, a resident of the county of Kern, State of California; that on or about the month of ———, 1877, Wm. S. Powell, a land attorney at Visalia, California, sold me the following additional homestead certificates, to wit:

No. 2151, F. C. No. 921, Benj. F. Todd.

No. 1972, F. C. No. 755, John D. Mathis.

No. 1950, F. C. No. 737, James M. Hoover.

No. 1949, F. C. No. 736, Wm. C. Sullivan.

No. 1760, F. C. No. 558, John Thomas.

No. 1711, F. C. No. 519, Johannes Doell.

No. 1710, F. C. No. 518, Wm. F. Hundley.

Said Powell assured me that the said papers were all regular and valid, that he was the attorney in fact of each of the entrymen above named, and had authority to locate and sell the land for them, and receive the money therefor; he also assured me that others had used the same means to acquire title to the land, and that the same was entirely regular and customary, and I was more than ever assured of the regularity of all proceeding when the United States officials at Visalia, California, accepted the fees and commissions, and issued receipts on said additional homestead certificates.

The money paid the United States government was advanced by me to the said Powell, and I have never in any manner been reimbursed; that I have never secured title to the land; that I have never sold, assigned or transferred any of my rights herein to any one; that my purchase of said additional homestead certificates was in entire good faith, and free from any fraud or collusion with any one.

Wherefore, I most respectfully ask that the money paid to the United States Land Department as fees and commissions on said location be refunded, as this is but a small portion of my loss, by reason of my purchase above mentioned.

SOLOMON JEWETT.

Subscribed and sworn to before me this 13th day of February, 1893.

H. A. BLODGET,

Notary Public in and for Kern County, State of California.

I have given this matter careful consideration, and am of opinion that the fees and commissions, for which this application for repayment is made, were paid by the applicant, and that he is an "innocent party" within the meaning of the act cited, and entitled to the relief asked.

RAILROAD RIGHT OF WAY—SECOND MAP OF LOCATION.

MONTANA RAILWAY COMPANY.

A railway company that secures a right of way by compliance with the act of March 3, 1875, and thereafter fails to complete its line of road within five years as required by section 4 of said act, may file a new map of location, which will be operative only on such portions of the public land as are free from every claim or right at the date of the approval of said map.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (J. I. H.) (E. F. B.)

With your office letter of June 22, 1893, were forwarded nine maps of location filed by the Montana Railway Company, under the provisions of the act of March 3, 1875 (18 Stat., 482), with a recommendation that the same be not approved, said maps having been returned to your office with departmental letter of May 31, 1893, for examination and report with recommendation.

The location shown upon five of those maps is identical with that shown upon maps filed by said company, which maps received the approval of this Department on September 2, and October 20, 1882.

The act of March 3, 1875 (18 Stat., 482), provides:

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.

In 1882 the Montana Railway Company filed with the Secretary of the Interior copy of its articles of incorporation and due proofs of its organization under the same, in accordance with the rules and regulations of the Department governing in such cases, which were accepted by the Secretary of the Interior, and thus acquired a grant of the right of way through the public lands of the United States for the road contemplated by its charter upon complying with other provisions of the act, requiring it to definitely fix the location of its road.

In 1882 said company filed maps showing the location of its road, which maps received the approval of the Secretary on September 2, and October 20, 1882.

Section 4 of the act of March 3, 1875, provides:

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.

The company failed to build its road within the five years required by the 4th section of said act, and you are therefore of the opinion that the right of way over the public lands can not be extended by the filing of new maps of location, and therefore recommend that the approval of the same be denied.

Your opinion is predicated upon the theory that all right of way over the public lands acquired by the filing of the articles of incorporation and due proofs thereunder, and the location of the road, which received the approval of the Secretary, was forfeited by the failure of the company to complete the road within five years after the location thereof.

I do not so construe the act.

Whenever a railroad company, duly organized under the laws of any State or Territory, or by an act of Congress of the United States, shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs thereunder, it acquires, by virtue of the act of March 3, 1875, a present grant of the right of way through the public lands of the United States upon the line of the road indicated by its charter, and whenever the road desiring to secure the benefits of the act shall file its map of location within the period prescribed by the 4th section of the act, and the same is approved by the Secretary of the Interior and noted upon the plats in the local office, all lands over which such right of way shall pass shall thereafter be disposed of subject to such right of way.

The filing of the map of location within the time prescribed by the act fixes the right of the road as to all lands which shall be traversed by it, and after the road is so located, all lands upon the line thereof, to which no claim or right had attached at the date of the filing of its articles of incorporation and due proofs of organization thereunder with the Secretary of the Interior, were subject to such right of way, and this right could not be forfeited or impaired, if the company should within five years after the location of such section of road complete the same, but if the company should fail to complete its road within the five years after the location thereof, the rights granted and acquired by the filing of such maps of location shall be forfeited as to any such uncompleted section of said road.

It is therefore clear that the rights that are forfeited, as declared by the proviso, are the rights to subject to its right of way the lands over which the road passes, as indicated by its map of location.

But I can see no reason why the company should be denied the right to file a new map of location at any time thereafter, even after the expiration of the five years, to operate upon only such portions of the public lands as are free from every claim or right at the date of the approval

of the new map of location. The right to build the road through the territory covered by its map of location is acquired by its charter, under which it would have the right to condemn private property for the purposes contemplated by such character, but it would not acquire any right to pass over any portion of the public lands by virtue of its charter, and acquires the right solely under the act of March 3, 1875.

I have, therefore, this day approved the maps, which can only secure to the company the right to pass over any portion of the public lands upon the line of its road, and to which there is no claim or right existing at the date of said approval.

RAILROAD GRANT—WITHDRAWAL—TERMINAL—CASH ENTRY.

DENNY ET AL *v.* NORTHERN PACIFIC R. R. CO. and MOORE *v.* DENNY.

Lands north of the western terminus of the main line of the Northern Pacific, as fixed at Tacoma, were released from the effect of the prior withdrawal thereof on general route, by the establishment of said terminal, and the right to equitable action on a private cash entry made of such lands after such withdrawal and prior to said release, is not defeated by the subsequent withdrawal for the branch line of said road east of said terminal.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (F. W. C.)

On September 20, 1870, Frank Tarbell was permitted by the local officers to make private cash entry covering lot 4 of Sec. 24, lots 1, 2 and 3, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ Sec. 25, T. 24 N., R. 4 E., Seattle land district, Washington.

This land was within the limits of the withdrawal upon the map of general route of the main line of the Northern Pacific Railroad, which map was filed on August 13, 1870. The notice of the withdrawal thereon, however, was not received at the local office until October 19, 1870, nearly a month after Tarbell had been permitted to purchase the land before described.

In 1875 the Northern Pacific Railroad Company fixed Tacoma as the western terminus of its road, and the land in question falls north of the terminal established to the grant at Tacoma. Prior to this time, however, the map of general route of the branch line of said road had been filed, to wit, on August 20, 1873, and the land in question was embraced within the limits of the withdrawal adjusted to said map.

On March 20, 1884, the map of definite location of the branch line, showing the line of road east of Tacoma, was filed, and the limits adjusted to said definite location embraced but forty acres of the land covered by Tarbell's entry, to wit, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25; so that Tarbell's entry conflicts with the existing limits of the grant to said company only as to the said SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, which tract is claimed by the company on account of the branch line.

Tarbell's entry was considered in your office decision of November 20, 1889, which held that as lots Nos. 1, 2 and 3, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, had been excluded from the limits of the grant under which said company claims, the entry might be referred to the board of equitable adjudication; but as to the remaining tract in Sec. 25, to wit, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the entry was held for cancellation, for the reason stated—that the land has continuously been withdrawn since August 13, 1870.

So far as the company's right to the tract in conflict is concerned, the only question presented for consideration is as to whether it can claim the benefit of the withdrawal made on account of the main line, in view of its abandonment of that portion of the main line opposite the land in question, so as to defeat Tarbell's entry, to the end that the land may be claimed on account of its branch line.

After a careful consideration of the matter, I am of the opinion that it can not. While it is true the withdrawal attaching upon the filing of the map of general route of the main line was a legislative withdrawal, the purpose of which, as stated by the supreme court in several decisions, was to preserve the land to await the definite location of the company's road, yet the selection of the terminus for the grant on account of the main line at a point south of the land in question, so far as the company's rights in the premises under said withdrawal were concerned, released from any claim on account of that grant those lands previously withdrawn according to the map of general route, which, upon adjustment to the terminus selected, fell north of the terminal limit. The company, however, claims this land on account of its branch line, but at the date of the filing of the map of general route of the branch line this land was shown by the records to be embraced in the purchase by Tarbell.

The withdrawal made on account of the general route of the branch line can not, therefore, be pleaded against Tarbell's rights under his entry, made as before described. Strictly speaking, said entry was improperly allowed, having been made after the filing of the map of general route of the main line of said road, but, as before stated, when the company fixed the terminus of the main line at the point south of the land in question, it abandoned all right or claim to the land previously withdrawn on account of said main line, so far as the same fell north of the terminal limit, and while the invalidity might be taken advantage of by the government, it can not be pleaded by the company, neither could any subsequent withdrawal made upon the map of definite location of the branch line affect his rights in the premises.

Rule 13, governing the submission of entries to the board of equitable adjudication, provides for the confirmation of "all bona fide entries on lands which had been once offered, but afterwards temporarily withdrawn from market, and then released from reservation, where such lands are not rightfully claimed by others." The rightful claim of

others here referred to must be those that had attached prior to the making of the entry submitted for confirmation, for it can not be held that lands are rightfully claimed by others, where the initiation of such adverse claim was with the knowledge of a previously allowed entry upon the same land.

I am, therefore, of the opinion that Tarbell's entry may be submitted to the board of equitable adjudication for confirmation in its entirety, and that the company has no such claim on account of its branch line to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 25, as would bar the confirmation thereof. Your office decision holding for cancellation the entry made by Tarbell, as to the tract last described, is, therefore, reversed.

In this connection, I have considered the appeal by Watson W. Moore from your office decision of June 4, 1890, rejecting his homestead application, presented on October 12, 1890, embracing the land covered by Tarbell's entry, for conflict with said entry. Moore's claim rests solely upon his application, presented, as before stated, on October 12, 1890, he claiming that the entry by Tarbell was invalid, and, therefore, no bar to the allowance of said application. For the reasons hereinbefore given, the rejection of Moore's application is proper, and your office decision of June 4, 1890, is therefore affirmed.

The papers relative to said cases are herewith returned, for action by your office in accordance with the directions herein given.

RAILROAD GRANT—FORFEITURE—SETTLEMENT RIGHT.

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

To the extent of the lands occupied by actual settlers the State act of March 1, 1877, was a forfeiture, and where the governor of the State has relinquished such lands, in accordance with said act, they are restored to the public domain free from their previous patented condition.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (J. I. H.) (F. W. C.)

I have considered the appeal by Ole Ellingson from your office decision of October 20, 1892, rejecting his application to file pre-emption declaratory statement for the fractional NW. $\frac{1}{4}$, Sec. 15, T. 132 N., R. 39 W., St. Cloud land district, Minnesota.

Said tract is within the indemnity limits of the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway, as shown by the map of definite location filed and accepted December 18, 1871.

On November 25, 1873, the company selected this tract on account of the grant and the same was patented January 22, 1877.

The time within which this road should have been built under acts making the grant, and the extension of June 22, 1874 (18 Stat., 424), expired March 3, 1876.

The road not having been completed, the State, by act of its legislature dated March 1, 1877 (Special Laws of Minnesota, 1877, page 257), extended the time, and among other conditions imposed by the act, the following is taken from section 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.

The supreme court in the case of said company against Greenalgh (139 U. S., 19), referring to the conditions in favor of settlers, imposed by the acts of June 22, 1874 (*supra*), and March 1, 1877 (*supra*), states:

The road of the plaintiff under consideration here was not completed till November, 1878, and consequently the rights granted to the company were subject to forfeiture, or at least the company was subject to hostile proceedings, for breach of this condition attached by law to the grant. A mere breach of condition does not of itself work a forfeiture of a grant; some other proceeding must be taken by the grantor to indicate his dissatisfaction with the breach and his intention to exercise his rights to revoke the grant and take possession of the property in consequence thereof. While in this case no specific action was taken by Congress to work a forfeiture of the grant, or by the State, yet the continued possession and use of the property by the company were, in fact, subject to the condition that the rights of settlers upon the lands at the time should not be interfered with, where such settlements had been made in good faith, as was the case in the present instance. And it would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to avoid any forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

The company having failed to build the road within the required time, in extending the time the grantor might impose a new condition. *New Orleans Pacific Railway Company v. United States* (124 U., 124).

From the above it will be seen that the conditions imposed by the said act of March 1, 1877 (*supra*), are binding upon the company.

The purpose of the State act was to take recognition of the company's default; to extend the time, and to protect settlers then upon land within the limits of the grant.

To the extent of the lands so occupied it was a *pro tanto* forfeiture (see *Tronnes v. St. Paul, Minneapolis and Manitoba Ry. Co.*, 18 L. D., 101), and in view of the governor's relinquishment under the act, I am of the opinion that the previous patent in advance of construction is no bar to extending to the settler the benefits of the State act.

I have therefore to direct that Ellingson be permitted to file as applied for, and upon the completion of the same that patent issue to him as in other cases.

Your office decision in the case under consideration is reversed.

SWAMP LAND GRANT—AGRICULTURAL CLAIM.

DEWITT *v.* STATE OF OREGON ET AL.

Where, under the regulations of the Department a homestead claimant is permitted to make entry of a tract included within an unapproved swamp selection, and makes the requisite corroborated oath as to the character of the land, the State thereafter waives its claim by failure, after due notice, to file objections to the allowance of said entry as required by said regulations, and, in case of such default, the entryman should not be required to furnish further proof as to the character of the land.

Lands cannot be properly classed within the swamp grant that are subject to annual overflow, but are made thereby fit for cultivation, and without which crops can only be raised by irrigation.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895. (J. L.)

The land involved in this controversy embraces lots 4, 5, and 6, and the N. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 2, T. 24 S., R. 31 E., Willamette meridian, containing 157.83 acres, in Burns, formerly Lakeview, land district, Oregon.

On September 14, 1883, there was filed in the name of the State of Oregon, swamp land selection list No. 34, including 34,710.08 acres of land, and therein, the lots 4 and 5 and the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 2 aforesaid. Said list was verified by the *ex parte* affidavits of William Lytle and H. E. L. Layton, made upon the printed forms of affidavit usual in such cases. The surveyor-general in his letter transmitting said list advised your office that he had not full faith in the proofs arrived at by *ex parte* evidence, and recommended that the lands listed in No. 34 be inspected by a government agent appointed for that purpose.

On June 23, 1887, your office sent out one George F. Elliott as special agent to act in conjunction with one C. L. Richmond, as agent of the State of Oregon, with instructions to examine in the field each and every subdivision, however small, of the lands listed as aforesaid, and make report thereon. On November 14, 1887, Richmond and Elliott submitted a joint report, in which they "swamped" lots 4 and 5 and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 2 aforesaid, and gave descriptions of said parcels of land, which show that they did not see said tracts in the year 1887.

On February 27, 1888, Charles H. DeWitt applied to make homestead entry of lots 3, 4 and 5, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 2 aforesaid, alleging settlement on September 24, 1887, and continuous residence upon and improvement of said land ever since. By letter "K" of April 30, 1888, your office instructed the local officers, that DeWitt was not a party to the agreement under which the agents aforesaid made their examination and report, and could not be prejudiced

thereby; and that they must proceed in respect to DeWitt's homestead application, in accordance with office circular of December 13, 1886. Consequently on July 18, 1888, DeWitt was permitted to make "subject to the swamp land claim", homestead entry No. 1074 (Lakeview series), of lots 4 and 5 and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 2 aforesaid. He alleged in his homestead affidavit that,

I have lived upon and held peaceable possession of this tract since September 24, 1887. No one else has any improvement upon said tract except J. S. Devine, who has a fence running through the SW. $\frac{1}{4}$. My improvements are worth at least \$800.

Subsequently, on September 3, 1889, DeWitt was permitted to make additional homestead entry, No. 10 (Burns series), of lot 6 of section 2 aforesaid, containing 12.95 acres of land; thus filling out his whole entry to 157.83 acres of land as herein first stated.

Simultaneously with his homestead entry aforesaid, to wit: on July 18, 1888, DeWitt filed his "statement under oath, corroborated by two witnesses that the land in its natural state is not swamp and overflowed and rendered thereby unfit for cultivation", substantially, as required by the first section of the circular of December 13, 1886 aforesaid; and the local officers at once notified the governor of Oregon thereof, and of his rights, privileges and duties under sections 2 and 4 of said circular.

It does not appear by the record before me, that any protest or application for a hearing was presented on the part of the State of Oregon within sixty days as provided in said circular. Therefore, the State of Oregon, by the express terms of said circular, was and is concluded from thereafter asserting any claim to the land in controversy under the swamp-land grant. (For circular, see 5 L. D., 279.)

I learn from your office letter "K" of March 21, 1891, that on March 14, 1890, DeWitt filed in the local office, "the required affidavit duly corroborated, setting forth that the tracts involved were not swamp or overflowed land"; and that DeWitt "asked that a hearing be ordered for the purpose of determining the true character of the land". "That the local officers set June 30, 1890, at 10 o'clock A. M., and the local office, as the time and place of this trial; and that due notice was given to the parties in interest, Henry Miller and the State of Oregon.

The papers referred to above are not in the record before me. But all this proceeding was irregular and unnecessary. When DeWitt offered his second corroborated statement and asked for a hearing, he should have been told by the local officers, that the State of Oregon had never selected lot No. 6 as swamp land; that the State by failing in 1888, to present a protest or an application for a hearing, had concluded her right thereafter to claim as swamp lands the residue of his entry; and that there was no contest pending against his entry.

However, the second notification gave the State of Oregon another opportunity of one hundred and eight days, within which to present a protest or an application for a hearing. The State again made default; did neither; did not even appear: By the express terms of the circular

aforesaid, "the burden of proof was upon the State to establish the character of the land". The State offered no evidence. DeWitt moved for a decision in his favor. The local officers overruled the motion, and DeWitt appealed to your office. On March 21, 1891, your office affirmed the action of the local officers, and required DeWitt to offer testimony relative to the character of the land; and assigned as the sole reason for such ruling, the report of Richmond and Elliott aforesaid, to which DeWitt was no party, for which he was not responsible, and which could not impair his rights, as stated in your office letter "K", of April 30, 1888; above referred to.

Your office decision of March 21, 1891, was null and void. The State of Oregon having twice disregarded notice, and refused to present either protest or application for a hearing, or to otherwise appear and submit to the jurisdiction, there was no case before your office. Moreover, your office had no authority to impose upon DeWitt the burden of proof.

As directed, the local officers convened the parties on December 27, 1892, and forced them to contest. Henry Miller assumed the burden of proof and examined twelve witnesses. DeWitt examined twenty witnesses including himself. The land officers disagreed. On March 24, 1893, the receiver recommended that the swamp-land selection be cancelled, and that DeWitt be permitted to perfect his homestead entry. On March 28, 1893, the register recommended that the swamp land selection be perfected, and that DeWitt's homestead entry be cancelled.

On December 12, 1893, your office, after premising that—

the testimony is very contradictory as a whole; and as your decisions are opposed to each other, I am compelled in rendering a decision in this case, to resort to any and all records in this office, whether alluded to at the hearing or not, in order to arrive at a conclusion as to the true character of the land,

proceeded to decide,

"That lots 4 and 5 and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 2, T. 24 S., R. 31 E. were swamp land on March 12, 1860, and as such inured to the State under the provisions of the act of September 28, 1850, as extended to said State by the act of March 12, 1860." . . . And that "homestead entry No. 1074, Lakeview series, in the name of Charles H. DeWitt, covering lots 4 and 5 and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 2, T. 24 S., R. 31, E., is this day held for cancellation."

From said decision DeWitt has appealed to this Department.

I have carefully examined and considered the whole record before me, all the testimony, the briefs of counsel, and the official records referred to in the decision appealed from as the basis thereof. Making all due allowance for the testimony of witnesses, who are either in feeling or in interest partisans of the settlers on the one side, or the swamp-land claimants on the other, and refraining from harsh criticism, I have no difficulty in finding that the evidence shows by a clear and palpable preponderance, that the tracts of land now in controversy were never

swamp lands; that in their natural state they were subject to partial overflow every year for about four months, between the months of March and July, and that said tracts of land were made by said overflow fit for cultivation; and that without said overflow they would be unfit for cultivation,—unfit even to make hay which is the staple crop of that region. The testimony also proves by a clear and palpable preponderance, that if said tracts of land were drained of water, or if, in the language of the statute, they were “reclaimed by levees and drains,” they would be thereby reduced to a dry and inarable desert; and that it is necessary every year to supplement the natural overflow by artificial irrigation, in order to make said tracts produce even an annual crop of hay. (See State of California, 15 L. D., 428.)

The swamp land claimants did not introduce a single witness, who had, or pretended to have, any knowledge of the character of the land at any time prior to March 12, 1860, or before the month of June, 1862. They produced two witnesses, Thomas N. Lofton, aged 68 years, and C. S. Grigsby, aged 60 years, who professed to have seen Harney Valley in 1862, in the months of June, July, and September. They did not see each other then and there, but they concur in testifying that all the low and meadow lands in Harney Valley were that year principally covered with water. They also confirm the historical fact developed in many contest cases before this Department, that the year 1862 was a season of extraordinary and phenomenal waterfall, amounting almost to a deluge, over the whole Pacific Slope from the crest of the Rocky mountains to the sea, and from British Columbia to Mexico. I see no reason to doubt that in the year, 1862, between June and September, the lowlands and meadows of Harney Valley were principally covered with water.

They next introduced one E. C. Bulkeley, aged 52 years, who said that he was in Harney Valley in the year, 1865, employed as a packer for the soldiers under the command of Col. Baker. He testified that “the lowlands in Harney Valley were very wet then (1865), as compared with the conditions of the country now,” (January 4, 1893.) The rest of their witnesses first saw the land later; two of them in 1874, two in 1878, two in 1879, and two in 1884, and their personal knowledge was limited by those dates. Their twelfth witness was J. Simmons, a civil engineer, employed by the swamp-land corporation represented by Henry Miller. He was placed on the stand to prove that he had gone upon the land in contest with swamp-land witnesses, in order that they might certainly be able to identify it; and also to prove that the fall of the land was very slight. Although he had run and checked a line of levels expressly to ascertain the slope, he could not remember any figures, and he had lost or misplaced his book of field notes, and would not produce it.

The entryman, Mr. DeWitt, introduced as a witness, Louis B. Stein, aged 67 years, who says he was a soldier in the army of the United

States, was on duty in Harney Valley for about three days in the latter part of September, 1853, and again for two or three days in the month of June, 1859. That in the year, 1867 or 1863, he and the company to which he belonged scouted all through Harney Valley. That he was stationed in the valley from 1871 to 1872; and was discharged from the army at Fort Vancouver in the year, 1873. Stein testified:

That in September, 1853, the valley was dry, about the same as now (January 18, 1893) only from the observations he then took, "there used to be more patches of grass than from what there is now, and there seems to be more sage-brush now than then". That in June, 1859, he did not observe any particular change in the country; it seemed to be as it was in September, 1853. That in 1867 or 1868, he (his command) stayed here long enough to scout all through this country in a military point of view, and that he thinks that the character and conditions of Harney Valley as to being wet or dry was then about the same as at the present time. That in the years, 1871 and 1872, there was some little difference in the general appearance of Harney Valley from its general appearance when he had seen it previously at different times. In August, 1872, the witness was in the immediate neighborhood of the land on which DeWitt resides. A man named Jim Clark who had the contract to furnish hay for the troops, cut and stacked hay in the year, 1872, on said land. The land must have been dry for it was fine hay. The witness visited Clark's haystack there. He went there twice to see an old friend named Paddy Collins, an old soldier, who was working for Jim Clark, who contracted for the government hay. Clark's camp was located on the ridge on the land now in dispute.

The testimony of Mr. Stein was not contradicted. His character was not impeached. The only attempt to disparage him was by the asking of sarcastic and impertinent questions on the cross-examination.

Charles A. Adams, aged 41 years, testified:

That in August, 1864, he was in Harney Valley for about three days, travelling through, and around the west and north side of the valley, and was upon and over the lowlands, or meadows as they are now called. Said lands were dry; as dry then as they are now; and about the same as they were in August of 1882, the year when witness settled in the valley.

D. H. Smith, aged 49 years, testified that he first came to Harney Valley in the summer of 1872, and remained for more than two years. That he then became acquainted with the land on which Mr. DeWitt now resides. That the natural growth was principally grass, and the land was mostly dry. That in the year, 1874, a man named Boon cut the hay on the land now in question.

In the year, 1883, in the months of July and September, W. R. Gibson, aged 62 years, E. N. Fleming, aged 34 years, M. Fenwick, aged 37 years, and J. L. Albert, aged 41 years (witnesses for the entryman), came into the valley, and settled in the neighborhood of DeWitt's present homestead. John Devine, who then represented the State of Oregon and the swamp-land claimants as Henry Miller does now, claimed the said land; and in the year, 1883, cut and stacked upon the tract from 130 to 150 acres of good hay. All four of the gentlemen above-named testified that the land in controversy was then dry, fine meadow land, growing good hay, consisting of wild clover, and red-top, blue-joint and other rye-grasses. That the land needed no drainage, but did need irrigation, and that drainage would have ruined the land.

Yet, it was in this year, 1883, that the swamp-land claimants procured the filing of their selection list No. 34, and the corroborative affidavit of William Lytle and H. E. L. Layton referred to in your office decision. Other witnesses for DeWitt came to know his land later; four of them in 1884, two in 1885, two in 1886, three in 1887, and one in 1889. Their recorded testimony shows that they are intelligent men, and have testified sincerely, although they are plainly very earnest in their convictions that the land in controversy is not, and never has been, "swamp and overflowed land made unfit thereby for cultivation." They prove that the low grounds are "beautiful meadows"; that they are overflowed every year for a few months between March and July, and that the land is rendered thereby fit for cultivation, with the aid of artificial irrigation which Mr. DeWitt has provided for. They prove that neither the swamp-land claimants, nor any other persons have ever made any attempt to drain said land; and that successful drainage would reduce it to a desert, and render it valueless for any purpose.

According to the testimony of Seth Bowers, one of the swamp-land witnesses, corroborated by others, the soil of DeWitt's homestead consists of decomposed vegetable mold, varying in depth from two to two and a half feet, and rests like a mat or carpet upon a stratum of hard earth, or lava rock, called by the settlers "hard-pan", which is impervious to water, and to the roots of the superincumbent vegetation. The land lies in Harney Valley, which is a basin about four thousand five hundred feet above the level of the sea, near the crest of the Rocky mountains, enclosed by high hills, peaks and ridges. The Silvies river runs through it from north to south. The soil of the low grounds is porous, and when the spring overflows recede, it dries very rapidly during the long days of July and August under the hot sun and in the rarified atmosphere of that elevated region. Rain rarely falls during the summer. And unless the meadows are kept wet by artificial irrigation, the grasses which have flourished in the spring, wither, dry up, and die, and become useless for hay, before harvest time.

In September, 1887, when DeWitt first established his residence on lot 4, a fire broke out near his residence and got away from him. Not only did the grasses burn, but the soil itself, like peat, burned to the depth of several inches, before it was extinguished.

DeWitt has maintained his residence on lot 4, and four children have been born to him there. He has also established a profitable dairy business.

The testimony of intelligent witnesses on both sides contradicts the description of the land in controversy given in the report of Elliott and Richmond aforesaid. Moreover, a sketch map of the location filed with said report as part thereof, places the Silvies river outside of DeWitt's homestead, and represents the latter as one compact quarter-section, without any lots; and thereby indicates that Elliott and Richmond were not upon the tracts in 1887. Dewitt testifies that Elliott and

Richmond both told him in 1887, to go ahead and build his house, as they knew that the land was not "swamp".

On August 25, 1873, the exterior lines of T. 24 S., R. 31 E., were surveyed, and the map thereof, of record in your office, was approved January 8, 1874. It appears thereby that Silvies river crossed the north line of the township at a point 4 miles and 77 chains distant from the northwest corner thereof. The subdivisions of said township were surveyed October 15 to 25, 1875, and the map of said township now of record was approved April 15, 1876. The field notes show that in October, 1875, on the true lines between sections 2 and 11 and sections 2 and 3 there was "land level, good grass, soil first rate, subject to overflow." The general description of the township was: "This township is well adapted for grazing, as it is well watered, and most of it is subject to overflow during the spring and early summer. But a very small portion of this township is fit for agriculture."

These notes show that the land in its wild state in 1875 was in very much the same condition as in 1893, when the testimony in this case was taken.

The deputy surveyor in 1875, made also the following field note:

I find that in running the section lines between sections 1 and 2 and 2 and 3, I intersected what appeared to be a channel of the Silvies river, which when the boundary of the reservation (the Malheur Indian) was run, must have been taken for the main channel of the river. This channel (meaning the channel surveyed and meandered in 1875), appears to have been formed since the exterior lines of this township were run, when the deputy surveyor made the intersection on the north boundary of section 2, at 77.00 chains (from the northwest corner of section 2.)

And on further examination I found what appeared to be a drift above the township line in Silvies river which had been formed since the exterior lines were run, and hence turned the channel so as to cause it (the river) to make about one mile westing, crossing the township line on the north boundary of section 3.

It does not appear from the testimony in this case, whether the channel obstruction above referred to, was a natural drift, or an artificial dam. It is certain, however, that in the interval of twenty-six months between the two surveys, the channel of Silvies river moved westward more than a mile. In 1873 the nearest point of DeWitt's low grounds was half a mile away from the river. In 1875 his homestead had a river front of more than half a mile.

The well established fact of such a change as that, impairs the weight and force of all inferences as to the probable condition and character of a tract of land at any given period of time, drawn from its appearance at other times either before or after. The swamp-land claimants would have me infer that Harney Valley was on March 12, 1860, in same condition as it was in the pluvial year of 1862. I think it more reasonable to infer that its condition in 1860 was as it was seen by witnesses to be in 1853, 1859, 1864, 1867-68, 1871, 1872, 1873, 1875, 1883 and ever since.

But the burden of proof is on the swamp land claimants. After the lapse of more than thirty years they claim under a congressional grant, which must be strictly construed against the grantee. The State of Oregon and her assignees have failed to prove that the land in controversy was on March 12, 1860, swamp and overflowed land made unfit thereby for cultivation.

Therefore, your office decision is hereby reversed. The swamp land selection No. 34, is cancelled as to the lands involved herein. And DeWitt's homestead entries are held intact.

RAILROAD GRANT—ADVERSE CLAIM—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* FLETT (ON REVIEW).

A pre-emption filing of record at the date of definite location excepts the land covered thereby from the operation of the grant.

The former decision of the Department herein, 13 L. D., 617, recalled and vacated.

Secretary Smith to the Commissioner of the General Land Office, September 27, 1895. (J. I. H.) (F. W. C.)

I have considered the motion filed for the review of departmental decision of November 28, 1891, in the case of the Northern Pacific Railroad company *et al. v. Flett* (13 L. D., 617), in which it was held that the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 21, T. 20 N., R. 3 E., Seattle land district, Washington, passed to the Northern Pacific Railroad company under its grant.

This land is within the primary limits of the grant to said company opposite that portion of the main line extending from Portland to Tacoma, to aid in the construction of which a grant was made by the Joint resolution of May 31, 1870 (16 Stat., 378).

The map showing the general route of this portion of the line was filed August 13, 1870, and the map of definite location opposite this land was filed May 14, 1874. The land is also within the primary limits of the grant for the branch line of said road, as shown by the map of definite location filed March 26, 1884.

The records show that John Flett filed declaratory statement for this land on April 9, 1869, which filing was still of record at the date of the passage of the joint resolution of May 31, 1870, and at the dates of the filing of the several maps of location referred to.

In 1883 one Algyer tendered a declaratory statement for this land, which was rejected by the local officers for conflict with the grant, from which action he appealed.

In 1886 one James De Lacey tendered a homestead entry for this land which was also rejected for conflict with the grant, from which action he appealed. On September 7, 1887, Flett tendered proof upon his pre-emption filing.

It was upon consideration of the proof tendered by Flett that the claims of the several applicants, and the company, were considered, resulting in the decision under review which rejected Flett's proof and applications by Alger and De Lacey, holding that the land had passed to the company under its grant.

From the record made in said case it appears that on February 20, 1874, Flett made homestead entry of a tract of land different from that here in controversy, upon which he made proof and received final certificate on June 9, 1880. This was held to be in the decision under review, an equivalent to a relinquishment of the filing made by Flett in 1869, and as an abandonment of any right thereunder, and it was therefore held that the land being free from claim at the date of the filing of the map of definite location on May 14, 1874, passed to the company under its grant.

In the recent case of *Whitney v. Taylor* (156 U. S., 85), the court, after referring to the case of *Hastings and Dakota Railway Co. v. Whitney* (132 U. S., 357); *Kansas and Pacific Railway v. Dunmeyer* (113 U. S., 629), *Newhall v. Sanger* (92 U. S., 61), and *Bardon v. Northern Pacific R. R. Co.*, *supra*, held as follows:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be inforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

It would appear from this decision that if it be shown by the record that a pre-emption or homestead claim has been once accepted and placed of record, the same, in so far as a railroad grant is concerned, in an appropriation of the tract covered thereby until the claim is finally canceled.

In the present case, as before stated, Flett's filing was accepted by the local officers and placed of record in 1869, and it remained of record until after the filing of the several maps of location, upon which the claimed rights of the company depend. Said filing was an appropriation of the land as against the attachment of rights under said locations, and it must be therefore held that the land was excepted from the company's grant and the previous decision of this Department referred to, is therefore recalled, vacated, and set aside.

It further appears from the papers now before me that, following the decision of this Department, the land in question was patented to the company, and on July 27, 1893, a rule was laid upon the company to

show cause why the land should not be reconveyed to the United States, as contemplated by the provisions of the act of March 3, 1887 (24 Stat., 556).

As it is held that the land was excepted from the company's grant, it follows that the patenting of the same on account thereof was erroneous, and I have, therefore, to direct that demand be made upon the company, under the provisions of the act of March 3, 1887, *supra*, for the reconveyance of this land to the United States, and at the expiration of the time allowed within which to comply with said demand, you will make report to this Department of the action taken, to the end that such further action may be taken as the facts then presented may justify.

AMENDMENT—DESERT LAND ENTRY.

HARRIET A. BABCOCK.

A desert land entry may be amended by substituting a tract not included therein for one of the sub-divisions covered by said entry where after diligent effort it is found impossible to effect reclamation of said sub-division.

Secretary Smith to the Commissioner of the General Land Office, September 28, 1895.
(J. I. H.) (J. L.)

On September 29, 1891, Harriet A. Babcock made desert land entry, No. 89, of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 8, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 7, T. 13 N., R. 12 E., Lewiston land district, Montana.

On September 29, 1893, she filed an application to amend her entry by substituting the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Section 8, in place of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 7.

On January 24, 1894, your office denied said application because it did not appear that Mrs. Babcock originally intended to take said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Section 8.

Mrs. Babcock has appealed to this Department.

It is true that Mrs. Babcock did not originally intend to take the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8. She intended to take one hundred and sixty acres of land accessible to the water that was to flow through an irrigating ditch which she had planned and intended to construct. She selected the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 7, as a part of her entry, because after making a preliminary survey for the ditch, she verily believed that the water could run from said ditch over and upon the land in said last mentioned subdivision, and successfully irrigate it. In this she was mistaken, as she found out after two years of trial, during which she expended money liberally in carrying out her plan of irrigation. When she came to locate the ditch on the ground with precision, it was discovered that it was necessary to run it around the heads of numerous intervening *coulees*, increase its length, and reduce

the average fall per running foot to such an extent as to make it impossible to carry water over the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 7; so that she could not redeem her promise to irrigate that particular subdivision. It appeared, however, that the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8, which lies lower down the stream and contiguous to her holding could be successfully irrigated by means of said ditch, which was calculated and constructed to carry enough water to irrigate one hundred and sixty acres of land.

Mrs. Babcock's mistake was not as to the identity of a particular piece of ground; but only as to its adaptability for the common purpose of the government and herself. It was caused by the intervention of unexpected physical obstacles.

Your office has reported that the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8 is vacant; so that no adverse interest will be affected by granting her application.

Both of the local officers, as required by the rule (See 8 L. D., 187), report that they are acquainted with Mrs. Babcock and her witnesses; and they recommend that the amendment be allowed.

I do not find any case exactly like this; but I am sure that the allowance of the amendment applied for will be in harmony with previous departmental decisions respecting amendments of entries.

In the case of *Johnson v. Gjevre* (3 L. D., 157), it is said:

While it is true that the right to amend lay within the discretion of the officers charged with the disposition of the public lands, dependent upon the proofs, it is also true that if Gjevre could fairly show his original intention through mistake or accident to have been defeated, the right to make such change would be conceded, subject to any superior rights intervening prior to such application.

In the case of *Frank S. Garred* (16 L. D., 171), an entry was "so amended as to avoid conflict with the subsequent entry of another, though the entry as amended will embrace land not originally applied for." The Secretary saying:

As the matter appears to be one solely between the entryman and the government, and as no one will be injured by the amendment . . . I think the amendment may be properly allowed.

It is the policy of the government to have desert lands reclaimed. Mrs. Babcock's good faith is clearly shown by her yearly proofs for 1892 and 1893 filed in the record.

For these reasons your office decision is hereby reversed, and the amendment applied for will be allowed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS—CHEYENNE AND
ARAPAHOE LANDS.RITTWAGE *v.* MCCLINTOCK.

The prohibitory provisions of section 14, act of March 2, 1889, with respect to settlement rights in the Territory of Oklahoma, were intended to be general in character as to lands opened to settlement in said Territory, and it therefore follows that said prohibition extends to lands formerly embraced in the Cheyenne and Arapahoe reservation, and became effective from March 3, 1891, the date of the act announcing the acquisition of the Indian title to said lands.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 1, 1895. (E. M. R.)

The land involved in this case is the NE. $\frac{1}{4}$ of Sec. 21, T. 12 N., R. 8 W., Oklahoma City land district, Oklahoma Territory.

The record shows that on April 20, 1892, George W. McClintock made homestead entry for the above described tract. July 18, 1892, A. F. Rittwage filed an affidavit of contest against the entry of McClintock alleging prior settlement.

A hearing having been ordered on November 8, 1893, the local officers rendered their decision, in which they found, first, that Rittwage was disqualified under the prohibition of entrance within this reservation prior to the time of opening fixed by the President's proclamation, and, secondly that he did not make actual *bona fide* settlement before the entryman, and as a consequence they dismissed the contest.

Upon appeal, your office decision of July 17, 1894, affirmed the action of the local officers. In that decision the following facts were found (page 2): "From the facts presented, it is shown that Rittwage, in company with one Francis E. Hall, was, about one month prior to the opening and during the prohibited period, in the vicinity of the tract in question locating 'corners.'" It was likewise found, that through a mistake in the time, Rittwage entered the Territory twenty-one minutes before twelve on the day of opening. It was further found that Hall was within the Territory at the time of opening, as the result of a prior agreement with Rittwage by which Hall was to hold a tract until he (the plaintiff) arrived, but that by mischance Rittwage failed to find Hall, and located upon the tract in controversy.

For the purposes of this decision it is only necessary to say, that the Department passes only upon the first question of fact, that is: that Rittwage was within the reservation about one month prior to the opening, seeking to locate "corners."

It appears that the evidence bears out the finding of your office upon this question, and we come now to a discussion of the effect of such presence within the Territory when coupled with the attempt to secure an advantage, as has been set out.

The law upon this question, as it relates to the Cheyenne and Arapahoe reservation, has never been definitely determined by this Department, and in order that a just conclusion may be arrived at, and that

a decision may be rendered that would be in accord with the law, an exhaustive research has been made into all acts that bear upon the question, and considerable difficulty has been experienced in arriving at a conclusion.

The act of March 1, 1889 (25 Stat., 757), provides for the opening of lands acquired from the Muscogee, or Creek, Nation, in what is known as Oklahoma Territory proper.

The act of March 2, 1889 (25 Stat., 980), being

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 thirtieth, eighteen hundred and ninety, and for other purposes,

which most specifically referred to the opening of the Seminole lands, provides in section 14 (page 1005), that—

The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, etc., . . . *Provided*, That said commission is further authorized to submit to the Cherokee Nation the proposition that said nation shall cede to the United States in the manner and with the effect aforesaid, all the rights of said nation in said lands upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January nineteenth, eighteen hundred and eighty-nine, and ratified by the present Congress; and if said Cherokee nation shall accept, and by act of its legislative authority duly passed ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized as soon thereafter as he may deem advisable, by proclamation open said lands to settlement in the same manner and to the same effect, as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto.

As a result of the negotiations of this commission the lands of the Cheyennes and Arapahoese were sold to the government.

The first portion of section twenty of the act of May 2, 1890 (26 Stat., 81), being an act to provide a temporary government for the Territory of Oklahoma and other purposes, is as follows:

That the procedure in applications, entries, contests and adjudications in the Territory of Oklahoma shall be in form and manner prescribed under the homestead laws of the United States, and the general principles and provisions of the homestead laws, except as modified by the provisions of this act and the acts of Congress approved March first and second, eighteen hundred and eighty-nine, heretofore mentioned shall be applicable to all entries made in said Territory, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof.

The act of March 3, 1891 (26 Stat., 989), being—

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 thirtieth, eighteen hundred and ninety-two, and for other purposes,—

after making provision for various Indian tribes, amongst others, the Cheyenne and Arapahoes, provided for the payment of the twenty-fourth of thirty installments, as provided,

to be expended under the tenth article of treaty of October twenty-eighth, eighteen hundred and sixty-seven, twenty thousand dollars.

Article 1, of the agreement with the Cheyennes and Arapahoes (26 Stat., 1022,) of the act *supra*, reports that these Indians have conveyed their title to the United States, the land being west of the ninety-sixth degree of west longitude.

Section 16 of the same act (page 1026) opens the land to homestead settlers only.

The President's proclamation of date April 12, 1892 (27 Stat., 1018), provides (see page 1021):

Notice, moreover, is hereby given that it is by law enacted that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto, and that the officers of the United States will be required to enforce this provision.

I have thus chronologically set out the sections of the various acts bearing upon the questions at bar.

Was there a prohibition in law against entering the Cheyenne and Arapahoe reservation prior to the date fixed in the President's proclamation when the reservation was thrown open to settlement and entry on April 19, 1892? If so, did the inhibition commence to run from the date of the proclamation of the President, the act of March 2, 1889, or the act of March 3, 1891?

It will be seen that section 14 of the act of March 2, 1889, provided for the appointment of a commission to negotiate with the

Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character, in and to said lands.

The Cheyenne and Arapahoe reservation lies west of the ninety-sixth degree of longitude and is in the Indian Territory.

By reference to the section as quoted, it will be noticed that the proviso seems to refer to the lands to be acquired from the Cherokee Nation only, but this is an apparent, not a real purpose. That portion of the proviso containing the prohibition commences, it will be seen, with the disjunctive word "but", showing an intention to disconnect that which follows from what has just preceded it, or—to speak more specifically as to what was the intention of Congress—to make the prohibition of general application not only to the lands of the Cherokee Nation, but also to all the lands of Indians west of the ninety-sixth degree of longitude. In other words, making it applicable to the land mentioned in the body of the section.

The meaning of congress would have been more clearly set forth had a second proviso been recited and we should read instead of the word "but", the words "provided further." It is in effect a double proviso; the first having a limited effect, the second being of general application.

The intention of Congress appears to have been to make the prohibition of entering lands in the Oklahoma Territory general. I am unable to conceive any reason why it should have been the intent of Congress to make it unlawful for a prospective homesteader to go into the Creek, Seminole, or Cherokee reservations prior to the time fixed in the President's proclamation therefor, and yet be lawful to enter the Cheyenne and Arapahoe or Sac and Fox reservations. It is true that the acts opening these reservations contain no prohibition, but there is nothing in these acts (the one now more specifically under consideration being that of March 3, 1891) which excepts the land thus opened from the operation of section fourteen, quoted.

To hold that there was no prohibition would be, by implication, to repeal that section of the act of March 2, 1889, and repeals by implication are not favored and will only be recognized when the two acts are irreconcilable. Such is not the status here, and the conclusion is therefore reached, that the prohibition contained in section fourteen of the act of March 2, 1889, is of effect as applied to the Cheyenne and Arapahoe reservation.

The contention that the inhibition commenced to run only from the date of the President's proclamation is not well taken. It was either by act of Congress unlawful to enter the reservation, or the warning given in the prohibition of the proclamation was without authority. The language used by the President shows clearly that there was no intent to establish a prohibition, but to call attention to an existing prohibition, the words used being: "Notice, moreover, is hereby given that it is by law enacted that until said lands," etc.

On the other hand, I do not consider that the prohibition commenced to run from the date of the act containing it—March 2, 1889—for at that time the title of the Indians to the land had not been extinguished. As the result of treaties, this reservation had formally and solemnly been set aside for the Indians, and their title to it, of whatever nature it may have been, was sufficient to prevent its annexation to the public domain for the purposes declared in the act, without their consent. The language of the act itself bears out this position. The commission appointed was "to negotiate" with these Indians "owning or claiming lands" "for the cession to the United States of all their title," etc. Such being the case it seems unreasonable to hold that Congress intended the prohibition to commence to run from the passage of the act.

Suppose the Cheyennes and Arapahoes never had consented to the sale of their lands, or, rather, only consented after a lapse of many years; would it be maintained that during such lengthy period the

prohibition ran? and that all who entered under the law, as construed by the Department, would be disqualified? Such a holding would be a grievous burden upon the public in violation of justice and not necessitated by the language of the statute, or public policy.

The prohibition was a prospective one. It was passed at a time when the title in Indians was still in existence, and when their refusal to sell would have defeated it and rendered it imperative. It was made general in order to prevent the necessity of embodying a special prohibition in the statutes as each separate reservation was opened to settlement.

The prohibition commenced to run from March 3, 1891. It was by the act of that date that it was formally announced that the title of the Indians had ceased and determined. The object for which the commission had been appointed had been accomplished; the land had become a part of the public domain; nothing then existed to prevent the operation of section fourteen of the act of March 2, 1889, and from March 3, 1891, the inhibition ran.

It is therefore held, under the doctrine laid down in *Curnutt v. Jones* (21 L. D., 40), that Rittwage is a disqualified homesteader; it appearing that he was in the Territory, in the vicinity of the tract in question, for the purpose of seeking advantageous information to be used when he entered.

Your office decision is accordingly affirmed.

INDIAN LANDS—DOUBLE ALLOTMENT.

NIELS ESPERSON (ON REVIEW).

The acceptance of a patent under an allotment right asserted in accordance with the terms of the act of March 3, 1891, precludes the recognition of a prior allotment, allowed under the general allotment act of February 8, 1887.

Secretary Smith to the Commissioner of the General Land Office, September 25, 1895. (W. F. M.)

Niels Esperson has filed a motion for review of departmental decision rendered on March 10, 1892 (14 L. D., 235), rejecting his homestead application for the SE. $\frac{1}{4}$ of section 4, township 12 N., range 7 W., within the land district of Kingfisher, Oklahoma, for conflict, as to the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the same section, with the allotment of Johanna Hauser under the act of February 8, 1887 (24 Stat., 388).

The following specifications of error are assigned as a basis for the motion:

1. The discovery of important, competent and material evidence tending to show the true parentage of the minor child Johanna Hauser.
2. The proof, by subsequent acts of the said Johanna Hauser, through her parents and guardians, of said parentage.
3. The abandonment of the alleged allotment by the claimant thereto, her parents and friends, and the implied confession of fraud therein by said abandonment.

4. The making of another complete allotment for and on behalf of the claimant to the tract herein involved at a point within the Cheyenne and Arapahoe lands declared open to entry and settlement by the President's proclamation of April 12, 1892, under the terms of the treaty of February 13, 1891.

On November 26, 1892, this Department transmitted the motion to the Commissioner of Indian Affairs, together with a request for "a report of the facts in the case." Replying to this communication on December 3, 1892, the Commissioner inclosed copy of a letter from Charles F. Ashley, Indian agent at the Cheyenne and Arapahoe agency, of date March 23, 1892, from which the following is quoted:

Johanna Hauser, represented to be the minor child of Ben-hi-kish Hauser and Herman Hauser and allotted under act of February 8, 1887 (24 Stats., 388), the NE. $\frac{1}{4}$ of the SE. $\frac{1}{2}$ of section 4, township 12 N., range 7 W., 40 acres, was not the child of Ben-hi-kish Hauser, but of Mollie Hauser, Cheyenne Indian, a former wife of Herman Hauser, from whom said Herman Hauser has not been legally divorced. Said Johanna Hauser, at the time of said allotment, as aforesaid, was in the custody and care of its mother Mollie Hauser, upon this reservation, has remained, and is now in her custody.

I find upon examination of record of allotments to Cheyenne and Arapahoe Indians, under act of March 3, 1891, that said Johanna Hauser was allotted E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and lots 1 and 2, section 30, township 16, range 8, in month of September last.

Mollie Hauser, mother of Johanna Hauser, says she did not know that her child Johanna had been allotted lands in Oklahoma; that she wants the allotment under the agreement ratified March 3, 1891, to stand.

It appears, furthermore, that patent was issued on May 6, 1892, to Johanna Hauser, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 1 and 2, section 30, township 16, range 8 W., Cheyenne and Arapahoe reservation, and was transmitted to the Indian Office on July 7, 1892, for delivery to the patentee.

There is presented here, under the view expressed in Amy Hauser *et al.* (on review), 20 L. D., 46, a case of a double allotment, and the authority of that case requires the cancellation of one of those allotments. In view of the representation made that her mother desires that within the reservation to stand, and since patent has already issued for the land embraced therein, the allotment to Johanna Hauser under the general act of 1887 is ordered canceled; the decision of March 10, 1892, rejecting Esperson's homestead application is revoked, and the papers in the case are herewith returned for further appropriate action in the premises.

MILITARY RESERVATION—DONATION CLAIM.

HENRIETTA M. HALLER.

An executive order creating a military reservation is not effective as to land embraced within a donation claim on which final certificate has issued.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (J. I. H.) (J. I. P.)

I am in receipt of your office letter "G" of August 24, 1895, asking for instructions relative to the petition of Henrietta M. Haller as the donee of Charles Thompson, for the issuance of patent on the donation claim of said Thompson, involving parts of sections 27 and 28, Twp. 29 N., R. 2 E., in Washington, for which Thompson filed notification No. 989, Olympia, Washington, series, under the act of September 27, 1850 (9 Stat., 496) and legislation supplemental thereto, and received final certificate No. 202 therefor on January 31, 1862.

It appears that on September 22, 1866, more than four years after Thompson had received his final certificate therefor, said lands with others were by executive order embraced in a military reservation.

Upon inquiry, addressed to the Hon. Secretary of War, July 28, 1882, that official under date of August 15, 1882, reported that the reservation had been made at the instance of the former chief of engineers, and that its retention had been recommended by all the officers of engineers and boards of engineers who had reported upon the defenses of Puget Sound and adjacent waters, and that the reasons for the retention of said reservation still continued, and that there was objection to the issuance of patent as proposed, for the tract in question. Your office thereupon without passing on its merits, suspended the donation claim of Thompson, notification 989, certificate 202.

Under date of August 5, 1895, the facts were again, at the request of your office, presented by this Department to the Hon. Secretary of War, who under date of August 12, 1895, replied that

The military reservation referred to within is situated at Double Bluff on Whidbey Island, Washington. It was reserved for defensive purposes. The objection heretofore urged against the issue of patent on a donation claim covering lands within its limits still exists.

Under the facts as detailed above, I am clearly of the opinion that when Thompson received his final certificate No. 202 on January 31, 1862, he was then entitled to patent for the lands involved, and that his right to patent could not be affected by the creation of a military reservation, which included his donation claim.

The objections urged by the Hon. Secretary of War against the issuance of patent for said lands, affords no valid grounds for the action of the government in the premises.

This case is almost identical with that of James Maxcy (19 L.D., 470), decided by the Department December 6, 1894, and for the reasons therein given, I think patent should issue for the tracts here involved.

You are therefore directed to remove the suspension, heretofore imposed by your office on Thompson's donation claim, notification 989, certificate 202, and to issue patent for the lands involved therein, as provided by law.

OKLAHOMA LANDS—SAC AND FOX RESERVATION.

GRIFFARD ET AL. *v.* GARDNER.

The prohibition in section 14, act of March 2, 1889, against entering the Territory of Oklahoma prior to the time fixed therefor, is general in its character and applicable to the Sac and Fox lands, becoming effective from the date of the act opening said lands to settlement.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ section 21, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 29, T. 15 N., R. 5 E., Guthrie land district, Oklahoma Territory.

The record shows that on October 18, 1891, James M. Gardner made homestead application for the above described tracts, which application was erroneously rejected on account of a supposed conflict with a homestead entry made for other land. October 29, 1891, he appealed to your office from the rejection of said application. October 31, 1891, Ira Hook filed homestead application for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 22, alleging prior settlement. The following homestead entries were allowed erroneously, each embracing forty acres of the tracts applied for by James M. Gardner:—The entry of John J. Baugh, made on October 18, 1891, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21, and that of Charles Griffard, made January 12, 1892, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22, said township and range.

A hearing having been ordered by your office letter of September 10, 1892, to determine the respective rights of the various parties hereto, on September 29, 1894, the local officers rendered their decision, finding that in July, 1891, defendant was within the Territory opened to settlement September 22, 1891, and held that he was disqualified and recommended that his homestead application be rejected, and that the entries of Griffard and Baugh remain intact.

On December 10, 1892, Ira Hook and James M. Gardner filed a stipulation in which Hook agreed to relinquish his claim to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 22, and Gardner to relinquish his claim to the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 21. On the same day Hook made homestead entry for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 22 and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21.

On April 11, 1895, your office decision was rendered in which you found that "as the defendant went within the Territory in July, 1891,

to look over the country, he is disqualified from acquiring title to lands applied for by him."

Further appeal brings the case to the Department.

For the purposes of this case I have made no finding of fact upon the matters in dispute as to priorities of settlement by the various parties to this suit, for the reason that I find that the evidence bears out your finding as to Gardner's presence within the Territory in July, 1891, and that it is shown that he was there looking over the lands and was either on or near the tracts in controversy.

The act of March 2, 1889, (25 Stat., 980), after authorizing the President to appoint a commission for the purpose of securing the titles of all Indians owning the lands west of the 96th degree of longitude in the Indian Territory, contains in section 14 thereof the following:

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

The act of February 13, 1891 (26 Stat., 749), provides for the opening of these lands, but contains no prohibition.

The President's proclamation of September 18, 1891, opening this reservation, contains the following:

Notice, moreover, is hereby given that it is by law enacted, that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto.

This case is similar in all respects under the law to that of *Rittwage v. McClintock*, 21 L. D. 267. It was there held: First, that there was a prohibition against entering the Cheyenne and Arapahoe country, which prohibition had as its authority the said section 14 of the act of March 2, 1889, *supra*; and, second, that the prohibition commenced to run, not from the date of the passage of the act of March 2, 1889, but from the date of the passage of the act opening the lands to settlement (in this case, from February 13, 1891); and that it continued in force and effect until the day set by the President at which the prohibition ended (here) September 22, 1891.

It thus follows that your office decision was not in error, and the same is hereby affirmed.

PRACTICE—SECOND CONTEST.

HOLM ET AL. *v.* LAUGHLIN.

Proceedings under a second contest should not be allowed pending the final disposition of a prior case involving the same land.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (P. J. C.)

The land involved in this appeal is a part of the SE. $\frac{1}{4}$ of Sec. 8, T. 22 N., R. 3 E., M. D. M., Marysville, California, land district.

It appears that Minnie E. Laughlin made homestead entry of said tract December 1, 1885.

I gather from the statement in your office letter that upon the report of a special agent, dated November 26, 1886, the entry was held for cancellation, for the reason that the land was mineral in character, and sixty days allowed to apply for a hearing on this question. A hearing was had before the local office on September 23, 1889, the government being represented by a special agent. The local officers "rendered partially dissenting opinions," and on appeal your office, by letter of November 25, 1892, decided that

the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 8 was mineral in character, and that the remainder of said SE. $\frac{1}{4}$ of said section 8 was agricultural in character.

It is also stated that

on February 1, 1893, the said Minnie E. Laughlin, homestead claimant, filed an appeal to the Honorable Secretary of the Interior, which was duly forwarded, and is now pending and undecided.

It appears that on February 3, 1893, Jacob N. Holm *et al.* filed corroborated affidavit, alleging a claim to a part of the land embraced in said homestead entry, and that at the time of filing said homestead entry the affiants were operating placer mines thereon; that at the former hearing they had no voice in the management thereof, and alleging that they would be able to make a stronger showing as to the mineral character of the tracts claimed than was made before. The land claimed by affiants is the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said SE. $\frac{1}{4}$, thus including the three ten acre tracts held to be mineral by the former decision of your office.

The local office ordered a hearing on this affidavit, at which each party appeared and submitted testimony. The register and receiver held that

the land in contest, more particularly the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of section 8, is not of any practical value for mining purposes, or for the minerals therein contained, and that whatever value they had for such purposes was practically exhausted several years ago; that said tract should be classed as agricultural land.

The contestants appealed, and your office, by letter of December 19, 1893, held that it was error in the local office to allow this second hearing upon the former contest, dismissed the contest, and returned the affidavit "for appropriate action after said former contest shall have been finally decided by the Honorable Secretary of the Interior.

From this action the contestants have appealed, assigning error in not considering their appeal.

The action of the local officers was clearly erroneous in ordering a second hearing pending the appeal in the former case, and there was no error in your office dismissing the appeal.

A better illustration of the justice of this rule, that a second contest will not be permitted pending the first, cannot be found than is presented by this case. Since the rendition of the judgment of your office in the case at bar the decision of your office in the first case has been affirmed by the Department, holding a part of her homestead entry to be mineral in character. Thus she has been put to the useless expense and annoyance of fighting a second contest when by the final judgment rendered in the first a part of her entry attacked by the record has been canceled.

Your office judgment is affirmed.

HUNTER *v.* BLODGETT.

Motion for review of departmental decision of May 16, 1895, 20 L. D., 452, denied by Secretary Smith, October 1, 1895.

PRACTICE—NOTICE BY PUBLICATION—NON-RESIDENT.

OLSEN *v.* EAGAN.

There is nothing in Rule 11 of Practice that requires a formal order of publication to be made by the local officers. It is sufficient if they authorize publication, either by formal order or verbally.

Notice by publication is the proper notice to be made where the party to be served is shown to be a non-resident.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895.
(E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 20, T. 157, R. 67, Devil's Lake land district, North Dakota.

The record shows that on March 21, 1884, William H. Eagan made timber culture entry for the above described tract.

On the 12th of April, 1893, Hendry Olsen filed an affidavit of contest alleging failure to comply with the law.

Notice for hearing was made by publication in the newspaper printed in the county wherein the land was located.

The record contains no order for service of notice by publication.

On the day set for taking the testimony in the case, the contestant appeared and submitted evidence.

On the day set for hearing claimant appeared by counsel and objected to the jurisdiction of the local officers on the ground that no legal proper notice had been served upon him. The motion was overruled and the local officers rendered the following decision:

Notice of contest issued in this case April 12, 1893, and same was published in "North Dakota Siftings" for a period of thirty days. Trial had June 15, 1893, defendant making default.

From the testimony presented it appears that the land embraced in said timber culture No. 359 has not been cultivated during the last five years; that no trees have been planted during that time and that no trees are now growing. We are, therefore, of the opinion that said timber culture No. 359 should be canceled.

Upon appeal, your office decision affirmed the judgment of the local officers.

The appeal raises the question of the sufficiency of notice shown, it being specifically urged that, there having been no order for the publication contained in the record, the publication was without authority.

Rule 11 of practice is as follows:

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

There is nothing in the rule that requires a formal order of publication to be made by the local officers. It is sufficient if they authorize the publication, either by formal order or verbally. Whether such order of publication is ordered may be determined by the record. If it appear that such service by publication was acquiesced in by the local officers and the showing made was such as would justify the use of the discretionary power conferred upon them by the rule, their jurisdiction is complete.

In *Jones v. De Haan* (11 L. D., 261), it was said, in speaking of this rule (page 263 of the opinion):

It is quite plain that this rule contemplates two classes of cases:

1st. Notice by publication to the entryman when he is a non-resident of the State.

2nd. When the entryman is within the State but absconds, or so conceals himself that personal service can not be made upon him. Under this rule, in the latter case, before the contestant is justified in resorting to service by publication, he must set out the facts showing what effort has been made to obtain personal service, so the register and receiver may determine whether or not he has used due diligence in such a degree as to justify them in allowing him to proceed to obtain service by publication.

It will be observed that the "diligence" used, and the "effort" made, which must be shown, are "to get personal service." If the party is not a resident of the State, no diligence or effort can "get personal service." The rules of practice pertaining to the same matter must, like different sections of the same statute, be construed together, so as to give effect to all, if it is possible to do so.

Rule 9 (then rule 10) is as follows: "Personal service shall be made in all cases when possible, if the party to be served is *resident in the State or Territory* in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served."

From this rule it is equally plain that personal service is not required to be made, if the party to be served is not a resident of the State or Territory; why, then, should diligence be shown to make personal service where such service is not *required* to be made.

I think these two rules can be reconciled to this construction. Rule 9 provides for personal service, when possible, on residents of the State or Territory. Rule 10 provides for the execution of such notice.

It would seem, therefore, that notice by publication is the proper notice to be made where the party to be served is shown to be a non-

resident. It appears in this case that defendant was a resident of the State of Minnesota and not of North Dakota and that such fact was satisfactorily established. The service made, therefore, was the proper service.

I concur in the decision of your office upon the finding of facts and the same is hereby affirmed.

SWAMP LAND GRANT—SELECTION—JURISDICTION.

MARQUAM *v.* SUOMELA.

The Department has no jurisdiction to settle questions arising out of irregular sales of swamp land by the State, if the land in fact belongs to the State under the grant of swamp lands.

It is the duty of the General Land Office to review the evidence submitted at a hearing held to determine the character of land claimed under the swamp grant, even though the State may not appeal from an adverse finding of the local office. The failure of the State to make its selection within the time named in the grant, does not defeat its title to lands of the character contemplated by said grant.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (G. C. R.)

On September 21, 1871, the State of Oregon selected (with other tracts) the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 27, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 28, T. 8 N., R. 4 W., Oregon City, Oregon, under the act of March 12, 1860 (12 Stat., 3), which extended the provisions of the act of September 28, 1850, known as the swamp land act, to the States of Oregon and Minnesota.

On January 25, 1889, the State, through its governor, secretary and treasurer, conveyed said tracts, with other lands, to P. A. Marquam for a valuable consideration.

On March 25, 1886, Peter Suomela made homestead entry of said tracts, and, on December 1, 1891, final certificate was issued to him. His entry was afterwards suspended because of the claim of the State, and a hearing was ordered by your office letter "K" of August 22, 1892, and was had February 10, 1893.

Testimony was taken as to the character of the land, both parties being present.

The register and receiver decided that the land was subject to overflow during freshets of winter, and from the melting of snow during May and June, and that after the waters recede, the land will grow and mature profitable hay crops. They, therefore, recommended the rejection of the State's claim and the release from suspension of Suomela's homestead entry.

No appeal was taken from that action; but your office, by decision dated February 14, 1894, reversed the action of the register and receiver, finding from the evidence, as also from the field notes of the public survey and reports from special agents, that the greater parts of each of

the smallest legal subdivisions embraced in the entry "will not, without diking or drainage, raise a profitable crop of wild hay in the majority of seasons." The entry was accordingly held for cancellation, and the land awarded to the State.

From that judgment the homestead entryman has appealed to this Department.

It is insisted that it was error of law not to have held the entry valid in all respects, whether the land included therein was swamp land or not, because:

1. The swamp land selection has never been approved.
2. There is no law of Oregon authorizing the sale of swamp land until the selections thereof made by the State have been approved.
3. That the State, through its legislature, has quitclaimed and granted all its right, title and interest in and to all swamp lands in the State to the homestead entryman or settlers thereon.
4. For the reason that the act of March 12, 1860 (*supra*), although a grant *in presenti*, was nevertheless a grant upon condition, and that the condition was not complied with in that the land was not selected by the State within the time designated in the act, and the title, therefore, never passed to the State, but the land has always remained subject to entry.
5. That it was error to hold the land was swamp, as against the adverse opinion of the register and receiver, whose decision was not appealed from.
6. That undue credit was given to the field notes and reports of special agents.

Conceding, in the first instance, the claim of appellant, that there is no law in the State of Oregon authorizing the sale of swamp land until the selection thereof made by the State has been approved, still it would not affect the question in the case at bar. If the land really belongs to the State under the swamp land act, and the agents of the State attempted to sell it in an irregular way, or even without authority under the State laws, this Department would have no jurisdiction to settle such irregularities.

Section 64 of Chapter 29, General Laws of Oregon, page 643 (1843-1872), provides that:

The right of the state to all swamp and overflowed lands within the state of Oregon held under the act of congress, approved March 12, 1860, in possession of or claimed by any actual settler under the pre-emption homestead or donation laws of the United States before the same was selected as swamp or overflowed lands by the authorities of said state under the provisions of the act of the legislative assembly of the state of Oregon, approved October 26, 1870, and before such lands were claimed by any lawful claimant under the swamp land law of Oregon, shall be, and the same are hereby granted, released and confirmed unto said settlers, respectively occupying and claiming as aforesaid, any portions of said swamp or overflowed lands.

Where entries of swamp lands have been allowed, or settlements thereon under the public land laws have been made, and the State, as in the section quoted, releases its claim to such lands, there is no reason why they may not thereafter be treated as public lands and disposed of as such.

Appellant cites no statute, but the section above quoted, which is presumed to be the statute relied upon, does not meet the conditions upon which the release or quitclaim of swamp lands to those claiming under the public land laws was contemplated. The lands in controversy were selected by the State long before Suomela settled thereon, and therefore the statute has no application.

Although there was no appeal from the findings of the register and receiver in favor of the homestead claimant and against the contention of the grantee of the State that the land was swamp, still your office had the authority to review the evidence and determine therefrom as to whether the decision "is contrary to existing laws and regulations." (Practice Rule 48.)

Again, under the provisions of the swamp land act, it is made the duty of the Secretary of the Interior to make out accurate lists and plats of the lands granted, and transmit the same to the governor of the state. To do this, he must determine what lands are of the character granted. (*French v. Fyan et al.*, 93 U. S., 169; *Railroad Company v. Smith*, 9 Wall., 95.)

Section 453 of the Revised Statutes requires the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, to perform all executive duties appertaining to the issuing of patents "for all grants of land under authority of the government." Such being the case, it was the duty of your office to review the testimony taken at the hearing, whether the findings of the local office were appealed from or not. *State of Oregon*, 3 L. D., 474.

I have carefully examined the testimony taken at the hearing. The homestead entryman admits that the land is usually submerged twice a year. He testifies that the June freshet of 1887 covered the land with six feet of water, and that it remained on five weeks; that in June of every year, but 1889, water covered the land. He states that he has raised crops of potatoes, carrots and cabbages every year, but those crops were very meager, spots of land having been only spaded in its preparation and cultivation.

A considerable scope of country, including the land in controversy, is shown to be low and flat, covered with swamps and sloughs, and subject to overflow, both in winter and summer. The entryman built a box house, and put it on piles six feet high, presumably to be above the waters.

From this evidence, together with the reports of the special agents and the field notes of the public survey, there can hardly be any question as to the character of the land, and I concur in your office finding that the land is now, and was at the date of the grant, swamp and overflowed within the meaning of the swamp land act.

The remaining question is, whether or not the State forfeited its right to the land by its failure to select the same according to the terms

of the 2d section of the act making the grant (12 Stat., 3). That section provides that:

The selection to be made from lands already surveyed in each of the states including Minnesota and Oregon, shall be made within two years from the adjournment of the legislature of each state at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session after notice by the Secretary of the Interior to the governor of the state that the surveys have been completed and confirmed.

The land herein was surveyed and the survey was approved December 30, 1856, and the selection was not made until September 21, 1871.

It is manifest, therefore, that the legislative mandate was not observed in this selection.

The case of *Pengra v. Munz* (29 Fed. Reporter, 830), cited by counsel, holds that the grant of 1860 (*supra*) to Oregon and Minnesota was made upon the condition precedent that the selection of lands thereunder is made within the time limited therein, and that if the selection is not made within the time prescribed, the grants revert to the United States.

I can not concur in this view of the law.

The act of September 28, 1850, known as the swamp land grant, was made applicable to the State of Oregon by the act of 1860 (*supra*). It granted "the whole of those swamp and overflowed lands which may be or are found unfit for cultivation." Under that designation and description, the act read "shall be and the same are hereby granted." It was therefore a present grant, as has been repeatedly held by the courts. *Railroad Company v. Fremont County*, 9 Wall., 89; *Martin v. Marks*, 7 Otto, 345.

The second section of the act relating to Oregon contains a legislative direction that the selection "shall be made" within a certain time; but it has no clause of forfeiture, conditioned upon failure to observe that direction, or mandate.

The grant of swamp land was made to the several states "to aid in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein," and the grant was made upon the condition or proviso: "That the proceeds of said lands shall be applied exclusively as far as necessary to the construction of the levees and drains aforesaid." In this is found a direction under a proviso that the funds arising from the sale should be used in a certain way, yet it has never been held, so far as I am advised, that the grant on that account was a conditional one, or that the states would suffer a forfeiture thereof on failure to carry out its purposes. On the contrary, it is held in the case of *United States v. Louisiana* (127 U. S., 191,) that "the swamp lands are to be conveyed to the states as an absolute gift," and in the case of *Mills County v. Railroad Companies* (107 U. S., 566,) the court held that the legislative direction for the application of the proceeds from the sale of the swamp lands "is neither a trust following the lands, nor a duty which private parties can enforce against the State."

For a much stronger reason, it may be held that the legislative direction (not made under a proviso) contained in section 2 of the act of 1860 (*supra*), that selections should be made in a certain time, did not carry with it a trust, or that there could be any grounds for forfeiture on failure to observe the directions.

The land being of the character contemplated in the swamp land act, passed to the State, notwithstanding the failure of the State to make its selections within the time prescribed in the grant. (See letter of Secretary Schurz, June 4, 1880, 7 Copp, p. 53; also *Crowley v. State of Oregon*, *Idem.*, p. 28.)

The decision appealed from is affirmed.

SECOND HOMESTEAD ENTRY—SECTION 2, ACT OF MARCH 2, 1889.

HAPPEL *v.* HAINLINE.

The commutation of a homestead entry prior to the act of March 2, 1889, defeats the right to make a second homestead entry under section 2 of said act.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (F. W. C.)

I have considered the appeal by Jost Happel from your office decision of January 30, 1894, sustaining the action of the local officers in rejecting his homestead application covering the NE. $\frac{1}{4}$, Sec. 14, T. 5 S., R. 42 W., Oberlin land district, Kansas, for the reason that he has exhausted his rights under the homestead laws.

This land was formerly embraced in the timber culture entry of one Montreville Cummings, made August 15, 1885, against which Happel filed an affidavit of contest October 4, 1892, which resulted in the cancellation of said entry, as directed by your office letter of June 17, 1893.

On August 12, 1893, Joseph L. Hainline tendered a homestead application for this land, which was held subject to Happel's preferred right of entry under his contest.

On September 11, 1893, Happel tendered a homestead application, which was rejected by the local officers for the reason that he had exhausted his homestead rights, having made proof upon a homestead entry made for other land, under the commutation provision of the homestead law.

In his appeal Happel claims that under the provisions of the act of March 2, 1889 (25 Stat., 854), all parties who had made commutation proof prior to that date are entitled to make a second homestead entry. This is the sole question raised by the appeal.

It has uniformly been held by this Department that the commutation of a homestead entry is an entry under the homestead law and bars the further exercise of the homestead right. See case of Frank Lipinski (13 L. D., 439) and cases therein cited.

The act of March 2, 1889, *supra*, provides:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of the public land subject to such entry, such previous filing of entry to the contrary notwithstanding.

In commuting the homestead entry made for other land than that here in question, Happel perfected title to a tract of land for which he had made entry under the homestead law, and he is, therefore, not entitled to make a second entry under the provisions of the act of March 2, 1889, and your office decision sustaining the rejection of his application to enter the land in question, is affirmed.

This disposes of Happel's application and Hainline should be permitted to make entry upon his application heretofore presented, upon showing his present qualification.

GOODWIN *v.* WOOD.

Motion for review of departmental decision of September 19, 1895, 21 L. D., 29, denied by Secretary Smith, October 1, 1895.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

MONROE ET AL. *v.* TAYLOR.

Knowledge of lands within the Territory acquired by presence therein prior to the passage of the act of March 2, 1889, can not disqualify a settler who subsequently complies with the prohibitive terms of said act.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (C. J. W.)

April 25, 1889, John D. Taylor made homestead entry No. 77, for the NE. $\frac{1}{4}$, Sec. 35, T. 12 N., R. 5 W., Guthrie, Oklahoma.

May 20, 1889, Johnson filed his affidavit of contest against said entry, alleging that defendant did unlawfully and in violation of the proclamation of the President, enter upon and occupy said above described tract of land before the hour of twelve o'clock, noon, April 22, 1889.

Subsequently, on June 24, 1889, Francis M. Jordan filed a duly corroborated application in which he asked to intervene in the case, alleging substantially that he was the first legal settler upon said tract.

August 2, 1889, William A. Monroe filed an affidavit of contest against said entry in which he alleged that defendant did enter upon and occupy the lands opened to settlement by act of Congress, approved March 2, 1889, and especially the land embraced in said homestead entry, before the hour of twelve o'clock, noon, of the 22d day of April, 1889.

Johnson, on August 10, 1889, filed an amended affidavit of contest in which he alleged that the said entryman entered and occupied a portion of the land opened to settlement by the act of Congress of March 2, 1889, and the proclamation of the President of March 23, 1889, based thereon, in violation of section thirteen of said act, before the hour of twelve o'clock, noon, of April 22, 1889, and after the passage of said act, to wit, that said contestee entered upon and occupied said above described tract prior to twelve o'clock noon, of the 22d of April, 1889, and that he (Johnson) has been for a long time a *bona fide* settler and actual resident upon said tract.

On September 14, 1889, Jordan filed a supplemental affidavit in which he alleges the disqualification of both Taylor and Johnson, by reason of having entered said Territory during the prohibited period.

May 20, 1890, Monroe filed an amended affidavit in which he alleged the disqualification of contestants Jordan and Johnson, by reason of their having entered said Territory during the prohibited period.

June 24, 1889, Jordan filed application to enter said tract as a homestead, which was rejected for conflict with homestead entry No. 77, by Taylor. There seems to have been no appeal from the decision rejecting Jordan's application to enter.

A trial was finally had upon the allegations of the several contests, at which all parties were present and submitted evidence, and on June 23, 1891, the register and receiver rendered their decision in which they recommended the cancellation of said homestead entry, and, after the dismissal of the contests of Jordan and Monroe, awarded the preference right of entry to Johnson.

July 18, and July 21, Jordan and Taylor respectively filed appeals from said decision.

July 11, 1891, Monroe filed his corroborated application wherein he asked that the case be re-opened and he be allowed to introduce evidence in support of his charge that Johnson is disqualified from making entry. The register and receiver allowed said motion as to the issue between Johnson and Monroe and ordered a hearing at which the one question of Johnson's qualification was considered, notice of the proceeding being served on Taylor, Jordan and Johnson.

On March 9, 1892, the local officers rendered their decision on this branch of the case, finding that Monroe had failed to sustain his charge of disqualification against Johnson and affirmed their former finding of June 23, 1891.

Monroe appealed from the decision, holding that he had not shown Johnson's disqualification.

On September 15, 1892, your office considered these appeals only in so far as they put in issue the rights and qualification of Taylor, the entryman.

In said decision your office reversed the finding of the local officers in so far as it found Taylor to be disqualified and recommended the

cancellation of his entry, your office finding that a preponderance of the testimony showed him to be qualified, and held his entry intact.

The entry being thus upheld, your office deemed it unnecessary to pass upon any other issues presented by the several appeals, and did not pass upon any others.

On October 23, 1892, Frank Johnson filed his appeal from your said office decision, the chief error alleged being that your office erred in holding that Taylor was a qualified entryman under the evidence.

On November 17, 1892, William A. Monroe filed his appeal from said decision, alleging error in finding Taylor to be a qualified entryman and also in failing to find that he (Monroe) had sustained his allegations of disqualification against Johnson and Jordan.

On November 15, 1892, Francis M. Jordan appealed from said decision, assigning as error the finding that Taylor was a qualified entryman and that his settlement was prior to his (Jordan's), and also alleging as error the failure of your office to pass upon the question of the qualification of him, the said Jordan, as an entryman, that question being distinctly presented in his appeal to your office.

Since the record was transmitted to the Department, Taylor has relinquished all right, title, and interest in and to said tract.

While there are many contradictions in the case, and a number of the witnesses against Taylor have in part retracted their testimony, there appears to be no doubt of the fact that among the parties now remaining in the case, Jordan was the earliest settler. The evidence upon which the local officers base their finding that he is disqualified is furnished chiefly by Jordan himself. He admits that he was among those who went into Oklahoma in 1888 prior to the passage of the act of March 2, 1889, with a view to making settlement, and that he then made selection of a tract adjacent to the land now in controversy. When the order to vacate the Territory was given by the military he went out, and before the passage of the prohibitory act. He was in the employ of the Atchison, Topeka and Santa Fe Railroad company, as physician and surgeon, with headquarters at Purcell, I. T. He had been such physician and surgeon for a long time prior to the opening of the Territory. Between March 2, 1889, and twelve o'clock, noon, April 22, 1889, Jordan was three times inside the prohibited Territory, but each time he was on a professional visit to a sick patient and was at no time more than a few steps from the railroad right of way. The visits had nothing to do with this or any other land, and no inquiry was made, or other steps taken, to obtain information in reference to land. He does not seem to have obtained or sought any advantage of any one, after the passage of the prohibitory act. On the day of the opening he went into Oklahoma City on the train and walked from the station to the land in question and made his settlement. No knowledge of this particular land, or of adjacent lands, obtained prior to the passage of the act of March 2, 1889, however advantageous such information might be could have the effect of disqualifying him for

subsequent entry, and the presence of Jordan inside the Territory during the prohibited period, under the circumstances detailed, would not disqualify him unless it should appear that he acquired some advantage over others by reason of such visits. The conclusion that he did or could obtain such advantage seems to be clearly negated by the evidence.

Applying the principles of the law as held in the case of *Curnutt v. Jones* (21 L. D., 40), I think it was error on the part of the local officers to hold that these acts disqualified Jordan. Such finding is therefore reversed, and he will be allowed the preferencé right of entry.

REPAYMENT—COMMUTED TIMBER CULTURE ENTRY.

ELIZABETH C. WARD.

The Department has no authority to return the purchase money paid on the commutation of a timber culture entry, and allow new proof to be made under the amendatory act of March 3, 1893, on a showing that the entry in question was commuted in ignorance of said amendatory act.

Secretary Smith to the Commissioner of the General Land Office, October 1, 1895. (J. L.)

On October 29, 1884, Elizabeth C. Ward made timber culture entry, No. 3158, of the NE. $\frac{1}{4}$ of section 32, T. 126 N., R. 76 W., Aberdeen land district, South Dakota. On May 26, 1892, she filed her application to commute said entry for cash, and gave notice of her intention to make final proof to establish her claim to the land, before the clerk of the circuit court of Campbell county, South Dakota, at Mound City, the county-seat, on the 27th day of July, 1892, and furnished a list of witnesses. Notice was given by publication in a newspaper. On the day named she appeared with her witnesses before the clerk, and made final proof; alleging in her final affidavit that she thereby applied to perfect her claim to the land by virtue of the first section of the act of March 3, 1891 (26 Stat., 1095). Said final proof and affidavit were received on July 30, 1892, at the Aberdeen land office, where they were held to await the payment required by said act as a condition precedent to acquiring title. On May 6, 1893, she appeared in person at the local office, made and filed her non-mineral affidavit, paid the receiver two hundred dollars and his fees, and procured her final receipt and certificate for the land.

On April 11, 1894, she filed a petition alleging in substance that on May 6, 1893, when she paid her money to acquire title under the act of March 3, 1891, she did not know that the act of March 3, 1893 (27 Stat., 593) had been passed; and praying that her final proof under the act of 1891 be returned and cancelled; that the two hundred dollars paid by her for the land be refunded and returned to her; and that she be allowed to make new final proof in accordance with the act of 1893.

Your office denied her request, and she has appealed to this Department.

The bare statement of the facts shows that the conclusion of your office is correct, and that this Department is without authority, under the law, to grant relief.

Your decision is affirmed.

OKLAHOMA TOWNSITES—COMPENSATION OF BOARD.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 7, 1895.

To Townsite Trustees in Oklahoma Territory.

GENTLEMEN: You are sometimes occupied in work pertaining to contest cases which have been heard by other boards, the unfinished business of which has been assigned to you. You are entitled to a reasonable compensation for such services which should be paid by the contestants.

In ordinary cases the time occupied by your board subsequent to a hearing and decision ought not to exceed one fourth of a day.

If the contestants in any such case refuse to make a deposit to cover the necessary expenses of the board while engaged on that case or to pay the same before the deed is ready for delivery, the said amount will be levied upon the lot or lots as an additional assessment, payment of which will be required before the deed is delivered.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

SURVEY—ABANDONED CONTRACT—BONDSMEN.

INSTRUCTIONS.

Where the work has been but partially completed under an approved contract, and then abandoned by the contracting deputy, his bondsmen may be allowed to employ a competent officer to complete the remaining work under said contract, at the rates therein stipulated.

Secretary Smith to the Commissioner of the General Land Office, October 12, 1895. (W. M. B.)

I am in receipt of your office letter "E" of the 5th instant, wherein you request authority of this Department to allow the special maximum rates, \$25, \$23, and \$20—where the lines pass over "lands heavily tim-

bered, mountainous, or covered with dense undergrowth—for the survey of T. 21 N., R. 10 W., Washington, embraced, together with other townships, in contract No. 361, dated May 1, 1891, and awarded to United States Deputy Surveyor Clinton F. Pulsifer, who failed to fully execute the surveys therein designated, wherefore his bondsmen now make application to employ and send a competent deputy in the field in the capacity of "compassman," to complete the survey of the above-named township at stated rates.

The act of appropriation, of date August 20, 1890 (26 Stat., 370), for the use of the fiscal year ending June 30, 1891,—being the year during which this contract was entered into—stipulated that for the character of work herein described, the rate of compensation should not exceed \$18, \$15 and \$12 per mile.

The act of March 3, 1891 (26 Stat., 971), making appropriation for the service of public surveys for the fiscal year ending June 30, 1892, however, was retroactive, in so far as regarded compensation for such service in the States of Washington and Oregon, stipulating that \$25, \$23 and \$20 might be allowed for standard, township and section lines which pass over lands that were "heavily timbered, mountainous, or covered with dense undergrowth," for surveys in said States embraced in "contracts hereafter made," that is to say, subsequent to March 3, 1891. Payment of said special maximum rates of \$25, \$23 and \$20 for the survey of said T. 21 N., R. 10 W., was not only prescribed by the said act of March 3, 1891, but was also stipulated in said contract No. 361, which was executed *thereafter*, and approved by the Commissioner of the General Land Office, as also by my predecessor.

Under the above state of facts, and where work has been but partially completed under an approved contract, regular in all particulars, as in this case, and then abandoned by the contracting deputy, and his bondsmen apply in good faith to be allowed to employ a competent officer to complete the remaining work under such contract at the rates therein stipulated, when such compensation was authorized by law at the time the contract was made, as well as at the time such application is made, as in the present case, you are authorized to act in the matter and grant the application, without any further approval by this Department, authorizing the payment of the said special maximum rates.

DAY ET AL. *v.* FOGG.

Motion for review of departmental decision of June 13, 1895, 20 L. D., 553, denied by Secretary Smith, October 11, 1895.

APPLICATION FOR SURVEY—MEANDERED STREAM—ISLAND.

FRANK LEVEL ET AL.

An order for the survey of an island in a meandered river, within an Indian reservation, may be properly made, where it appears that said island existed at the date of the survey of the riparian lands as at present, and should have been included then in the official survey.

The Department should not order the survey of a small body of land lying between the water's edge and the meander line of a river, where the original survey has stood for a number of years, and the rights of riparian owners have intervened.

Assistant Attorney General Hall to the Secretary of the Interior, July 3, 1895. (E. M. R.)

I am in receipt by reference from the Hon. Acting Secretary, Wm. H. Sims, of the report of the Commissioner of the General Land Office of date May 2, 1895, and the report of the Commissioner of Indian Affairs of June 21, 1895, together with a request from him for an opinion as to whether certain islands therein mentioned could be lawfully surveyed.

The applications for the survey of these islands were made by Frank Level and W. J. Belk. These islands are situated in the Kansas river, T. 11, R. 15 E., Kansas, and are within the limits of the Pottawatomie Indian reservation.

From the application of Frank Level it appears that the island he desires to have surveyed, is partly in section twenty-nine and partly in section thirty, said township. It is shown to contain $26\frac{1}{4}$ acres, and the width of the channel between the island and main shore on either side is about two hundred feet, the depth of the river at ordinary stages of the water being about two feet, and that the island is three feet above high water mark, not subject to overflow, and is fit for agricultural purposes.

The application appears to have been served upon the riparian owners.

The application of W. J. Belk shows that the alleged island is situate in sections twenty-seven and twenty-eight in the same township and range and that it contains forty acres of land, the width of the channel on either side being one hundred and fifty feet and the depth thereof, at ordinary stages of water, being three feet. The island is about three feet above high water mark and is not subject to overflow; it is fit for agricultural purposes. The notice of application for survey was served upon the riparian owners.

In the field notes of private survey the following appears:

81-97 chs. to N. bank of the river when the water was high enough in the river to back around here This island lies, as you may see, partly in section twenty-seven and partly in section twenty-eight, very near the N. of each. There are two ponds of water on the N. side of this island and the place where the channel of the river once was and where the water comes yet at ordinary stages of water, but the river is low at present.

As has been before said, these islands are shown to be within the Pottawatomie Indian reservation and were not included within the survey of June 23, 1866.

There is with the record a letter from one Chas. W. Pape, in which he states that he bought the island sought to be surveyed by Level from one George W. Watson in 1882. It does not appear from whom his original grantors, Samuel Horner and wife, obtained their title.

By the first article of the treaty of 1861, proclaimed April 19, 1862 (12 Stat., 1191), the Commissioner of Indian Affairs was authorized to cause the whole of the Pottawatomie reservation to be surveyed in the same manner that the public lands are surveyed, the following language being used:

It is therefore agreed by the parties thereto that the Commissioner of Indian Affairs shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed, the expense thereof shall be paid out of the sale of the land hereinafter provided for.

But section 2115 of the Revised Statutes provides—

Whenever it becomes necessary to survey any Indian or other reservation, or any lands, the same shall be surveyed under the direction and control of the General Land Office and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

It would therefore seem that the survey should be placed under the direction of the Commissioner of the General Land Office.

I see no reason why the application of Frank Level should not be allowed, as in the case of the State of Idaho (16 L. D., 496), it was held (syllabus):

An order for the survey of an island in a meandered river may be properly made where it appears that said island existed, substantially, at the date of the survey of the riparian lands as at present, and should have been included then in the public survey.

Such are the facts in this case.

The plat of these surveys shows the existence of this island then, essentially as at present.

In the case of N. J. Paul (L. and R. Press copybook 245, page 271), decided by the Department on June 13, 1892, it was held that a survey would be ordered of an island in a case where the original survey did not even show the existence of the island, it appearing by other evidence, that it was in existence then, substantially, as now. This was done, too, in the face of a protest of a riparian owner. I consider the two cases cited sufficient authority for the ordering of the survey of the island mentioned.

A different state of facts confronts us in reference to the island sought to be surveyed by W. J. Belk. There it appears that at certain stages in the year, when the river is low, the island is joined to the main land on the north. It is not surrounded by water at all times and has not, therefore, that permanent status which is necessary in order that the tract may be regarded as an island.

In the case of *Edw. C. Hill* (17 L. D., 568), it was held (syllabus):

An application for a survey of a small tract of land lying between the meandered lands of a lake and the water's edge, will not be granted where the original survey has stood for a number of years, even though the meandered boundary of the lake may not exactly indicate the true water line.

That case came up upon an application, "for the survey of a tract of land extending into Lake Steilacoom," and it was further said in that opinion:

The burden of the evidence submitted is to show that there has been no change in the character of the land along the shore of the lake, since the date of official survey, at the point where the land which is sought to be surveyed is located.

I concur with you that if this fact were fully established, the Department will not, after so great a lapse of time, direct a survey and dispose of a small tract of land between the claim and the water, although it may be shown that the meander line did not exactly indicate the true water line, and that by this means a small fraction of land was left out which might, or should, have been included.

It having been held in this opinion already that the alleged island is not an island, the facts in the case then become essentially the same as those in the case just cited.

In *Mitchell v. Smale* (140 U. S., 406), the supreme court say:

Our general views with regard to the effect of patents granted for land around the margin of a non-navigable lake, and shown by the plat referred to therein, to bind on the lake were expressed in the preceding case of *Hardin v. Jordan*, and need not be repeated here. We think it a great hardship and one not to be endured for the government officers to make new surveys and grants of the beds of such lakes, after selling and granting the land bordering thereon, or represented so to be. It is nothing less than taking from the first grantee, a most valuable, and often the most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession, under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned.

And it was further said in the case of *Hardin v. Jordan* (140 U. S., 371):

It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

I am, therefore, of opinion that the application of W. J. Belk should be denied.

Approved,

HOKE SMITH,

Secretary.

WICKSTROM *v.* CALKINS ET AL.

Motion for review of departmental decision of May 16, 1895, 20 L. D., 459, denied by Secretary Smith, October 11, 1895.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

HALL *v.* GREEN.

The proof required of a purchaser from a railroad company who perfects title under section 5, act of March 3, 1887, may be made by one acting under a special power of attorney.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (I. D.)

The plaintiff in the case of Ira F. Hall *v.* George G. Green appeals from your office decision of February 28, 1894, holding his timber culture entry for cancellation as to the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 17, T. 2 N., R. 69 W., Denver land district, Colorado.

This land is within the limits of the grant to the Denver Pacific, now Union Pacific, Railway Company, whose rights attached by definite location of the road August 20, 1869, at which date this land was, however, covered by existing entries and so was excepted from the grant.

The proof shows that this land was contracted for in 1873 from the railroad company, and was fenced that year, and had ever since remained in cultivation and possession of the grantees of the railway company.

The following grounds of error are stated in the appeal:

1st. Error in finding that the entry of Green could be made under power of attorney.

2nd. Error in finding that Green was a *bona fide* purchaser, and in not finding that the burden of proof was on him to show affirmatively that he was such a purchaser.

3rd. Error in finding that the application of Hall to enter the land was not equivalent to a settlement under the second proviso to the fifth section of the act of March 3, 1887.

4th. Error in not finding that at the time Hall made his application to enter the land it was vacant public land, subject to timber culture entry; that his application, having been erroneously rejected by the local officers was equivalent to an entry, and was such an appropriation of the land as to place it beyond the power of Congress, by the act of March 3d, 1887, to create an adverse claimant, whose rights should be paramount to those of said Hall.

5th. Error in not finding that Hall's timber culture entry, having been made under a decision of the Department, upon an application antedating the passage of the act of March 3, 1887, can not now be canceled, by reason of anything contained in said act.

July 27, 1892, Wm. A. Moore appeared with a special power of attorney given by Green authorizing him to make the necessary proof, and made the proof required by law.

Hall objected to the proof so made by Moore.

No reason is perceived why proof can not be made under a power of attorney. The burden of proof is on Green to show that he was a *bona fide* purchaser of the land and it does not appear that the Commissioner held otherwise. The proof is convincing on that point and shows entire good faith in the purchase.

It also shows that when Hall made application for timber culture entry the land was under fence, was irrigated and cultivated under deed from the railroad company, and was not vacant public land.

Hall's entry has neither the sanction of law nor the slightest equity to sustain it.

Your office decision is affirmed; Hall's timber culture entry is canceled and Green will be allowed to complete his title according to law.

HAINES v. SEESE.

The departmental decision of June 18, 1894, 18 L. D., 520, in so far as it denied the right of entry to Haines, revoked on review, by Secretary Smith, October 11, 1895.

HOMESTEAD APPLICATION—PRELIMINARY AFFIDAVIT.

DAVIS v. FRASER.

A homestead application prepared before a clerk of court, or other officer remote from the local office, takes effect only when filed in the proper land office.

Applications and affidavits made before a United States commissioner, or clerk of court, are not valid and lawful unless they show that the applicant "is prevented" by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office.

The failure of a party to appeal from the adverse decision of the local office leaves the case to be determined as between the government, and the party successful below.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (J. L.)

In this case Mrs. Georgia Fraser has appealed from your office decision of February 24, 1894, reversing the decision of the local officers, and holding her homestead entry, No. 3144, subject to the right of Frank C. Davis to make homestead entry of the same land under his application, rejected by the local officers on July 10, 1893.

The land involved embraces the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 1 and 2 of section 6, T. 30 N., R. 1 W., Lewiston land district, Idaho.

The township map was filed April 12, 1893. Mrs. Fraser made entry of the tracts aforesaid on July 8, 1893.

On July 7, 1893, Frank C. Davis appeared before E. R. Wiswell, deputy clerk of the district court of Latah county, Idaho, at Moscow,

and made out and signed an application to make homestead entry of said land and the affidavits required by law, and transmitted the same with the fee and commissions to the register and receiver at Lewiston. In his homestead affidavit he made oath as follows: "That, owing to distance and expense I am unable to appear at the district land office to make this affidavit." Moscow is situated in T. 39 N., R. 5 W., twenty-four miles west of the land in contest. Lewiston is situated in T. 30 N., R. 5 W., twenty-four miles south of Moscow. The distance from the land in contest to the land office at Lewiston is thirty-four miles along a due southwest line.

Davis' application arrived at the land office on July 10, 1893, and was rejected for conflict with Fraser's entry; and on that same day Davis personally in writing, accepted notice of said decision and of his right to appeal.

On the next day, July 11, 1893, Davis was again present in person at the Land Office, and filed his affidavit of contest against Mrs. Fraser's entry, alleging, in substance, that he was the prior settler.

A hearing was had on August 25, 1893. After which the local officers found that Davis was the prior settler as alleged; but they recommended that his contest be dismissed, because his application for homestead entry made before the deputy clerk at Moscow, did not show that he, or his family, or some member thereof, was residing upon the land at the time of his application.

Davis was duly served with notice of said adverse decision, but took no appeal therefrom.

On February 24, 1894, your office, considering the decision of the local officers in pursuance of Rule of Practice 48, reversed the same, and held that Mrs. Fraser's entry was subject to the right of the contestant, Davis, to enter said land under his rejected application above referred to.

From said decision Mrs. Fraser has appealed to this Department. This brings before me for examination both the facts and the law of the case.

Under the rule, in the absence of an appeal, your office assumed to be true the finding of the local officers that Davis was the prior settler. Even upon that assumption, (which is not sustained by the evidence), I am constrained to dissent from your office decision. The local officers overlooked the act of May 26, 1890 (26 Stat., 121), amending section 2294 of the Revised Statutes. Your office overlooked the fifth section of the act of March 3, 1891 (26 Stat., 1095), amending sections 2289 and 2290 of the Revised Statutes. Considering said three sections together, as amended, it is plain that homestead papers prepared before a clerk, or other officer remote from the land office, take effect only when filed in the proper land office. Davis' application did not reach the register until July 10; two days after Mrs. Fraser's entry had been consummated. It was error to hold that Davis' application was executed, i. e.

became a finished act, before the filing of it; and that it would be returned to be made of record; and that Mrs. Fraser's entry was subject to it.

Homestead applications and affidavits made before a United States Commissioner, or the clerk of a State court, are not lawful and valid, unless they show that the applicant "is prevented" by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office. The only showing on this subject in this case is in the following words, extracted from the homestead affidavits: "That owing to distance and expense I am unable to appear at the district Land Office to make this affidavit."

This is not sufficient. The distance from the tract in contest to Lewiston is only ten miles greater than the distance to Moscow; and the difference could be ridden in two hours without additional expense. Distance and expense did not prevent the young man (he is twenty-one years old), from going to Lewiston on July 7. His father testified:

Before he got this notice he and I were down here (in the land office), to see in regard to Mrs. Fraser's filing on the land, and ascertained the fact here, that his application for filing on the land had been rejected.

On July 10, in the land office before the register, young Davis accepted service of notice of the rejection, and on the 11th he made and filed his affidavit of contest.

By failure to appeal from the decision of the local officers, Davis waived whatever right he had or might have acquired by pursuing his contest to a successful termination; and eliminated himself from the case, which remained to be considered by your office only as between Mrs. Fraser and the government. This Department will not re-open personal controversies, which the parties have abandoned, apparently with satisfaction. *Morrison v. McKissick* (5 L. D., 245); *Curtiss v. Simmons* (6 L. D., 359); *Schrotberger v. Arnold* (6 L. D., 425); *Dovenspeck v. Dell* (7 L. D., 20); *Grass v. Northrop* (15 L. D., 400).

I have carefully examined the testimony, and find that the evidence proves by a clear and palpable preponderance that the contestant, Frank C. Davis, was not an actual *bona fide* settler upon the land at any time. All the work done by him on the premises,—the girdling and deadening of trees, the log-rolling and brush-burning and the plowing—was done by him for the benefit of his father, and his two elder brothers, and at their instance and request. There was no house, and no indication of a purpose to build a house. Young Davis, who had very recently become of age, continued to reside in his father's house. All the testimony repels the idea that he did the work described in the testimony, with intent to establish and maintain a home for himself.

For the foregoing reasons your office decision is hereby reversed.

L. B. SHAPLAND ET AL.

Motion for review of departmental decision of August 8, 1895, 21 L. D., 84, denied by Secretary Smith, October 11, 1895.

RAILROAD GRANT—SELECTIONS WITHIN MINERAL DISTRICTS.

CHARLES H. FISHER.

Railroad companies in giving notice of applications for patent under the circular of July 9, 1894, will be required to describe in the published notice the sub-divisions covered by such applications, except where the list covers all the odd numbered sections in a township, in which event the notice can so state.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895.

I am in receipt of your office letter of September 18, 1895, making report upon letters from Chas. H. Fisher, Esq., dated June 29 and July 21 last, in the matter of the advertisement (in accordance with departmental circular of July 9, 1894, 19 L. D., 21) of lists of lands selected by railroad companies within mineral districts.

Your report brings to my attention the fact that, under said circular, publication is only required to be made by the company of the townships for which application has been made for lands on account of its grant, the interested public being referred to the local office for information as to the particular subdivisinal description covered by the company's application for patent.

While the circular will bear this construction, yet upon consideration, I am satisfied that the publication of notice by townships only, will be of little service as a notice to those most likely to be interested.

The necessity of traveling to the local office to ascertain the exact tracts applied for by the railroad companies puts the expense upon those least prepared to bear it, and, while it is true that the publication of the subdivisinal description applied for will entail an additional expense upon the companies, yet, it would seem that being anxious to secure patents, they should be required to give any notice thought to be necessary by this Department for the protection of individual rights.

The settler in giving notice of his intention to make proof upon his claim is required to particularly describe the lands covered thereby, and I can see no good reason why the notice by the company, if it is to be of any service as information to the public, should not describe the lands applied for with the same exactness.

The companies, therefore, will be required hereafter in giving notice under the circular of July 9, 1894, *supra*, to describe in the published notice the descriptive sub-divisions covered by their applications for patent, except where the list covers all the odd-numbered sections in a township, in which event the notice can so state.

The local officers will be notified accordingly and you will also advise Mr. Fisher hereof. Herewith are returned his letters for the purpose indicated.

KNAPP *v.* KALKLOSCH.

Motion for review of departmental decision of May 18, 1895, 20 L. D., 483, denied by Secretary Smith, October 11, 1895.

RAILROAD GRANT—TIMBER CULTURE APPLICATION.

SACHS *v.* HASTINGS AND DAKOTA RY. CO.

An application to make timber culture entry of land embraced within a railroad indemnity withdrawal confers no right as against the grant or the government. Where land covered by such an application is restored to the public domain, after the repeal of the timber culture law, there is no right in the applicant that can be recognized as within the protective terms of said repeal.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (C. W. P.)

I have considered the appeal by Wilhelm Sachs from the decision of your office of January 18, 1894, rejecting his application to make timber culture entry of the NW. $\frac{1}{4}$ of section 27, T. 122 N., R. 42 W., Marshall land district, Minnesota.

The land in controversy is within the indemnity limits common to the Hastings and Dakota and the Saint Paul, Minneapolis and Manitoba Railroad grants, withdrawals for which, under the granting acts, were ordered, and continued in force until May 22, 1891, when they were revoked, so far as the indemnity lands are concerned, by departmental order, issued under the act of September 29, 1890. (26 Stat., 496.)

January 20, 1880, Sachs applied to enter this land under the timber culture law, and appealed from the rejection of his application, which appeal was pending and undisposed of, when he made a second application on January 23, 1886, to enter the same under the timber culture law.

No action was taken by your office on Sachs' appeal for nearly fourteen years.

The Hastings and Dakota Railway Company made selection of this land October 29, 1891.

On Sachs' second application, a hearing was had before the local officers, who allowed his application. From this decision the Saint Paul, Minneapolis and Manitoba Railway Company appealed, but no appeal was taken by the Hastings and Dakota Railway Company.

The decision appealed from holds that Sachs' application of January 20, 1880, was properly rejected by the local officers, because the land was then reserved for railroad purposes, and as the timber culture laws

were repealed by the act of March 3, 1891 (26 Stat., 1095), while the land in question was yet in a state of reservation, it was not subject to disposal under the timber culture laws, after the restoration by departmental order of May 22, 1891, issued under the act of September 29, 1890, *supra*.

Your decision also held that Sachs' application of January 23, 1886, should have been rejected by the local officers because this first application to enter said land was then pending on appeal, and he was thereby precluded from making a second application for the same land.

Sachs' specifications of error are as follows:

1st. Error of the Hon. Commissioner in rejecting the application because the land had (at one time) been withdrawn for railroad purposes.

2nd. Error of the Hon. Commissioner in rejecting the application because the act, under which it was made, had been repealed.

3rd. Error of the Hon. Commissioner in rejecting the application because the tract applied for had been selected by the Hastings and Dakota Railway Company, October 29, 1891.

SPECIFICATIONS.

1st. The withdrawal of this land, for railroad purposes, was revoked May 22, 1891, thus removing the first cause for rejecting the application.

2d. The act repealing the timber culture laws specifically provides for just such causes as the one now under consideration, and reads as follows: "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 same manner, upon same terms and conditions, and subject to the same limitations, forfeitures and contests as if this act had not been passed." The law therefore removed the second cause for rejecting the application.

3d. The application, now under consideration, was made and became a matter of record, prior to October 29, 1891, the date the tract was selected by the Hastings and Dakota Railway Company. The rights of the application were, therefore, paramount to the selection and left no cause for rejecting the same.

The action rejecting both of Sachs' applications was proper, by neither of which were any rights acquired either against the United States or the company. *Shire v. Chicago*, St. Paul, Minneapolis and Omaha Railway Co. (10 L. D., 85); *Hestetun v. St. Paul, Minneapolis and Manitoba Ry. Co.* (12 L. D., 27); *McFarlane v. Hastings and Dakota Ry. Co.*, Id., 228; *William Ray Durfee* (15 L. D., 91); *St. Paul, Minneapolis and Manitoba Ry. Co. v. Keslik* (19 L. D., 275); *Wolsey v. Chapman* (101 U. S., 755); *Wood v. Beach* (156 U. S., 548.)

But it is objected that at the date of the restoration of the land by the order of May 23, 1891, it became subject to the application of Sachs. The answer to this contention is, that the lands were restored May 22, 1891, and the timber culture act had then been repealed by the act of March 3, 1891, *supra*. The restored land could then only be entered under the homestead law. *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* (12 L. D., 259).

Then it is insisted that by the act of March 3, 1891, *supra*, the rights of Sachs' application were protected and were paramount to the com-

pany's selection. This is not so. Sachs' application to enter the land was improperly allowed by the local officers, and conferred no right whatever against the grant to the company. *Atlantic, Gulf and West India Transit Co. v. Lutz* (19 L. D., 11); *Northern Pacific Ry. Co. v. Hunt* (18 L. D., 163); *Shire v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, *supra*.

For those reasons your office decision is affirmed; Sachs' application of January 20, 1880, will be rejected, and his entry on his application of January 23, 1886, cancelled.

MCCHESNEY *v.* MCALLISTER ET AL.

Motion for review of departmental decision of August 3, 1895, 21 L. D., 71, denied by Secretary Smith, October 11, 1895.

COAL LAND ENTRY—SPECULATIVE ENTRY.

ELWOOD R. STAFFORD ET AL.

A coal land entry not made for the use and benefit of the entryman is illegal and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (C. J. G.)

I have considered the case of the Pleasant Valley Coal Company, as transferee of Elwood R. Stafford, on appeal by said company from your office decision of April 17, 1894, holding for cancellation the coal entry No. 69 of said Stafford, made September 20, 1883, for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 17, T. 13 S., R. 7 E., Salt Lake City, Utah, land district.

The record shows that Elwood R. Stafford, on September 20, 1882, filed coal declaratory statement No. 599 for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 17, T. 13 S., R. 7 E.; that on September 20, 1883, he filed a relinquishment for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 17, and made coal entry No. 69 for the remainder.

On September 19, 1882, the date of his declaratory statement, Stafford executed a power of attorney in favor of Henry Wood, and every subsequent act in regard to this entry, including the relinquishment above mentioned, and the final affidavit under paragraph 32 of the coal regulations, was performed by said Wood. As the final affidavit at the time of actual purchase must be made by claimant himself, and as the affidavits of Agent Wood and two witnesses under paragraph 35, were unsatisfactory, for the reason that they failed to state that the land "is chiefly valuable for coal," claimant was allowed by your office letter of May 29, 1891, to furnish a new affidavit *nunc pro tunc*.

Under date of December 22, 1891, the register reported to your office that every effort had been made to find the entryman Stafford, but without avail, and enclosed the "unclaimed" letter of notification as evidence of service. The register also transmitted a letter from one William F. Colton, Assistant Secretary of the Pleasant Valley Coal Company, in which he stated that said company is the present owner of the lands described in coal entry No. 69; that the entryman himself had long since left the Territory, and his present whereabouts could not be ascertained, and therefore the affidavits required by the Department could not be furnished. In lieu thereof he asked to be allowed to furnish the affidavits of disinterested witnesses as to the character of the land in question.

Under date of January 23, 1894, the register transmitted to your office an affidavit by William F. Colton, in which he states that he is Assistant Secretary of the Pleasant Valley Coal Company; that said company, relying upon coal cash entry certificate No. 69 held by Elwood R. Stafford, purchased in good faith from said entryman the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 17, T. 13 S., R. 7 E., and have held and worked the same for coal during the past ten years. Affiant further states that he is informed and believes that the entryman Stafford has long since left the Territory and that the affidavits required by the Department cannot therefore be obtained. There are also submitted affidavits by William Bird and Edwin Z. Carpenter to the effect that the land embraced in entry No. 69 is chiefly valuable for coal, and the request made that said entry be approved for patenting.

On February 10, 1894, your office sent to the local officers a letter in which was said—

The regulations require that the affidavit made at time of actual purchase, under paragraph 32 shall be made by claimant, see also 2 L. D., 735, and failure to make such affidavit has been held by this office sufficient cause for the cancellation of an entry.

It would seem, however, that in the case of coal entry No. 69, that, if, as stated in the affidavit of Mr. Colton, the Pleasant Valley Coal Company purchased the tract embraced in said entry, in good faith from the entryman, and have held the same, and developed the coal thereon, and, the failure to require the affidavit under paragraph 32, to be sworn to by the claimant was a mistake of the local officers that cannot be rectified, the cancellation of said entry would work a hardship to the present owners. I see, therefore, no reason why said entry may not be considered on its equities.

The coal company was then notified that it would be required to show title to said coal entry from the entryman, and also to furnish evidence of the authority of William F. Colton to represent the company.

Under date of February 26, 1894, the register transmitted to your office a certified copy of a quit claim deed, dated and acknowledged September 19, 1882, and filed for record September 25, 1883, by which it appears that Elwood R. Stafford conveyed all his right, title and interest in the land described in his declaratory statement No. 599, to wit: the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of

the SE. $\frac{1}{4}$ of Sec. 17, T. 13 S., R. 7 E., to the Pleasant Valley Coal Company.

It thus appearing that one year prior to entry, said Stafford had parted with the land embraced in this entry, your office, on April 17, 1894, held the same for cancellation (7 L. D., 422).

On May 11, 1894, the Pleasant Valley Coal Company filed a motion for review, and, by your office letter of May 23, 1894, you declined to disturb your decision of April 17, 1894.

Motion was also made to confirm said entry under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1098).

As shown by the recital of facts in this case, the final affidavit under paragraph 32 of the coal regulations was sworn to by Henry Wood as the attorney in fact for Elwood R. Stafford. The regulations under the coal land law approved July 31, 1882, require that the affidavit made at the time of actual purchase shall be made by claimant himself (2 L. D., 735). The original affidavit or declaratory statement of Stafford, in which he declared his intention to purchase the land in question was filed September 20, 1882. The quit claim deed by which he conveyed his right, title and interest in said land to the Pleasant Valley Coal Company is dated September 19, 1882, or the day *before* he filed his declaratory statement. It is true the said company has filed in the case an affidavit of one M. K. Parsons, who states, under oath, that as an attorney, he drew up the papers in the matter of Stafford's declaratory statement on September 19, 1882, and that said declaratory statement was filed in the Salt Lake land office on that day. It is fair to presume, however that said paper was not filed before September 20, 1882, for the reason that a declaratory statement would not be filed by the register until the fees had been paid to the receiver, and receipt was not issued in the case until September 20, 1882. But, granting that this affidavit is true, and granting also that the error of the local officers in accepting the affidavit of Agent Wood at time of actual purchase could be rectified by the filing of satisfactory affidavits of two disinterested witnesses, yet the fact that one year prior to final proof and entry Stafford had by quit claim deed parted with all his right, title and interest in the land to the Pleasant Valley Coal Company, is good ground for holding the entry for cancellation. The law is plain that an entry must be held for the use and benefit of the entryman (Union Coal Company, 17 L. D., 351).

As the entry was properly held for cancellation on other grounds, it is unnecessary to discuss in this connection the provisions of the act of March 3, 1891.

Your office decision is hereby affirmed.

MCINNIS *v* COTTER ET AL.

Motion for review of departmental decision of August 9, 1895, 21 L. D., 97, denied by Secretary Smith, October 11, 1895.

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

RADABAUGH *v*. HORTON ET AL.

A mortgage covering a legal sub-division, with the exception of one acre thereof, is such an encumbrance of the entire sub-division as to bring the entry thereof within the confirmatory provisions of section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (E. E. W.)

The contestant, C. C. Radabaugh, has filed a motion for review of the decision rendered in the above styled contest on the 19th of March, 1895 (unreported), and the same has been duly considered.

Raughley Horton, the contestee, made timber culture entry of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 30, T. 22 S., R. 2 E., October 5, 1878. On the 16th of October, 1886, he made final proof, and received final certificate. On the 10th of June, 1887, he gave the International Bank of Newton, Kansas, two mortgages on all the land, except one acre in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, described by metes and bounds, and expressly excepted, to secure the payment of two promissory notes, one for \$1,200, and the other for \$60. Three days later, June 13, 1887, Radabaugh instituted contest, alleging that Horton had not complied with the law in the matter of the planting and cultivation of trees. On the 30th of November, 1887, the register and receiver rendered a decision sustaining the contest, and recommending cancellation of Horton's entry. Horton appealed, and on the 27th of September, 1889, the Commissioner of the General Land Office affirmed the decision of the office below. Horton appealed again, and on June 11, 1891, the Department affirmed the decision of the Commissioner of the General Land Office. Pursuant to this decision Horton's entry was cancelled September 9, 1891, and thereupon Radabaugh made homestead entry of the land October 6, 1891. On the 5th of October, 1892, W. M. Shever and Sarah A. Edwards filed a motion for review of the said decision of June 11, 1891, alleging that Shever was the assignee of the mortgage for \$60, and Edwards of the one for \$1,200; that as such assignees they were entitled to intervene in the case, and that all proceedings up to that time had been taken without notice to them. On the 7th of July, 1893, the motion was sustained, and a decision rendered reinstating Horton's entry, and requiring Radabaugh to show cause why his entry should not be cancelled. Such cause not being shown, on the 8th of February, 1894, the Commissioner of the General Land Office held Radabaugh's entry for cancellation. Radabaugh appealed, and on the 19th of March, 1895, the Department affirmed the decision of the Commissioner. The motion

under consideration is for review of this last mentioned decision of the Department.

The decisions of the Department of June 11, 1891, and March 19, 1895, were both based on Sec. 7 of the act of Congress of March 3, 1891, 26 Stat., 1095, which 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 certificate 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 this case the entry was made under the timber-culture laws, and final proof and payment has been made, and certificate issued. There was no adverse claim, and the land had been incumbered by the two mortgages above specified prior to the first day of March, 1888, and after final entry, to a *bona fide* incumbrancer for a valuable consideration, and no fraud on the part of the incumbrancer has been found by a government agent, and none is alleged.

The motion for review is based entirely on the ground that the mortgages do not cover all the land embraced in the entry. It is contended in the motion that because the mortgages lack one acre of covering the entire tract they do not bring the case within the confirmatory provisions of the act of Congress—that to entitle the entry to confirmation under this act the incumbrance must be upon the entryman's entire interest in the entire tract.

In the case of *Bradbury v. Dickinson*, 14 L. D., 1. Dickinson, the entryman, after making final proof and payment and receiving final receipt, and prior to March 1, 1888, had sold an undivided three-fourths interest in his entry to a *bona fide* purchaser for a valuable consideration. The tract was then platted as a townsite, and the entryman and his transferee had also sold about one hundred and ten lots to different purchasers. There was no adverse claim, and no fraud on the part of the purchasers had been found. But the Department held that the sale of the three-fourths interest and the town lots did not entitle the entry to confirmation. Discussing the question, Mr. Secretary Noble said:

No provision is made for confirming an entry where an undivided part of the tract covered thereby is so sold. Congress seems to have dealt with an entry as an entirety, and to hold that it was the legislative intent to confirm where a purchaser has acquired three-fourths or one-half interest in the entry, would also require in a proper case, the holding that an entry was confirmed where a purchaser had acquired a one-tenth interest, or even less. I do not think that this was the intention of Congress when the act was passed.

This decision was followed in the case of *Emblen v. Weed*, 16 L. D., 28, where the entryman had sold his entire interest in one-fourth of the tract, and an undivided half interest in the remainder; and also in

Paul *v.* Wiseman, 21 L. D., 12, in which an undivided half interest had been sold.

In the case of Snow *v.* Northey, 19 L. D., 496, the entryman had sold his entire interest in one-half of the land prior to March 1, 1888, and the other half subsequent to that date. The Department confirmed the entry as to the half sold prior to March 1, 1888, and cancelled it as to the other. This rule was also followed in the case of William Randolph, 20 L. D., 411, where the entryman's entire interest in a certain portion of the tract had been sold.

The decision in this case is not inconsistent with those in the cases of Randolph, and Snow *v.* Northey, above cited, in which it was held that where an entryman had sold his entire interest in a certain subdivision of the land, the entry would be confirmed as to that subdivision, and where only an undivided interest in the land had been sold the entry would not be confirmed.

In this case the entry embraces two subdivisions, aggregating 83.71 acres, though it is treated as only one tract. Each of the mortgages covers the entryman's entire interest in the whole tract, except the one acre. Considered by separate subdivisions, both incumbrances cover the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ entirely, and all of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, except one acre.

No argument is necessary to show that the entry must be confirmed as to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$. But the Department does not divide subdivisions. The entry must be confirmed as to the whole of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, or cancelled as to the whole of that subdivision. It cannot be confirmed as to all of that subdivision, except the one acre, and cancelled as to the one acre. If the mortgages are not incumbrances upon the whole of the subdivision they cannot be recognized as incumbrances upon any portion of it, within the meaning of the act of Congress. It is the judgment of the Department, however, that they constitute such incumbrances upon the subdivision as must bring it within the confirmatory provisions of the act. The act is purely remedial in its character, and must be liberally construed. To hold that the exception of one acre excluded the entire subdivision from confirmation would be to allow the spirit, if not the letter, of the act to be defeated by a bare technicality.

The contestant makes a strong appeal on the ground that he has complied with every condition of his homestead entry, made valuable improvements, and acted throughout in good faith. He also contends that, acting in good faith, he has acquired rights which cannot be defeated by reinstatement and confirmation of Horton's entry. In this he is unfortunate. His entry and all of his improvements have been made in violation of the rights of the incumbrancers, and of which the law charged him with notice.

These, and all other questions raised in the motion, were duly considered in the trial of the case.

The motion is overruled.

SIOUX HALF BREED SCRIP—LOCATION ON UNSURVEYED LAND.

MORGAN *v.* MISSOULA ELECTRIC LIGHT COMPANY.

The law authorizing Sioux half-breed scrip locations on unsurveyed land contemplates that the improvements placed on the land by the half-breed must be put there by him in good faith, and for his personal use and benefit, and not for the gain and advantage of third parties.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (P. J. C.)

The record here shows that Daniel B. Bailly filed an application to locate Sioux half breed scrip No. 100 D, June 20, 1892, "on unsurveyed land which, when surveyed, will be the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 26, T. 13 N., R. 19 W., Missoula land district."

The scrip itself seems to have been retained in the local office for the purpose, as stated by the register in his letter of February 17, 1894, of "adjustment of said scrip when surveyed."

Said Bailly filed with the scrip an affidavit, alleging that he is the identical person mentioned in the scrip; that there are improvements on the land "made by me or under my personal supervision or direction, and for my personal use and benefit, consisting of one frame house ten by twelve feet;" that he is at this time occupying and residing in said house; he also describes two other houses on the land, stating that they are habitable dwellings and occupied by him; that there are twenty acres under fence and in a good state of cultivation.

On January 4, 1893, James D. Morgan filed a protest against the acceptance of the scrip, alleging—

First: That the proof offered by said Bailly on making location of said scrip was and is insufficient in this, to wit:

That it fails to state whether the improvements upon said land were placed thereon by said Bailly, or that the same were placed thereon under his personal supervision or direction.

Second: That the improvements described in said affidavit were made by one D. J. Heyfron, for his own benefit, long prior to the pretended settlement of said Bailly and neither by, or for the benefit of or under the supervision or direction of said Bailly.

Third: That said Bailly on the same day he filed said scrip, deeded the land covered thereby to one W. E. Moses who thereupon deeded said land, to Charles E. Cowell who has since deeded said land to the Missoula Electric Light Co., (a corporation).

Fourth: The protestant further alleges, that he is informed and believes that said Bailly located said scrip upon said land at the instigation and for the benefit of certain persons, to wit: Charles Cowell and J. E. Greenough for speculative purposes and not for his own benefit, except as to the amount received by him for the scrip.

Fifth: Protestant further alleges that such sale was made through said Moses; that said Moses is a dealer and broker in scrip; and that said location was made by said Bailly for the purpose of evading the law prohibiting the transfer of such scrip, and not in good faith.

Sixth: That said Bailly never made a bona fide settlement, established his residence, or directly connected himself with said land.

In accordance with your office order of April 14, 1893, a hearing was had before the local office, at which one Harry D. Moore represented the protestant. As a result of said hearing the local officers decided that the protestant had failed to prove his allegations, and recommended the dismissal of the protest.

Moore, as attorney for the protestant, filed an appeal from said decision on September 14, 1894. On September 18 following there was filed in the local office this paper, addressed to the register and receiver of the local office (omitting the caption and acknowledgement):

You are hereby notified that I have this day, and by these presents do, abandon and decline to prosecute further the contest heretofore entered by me against Daniel B. Bailly, and I abandon all claim of taking an appeal or prosecuting the said contest further, and relinquish and surrender all possession of the lands embraced in said contest, and you are hereby further notified that no person is authorized, in my name, or for me, or in my stead, to appeal, prosecute or further carry the said contest, and you will make such order dismissing the said contest as to you may seem meet and proper.

This paper seems to have been acknowledged on September 12. On October 12, following Moore filed an affidavit before the local office, and requested that it be transmitted to your office, in which he sets up that he was the duly authorized attorney of record of the protestant; that he had never had any notice, or been informed by the protestant, that he was to cease the prosecution thereof, or of any compromise or settlement between the parties, or that his services as attorney were dispensed with; that on September 14, 1893, two days after the date of the acknowledgment of the revocation, Morgan instructed him to immediately file an appeal in said case, which he did on the same day; he alleges that the settlement between the parties was collusive, for the purpose of preventing a further investigation into the character of the scrip location, and also for the purpose of defrauding affiant of his fees. In a separate paper Moore asked leave to continue the prosecution of the case as the friend of the government.

When the matter came up for consideration in your office it was decided by letter of April 24, 1894, that Morgan had a perfect right to withdraw from the case at any stage of the proceedings, and that Moore could not be substituted as a party plaintiff, and held that the government, being a party in interest, the case would be considered under rule 48, of rules of practice; and on an examination of the entire record, reversed the action of the local office, and held the scrip location for cancellation; whereupon the defendant prosecutes this appeal, assigning errors as follows—

1. In finding and concluding from the evidence that Daniel B. Bailly, who made the above described location, did so in pursuance of a prior agreement or understanding and not for his own benefit.

2. In assuming that the location by said Bailly was fraudulent and in violation of law, in the absence of any evidence to support that assumption.

3. In finding from the facts and circumstances anything inconsistent with honest and fair dealing.

4. In reaching a conclusion against the validity of Bailly's location from inference and suspicion, without proof.

5. In reversing the decision of the local officers; and in failing to hold said location valid and intact.

I find in the files the application of Harry D. Moore to make homestead entry of said land, which was filed and rejected April 30, 1894, because it was covered by the location of Bailly and the same was under contest.

There is a motion filed by counsel for Harry D. Moore in which he, as "intervenor," seeks to have said appeal dismissed, for the reason that no notice of the same was served on the protestant Morgan or upon "this intervenor." This motion will be denied, for the reason that defendant is under no obligation to serve notice of this appeal upon either of the parties named. Morgan had withdrawn from and is out of the case. There is nothing in the files to give Moore the status of an intervenor, unless it may be his application to make homestead entry of the land. He has acquired no rights in this controversy that would entitle him to be heard; consequently, it was not necessary that notice should be served upon him.

The question involved in this case is very largely one of fact; that is, as to whether or not Bailly had any direct connection with this land, or whether his claim thereto or the improvements placed thereon, were for his personal use and benefit; or whether his connection with the land was purely speculative and wholly in the interest of this defendant. In your said office letter these facts are sufficiently set forth and inasmuch as they are substantially correct, the facts will not be restated, except in so far as is necessary to meet the argument of counsel.

It may be said here, however, that it is conceded that this tract of land had been in the possession of one H. D. Heyfron, for three or four years prior to June 17, 1892; that the tract was partially fenced; that there were thirty-five acres of ground in a good state of cultivation, which had been put in crop by Heyfron prior to June 17, 1892; that there were two houses upon the land, one a log house, and the other partly log and partly frame.

Certified copies of the following instruments are in the record—

A bill of sale, dated June 17, 1892, from Heyfron to Bailly of his dwelling house and all improvements made by him on the land. The consideration expressed is one dollar;

Warranty deed, dated June 20, 1892, from Bailly and wife to William R. Moses, for the land; consideration \$2,300. This was acknowledged by Bailly in Montana the day of its execution, and by his wife in Colorado, July 2, following;

Warranty deed from Moses and wife, dated June 20, 1892, to Charles Cowell and Joseph W. Greenough for the land; consideration, \$3,200; acknowledged by Moses on the day of its execution in Montana, and by his wife in Colorado, July 1, following;

Warranty deed from Cowell and wife and Greenough and wife, dated and acknowledged September 13, 1892, to the Missoula Electric Light Company; consideration \$20,000.

This case in many of its features is very like that of *McGregor et al. v. Quinn* (18 L. D., 368), wherein it was decided (syllabus)—

A Sioux half-breed scrip location on unsurveyed land is not authorized by law, if the Indian prior thereto has not made, or caused to be made, improvements on the land for his personal use and benefit.

In that case the facts are set forth, which show that Quinn did not place any improvements on the land, but relied entirely upon those purchased as a compliance with the law.

Congress, by act of July 19, 1854 (10 Stat., 304), provided for the issuance of Sioux half-breed scrip, and authorized the President to issue to Indians who were entitled to certain lands mentioned, certificates or scrip upon their relinquishment of said lands, which might be located upon unsurveyed lands "upon which they have respectively made improvements," and provided that no transfer of the scrip should be valid.

Under the circular of instructions of January 29, 1872 (1 C. L. L., 723), local officers were directed, with a view to protect the interests of the government, "and to carry out the law in its meaning," to see that certain requirements are strictly complied with; among them—

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.

In discussing this feature it was said in the *McGregor* case (page 372)—

It seems to me that it cannot be seriously contended that the purchase of improvements that are never used or occupied by the Indian is a compliance with the law.

But it is contended in the case at bar that Bailly did put improvements on the land for his use and benefit, and that he did have a direct connection with the land.

The testimony submitted shows what I think may be termed the shadowy connection of Bailly with the land. To state it briefly, it is this: Here is a tract of land situated in close proximity to Missoula, Montana, that is presumably of great value, if the consideration expressed in the several transfers is to be taken as any guide. Heyfrom had been in possession of it for several years. He says he and Moses, who is shown to be a scrip broker residing in Denver, Colorado, some time prior to the sale, had a talk about selling the land. Bailly, who lives in southwestern Colorado, and who says he is a man of very small means, at the suggestion of Hickman, who had been in correspond-

ence with Moses, went to Missoula, where he met Moses; they went to Heyfron and purchased his improvements on and "rights" to the land for the expressed consideration of \$1.00. They admit that this is not the real consideration, and Heyfron says Cowell paid him the balance, which was the greater portion, that day. Bailly built a shed on one of the houses, and says he ate and slept there for three days.

Granting, for the sake of argument, that Bailly did build a shed, and did stay there as he says, the question then arises, is this a compliance with the law? Counsel contends that it is; that if the half-breed erected a mill, or a building for use in fishing, or a store, or a barn, "or any equivalent structure not contemplating personal residence, it would be palpably erroneous to hold that the purposes of the law were not complied with." It is urged that it is not contemplated that residence and home are required; that any improvement "and any direct connection with the land for his personal use" is sufficient; that

his direct connection with the land was as absolutely established by his purchase; by going into possession for three days; by his building an addition to the house and occupying it, and by the surrender of occupancy of Heyfron, as if Bailly had lived there for a series of years prior to that time.

Whether improvements placed upon unsurveyed land by the Indian of the character suggested by counsel hypothetically would be a compliance with the law, the Department is not called upon to decide in this case. It will be time enough to do so when cases involving such issues are presented. But it may be said that the law under which this class of entries is permitted clearly contemplates that whatever improvements are placed upon the land must be put there in good faith by him, and for his personal use and benefit, and not for the gain and advantage of third parties. And all the instructions and rulings of the Department have been in consonance with this view. The language of the instructions quoted above is emphasized in the McGregor case:

In other words, you should be satisfied that the Indian has a direct connection with the land, and is claiming it for his own personal use.

What "personal use" of, or what "connection with" the land did Bailly have? It is so clearly apparent from his testimony that it was only for the purpose of "complying with the requirements of the statute," which he so often repeats and dwells upon, and thus enable him to dispose of the same, that it requires no further elucidation than simply reading his evidence. He would have brought his family there if it were necessary to "comply with the law;" he built the shed "to comply with the requirements of the statute," and he lived there three days for the same purpose. He made no personal use of the land or improvements, and his only connection with it was for this purpose.

I do not understand from counsel that they seriously contend that his acts were other than those stated, or for any other purpose.

It seems to me that this is not such a use as is contemplated by statute; that it is so purely speculative in its nature as to be abhorrent to

the policy of the law in the disposition of the public lands. It was not, in my judgment, contemplated by Congress that this class of entries should be used as a basis for speculation. It specifically declared that any transfer of the certificates or scrip would be invalid, thus strengthening the belief that they should only be used for the personal benefit of the scribee.

It is urged that the statute does not require residence on the land, and that there are no restrictions on alienation. This is true, yet in securing public lands good faith and fair dealing are absolutely required. In my judgment it is fairly shown that there was a scheme here to get title to this land in Cowell and Greenough, and possibly in this defendant, although there is nothing in the record to show who are the incorporators, stockholders or officers of the defendant company. The company had an opportunity to be heard upon any and all questions touching its connection with the transaction, but offered no evidence except upon the question of the *bona fides* of Bailly; neither does it raise any other question by its appeal.

The services of a scrip dealer are enlisted, apparently, and he and Heyfron talked over the price before Bailly got to the ground. Upon the arrival of the latter a trade was consummated, they three being present. Cowell paid the greater portion of the consideration, the amount of which witnesses refuse to disclose. Greenough furnished the lumber for building the addition. On the day the entry is made Bailly, the "man of very small means," who borrowed the money to pay his expenses on the trip, executed a deed to Moses, who on the same day executed a deed to Cowell and Greenough. Collusion between the parties is denied by Bailly only, but a critical examination of his testimony, in the light of all the circumstances and the evidence of Heyfron, does not warrant the conclusion that all these incidents transpired without premeditation. Here was a valuable piece of land, the title to which, while unsurveyed, could not be secured from the government except by use of scrip of some sort, and in order to accomplish their purpose, the means herein detailed were resorted to. It is inconceivable why Cowell should have paid the purchase price of Heyfron's improvements and his right to the land upon any other theory than his personal interest in the deal, and the transfer to him and Greenough for the consideration of \$3,200, and by them to the defendant for \$20,000, are incidents satisfactory to my mind that the value of the land was sufficient inducement to actuate them in the participation in this fraud upon the government.

It is a well known rule of evidence that fraud is rarely susceptible of direct proof, that a mind capable of conceiving fraud possesses ingenuity sufficient to conceal it; that it is ordinarily only by circumstances outside of the usual course of business transactions of prudent men, which are termed badges of fraud, that a conclusion may be reached that would justify a finding that the action is fraudulent in law.

I can not escape the conviction that there is sufficient evidence to warrant the conclusion that there was collusion between the parties named to fraudulently secure title to the land in controversy; that Bailly's use of and connection with the land was solely for speculative purposes, and not such a compliance with the law as contemplated by the statutes.

Your office judgment is therefore affirmed.

RAILROAD GRANT—FORFEITURE—RELINQUISHMENT BY STATE.

HASTINGS AND DAKOTA RY. CO.

The Hastings and Dakota railway company is entitled to the lands earned prior to the forfeiture of its charter, and the State cannot, through legislation intended to operate as a forfeiture, and the relinquishment of the lands by the governor, defeat the right of said company to receive said lands through its trustee.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895.
(J. I. H.) (G. B. G.)

The legislature of Minnesota passed an act, which was approved and took effect on April 18, 1895, entitled—"An act to declare a forfeiture and determination of the rights of the Hastings, Minnesota River and Red River of the North railway company, afterwards called the Hastings and Dakota Railway Company, to any of the public lands within this State, heretofore granted or reserved to aid in the construction of the line of road of said company."

In accordance with section 3, of said act, the governor of said State has executed and forwarded to the Department his relinquishment thereunder to the United States of all and every claim of the State of Minnesota, and the Hastings and Dakota Railway Company, or its assignee or trustee, Russell Sage, which has been or might be asserted through the State of Minnesota to any of said lands not heretofore conveyed to said company, or its assignee. And in accordance with said legislative act the governor requests that said lands be restored to the public domain and disposed of under the homestead laws to actual settlers.

It appears that in 1857 the Hastings, Minnesota River and Red River of the North Railroad Co. ("afterwards the Hastings and Dakota Railway Co."), was incorporated under the laws of Minnesota and authorized to construct a railroad therein from Hastings to the western boundary of the State.

By the act of Congress of July 4, 1866 (14 Stat., 87), there was granted to the State lands in prescribed primary and indemnity limits, to aid in the construction of a railroad "from Hastings through the counties of Dakota, Scott, Carver and McLeod, to such point on the western boundary of the State as the legislature of the State may determine"

Section 3 of said act provided,

That the lands hereby granted shall be subject to the disposal of the legislature of the State of Minnesota, for the purpose aforesaid and no other.

The State accepted the grant by an act of its legislature approved April 20, 1867; by section 1 of which it is expressly declared, that the State of Minnesota assumes and undertakes the trust created in and by said act and pertaining to said line of road; and section 2 thereof confers upon the corporation "all the lands, interests, rights, powers and privileges granted to and conferred upon the State of Minnesota for the purpose of aiding in the construction of a railroad" &c. under the act of Congress *supra*.

The congressional act required the road to be completed within ten years from acceptance of the grant under penalty of forfeiture of all the lands then remaining unpatented.

The entire road was finished in 1879, a portion of it being built after the time named in the congressional grant; but inasmuch as Congress had not forfeited the grant this breach of the condition did not forfeit the company's rights under the grant.

It is settled law that no one can take advantage 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 a forfeiture on that ground, the title remains unimpaired in the grantee." *Schulenberg v. Harriman* (21 Wall., 44).

In 1872, the Hastings and Dakota Railway Company sold part of its road to the Milwaukee and St. Paul Railway Company, and in 1880 sold and conveyed the balance of its road to the same company. The sales included everything belonging to the grantor company, except the land grant and that company's corporate franchise.

Subsequently the State of Minnesota instituted *quo warranto* proceedings in the supreme court of that State to forfeit the charter of the Hastings and Dakota Railway Company, and a judgment of forfeiture was decreed by that tribunal on December 23, 1886.

By virtue of section 415 of the general statutes of Minnesota (vol. 1, p. 450), which provides that when the charters of corporations have expired by their own limitation or have been annulled by forfeiture or otherwise, such corporations shall nevertheless continue bodies corporate for the term of three years after the time when they would have been so dissolved for the purpose of prosecuting and defending actions by or against them and of enabling them gradually to settle and close their concerns, to dispose of and convey their property and to divide their capital stock, the vice president and secretary of the Hastings and Dakota railway company pursuant to the resolutions of the stockholders and board of directors of said company executed on December 9, 1889, a deed to Russell Sage, as trustee of the stockholders, to all the lands belonging to said company by virtue of the grant aforesaid, held in trust or otherwise, and the right to prosecute for said company

all proceedings and actions necessary to perfect the title of said company to lands under said grant.

In the case of Hastings and Dakota Railway Company (18 L. D., 511), it was held (syllabus)—

The judicial proceedings instituted by the State resulting in a decision that the Hastings and Dakota company by failure to maintain and operate its road had forfeited all rights and franchises under its charter, including its land grant, except as to lands already earned, will be accepted by the Department as final, and determinative of the rights of the company, under the laws of the State in regard to matters properly passed upon.

The judicial dissolution of said company does not defeat the right of the stockholders to select and receive, through a trustee appointed for such purpose, indemnity for lost lands.

Under the provisions of the State law it was competent for the stockholders in said company, after the decree of dissolution, to execute a deed conveying all interest in its land to a trustee, for the purpose of closing up the affairs of said company and settling the claims of creditors and stockholders, and the power so conveyed survives the existence of the company.

The question as to the right of the stockholders to select and receive through a trustee appointed for such purpose indemnity for lost lands will not be reopened. This question was fully and finally considered in the case of Hastings and Dakota Ry. Co. (*supra*), and the matters of law and fact adjudicated in favor of the stockholders, and on November 11, 1893, the United States circuit court for the district of Minnesota, in the case of Hanan *v.* Sage, wherein the validity of the aforesaid trust conveyance was assailed, ruled in harmony with the aforesaid departmental decision.

The question now to be considered is whether the State of Minnesota can defeat the grant by an act of its legislature intending to operate as a forfeiture, and by the relinquishment of these lands by the governor of the State to the United States. Clearly on principle and authority, I think not. These lands were certified to the State in trust for the company; the State accepted them as trustee of an express trust; it is not denied that the lands were earned by the company; this Department and the courts have decided the company to be entitled to the lands earned before the forfeiture of its charter, and that the trustee of the company is authorized and is the proper person to receive them.

The aforesaid relinquishment of the State of Minnesota is rejected.

TIMBER CULTURE CONTEST—ACT OF MAY 20, 1876.

PATTIN *v.* SMITH.

A charge of failure to submit final proof under a timber culture entry within the statutory life of the entry, must fail where it appears that under the extension of time authorized by the act of May 20, 1876, the entryman is not in default.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895. (I. D.)

The plaintiff in the case of Eugene M. Pattin *v.* Walter C. Smith appeals from your office decision of April 7, 1894, dismissing his contest against timber culture entry for the SW. $\frac{1}{4}$, Sec. 28, T. 139, R. 51, Fargo land district, North Dakota.

Smith made timber culture entry for the land July 5, 1875, and on December 19, 1892, Pattin began his contest against the entry, charging general failure on the part of Smith to comply with the law as to planting or cultivating any part of said land to trees, and that not over two hundred living trees stood thereon. Also

that said entry was made over seventeen years ago and said Walter C. Smith has failed and neglected to make final proof, and that final proof can not be made on account of the failure or neglect of said Smith to promote the growth of timber thereon. The failure exists at the present time.

On the day of the hearing, the plaintiff filed an amendment to his contest affidavit, saying

that since said action was initiated he has discovered that there is a piece of the land containing two acres and fifty-four rods, upon which there are growing 6,400 trees, etc.

The decision complained of gave a full, fair and elaborate statement of the evidence and a review of the law bearing upon the case, and no reason is seen for differing from its conclusion. The evidence shows without dispute that the entryman had fully and completely complied with the law against very unusual misfortunes and disadvantages, and had finally succeeded in establishing about forty acres of fine timber.

The only question in the case is the failure to make final proof within thirteen years from the date of the entry. Five times he met with the entire loss of a fine growing crop of trees; once by grasshoppers, twice by fire, and twice by floods. Three times he procured extensions of time within which to replant and cultivate the tract. These extensions aggregated six years and were so worded as to entitle him to believe that the time within which final proof should be made was itself extended, the last extension being made at a time which, on its face, gave him a year beyond the life of the entry in which to comply with the law; but the act of May 20, 1876 (19 Stat., 54), provides:

Provided, further, That whenever a party holding a claim under the provisions of this act, or whenever making final proof under the same, shall prove by two good and credible witnesses that the trees planted and growing on said claim were

destroyed by grasshoppers during any one or more years while holding said claim, said year or years in which said trees were so destroyed shall not work any forfeiture of any of the rights or privileges conferred by this act; and the time allowed by this act in which to plant the trees and make final proof shall be extended the same number of years as the trees planted on the said claim were destroyed in the manner specified in this section.

Sec. 2. That the planting of seeds, nuts, or cuttings shall be considered a compliance with the provisions of the timber culture act:

Provided, That such seeds, nuts, or cuttings of the kind and for the purpose contemplated in the original act shall be properly and well planted, the ground properly prepared and cultivated; and in case such seeds, nuts, or cuttings should not germinate and grow, or should be destroyed by the depredations of grasshoppers, or from other inevitable accident, that the ground shall be replanted or the vacancies filled within one year from the first planting:

Provided further, That parties claiming the benefit of the provisions of this act shall prove, by two good and credible witnesses, that the ground was properly prepared and planted in such seeds, nuts or cuttings, and were so destroyed by inevitable accident in such year.

This statute applied to the present case would give Smith until June, 1893, to make final proof by its express terms, and at the date of the initiation of this contest he was not in default in the matter of offering final proof, even if the time the statute names, within which final proof may be made, can be considered mandatory and inflexible under all circumstances.

Smith's entire good faith is not questioned and he was not in default in any matter at the time that the contest charges were preferred.

Your office decision is affirmed; the contest is dismissed, and Smith will be allowed to make final proof, if no other objection exists.

RAILROAD GRANT—INVALID SCHOOL INDEMNITY SELECTION.

SIoux CITY AND PACIFIC R. R. Co. v. WIESE.

A school indemnity selection, made prior to statutory authority therefor, does not reserve the land so selected from the operation of a railroad grant.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1895. (W. F. M.)

The land involved in this case is the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 21, township 17, range 11 E., in the land district of Neligh, Nebraska, and lies within the limits of the grants of 1862 in aid of the Union Pacific Railway and the Sioux City and Pacific Railroad companies.

By letter of November 24, 1891, your office, in passing upon the status of this land, held that it was excepted from the operation of the grants by virtue of a State indemnity school selection of date July 1, 1858, which selection, though invalid, had remained of record until July 3, 1880, when it was canceled by your office. By the same letter a selection of the Union Pacific Railway Company of the land in ques-

tion was canceled, and the claim of the Sioux City and Pacific Railroad Company was denied. There was no appeal by either company from this decision.

Meanwhile, on September 25, 1893, Asmus Wiese was allowed to make cash entry of the land, and on October 17, 1894, Burdette, Thompson and Law, of this city, counsel of the Sioux City and Pacific Railroad Company, filed in your office a protest against the issuance of patent to Wiese, setting out various grounds of objection thereto. This protest was dismissed, and the company, though intending to appeal, failed, through inadvertence, to file the same before the expiration of the time allowed therefor.

When the appeal was presented to your office it was rejected, for the reason that it was sought to be filed out of time.

The company has now presented to this Department a duly verified petition for certiorari, wherein all the foregoing facts are set out, the same being accompanied by copies of the decisions rendered by your office and of which complaint is made.

This Department is asked to interfere at this stage of the proceedings on the ground that your office erred in holding that the invalid school selection of the State of Nebraska operated to except the land from the grants, and that inasmuch as this action can not in any manner affect the real title to the land, and since only a question of law is involved, it is the plain duty of this Department under its supervisory authority to correct an error, which the courts when appealed to would certainly rectify.

Since the decision of your office complained of, this Department has held, in the case of the Union Pacific Railway Company *v.* United States (17 L. D., 43), that a school indemnity selection, made prior to statutory authority therefor, does not reserve the land so selected from the operation of a railroad grant on definite location of the road, and in that case the earlier one of *Fitch v. Sioux City and Pacific Railroad Company* was in express terms overruled as to that point.

It appears, therefore, from the *ex parte* showing presented, that the petitioner is entitled to the relief prayed for, and the record will be duly certified to this Department accordingly.

RAILROAD LANDS—PRICE OF LAND.

JOEL E. DAVIS ET AL.

Odd numbered sections excepted from the grant to the Union Pacific, and sold to grantees of the railroad company under section 5, act of March 3, 1887, are properly rated at double minimum.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1895. (E. M. R.)

The various tracts involved in this case constitute the S. $\frac{1}{2}$ of section 3, T. 5 N., R. 65 W., 6th P. M., Denver land district, Colorado.

The record shows that under the fifth section of the act of March 3, 1887 (24 Stat., 556) the following cash entries were made:

Joel E. Davis for the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$;

Charles Camp for the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$;

Charles Emerson for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$;

Annie Burrows for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$;

Mary E., Frank A. and Fred M. Dille for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$;

Robert Hale for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$.

These various entries were allowed under the doctrine laid down in *Union Colony et al. v. Fulmele et al.* (16 L. D., 273 and 17 L. D., 353).

At the time of making the entry the various claimants offered \$1.25 an acre, which was rejected by the local officers and \$2.50 demanded, which was paid under protest.

Upon appeal your office decision approved for patent these various entries and held that the local officers had properly charged \$2.50 an acre, from which action as to the price of the land the various parties appealed, claiming the price asked to be improperly charged.

They were allowed to purchase under the act of March 3, 1887, for the reason that they were *bona fide* purchasers of their respective tracts, believing at the time of such purchase that they were railroad lands.

These lands are rated at double minimum price because they are within the limits of the grant for the Union Pacific railway company.

The act of March 3, 1887, provides for making "payment to the United States for said lands at the ordinary government price for like lands."

While, under the portion of the act just quoted, the term "ordinary government price" would, read by itself, seem to indicate that the minimum valuation of \$1.25 per acre was intended, yet, when read in connection with the words "for like lands", which immediately follow, I am of opinion that the double minimum price charged was a proper one, inasmuch as "like lands" should be sold at that price.

The decision appealed from is therefore affirmed.

SPAULDING *v.* NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of July 16, 1895, 21 L. D., 57, denied by Secretary Smith, October 18, 1895.

PRACTICE—SERVICE OF NOTICE BY PUBLICATION.

BROTEN *v.* JASKOWIAK.

In the service of notice by publication the copy of the notice to be sent by registered mail should be directed to the "last known address" of the defendant, and not to the post office nearest to the land involved in the contest.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1895. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ of Sec. 4, T. 45 N., R. 21 W., St. Cloud land district, Minnesota.

The record shows that on February 20, 1888, John Jaskowiak made homestead entry for the above described tract.

On August 9, 1892, Charles Broten filed his affidavit of contest, alleging abandonment on the part of the entryman.

On December 19, 1893, the local officers rendered their decision in favor of contestant, and, upon appeal, your office decision of June 20, 1894, remanded the case to the local office on the ground that the service of notice upon the defendant was defective, and they were ordered to allow the contestant thirty days in which to apply for notice and proceed under the rules of practice. If the entryman did not respond after due notice, the testimony already taken would be submitted; and further, if the contestant failed to take any further action the local officers were directed to dismiss the contest.

It appears from the record that at the time of making homestead entry the entryman gave his address as Silver Lake, McLeod county. The record shows that he was served by publication and that notice of the affidavit of contest was mailed to him at Sturgeon Lake, Minnesota, and returned as "not called for."

Rule 14 of practice is as follows:

Where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified, thirty days before the date of the hearing, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place upon the land for at least two weeks prior to the day set for hearing.

In order to gain jurisdiction of the parties in cases where notice is served by publication, it is necessary to strictly follow the requirement of the rule. The rule does not provide for the sending of notice to the post office nearest the land, which was done in this case, but "to the last known address" of the defendant. In addition to this it appears

that the decision rendered by you is in the nature of an interlocutory order and therefore not appealable. The right of appeal would only ripen when final action was taken by the local officers, under the direction contained in your decision.

The decision appealed from is affirmed.

GRANT OF SALT SPRINGS AND SALT LANDS TO THE STATES.

THE STATE OF ALABAMA.

In the grant of salt springs and salt lands to the several States the phrase, "the land reserved for the use of the same" means the section including each salt spring.

The Department is without authority to withdraw from settlement and entry lands for the benefit of the State under said grant, as necessary and proper for the working of salt springs that are not in use by the State.

Secretary Smith to the Governor of Alabama, October 21, 1895.

(J. I. H.)

(J. L.)

Your letter (which bears no date and was handed by yourself to me in person some time last August), in relation to salt springs and salt lands alleged to have been granted to the State of Alabama by the United States by the act of March 2, 1819 (3 Stat., 489), was, on September 28, 1895, referred to the Commissioner of the General Land Office for investigation and report.

Your letter calls attention to the act aforesaid, and alleges:

I. That there are seven of said salt springs situated as follows: One in section 21, one in section 22 and one in section 27, in township 7 N., R. 1 E.; and one in section 33 and one in section 34, in township 6 N., R. 2 E.; and one in section 21 and one in section 28, in township 5 N., R. 2 E.; Clarke county.

II. That there never was designated by the President of the United States, nor by the Commissioner of the General Land Office, any of said public land in the sections named, or elsewhere for the use of said salt springs; nor did the President ever designate "such other lands as may by the President of the United States be deemed necessary and proper for working the said salt springs, not exceeding in the whole the quantity contained in thirty-six entire sections," and

III. That each of the said salt springs have at intervals been worked and salt made thereat; but nothing of the kind has been done for several years past; and the United States has permitted to be taken up much of said land by cash entry, and more recently by homestead entry, even in large part the sections in which said salt springs are located, thus rendering it impracticable to work the same profitably.

And therefore, your letter, in behalf of the State of Alabama, requests the Secretary of the Interior, under and by virtue of the authority of the President under the statute aforesaid—

IV. To designate and set apart to the State of Alabama, the aforesaid seven sections of lands on which said salt springs are situated; and also that the following lands adjacent to said salt springs, or as near thereto as practicable, which still remain vacant, be granted to the said State, in lieu of those lands immediately adjacent to said salt springs, which have been entered and taken up by private parties; all being in townships north and ranges east of the St. Stephens meridian, State of Alabama, to wit:

Then follows in your letter a list embracing the seven sections aforesaid, and two hundred and forty-two smaller tracts or subdivisions, aggregating 23,165.35 acres of land, lying within an area thirty miles long north and south, and varying in width from six to eighteen miles. Three maps are also attached to your letter as part thereof, intended to show the location of the salt springs and the subdivisions of land embraced in your application.

In reply I have the honor to communicate the result of examination of public records in this Department.

By section 6 of the enabling act of March 2, 1819 (3 Stat., 489), Congress "offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States, the following proposition:

Second. That all salt springs within the said territory, and the lands reserved for the use of the same, together with such other lands as may by the President of the United States be deemed necessary and proper for working the said salt springs, not exceeding in the whole the quantity contained in thirty-six entire sections, shall be granted to the said State for the use of the people of the said State; the same to be used under such terms, conditions and regulations, as the legislature of the said State shall direct: *Provided*, That said legislature shall never sell, nor lease the same for a longer term than ten years at any one time.

On August 2, 1819, the convention of the people of Alabama, by ordinance accepted said proposition; and afterwards gave notice thereof to Congress. By joint resolution, approved December 14, 1819 (3 Stat., 608), Congress admitted Alabama into the Union as a State. Whereupon, by force and virtue of the aforesaid legislative grant, the "salt springs" aforesaid, and "the lands reserved for the use of the same," aforesaid, became vested in the State of Alabama, for the uses and purposes prescribed in the enabling act aforesaid.

"All salt springs within the said territory and the lands reserved for the use of the same," is a phrase which has had a fixed and definite legislative meaning ever since the passage of the act of May 16, 1796 (1 Stat., 464); which was the first act to authorize the sale of public lands, and is the basis of the government's system of surveys. Therein Congress enacted (in section 2), that "every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs and mill seats which shall come to his knowledge;" and (in section 3),

that a salt spring lying upon a creek which empties into the Sciota river on the east side, together with as many contiguous sections as shall be equal to one township, and every other salt spring which may be discovered, together with the section of one mile square which includes it, shall be reserved for the further disposal of the United States.

The condition of the country, the lack of means of transportation, and the necessities of the pioneers, constrained Congress to reserve and retain for its own disposal all salt springs and six hundred and forty acres around each spring, for the use and benefit of all the people, in

order that salt might be as free as air and water, as far as possible. The policy thus inaugurated was steadfastly maintained, and extended to all the territories successively, in the acts passed for the sale of public lands therein. (See the opinion of Davis J. in the case of *Morton v. Nebraska*, 21 Wallace, 660-667.)

Congress made partial disposals as follows—

By the enabling act of April 30, 1802 (2 Stat., 173), Congress granted to Ohio, in addition to the great Scioto Salt Springs Reservation, "the salt springs near the Muskingum river, and in the military tract, with the sections of land which include the same."

By the enabling act of April 19, 1816 (3 Stat., 289), Congress granted to Indiana

all the salt springs within the said territory and the land reserved for the use of the same, together with such other lands as may by the President of the United States be deemed necessary and proper for working the said salt springs, not exceeding in the whole the quantity contained in thirty-six entire sections.

By the enabling act of April 18, 1818 (3 Stat., 428), Congress granted to Illinois "all salt springs within such State and the land reserved for the use of the same," and nothing more.

The draftsman of the enabling bill for Alabama followed the language of the Indiana act aforesaid. In every case the words "and the land reserved for the use of the same," meant the "section of one mile square which includes each salt spring." Accordingly, the legislature of the State of Alabama, on December 17, 1819, took possession and control of all the salt springs then existing in the State, and of one whole section of land embracing each spring, by passing an act in the following words:

Be it enacted by the Senate and House of Representatives of the State of Alabama in general assembly convened, That the governor be and he is hereby authorized to appoint one fit and proper person, who shall have power to lease the salt springs and lands donated by the Congress of the United States by the act of the second of March, 1819, to this State, for a term not exceeding that stipulated in said act of Congress, on such terms as will ensure the working the same most extensively and most advantageously to the State.

I find that "an act to establish the Bank of Alabama," approved December 20, 1823, enacted

that all the moneys that may arise from the lease of the salt springs granted to this State by the United States, shall form a part of the capital of said Bank, and that the proceeds shall be vested so as to continually increase the capital until otherwise provided by law.

I find also that on January 5, 1827, the legislature passed an act to extend Seth Hunt's lease of the "salt springs and the lands reserved to this State by the United States for the support of salt works," for a term of ten years from and after the first day of January, 1827.

From this history I infer that, between 1819 and 1837, a period of seventeen years, the State of Alabama was in continuous possession of salt

springs, presumably all the springs that were then known, and of six hundred and forty acres of public lands with each spring, under a title which is the best the government can give, to wit: a congressional grant. If it be made to appear that this Department has improvidently issued patents for any part of the lands which were granted to the State of Alabama in 1819, upon the request of the State to this effect, this Department will consider the propriety of recommending the Attorney-General to institute suits to have such patents judicially declared null and void.

For seventy-five years the State of Alabama never alleged that any other lands were necessary or proper for the working of said salt springs; and never made any application to the President for the exercise of the discretion vested in him by the granting act. Such protracted inaction warrants the presumption that the State has always deemed that any other lands were unnecessary for the working of said salt springs.

After January 1, 1837, when steamboats and railroads had increased facilities for transportation, it became unprofitable to make salt by boiling salt water; and the salt springs of Alabama were not worked, and apparently were regarded of little value. For I find that on February 13, 1843, the legislature of Alabama passed a joint resolution in the following words:

That the governor be, and he is hereby authorized, after obtaining the necessary information in relation to the salt springs and wells belonging to the State, to farm them out to the best advantage, and take the necessary bonds and security for the proper working and care of the same.

It does not appear that anything was ever done under this resolution.

In the year 1861, the legislature of Alabama resumed possession of the salt springs and the lands appurtenant, and worked them for four years to their utmost capacity. A great many acts were passed, which show that new salt springs were discovered and opened. Wells were dug, and artesian wells were bored to tap the subterranean springs and increase the number of vents through which salt water might be procured. It can not be conceded that each new vent when opened, carried with it title to six hundred and forty acres of public lands.

On February 23, 1866, the legislature of Alabama passed an act, in the following words:

That the governor of this State is hereby authorized to appoint a suitable agent, whose duty it shall be to superintend the salt springs and salt lands donated to this State by the Congress of the United States; to prevent all trespass and waste on said lands; to lease the springs and lands on such terms and conditions as he may see fit; to settle all accounts with any former agent or agents, lessee or lessees; to take charge of all property, debts and demands due the State, from all and every person; and generally to save and secure to the State whatever property, debts and demands due the State on account of said lands.

With the State in full possession, the salt springs and salt lands again passed into disuse, as appears by your letter, wherein you state, that "said salt springs have at intervals been worked and salt made

thereat; but nothing of the kind has been done for several years past." This Department perceives no reason why other lands should be deemed necessary and proper for the working of salt springs which have not been worked for nearly thirty years past. This Department has no authority to withdraw from settlement and entry two hundred and forty-two tracts of land, which may furnish homesteads for as many citizens with their families; and make them inalienable forever, by dedicating them as necessary and proper for the working of salt works which are not in operation. This Department has no authority to grant indemnity or lieu lands in place of lands specifically granted by Congress, unless such authority be expressly conferred by Congress.

The field books, or field notes, of the surveys of township 7 north range 1 east, township 6 north range 2 east, and township 5 north range 2 east, St. Stephens' meridian, made in the year 1811, are not to be found in the General Land Office. Copies of them may be on file in the office of the Secretary of State of Alabama. They ought to show the true situation of all salt licks and salt springs that came to the knowledge of the surveyor in 1811.

The field notes of the survey made in 1849 are of record here. They show the location of all salt licks and salt springs known at that date.

For the foregoing reasons, I am reluctantly constrained to deny the request of the State of Alabama, presented by you as governor in your letter aforesaid.

REPAYMENT—PURCHASE OF RAILROAD RIGHT OF WAY—FORFEITURE.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

The payment of the Chicago, Milwaukee and St. Paul Railway Company, under its agreements with the Sioux Indians, for the right of way across their reservation, was originally in the nature of a deposit to await the action of the Secretary of the Interior and Congress, but when Congress ratified said agreements, and the company accepted the terms of the ratification, the matter became an executed contract. The company had bought an easement and paid for it, taking the same subject to forfeiture for non-performance of conditions subsequent. The failure of the company to build its road within the time stipulated, forfeited its right of way by its own default, and it is not entitled to repayment of the money paid therefor.

Secretary Smith to the Commissioner of Indian Affairs, October 21, 1895.
(J. I. H.) (G. B. G.)

This is in the matter of the application of the Chicago, Milwaukee and St. Paul Railway Company for the repayment of certain moneys, amounting to the sum of \$15,335.76, deposited by said company with the Secretary of the Interior upon four several agreements with the Sioux Indians of Dakota in the year 1880 for right of way and depot grounds described in said agreements upon, across, over and through what was then the Great Sioux Reservation in Dakota.

The petition of said company recites, substantially, that said money was paid as aforesaid; that said agreements were approved by the Secretary of the Interior, but were never approved or ratified by Congress; that the company has not received, and, according to the decision of the Secretary of the Interior and the subsequent acts of Congress, can never receive said land, or any part thereof, as agreed with said Indians, and that no consideration whatever has been received for said deposit. That said lands and all of the same, for which said money was deposited, according to the provisions of what is known as the Sioux bill of March 2, 1889 (25 Stat., 888), have become a part of the lands open to settlement, and have been, or are to be, sold for the benefit of the Sioux Indians according to the provisions of said act, and for which lands and all of the same the said Sioux Indians must receive the full sum of money per acre that they received for their lands under said act, as provided by section 21 of said bill. And that such terms were imposed by the provisions of the Sioux bill as so changed the agreements and contracts of the company with said Indians as to render it impossible for the company to comply therewith.

It is asked that the company be allowed to withdraw said deposit.

The contention that Congress has never approved or ratified the agreements of said company with said Indians has already been decided adversely to the petitioners by this Department.

In the case of *King v. the Chicago, Milwaukee and St. Paul Railway Company*, in which the rights of the company rested largely on just the opposite position from the one now taken by it, the Department adjudicated the question in favor of the Railroad company, and held that—

The express language of the act, that said company shall have the right to take and use for . . . depot and station privileges, machine-shops, freight-house, round-house and yard facilities, prior to any white person, and to any corporation or association, so much of the two separate sections of land embraced in said agreements; shows that it was intended to ratify and confirm said agreements (14 L. D., 167).

The act here referred to is the act of March 2, 1889. (25 Stat., 888.) That Congress by said act modified the original agreements of the company with said Indians is not material. This the legislative branch of the government certainly had the power to do, and it appears that the company accepted the agreements as modified by Congress, by complying with certain preliminary requirements thereof, the company having afterwards, in 1890, filed its maps of definite location, which maps were approved by the Secretary of the Interior on June 24, 1891.

The 16th section of said act, provided, among other things, as follows:

And the said railway companies, and each of them, shall within three years after this act takes effect, construct complete, and put in operation their said lines of road; and in case the said lines of road are not definitely located and maps of location filed within the periods hereinbefore provided, or in case the said lines of road

are not constructed, completed, and put in operation within the time herein provided, then, and in either case, the lands granted for right of way, station grounds, or other railway purposes, as in this act provided; shall, without further act or ceremony, be declared by proclamation of the President forfeited, and shall, without entry or further action on the part of the United States, revert to the United States and be subject to entry under the other provisions of this act; and whenever such forfeiture occurs the Secretary of the Interior shall ascertain the fact and give due notice thereof to the local land officers, and thereupon the lands so forfeited shall be open to homestead entry under the provisions of this act.

The company having failed to construct its road within the time required by the act, all of its rights became subject to forfeiture thereunder, and as provided therein, and on December 5, 1894, the President of the United States issued his proclamation forfeiting all interest of the company to the United States.

The question remains,—Is the company entitled to a repayment of the money applied for?

The contention is that the money was not paid, but deposited, and may therefore be withdrawn.

This contention is not sound. The original agreements stipulated that the money should be "paid", the act of Congress ratifying said agreements provided that the money should be "paid"; and, moreover, the contention of the company has heretofore always been that it was a payment.

In the case of the Chicago, Milwaukee and St. Paul Railroad Co. (19 L. D., 429), it was said in reference to this same transaction:

These selections were approved by this department, and payment made for right of way and station purposes, amounting to about \$15,000.

An examination of the record in that case also shows that this was the contention of the company. Counsel for the company say in their brief:

So far as the rights of way and lands lying west of the Missouri River are concerned, we can add nothing to our letter of June 1, 1893. We have paid for those rights over fifteen thousand dollars in money, and the government holds the same for our rights there.

While originally this payment was in the nature of a deposit to await the subsequent action of the Secretary of the Interior and Congress, when Congress ratified the same and the company accepted the new conditions imposed, it became an executed contract; the deposit became a payment. The company had bought an easement, a right of way and station grounds, and paid for them.

That the interest bought by the company was an easement there can be no doubt. The agreements and the act of Congress referred to both provided that the lands purchased by said company should be used for right of way and station purposes and no other, and the act provided for forfeiture in case of non-user—that is, in case the road was not built within three years. The rule is that money paid in pursuance of a contract which is rescinded or abandoned by the mutual consent of

the parties, or by reason of the laches or default of the payee, may always be recovered back, if the payer is not in default in any respect. But it cannot be affirmed in part and rescinded in part, except by mutual consent, nor can the money paid be recovered back if both parties are in default, nor if the contract still remains executory and open. *Waits' Action and Defences*, Vol. 4, pages 501, 502, cases cited; also *Bales v. Weddle* (14 Ind., 349).

The contract between the railroad company and the Indians was from the disability of one of the contracting parties executory in its nature. If Congress had ratified the agreement in terms, it would have become an executed contract. But Congress saw fit to change some of the conditions of the contract, and it was, of course, not binding on the company until it accepted the new conditions imposed. This it could have done in terms, or by performing any act denoting its acceptance. When the company made its survey and filed its maps of definite location in conformity with the requirements of the act of Congress, the contract became complete. It took the right of way subject to forfeiture for non-performance of conditions subsequent.

The company failing to build its road within the time stipulated forfeited its right of way. It was of its own default. It was not prevented by the Indians or the Government from building its road within the time stipulated, and on principle and authority cannot recover the money paid.

If one of the parties to an abandoned or violated contract cannot recover money paid by them where both parties are in default, it follows *a fortiori* that the party in default can not recover from the party not in default.

Leaving out of the question the fiduciary relation which the Secretary of the Interior sustains to the Indians, the law does not warrant a repayment of the money applied for.

PLACER ENTRY—BUILDING STONE—SCHOOL LAND.

PARIS GIBSON ET AL.

Land embraced within a placer entry of a tract chiefly valuable for ordinary building stone, allowed at a time when such entries were recognized under the departmental rulings, is by such sale excepted from the subsequent operation of the grant of school lands to the State, and the entry therefor, appearing to have been made in good faith, may be carried to patent.

Secretary Smith to the Commissioner of the General Land Office, October 21, 1895.

On January 30, 1895, the Department rendered a decision in the case of *Paris Gibson et al.*, denying a motion for review of departmental decision of September 26, 1893 (unreported), in the matter of the mineral entries, Nos. 2003 and 2004, made October 8, 1889, upon alleged placer

claims embracing the SW. $\frac{1}{4}$ of section 36 and the SE. $\frac{1}{4}$ of section 30, T. 21 N., R. 3 E., Helena, Montana.

The aforesaid decision of January 30, 1895, has not been promulgated by your office, and the case is now before the Department on motion of the mineral claimants to recall and vacate said decision.

The grounds upon which the present motion is predicated are, substantially—

1st. It is error to hold that lands chiefly valuable for ordinary building stone are not mineral lands and subject to location and entry as a placer.

2d. That even if it was error to allow the entry of such lands under the placer mining laws, that under the well established ruling and practice of the land department at the date of location and final certificate, such entries were allowed, and that property rights initiated under departmental construction once established, should not, and cannot, be defeated by a subsequent change of construction.

If this latter contention is sound, the question as to the classification of lands valuable chiefly for ordinary building stone may be waived.

That part of the land entered, which is in controversy herein, to wit, the SW. $\frac{1}{4}$ of section 36, was by the act of May 26, 1864 (13 Stat., 85-92), organizing the Territory of Montana, reserved for the benefit of the common schools of the State or States that might thereafter be carved out of said Territory. The State of Montana was admitted into the Union by the act of February 22, 1889 (25 Stat., 676-684). Section 10 of said act is, in part, as follows—

That upon the admission of . . . said State into the Union sections numbered 16 and 36 in every township of said proposed State, and when such sections . . . have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto . . . are hereby granted to said State for the support of common schools.

The State was admitted into the Union on November 8, 1889, by the President's proclamation of that date (26 Stat., 1551), and the grant took effect on that date, and the land in controversy passed to the State, unless it had, at that time, been sold or otherwise disposed of by or under the authority of an act of Congress. This, of course, presupposes that the land is not mineral, for in that event, it is excepted from the grant by section 18 of the act. The land in controversy was entered by the mineral claimants, as a placer mine, at the local office, and payment was made and certificate issued thereon on October 8, 1889. The tract then had been disposed of under section 2329 of the Revised Statutes just one month before the grant to the State attached, and, therefore, did not pass under the grant.

In the case of the State of Minnesota *v.* Bachelder (68 U. S., 109), it was held (syllabus):

Neither the act of Congress of 3d March, 1849—the organic law of the Territory of Minnesota, which declared that when the public lands in that Territory shall be surveyed, certain sections, designated by numbers, shall be and “hereby are reserved for the purpose of being applied to schools”—nor the subsequent act of February

26th, 1857, providing for the admission of that Territory into the Union—and making the same reservation for the same object—amounts so completely to a “dedication,” in the stricter legal sense of that word, of these sections to school purposes, that Congress, with the assent of the Territorial legislature, could not bring them within the terms of the pre-emption act of 1841, and give them to settlers who, on the faith of that act, which had been extended in 1854 to this Territory, had settled on and improved them.

The Territory of Montana coming into the Union of States accepted the conditions laid down in the act of February 22, 1889 (*supra*) among which, as has been seen, was, in effect, an agreement to take indemnity-lands where sections 16 and 36 had been sold, or otherwise disposed of, under the authority of any act of Congress.

This act does not say lands properly disposed of, so it makes no difference to the State whether it was an erroneous disposition, or whether the tract was subject to mineral entry or not. It has been sold under the act of Congress, and the State is protected fully by the indemnity clause. The issue is then between the entryman and the government.

Inasmuch as the practice of the land department at the date of the mineral location herein was to allow placer entries on lands of the character herein applied for, and it appearing that these entries were made in good faith, believing the lands were subject to appropriation under the mineral laws, and it further appearing that payment has been made and final certificate issued, I am of opinion that the entries should be passed to patent.

The case of *South Dakota v. Vermont Stone Co.* (16 L. D., 263), does not control, nor is it in conflict with, the conclusions reached in the case at bar. In that case it was held that land valuable chiefly for ordinary building stone was not subject to entry under the placer mining laws, and that the land in controversy therein passed to the State under its school grant. But that case was before the Department on an application to enter; whereas, in the case at bar, final entry has been allowed, payment made and certificate issued, and the entrymen present a vested right and ask for patent. (115 U. S., 405.) In other words, in the case cited, the land had not been sold.

But I do not intend by this distinction to imply an approval of the case of *South Dakota v. Vermont Stone Company*, *supra*.

Contemporaneously with the passage of the act of July 9, 1870 (16 Stat., 217), the land office held that lands chiefly valuable for building stone were mineral lands and subject to location as placer. This view was sustained by the Department (see *H. P. Bennett, Jr.*, 3 L. D., 116, and cases there cited). Parties acted upon the law as then construed, and I do not intend to express the opinion that this decision was erroneous.

RIGHT OF WAY—FOREST RESERVATION.

HAMILTON IRRIGATION COMPANY.

In applications for right of way privileges under the act of March 3, 1891, where the proposed location is upon, or traverses a forest reservation, the Department should require a stipulation on the part of the applicant that no timber will be taken from the land within the reservation outside of the reservoir, or from land not occupied by the water way.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1895. (F. W. C.)

With your office letters of September 25, and October 8, last, were submitted articles of incorporation, due proof of organization, filed by the Hamilton Irrigation Company of California, together with maps of location showing a proposed reservoir site, together with a pipe line leading therefrom, on account of which application is made for right of way under the provisions of the act of March 3, 1891 (26 Stat., 1095).

The proposed reservoir is entirely within the San Gabriel timber land reserve, part of the same being on surveyed and part on unsurveyed land, and the pipe line on account of which the right of way is applied for lies partly within said reserve.

This reserve was created by the President's proclamation of December 20, 1892, and was designed to protect timber upon the lands reserved.

While the reservation in question is no bar to the approval of the right of way under the act of March 3, 1891, *supra*, yet under the terms of section 18 of that act, if these maps are approved the company would have the right to take from the public land adjacent to the reservoir and pipe line, materials earth and stone, necessary for the construction of the same.

I am therefore of the opinion that the interests of the government require in this case, and all others of like nature, for the purpose of protecting the timber upon these reserves, that before approval of the maps of location covering these forest reserves an agreement should be filed by the company in which it stipulates not to take any timber from the lands within the government reserve outside of the reservoir, or from lands not occupied by the pipe line.

I therefore herewith return the maps filed by the Hamilton Irrigation Company, without action, and have to direct that you call upon them to file an agreement as above indicated before again submitting the maps for my consideration.

PORTERFIELD SCRIP—DOUBLE MINIMUM LAND.

REMLINGER *v.* MORELAND.

Porterfield scrip is not locatable upon double minimum land.

A mere *de facto* appropriation of a tract for city purposes, by an act of a State legislature, is not a legal appropriation of government land, and does not defeat the provision made in the grant to the Northern Pacific railroad company raising the alternate reserved sections to double minimum.

Secretary Smith to the Commissioner of the General Land Office, October 21, 1895. (C. W. P.)

The land involved in this appeal is lot 6, section 22, T. 2 N., R. 1 E., Vancouver land district, Washington.

The record shows that the land involved is a triangular lot containing 5.22 acres, situate within the corporate limits of the town of Vancouver; that it was included within the limits of said town by an act of the territorial legislature, approved January 23, 1857; that it was first occupied by one Sonensine in 1863, who in 1865 sold and transferred his possessory right to one Damphoffer; that Nicholas Remlinger then obtained possession from Damphoffer (in 1868) upon payment of \$200; that in 1881 on payment of \$131 Remlinger procured a quit-claim deed to the premises from the Catholic bishop of Nisqually, who had formerly claimed it for mission purposes.

Julius C. Moreland located said land with Porterfield scrip, No. 87, for forty acres, April 10, 1890. On April 21, 1890, Remlinger filed protest against the acceptance of the same.

A hearing was had on March 9, 1891, and at the trial it was admitted by the parties that the land was within the corporate limits of Vancouver; that none of the land had been platted into lots and blocks; that it is not within the government townsite, nor is used or occupied for trade or business, except as shown by the testimony. The proof showed that Remlinger had resided continuously on this land since 1868, and placed valuable improvements thereon; that about three acres of the land is an orchard of fruit-bearing trees, yielding Remlinger an annual income, and that the balance of the tract is used as a nursery; that the land with improvements is worth between \$7000 and \$8000.

Remlinger testified that he believed that he had obtained title by reason of his purchase, and that he had paid taxes on the land for twenty years. Mr. O'Keene, who was receiver of the land office from 1885 to 1889, and has known plaintiff for twenty years, testified that Remlinger applied once to make entry of the land, and frequently talked to witness and the register about said tract, after he became aware that the government had not parted with its title; and was always advised that he could not enter it by reason of its being within the corporate limits of Vancouver, and further that it was claimed by the St. James Catholic mission.

Upon the testimony submitted the register and receiver held that the scrip location of Moreland should stand. Remlinger appealed. On June 1, 1893, Remlinger applied to make homestead entry of said land, which was refused on the ground that it conflicted with the scrip location of Moreland, and that the land was within the corporate limits of the city of Vancouver. Remlinger appealed.

Your office reversed the judgment of the local officers, and held the scrip location of Moreland for cancellation.

Moreland appealed to the Department.

The land in question is an even-numbered section within the granted limits of the Northern Pacific Railroad Company. Section 6 of the granting act of July 2, 1864 (13 Stat., 365), provides for the survey of the lands for forty miles in width on each side of the road after the general route shall have been fixed; that the odd-numbered sections should not be subject to sale by the government thereafter; that the even-numbered sections should be subject to settlement and sale as provided by law; and then provides:

And the reserved alternate sections shall not be sold by the government at a price less than \$2.50 per acre, when offered for sale.

The reserved alternate sections named in the statute are the even-numbered sections open for settlement and sale by the government. The general route of the road was fixed August 13, 1870 (Cole v. Northern Pacific R. R. Co., 17 L. D., 8), and the land in controversy then became double minimum. Michael Dalton (14 L. D., 377).

The act creating the Porterfield scrip (12 Stat., 836), provides that it may be located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location within any of the States or Territories of the United States where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre, thus expressly limiting the location of this scrip to single minimum lands.

It is contended in behalf of the claimant that this land is not affected by the act of 1864, because of its inclusion within the corporate limits of Vancouver by the act of the territorial legislature above referred to. But this is not so; for a mere *de facto* appropriation by an act of a territorial legislature is not a legal appropriation of government land, and does not run against the government. Lewis v. Town of Seattle (1 L. D., 497); Wilcox v. McConnel (13 Peters, 498); Root v. Shields (1 Woolworth, U. S. Circuit Court, 34).

There is a motion by the counsel for Remlinger to dismiss Moreland's appeal from your decision because not taken in time. But it is shown that no sufficient notice was given to Moreland, or his counsel, until June 29, 1894, when the Assistant Commissioner of the General Land Office extended the time to file an appeal to sixty days from June 13, 1894. Appeal was filed August 8, 1894, and within the required time. The motion is therefore denied.

Your office decision is affirmed.

HOMESTEAD—SECTION 2, ACT OF MARCH 2, 1889—RELINQUISHMENT.

LAMBERSON *v.* EDGERTON.

The right of a pre-emption settler to change his claim to a homestead entry under the proviso to section 2, act of March 2, 1889, where such claim is initiated prior to the passage of said act, is not affected by the fact that the right of the settler was involved in a suit that was not finally determined until after the passage of said act.

A relinquishment filed during the pendency of a contest, but not the result thereof, does not inure to the benefit of the contestant; and his rights thereafter depend upon his success in establishing the charge as laid by him against the entry in question.

Secretary Smith to the Commissioner of the General Land Office, October 21, 1895. (W. A. E.)

The land involved here is the SE. $\frac{1}{4}$, Sec. 23, T. 7 S., R. 38. W., Colby (formerly Oberlin), Kansas, land district.

March 1, 1888, Mary O. Lively made homestead entry No. 12,815 for said tract, and on March 10, 1888, George L. Calvert filed contest on the ground of prior settlement, tendering at the same time his pre-emption declaratory statement in which settlement was alleged as of January 18, 1888.

A hearing was had, as a result of which your office, on April 17, 1891, directed that Calvert's declaratory statement be accepted and placed of record, and that Lively's entry be allowed to remain intact, subject to Calvert's right to make final proof.

November 20, 1891, Lively's entry was canceled by relinquishment, and on the same day Calvert made homestead entry No. 14,445 for the land under the proviso to the second section of the act of March 2, 1889 (26 Stat., 854).

December 10, 1891, Charles W. Lamberson filed affidavit of contest against Calvert's entry, alleging that said entry was illegal, for the reason that Calvert had previously obtained title to a tract of land under the homestead law and he did not enter the present tract as a pre-emptor prior to March 2, 1889.

April 14, 1892, the day set for hearing, the register and receiver dismissed the contest for want of prosecution.

On the following day, April 15, 1892, Calvert's entry was canceled by relinquishment, and Elmer Edgerton made homestead entry No. 14,744 for the tract.

April 21, 1892, Lamberson tendered his homestead application for the land, the application was rejected, and he appealed, both from the dismissal of his contest and the rejection of his application.

Your office, by letter "H" of July 9, 1892, overruled the action of the register and receiver dismissing Lamberson's contest, and remanded the case with instructions to the local officers to call upon Edgerton to show cause why his entry should not be canceled and Lamberson allowed to enter.

At a hearing before the local office on August 3, 1893, Lamberson showed by the records of the Colby, Kansas, land office that Calvert had perfected title to a tract of land under the homestead law on December 7, 1885, and that his pre-emption declaratory statement for the land in controversy was not allowed until after the passage of the act of March 2, 1889.

November 25, 1893, the register and receiver rendered their decision recommending that Edgerton's entry be held intact, and on appeal by Lamberson your office, on April 25, 1894, affirmed their action.

Lamberson's further appeal brings the case before the Department.

The presumption that Calvert's relinquishment was the result of Lamberson's contest is overcome by the fact that the relinquishment was executed and filed after the contest had been dismissed by the local officers for want of prosecution, and the testimony of Calvert, given at the hearing on August 3, 1893, that the relinquishment was an independent transaction in no way induced by the contest. Any rights that Lamberson might have, therefore, would depend upon his ability to show that Calvert's entry was illegal.

The proviso to the second section of the act of March 2, 1889, reads as follows:

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, but such settlers who perfect title to such claims under the homestead law shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States.

Calvert clearly came within the provisions of this act. It is shown that he settled upon this land on January 18, 1888, prior to the date of Lively's entry, and resided there until after he had made homestead entry in 1891. He tendered his pre-emption declaratory statement on March 10, 1888, and at the same time took steps to have the record cleared of Lively's entry. The fact that a decision in his favor was not reached until after the passage of the act of March 2, 1889, could not affect his rights. He had initiated a valid claim to the land as a pre-emption settler prior to the passage of that act and was entitled to its privileges. *Neil v. Southard*, 16 L. D., 386.

Lamberson having failed to substantiate his charge of illegality against Calvert's entry, his claim of preference right of entry falls.

The decision of the General Land Office is affirmed.

PRACTICE—NOTICE—TIMBER CULTURE CONTEST.

RICHARDS *v.* ROBERTS.

Leaving a copy of notice of contest at defendant's house with some member of his family is not such service as is contemplated by the rules of practice.

A timber culture contest must fail where the defendant cures his default prior to legal service of notice, and it does not appear that the compliance with law was induced by knowledge of the impending suit.

Secretary Smith to the Commissioner of the General Land Office, October 21, 1895. (W. A. E.)

Henry F. Richards has appealed from your office decision of March 31, 1894, dismissing his contest against the timber culture entry of Clarence L. Roberts, made April 2, 1890, for the SW. $\frac{1}{4}$ of Sec. 10, T. 141 N., R. 51 W., Fargo, North Dakota, land district.

The affidavit of contest, filed April 20, 1893, charges failure to plant or cultivate trees, tree-seed, or cuttings, during the third year of entry and to date of contest.

Notice of contest was served upon the defendant on May 13, 1893.

The testimony shows that during the years 1890, 1891, and 1892, a large portion of the land in controversy was planted to agricultural crops. In the fall of 1892 defendant staked off and prepared for tree planting ten and one-half acres. March 27, 1893, a few days before the expiration of the third year of entry, he received a lot of willow trees, but as the ground was covered with snow at that time these trees were not planted until May 2, and 3, when they were set out over five acres.

While it is true that the defendant was very negligent in waiting until the last moment to plant the trees, knowing, as he must have known, that in the latitude of North Dakota the chances were that he would not have an opportunity of planting trees or seeds in the spring of 1893 until after the expiration of the third year of entry, yet he had cured his laches before legal service upon him of notice of contest.

The plaintiff files with his appeal to the Department an affidavit, showing that a copy of the notice of contest was left at the defendant's house with the defendant's father on April 29, 1893.

Waiving the question as to whether said affidavit is admissible at this time, it is sufficient to say that merely leaving a copy of notice of contest at defendant's house with some member of his family is not such service as is contemplated by the rules of practice. *Ackerson v. Dean*, 10 L. D., 477. It follows that there was no legal service of notice until May 13, 1893, when the defendant was personally served.

Nor can it be held that the planting on May 2, and 3, was induced by a knowledge of the contest, as the defendant had made arrangements to plant trees before this contest was filed, and the planting was merely a furtherance of his original plan.

Your office decision is accordingly affirmed.

MINING CLAIM—NOTICE—POSTING—EXPENDITURE.

FERGUSON ET AL. *v.* HANSON ET AL.

A mineral entry cannot be allowed where the applicant fails to post the plat and notice of application in a "conspicuous" place on the claim, and failure to comply with the statute in such particular will make new notice of the application necessary.

In case of an application for mineral patent that embraces several locations, five hundred dollars worth of labor or improvements is required on each location, unless it is shown that the expenditure made is for the convenient working or development of all the claims included in the application.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 31, 1895. (P. J. C.)

The record shows that application for patent was filed in the local office at Helena, Montana, November 3, 1892, by Magnus Hanson and John C. Paulsen for the Priscilla, Georgiana and Dorcas lode mining claims, mineral surveys Nos. 4092, 4093 and 4094, respectively; that publication notice of said application was made, on order of the register, in the Semi-Weekly Inter Mountain, the first publication on November 6, 1892, and the last January 8, 1893.

On January 13, 1893, attorneys for Thomas Ferguson *et al.*, claimants of the Happy New Year lode claim, and Thomas P. Byrne *et al.*, claimants of the Lucky Tom lode claim, filed protest against the entry by Hanson, alleging prior location of their claims; that they had no notice of the application, because it was published in a paper not of general circulation. On January 20, following they filed another affidavit, made by the parties, alleging in addition to what is stated above, that the notices were not posted in conspicuous places on the claims and that not to exceed one and one-half days' work had been done on the claims by the applicants. Again, on February 8, 1893, they filed another affidavit, setting out with more detail the above allegations, supporting the same by additional affidavits.

Notice was issued for a hearing upon two of the charges: (1) that notice had not been conspicuously posted, and (2) that applicants had put no improvements on the claims. The testimony was taken before a notary public at Butte, and on examination thereof, the local officers decided (1) that sufficient work had been done, and (2) that although the notices were posted on the claims, yet they were put in inconspicuous places. They recommended that applicants be required to repost and republish the notices.

On appeal, your office, by letter of March 15, 1894, concurred with the register and receiver upon all points, except as to posting the notices in conspicuous places, and reversed them on that, on the ground, however, that the testimony of the protestants was of a negative character purely, while that offered by claimants was of witnesses who were

present when the notices were posted and "saw them while remaining posted." On this point your office decision says—

The evidence of one man who swears that plat and notice were posted in a conspicuous place on the claim in his presence, or that he saw the plat and notice while remaining posted, is worth more than the evidence of many witnesses who simply swear that they did not see such plat and notice on the claim. In the case at bar five witnesses testify affirmatively to the posting, some of whom were present at the time said plats and notices were posted, some saw them while remaining posted, and others were present when said plats and notices were taken down. All of these five witnesses identify the plats and notices offered in evidence as the same ones they saw posted on the locations, and all substantially agree as to the manner of posting, and the position on each location where plat and notices were posted.

From this decision protestants appeal, assigning six grounds of error; the first three in reference to posting notices on the claims, and the remainder in regard to compliance with the law in the location of applicants' claims.

Section 2325 of the Revised Statutes provides how a patent may be obtained for a mining claim, and among other things the applicant must do is to post a copy of plat, previously made under the direction of the surveyor-general,

in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice having been posted in a conspicuous place on the claim during such period of publication.

Both decisions below find that these notices were posted—and I concur in this—the only difference between them being that the register and receiver decided that they were not "conspicuously posted," as required by statute, while your office seems to hold that they were. The opinion of the local office goes into detail as to the posting on each claim, while your office simply rests its opinion on the competency of the witnesses, apparently without regard to the locus of the notices.

The return of the surveyor-general shows that at the time the survey was made, October 22, 1892, the work on these lodes was as follows—On the Priscilla, a discovery shaft four by seven and one half feet, seven feet deep; on the Georgiana, discovery shaft four by six feet,

eight feet deep; on the Dorcas, discovery shaft five by seven feet, six feet deep, and "shaft No. 2," four by five feet, two feet deep. So that it will be seen that on each claim some work had been done. The evidence shows that there were no windlasses or houses or any other improvement or conspicuous place or places on the claims. The ground is shown to be broken and mountainous, with rocky hills and many large boulders scattered over the surface. There are two or more traveled roads on the land, running in different directions. It is not definite as to whether they traverse each claim or not, but they are roads that are constantly traveled in reaching the villages or mining camps surrounding Butte City, to which the land in controversy is in close proximity.

The plats and notices required to be posted were tacked in open boxes about two feet square, and one foot deep, and were put upon the ground with rocks around them for their support and on top to keep them in place. On the Priscilla this box was placed two hundred and fifty feet northwesterly from the southeast corner. Between the box and the discovery shaft was a ridge about fifty feet high, the discovery shaft being about one thousand feet westerly from where the box was placed. On the Georgiana the box was placed about two hundred feet west of the discovery shaft, on the south side of a rocky hill, or butte, about forty feet from the top, which was covered with boulders, some of them four feet high, some of which were in front of the box. The box on the Dorcas was about one hundred and fifty feet south of the discovery shaft, on the side of a hill on level ground, rising a little from the shaft. There were large rocks or boulders all over the ground in this vicinity.

Neither of the notices were posted at either of the discovery shafts, nor were they placed on or near either of the traveled roads. They were not fastened on trees or otherwise placed at an elevation above the level of the ground so that they could be seen by those going over the land, or so that they might not be obscured by the snow that is shown to have fallen in that region at the season of the year when they were posted. On the contrary I am strongly impressed with the belief that there was a studied effort on the part of the applicants to avoid a compliance of the law in posting the notices in a conspicuous place on the land. In fact, there are several incidents disclosed by the testimony which were probably not properly at issue, but which were nevertheless brought out, and which the government may avail itself of in a proceeding like this, which is calculated to impress one with the belief that these applicants were anxious to avoid publicity in making their entry as much as was consistent with a colorable compliance with the law.

It is difficult, perhaps, to lay any general rule as to what should be construed to be a conspicuous place on a mining claim. It is a matter of common knowledge that they are generally located in mountainous regions, where from any given point but comparatively a small

portion of the claim may be seen. But there must, from the very nature of things, be an initial point, both physical and legal, in every mining claim, and that is the discovery shaft. Without this there can be no legal location, as all rights of every nature are based upon a discovery of mineral. In the absence of all other improvements, as in this case, it would seem perfectly natural that any one going upon a mining claim for any purpose for which the government would be interested, would go to the discovery shaft. It would seem as if this initial point would be the first to attract the attention of any one investigating the land, and in the absence of all other improvements, would certainly be the most conspicuous on the claim. In digging a shaft a dump is necessarily created which shows the handiwork of man. It may be said that the discovery shaft may be located in an obscure place. This is true, yet, nevertheless, if it be the only improvement on the claim, it is certainly, in contemplation of law, and as a physical fact as well, more conspicuous for the purpose of conveying notice to the world than "boulder drifted" hills, away from traveled trails or roads would be.

It is evident that posting the plat and notice of application for patent in a conspicuous place on the ground was one of the three methods, to be pursued simultaneously, by which all persons were to have notice of the intention of the applicants to procure title to the land (see *Byrne v. Slauson* 20 L. D., 43). Now if it be shown that those claiming adverse rights did not actually have notice of the pending application, so that they could protect their interests in the manner provided by law, and in addition it is shown that either of the three methods of conveying notice had not been complied with, it follows that an entry should not be permitted. For instance; if the publication is not made in the proper newspaper and adverse claimants are thereby deprived of their rights, the Department will require new publication. (*Condon et al. v. Mammoth Mining Company*, 14 L. D., 138; same on review, 15 L. D., 330.) If the local officers had failed to post a notice in their office, the entry could not be perfected, in the presence of adverse claimants who did not have notice. The same rule should apply, in my judgment, where the notice is not posted in a conspicuous place on the land. This is the only act of the applicant to convey notice. He posts the notice. The local office directs what paper it shall be published in and posts the notice in their office. If the applicant fails to conspicuously post it, he has no one to blame but himself.

I do not think there was a compliance with the statute by the applicants in posting the notice on the claim, and therefore reverse your office decision, and affirm that of the local office.

I call your attention to the fact that there has not been a compliance with the law on the part of the applicants in the matter of improvements. The value of these, as fixed by the deputy surveyor at the time of the survey, is \$68.00. The statute quoted above provides that the applicants may, during the period of publication, file the certificate

of the surveyor-general that \$500.00 worth of work had been performed "upon the claim." The period of publication expired January 8, 1893. On February 7, following the surveyor-general filed a certificate to the effect that \$514.00 worth of improvements then existed on the three claims named. Without discussing the failure to file this certificate within the time limited by statute, it is sufficient to say that the improvements reported are not sufficient in amount to satisfy the requirements of the statute (section 2325). The work done is largely confined to making each discovery shaft a few feet deeper. The statute requires \$500.00 worth of labor or improvements on each mining claim, and this must be performed on each location, unless it can be shown that the work done or improvements made is for the convenient working or development of all the claims included in one application (*Sweeney v. Northern Pacific R. R. Co.*, 20 L. D., 394).

RAILROAD LANDS—SECTIONS 2 AND 3, ACT OF SEPTEMBER 29, 1890.

GRUVER *v.* DAVIDSON.

In determining between the rights of an entryman under section 2, act of September 29, 1890, and an applicant for the right of purchase under section 3, of said act, the two provisions should be construed together, and priority of settlement control.

Secretary Smith to the Commissioner of the General Land Office, October 31, 1895. (C. W. P.)

The land in controversy is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 7, T. 20 S., R. 12 E., M. D. M., San Francisco land district, California.

On August 1, 1892, Samuel Gruver made homestead entry No. 12860, of the NE. $\frac{1}{4}$ of said section 7, his claim being founded upon the second section of the act of September 29, 1890 (26 Stat., 496).

On January 26, 1893, Gruver gave notice that final proof would be submitted on April 17, 1893. On said last mentioned date Milford Davidson filed an application to purchase the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 5, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 7 of said township, under the third section of the act of September 29, 1890 (26 Stat., 496), and requested that a hearing be ordered for the determination of the prior right as to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 7.

Gruver's final proof was submitted on April 17, 1893, and by stipulation of the parties a hearing was had at the same time, and it was agreed that the rights of the respective claimants should be determined after the submission of Davidson's final proof in support of his said application to purchase.

Davidson's final proof was submitted on July 10, 1893.

On September 4, 1893, the local officers rendered a decision recommending that Davidson be allowed to purchase the land in controversy, and that Gruver's entry be cancelled as to said land, and allowed as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 7.

Gruver appealed to your office, which affirmed the judgment of the local officers. He now appeals to the Department.

The land is located in an odd-numbered section within the limits of the grant to the Southern Pacific Railroad Company, and was restored to entry by said act of September 29, 1890.

On May 29, 1873, Davidson applied to purchase the land he now applies for, together with other lands, from the Southern Pacific Railroad Company. On the same day said company acknowledged the receipt of said application.

It appears that at the time of said application, Davidson held possession of the land with the railroad company's consent; that a few years after making said application he was through legal proceedings, involving the possessory right, brought by the parties whose improvements he had bought in 1872, deprived of the possession of that part of the land which is now in Gruver's possession; that since that time Davidson has remained in possession of a strip in the NE. $\frac{1}{4}$ of section 7, along its northern boundary, variously estimated at from forty three to fifty six acres. The southern boundary of this strip is irregular, but is clearly marked along its entire length from the east line to the west line of said NE. $\frac{1}{4}$ by a six wire fence. It further appears that Gruver has been in possession of the balance of the NE. $\frac{1}{4}$ of section 7, since 1884.

The decision of the local officers, awarding to Davidson the right to purchase the entire N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ is founded on their finding that the greater portion of each of the two forty acre tracts thereof lies north of the wire fence and is in Davidson's possession. In which finding you concur.

It is said in your office decision:

The land in Davidson's possession in the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ is variously estimated at from sixteen to twenty five acres, and the land in his possession in the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ at from twenty two to thirty one acres.

After a careful examination of the testimony I concur in your finding that the greater part of each of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ is in Davidson's possession.

It is apparent from the facts above stated that Davidson's right to purchase the land as a licensee of the Southern Pacific Railroad company, under the provisions of the third section of the act of September 29, 1890 (26 Stat., 496), was initiated long prior to Gruver's settlement right.

The concurrent decisions of the local officers and your office upon the facts must be accepted. But it is contended by Gruver's counsel that Gruver's homestead entry of the NE. $\frac{1}{4}$ of section 7, made under the second section of the act of September 29, 1890, and nearly a year prior to Davidson's application to purchase, gave him a preferred right to enter the land as against Davidson and all other claimants.

The said 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 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 the actual settlement or occupation.

By the third section a right of purchase was granted those in possession of forfeited lands under deed, written contract, or license, executed prior to January 1, 1888, or who had settled with a *bona fide* intent to purchase from the company, and which right was limited to three hundred and twenty acres.

These provisions should be construed together, and priority of settlement must control. It is upon that construction that the decision of *Thornton v. Rhea* (19 L. D., 571), is founded. It is there held that—

The preferred right of entry accorded by section 2, act of September 29, 1890, to actual settlers in good faith on railroad lands forfeited by said act, defeats the right of a subsequent settler to purchase said lands under section 3 of said act.

The decision of the Department in the case of *St. Clair v. Brandenstein* (20 L. D., 242), simply held that—

A settler on railroad lands forfeited by the act of September 29, 1890, whose settlement was made prior to the passage of said act and within an unimproved inclosure, including the tract in question and a large body of other lands, maintained by adverse claimants, has a preferred homestead right under section 2 of said act as against the right of purchase under section 3 thereof on the part of said adverse claimants, holding under a quit-claim deed from the railroad company—

and does not govern the case at bar.

The decision of your office is accordingly affirmed.

COMMUTED HOMESTEAD ENTRY—EQUITABLE ACTION.

JOHN H. RIFFENBERG ET AL.

A commuted homestead entry may be submitted for equitable action, where the residence of the entryman is not begun within six months from date of the entry, good faith is manifest, and no protest or objection was made to the allowance of the entry.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 31, 1895. (J. L. McC.)

On June 28, 1887, John H. Riffenberg made homestead entry for lots 6 and 7 of the NE. $\frac{1}{4}$ of Sec. 1, T. 8 N., R. 46 W., Denver land district, Colorado.

On September 18, 1889, in accordance with published notice, he made commutation proof on said entry before the clerk of the district court of Phillips county, Colorado; and on the 23d of the same month final certificate was issued.

The final proof shows that Riffenberg was an unmarried man; that he resided upon the tract from March 11, until September 15, 1888; then he went to Nebraska, where he remained at work earning money with which to improve the land, until February 10, 1889; that he then returned to his claim, where he resided until the date of his final proof,

September 18, 1889; that the value of his improvements was a little above two hundred dollars.

The Department has uniformly held that, after residence has once been established, temporary absences for the purpose of earning means with which to improve a homestead are excusable. (*Clark v. Lawson*, 2 L. D., 149, and many cases since.)

After said final proof had been accepted, the money due in payment for the land received, final certificate issued, and the papers forwarded to your office, it was there discovered that said final proof did not show residence from the date of entry (June 28, 1887,) until March 11, 1888—a period of eight months and eleven days; whereas the law, as construed by the Department, requires that residence be established within six months from date of entry.

Your office, therefore, on November 21, 1890, directed the local officers “to require claimant to furnish an affidavit showing why he failed to establish residence within six months from date of entry.” The record showed that he received notice of this order, by registered mail, on March 14, 1891; but he took no action relative thereto.

On April 15, 1893, counsel for the Reliance Trust Company filed a motion to have the entry referred to the board of equitable adjudication for confirmation. The motion was accompanied by an affidavit of the secretary of said company that, on October 1, 1889, the company had loaned Riffenberg the sum of four hundred dollars, secured by mortgage on the land, which amount is still due and unpaid; and that after diligent search Riffenberg can not be found.

On June 10, 1893, your office denied this motion, on the ground of the absence of evidence showing that Riffenberg established residence within the prescribed period. The local officers were also instructed: “If the claimant can not now be found, the mortgagee might be permitted to make the explanation, if in its power and it desires to do so.”

Thus the matter rested until March 8, 1894, when counsel for the company again moved that the entry be referred to the board of equitable adjudication for confirmation. But your office, on May 5, 1894, again declined to do so “until a good and sufficient reason is shown why the claimant did not establish his residence on the land within six months after date of entry, as required by law.”

From this action of your office the company appealed, setting forth its inability to find the entryman, in order to learn from him the reason why he did not establish residence on the land within the statutory period.

In my opinion, the good faith of the entryman and his substantial compliance with the requirements of the law have been clearly shown. He was called upon to supply what under the circumstances was a merely technical defect. The requirement that residence be established within six months from date of entry “is not a specific requirement of the statute, but a regulation of the Department,” in accordance with the spirit of section 2297 of the Revised Statutes

(Nilson v. St. Paul, Minneapolis and Manitoba Ry. Co., 6 L. D., 567-9). The failure to do so does not necessarily, in the absence of an intervening adverse right, defeat the right of commutation (Lambert v. Fairchild, 5 L. D., 675).

Where the good faith of the entryman is manifest, the commuted entry will be submitted to the board of equitable adjudication, although actual residence was not commenced within six months from date of entry, provided no protest or objection was made to the allowance of the entry. (Frank W. Hewitt, on review, 8 L. D., 566, bottom of page 569).

This covers the case at bar.

The judgment of your office is therefore reversed; and the entry will be submitted to the board of equitable adjudication for confirmation.

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SURVEY—RIPARIAN RIGHTS—ORDER OF SURVEY.

CALIFORNIA AND OREGON LAND CO.

26 L. D. 453
Overruled

A final judgment of the Department that the meander line of a lake is not properly established, and, that in the interest of the government a further survey of the lake boundary should be made, determines the status of the lands involved, is conclusive upon all persons whether parties to the proceeding or not, and precludes further departmental action therein.

Secretary Smith to the Commissioner of the General Land Office, October 31, 1895. (E. M. R.)

This case involves certain lands in sections 21, 27, 29 and 31 of T. 39 S., R. 20 E., Lakeview land district, Oregon. The record shows that on June 11, 1894, your office decision was rendered, wherein you dismissed the protest of the California and Oregon Land Company against the disposal of these lands by the issuance of patents or the allowance of any further entries.

It appears that in August, 1868, Goose lake was meandered, and the survey was approved on March 2, 1869. By that survey the land in question was outside of the meander line, and was adjacent to the above-described sections. Sections 21, 27, 29 and 31 were within the six mile indemnity limits of the Oregon Central Military Wagon Road company under an act of December 26, 1866 (14 Stat., 374).

On May 7, 1869, that company selected as indemnity section 21, the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 1, 2, 3, and 4 of Sec. 29, and also the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ and lots 1 and 2 of Sec. 27, which selections were approved on April 21, 1871.

On May 10, 1888, your office transmitted to this Department the application of certain citizens of Lake county, Oregon, for a survey of the same land herein described. Objection having been raised to such proceedings on the ground of alleged riparian rights, this Department on December 17, 1888 (7 L. D., 527), held that

where the meander line of a survey bordering upon a lake was established at a time of extreme high water, and the subsequent recession thereof, which occurred shortly

after the survey, left a large body of land between said meander line and the permanent shore line, such reliction is the property of the government and should be included within the system of surveys of public lands.

It is urged by counsel for appellant that as their client was not a party to that proceeding, and there being nothing in the record of the case to show that the company was notified, that said judgment is not *res judicata*; and they ask at least that a hearing be ordered, and that the company be given an opportunity to show what its rights are in the premises.

Without going over the various questions presented in the able brief of counsel, it is sufficient to say, that the judgment heretofore rendered with reference to these lines by the Department was such a judgment as established the status of these lands and as such was binding upon all persons, whether they were parties to the suit or not. It was therein determined that the meander line established was not the true line, and that the reliction which occurred thereafter was not a reliction from the shore line of the lake, but was a reliction from the line erroneously established as a shore line at a time when the lake was outside of its usual banks.

In addition to the views already expressed it was held in *Gowdy v. Gilbert* (19 L. D., 17), syllabus:

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

The action of the Department heretofore taken in this case is binding upon it now, and the application for a hearing is accordingly denied. Whatever rights the appellant may have can best be determined in the courts.

The decision of your office appealed from is accordingly affirmed.

FINAL PROOF—SECTION 7, ACT OF MARCH 3, 1891.

MCKINLEY MORTGAGE AND DEBENTURE CO.

A requirement, prior to the lapse of two years from date of entry, that an entrywoman shall furnish additional proof as to her qualification to make entry, is such a "proceeding" as will defeat confirmation of the entry under the proviso to section 7, act of March 3, 1891.

The final proof submitted by an entrywoman, and on which entry was allowed by the local office, may be held sufficient in the matter of her qualification as the "head of a family," where her response to the only question on such point, in the final proof blank furnished by the government, is full and without ambiguity.

Secretary Smith to the Commissioner of the General Land Office, October 31, 1895. (P. J. C.)

The record before me shows that Lizzie Dorman made pre-emption cash entry September 28, 1889, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1 and 2 of Sec. 4, T. 20 S., R. 43 W., Lamar, Colorado, land district. In her

final proof, in answer to the question—"have you a family, and of whom does your family consist?" she said: "I have; three children."

Your office, by letter of July 13, 1891, required corroborated affidavit showing whether claimant was, at date of entry, a widow, divorced, or otherwise the head of a family. On December 11, 1891, the local office reported that on September 4, 1891, a notice was sent her of the action of your office, giving her sixty days within which to comply with the order, and that no action had been taken. They also report "no transferee or mortgage of record in this office." The notice sent to the claimant was returned uncalled for. On April 22, 1892, the local office transmitted to your office three affidavits furnished by one G. M. Squire, an alleged transferee. Each of these affidavits is in identically the same language. They state that the claimant "must have been 27 or 30 years of age," and "that she was at the head of a family."

Your office, by letter of May 16, 1892, held that these affidavits were unsatisfactory, and that the alleged transferee be called upon to show whether she was a single woman, or a divorced woman, or a widow. Squire received notice of this order, but no action was taken. Subsequently, on November 10, 1893, counsel for Squire and the McKinley Mortgage and Debenture Company filed a statement in which it is said that the transferee has made "diligent effort to secure the party's affidavit and failed." Counsel suggests that the entry be confirmed under the proviso of section 7 of the act of March 3, 1891 (26 Stat., 1095).

Your office, by letter of November 27, 1893, held, under the authority of John Malone *et al.* (17 L. D., 362), that the entry could not be confirmed under the proviso to said section, and directed that the parties be given sixty days to furnish the evidence required. The parties were notified. No action was taken; whereupon your office, by letter of March 18, 1894, held the entry for cancellation. The McKinley Mortgage and Debenture Company appealed.

The proviso to said section 7 reads as follows—

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 instructions of July 1, 1891 13 (L. D., 1), it was said that the proviso "simply declares that after a lapse of two years the government can not begin proceedings to set aside the action of the register and receiver in allowing an entry." It was also declared that the word "proceedings," as used in the circular of May 8, 1891 (12 L. D., 450):

Will be construed as including any action, order, or judgment had or made in your office cancelling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

The entry in question was made September 28, 1889. The order of your office requiring her to show by affidavit whether she was a widow, etc., was issued July 13, 1891. Hence two years had not elapsed from the date of entry until this "proceeding" was instituted by the government.

While this entry cannot be confirmed under the act of March 3, 1891, yet it seems to me that on the final proof it should pass to patent. It is true that the answer made by the entrywoman might ordinarily raise a suspicion as to whether she was the head of a family, but I do not think it should in this instance. The blank upon which her final proof is made, furnished by the government, did not contain the direct question as to whether she was the head of a family. The only question bearing upon this subject is quoted above, and the answer thereto is full and unambiguous. The original affidavits are not in the record, but I take it that she must have shown by these that she was qualified to make the entry, which would include the sworn statement that she was the head of a family. If such an affidavit was filed, and the presumption would be that it was, then there is her oath that she is the head of a family.

It is not the intention of the Department to criticise the action of your office, or in anywise curtail or restrict its privilege and duty to closely watch entries and guard the public domain from being fraudulently despoiled, but it seems to me, on the face of the record before me, that there was no great emergency for requiring this additional proof.

In contemplation of law, the husband is the head of the family. It would seem as if it were only on the theory that she might be living apart from her husband, and thus secure public land under a false representation, that would prompt the demand of your office for this additional proof. If she were a widow, or a divorced woman, or even a single woman, she might be the head of a family, and qualified to make the entry, so far as this requirement is concerned.

Your office judgment cancelling Lizzie Dorman's entry is therefore reversed; the entry will be reinstated, and the same passed to patent.

CONTESTANT—PREFERRED RIGHT—INTERVENING CLAIM.

MELLOY *v.* FAIRFIELD.

Where the failure of the contestant to receive notice of a decision of cancellation results from his carelessness or neglect, and other rights attach in the meantime, his preferred right of entry is lost.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 31, 1895. (I. D.)

The defendant in the case of Albert R. Melloy *v.* Andrew M. Fairfield appeals from your office decision of January 18, 1894, wherein you hold his timber culture entry for cancellation for the SW. $\frac{1}{4}$, Sec. 1, T. 21 N., R. 54 W., Alliance land district, Nebraska.

On June 2, 1885, Frederick Plogue made timber culture entry for the land, and on August 17, 1886, Melloy initiated a contest against the entry and filed his application to make timber culture entry for it.

The contest affidavit, and other papers, were signed "Albert Maloy" and one paper "Albert Malloy."

Plogue did not appear at the hearing and on March 21, 1888, his entry was canceled by your office.

Notice of that decision was sent by registered letter from the local office April 3, 1888, addressed in accordance with plaintiff's written instructions to the register, to the address of Albert Maloy, Fort Laramie, Wyoming, and was received at that office April 4, 1888, where it lay until June 1, uncalled for, when it was returned.

On May 14, 1888, Fairfield made timber culture entry for the tract.

June 19, 1888, plaintiff applied to make timber culture entry for the land, which was refused by the local office for conflict with Fairfield's entry.

Melloy appealed, and a hearing was ordered to determine if he had been notified of the cancellation of Plogue's entry and had neglected to avail himself of his preference right within the thirty days allowed.

The local office, upon the hearing, found he had been notified and had failed to exercise his preference right in time and held Fairfield's entry intact.

Melloy appealed, and on September 19, 1891, your office reversed the decision of the local office and held Fairfield's entry for cancellation.

November 30, 1891, Fairfield filed a motion for review and on February 12, 1892, the local officers were ordered to rehear the case to determine whether Melloy had received notice of the decision canceling Plogue's entry.

December 20, 1892, a full hearing was had, but by agreement the case was held open for further testimony until May 29, 1893, when it was completed and the local officers again dismissed Melloy's contest and held Fairfield's entry intact on the ground that Melloy had actually received the notice.

Melloy appealed, and your office decision of January 18, 1894, reverses the register and receiver and holds Fairfield's entry for cancellation in case Melloy makes proper application to enter the land within thirty days of notice of that decision.

When Fairfield made his timber culture entry the local officers properly allowed it, as they had sent by registered letter the notice of the decision as instructed in writing by both Melloy and his attorney. That letter reached its address on April 4, more than six weeks before Fairfield's entry.

Melloy asks to have his preference right given him because he did not actually receive the letter. He testifies that he called at the Fort Laramie office in person in April, for letters, and admits that he was told that there was a registered letter there for A. Maley, but he did

not look at it; he testifies that the postmaster said that it was for "a man over there," pointing as if he knew whom it was for; but neither the postmaster, or any witness, ever knew any man there named Maley.

The registered letter, as returned to the local office, is found among the papers in the case—addressed, according to instructions, to Albert Maloy, Fort Laramie, Wyoming. It thus appears that the officers properly discharged their duty in sending the notice according to the Rules of Practice. It was incumbent upon Melloy to show that it was not his fault, or owing to his neglect, that the notice was not received. This he has not done; on the contrary, his testimony that he called for the letter at any time is very unsatisfactory, and directly contradicted.

Where the failure to receive notice of a decision results from the neglect or carelessness of the contestant, and other rights attach meantime, his preference right is lost. *John P. Drake* (11 L. D., 574), and *Johnson v. Still* (14 L. D., 319).

Your office decision is reversed, and Fairfield's entry is held intact.

RAILROAD LANDS—CONFLICTING CLAIMS.

BRAY *v.* HAYS.

Priority of settlement and possession at the date of the passage of the act of September 29, 1890, determines the rights of conflicting claimants under sections two and three of said act.

Secretary Smith to the Commissioner of the General Land Office, October 31, 1895. (J. L.)

The land involved in this case is the E. $\frac{1}{2}$ of section 15, T. 21 S., R. 13 E., M. D. meridian, San Francisco land district, California. It was granted to the Southern Pacific Railroad Company by the act of July 27, 1866 (14 Stat., 292, Section 18). It was forfeited and restored to the public domain by the act of September 29, 1890, (26 Stat., 496). It was first opened for entry on July 27, 1892. The time within which the railroad was to be completed opposite said land expired July 4, 1878. The township by sections was surveyed in the field on November 14, 1879. The township map, sectionized, was approved October 13, 1881, and filed in the local office on the same day.

On July 27, 1892, David Hays tendered, with fees and in proper form, his application to make homestead entry of the NE. $\frac{1}{4}$ of said section 15, alleging settlement on March 1, 1890, and lawful improvements and residence with his family thereon after that date.

On the same day, July 27, 1892, John Bray, with fees and in proper form, tendered his application to make homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section; and also an application to purchase under section 3 of the act of September 29, 1890, the whole of the east half of the same section. Afterwards Bray expressed to the local officers his desire that his application to purchase

extend only to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section. In his application to purchase, Bray alleged under oath, that he had been in possession of the whole E. $\frac{1}{2}$ of section 15, since 1879 under license of the Southern Pacific Railroad Company; that he had thereon as improvements, a dwelling-house, barn, shop, fencing, orchard, etc., of the value of \$1,000 at least; that he had had under cultivation since 1880 from ten to twenty acres of this land, and raised each season crops of hay; and that he had filed for said land with the railroad company on August 10, 1885, with the *bona fide* intent to secure title thereto by purchase from the Southern Pacific Railroad Company when earned by compliance with the conditions or requirements of the granting act of Congress.

Whereupon the local officers on January 16, 1893, made the following order:

John Bray having on the 27th day of July, 1892, offered his homestead application in this office, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 15, T. 21 S., R. 13 E., M. D. meridian, California; and also having filed his application to purchase the E. $\frac{1}{2}$ of said section, under the 3d section of the act of September 29, 1890; and

Whereas, David Hays, did on said July 27th, offer his homestead application for the NE. $\frac{1}{4}$ of said section 15, said township and range,

Now therefore, the said parties above named are hereby notified to appear at this office on Wednesday, April 12, 1893, to furnish testimony concerning their said applications and in support thereof, that their rights in the premises may be determined.

The hearing took place on the day appointed. The local officers recommended that Bray be allowed to make homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and that he be allowed to purchase the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 15; and that Hays' application to make homestead entry be denied.

Hays appealed; and on March 30, 1894, your office modified the decision of the local officers, and allowed Bray to make homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and to purchase the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 15; and allowed Hays to make homestead entry of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section only.

From said decision Hays has appealed to this Department.

There is no doubt of the fact, indeed it is not disputed, that David Hays, a qualified homesteader, was, on September 29, 1890, an actual settler in good faith on the NE. $\frac{1}{4}$ of section 15 aforesaid, having maintained residence in his dwelling house on the SW. $\frac{1}{4}$ of said NE. $\frac{1}{4}$, for many years, and that he made due claim on said quarter-section under the homestead law, within the time prescribed by the act of September 29, 1890 and the acts amendatory thereof. Therefore, under the second section of said act he is entitled to a preference right to enter said quarter-section under the provisions of the homestead law.

The evidence shows by a clear and palpable preponderance, that on September 29, 1890, Bray was not in possession of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$

of section 15, either under contract, or license or otherwise; that Bray was on that day in possession of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 15, having maintained his residence in his dwelling house on the NE. $\frac{1}{4}$ of said SE. $\frac{1}{4}$ for many years; and that Bray was not on that day in possession of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ aforesaid, otherwise than by virtue of the presumption recognized by this Department, that "the notice given by settlement and improvements extends only to the technical quarter-section upon which they are situated." (Pooler v. Johnson, 13 L. D., 134; and Staples v. Richardson, 16 L. D., 248). Bray failed to show that he was entitled to purchase from the United States under section 3 of the act of September 29, 1890. But there is enough in the record to authorize the Department to allow him to make homestead entry of the SE. $\frac{1}{4}$ of said section 15.

Further, it is proved that in the year 1881, Samuel Gruver (to whose rights David Hays succeeded), was persuaded and influenced to buy and settle upon the NE. $\frac{1}{4}$ of said section 15, by Bray's assurance that he did not claim any land in said NE. $\frac{1}{4}$.

I therefore decide and direct that Hays be permitted to make homestead entry of the NE. $\frac{1}{4}$ of section 15 aforesaid; and that Bray be permitted to make homestead entry of the SE. $\frac{1}{4}$ of said section.

Your office decision of March 30, 1894, is hereby modified as above indicated.

RIGHT OF WAY—TOLL ROAD—TOWNSITE SETTLEMENT.

WASON TOLL ROAD CO. v. TOWNSITE OF CREEDE.

A toll road company by the location and construction of its road acquires a vested right of way over public lands under the terms of section 2477 R. S., that cannot be defeated by a subsequent townsite settlement; and in such case the townsite patent should issue subject to the easement held by the company under said statute.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 31, 1895. (P. J. C.)

On January 14, 1893, the mayor of the town of Creede submitted proof of settlement and occupancy of certain lands, as a townsite, described by metes and bounds in what is said to be sections 19 and 30, in suspended township 42 north, range 1 east, and in section 25, township 42 north, range 1 west, Del Norte, Colorado land district, and made application to enter the same for the benefit of the settlers and occupants thereof. The Wason Toll Road company protested against the proof to the extent of a right of way of one hundred feet in width through the land, on the ground that under its charter and prior to the organization of the town of Creede, or the use and occupancy of the land by the inhabitants thereof, it did "lay out and commence the construction and operation of a toll road" over the land; that it is necessary to use fifty feet on each side of the centre of said road and that it

was so occupied prior to its occupancy as a town; that the land was a part of the public domain when the road was laid out and constructed. The company therefore protested against the issuance of a patent for the townsite, unless there be excepted therefrom "the protestant's easement in and to" one hundred feet across the tract covered by the line of its road.

A hearing was ordered, the testimony taken before the local officers, and as a result they recommended the dismissal of the protest, and on appeal your office by letter of December 22, 1894, affirmed their action, on the ground that

the officers of the land department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribes (*Deffeback v. Hawke*, 115 U. S., 392).

Whereupon the protestant appealed, assigning errors of law and fact.

It seems to me that your office decision on the one ground upon which it was based is erroneous. If the toll road company has acquired any lawful right to a franchise or easement by the construction and operation of its road, then I do not understand that the rule in *Deffeback v. Hawke* would be applicable. In that case the contention was that the land department should have excepted from the patent issued for a mining claim, without protest, municipal improvements that were alleged to be upon the surface of the ground included in the mining claim. The court says this position "has no support in any legislation of Congress," then follows the language quoted above from your office decision.

But in my judgment that doctrine is not applicable to the case at bar. If the protestant has any right here, it is distinctly by reason of "legislation of Congress," as will be hereafter discussed, and while it may be true that Congress has not specifically provided in the act for its protection, yet the right, if it exists, is a distinct one, and under the general powers conferred by law upon the Secretary of the Interior, in disposing of the public lands, may be guarded. (*Pensacola and Louisville R. R. Co.*, 19 L. D., 386.)

Section 2477 of the Revised Statutes, reads as follows:

The right of way for the construction of highways over the public lands, not reserved for public uses, is hereby granted.

It is under the provisions of this statute that the protestant bases its right to protest against the patent to the townsite and insists that whatever right has accrued to it by reason of the construction and operation of its road over the public lands, and over what is now the town of Creede, should be reserved in the patent.

The protestant here is a corporation organized under the laws of Colorado

for the purpose of constructing a wagon road and charging and collecting toll for travel thereon in the counties of Rio Grande, Hinsdale and Saguache in the State

of Colorado, between the termini and along the route more particularly described as follows:

The starting point is definitely fixed, then follows the general course of the road following named streams, "to a point thereon (east fork of Willow creek) opposite and below the Holy Moses mine in the aforesaid county of Saguache, making a total length of about five miles." The charter was granted December 30, 1890.

It is shown by the testimony that about January 1, 1891, the company began the construction of a bridge across the Rio Grande river, which is a part of the road; that a preliminary survey of the line of the road was made in the same month and the line staked and marked along Willow creek to the terminus of the road; that the work of construction continuously progressed and the road was fully completed in August, 1892, at a cost of between six and seven thousand dollars. Prior to this date, however, the road was open for travel and the collection of toll commenced May 22, 1891. Toll rates were fixed by the county commissioners of Rio Grande county, July 15, 1891, and in 1892 and 1893 the same were continued by their action. It appears that on August 31, 1892, the county commissioners of Hinsdale county also fixed toll rates, but on October 14, following, this action was rescinded until the final adjudication of the rights of the road company then pending in the courts.

It is quite apparent that the original object in the construction of the road was to make a means of transportation to and from the Holy Moses mine. The road was constructed through the narrow defile, or cañon, of Willow creek and its east fork, and at the time it was surveyed and construction begun in January, 1891, there were but two or three cabins in what is now Creede, outside of the "commissary" of the mine. The road was built through the town in June and at that time there was a considerable portion of the town occupied by settlers, but to what extent is not shown. At the time of the hearing the town was built almost solidly along the line of the road, and as I understand, it is the principal street of the town. It is not shown what the distance is that is thus built up, but it is shown that the road extends beyond the limits of the town some little distance.

There is exhibited an injunction writ issued by the district court, requiring "the town of Creede" and others named to "absolutely refrain from and desist from in any way interfering with the collection of tolls on the Wason Toll road in Hinsdale county, above station No. 55 on said road."

The evidence taken at the hearing does not disclose when the town of Creede was, if ever, organized as a municipality; the number of inhabitants therein or to what extent the road as laid out and operated conflicts with the lots as surveyed, if they are surveyed, or with the town plat, if they have one. Neither is it shown in the testimony thus

taken that toll is charged the residents of the town for the use of that portion of the road within its limits as distinguished from the charge for its entire length or any other portion thereof.

The affidavits that have been filed by the town in support of its motion to advance this case on the docket show that the town is built in a narrow gulch only wide enough to permit of one street running north and south with houses on each side and that it is along this street the toll-road claims its right of way; that three hundred and seventy-four lots conflict more or less with the right of way; that it extends a distance of three thousand and six hundred feet and occupies the entire street, and that all travelers on the street on horseback, or with any kind of a vehicle, are required to pay toll. Copies of these affidavits and the motion are shown to have been served on the protestant's attorney, and the statements therein made are not denied.

The situation here, as disclosed, is, briefly: that the Wason Toll-road company chartered under the State law for the construction and operation of a toll-road in a specified locality, surveyed and marked out its line of road and begun its construction prior to a settlement on the land for town purposes; the road was constructed and operated with reasonable diligence and finally completed as a whole; that a town has grown up along the line thereof, which, by reason of the peculiar situation, has been forced to make this line of road its principal street. The road company claims a right of way of one hundred feet along the line of road sought to be patented by the town authorities.

The solution of this proposition is not without its difficulties. It is to be regretted that the act granting the right of way to public highways was not more specific and definite as to the extent of the grant contemplated over the public lands, as to the width of the right of way, the nature and extent of the right thus conferred, both as against the government and subsequent settlers. But in the absence of everything save the naked grant, the Department must construe and decide it with the view of harmonizing the conflicting interests and the protection of the rights of all parties concerned.

The grant by Congress of the right of way for public highways is clearly an easement. It is akin to the grant of the right of way to railroads (act of June 8, 1872, 17 Stat., 340) and the Department has decided in Pensacola and Louisville R. R. Co., *supra*, that the lands over which the right of way is located may be patented to others, subject to whatever right the company may have in the same. Eugene McCarthy, 14 L. D., 105.

The act of the toll-road company in locating and constructing its road gave it a vested right of way under the statute, and the laws of Colorado, that cannot be defeated by the subsequent settler. Its right over the public lands is as great as though the right of way had been obtained by condemnation proceedings under the law of eminent domain, and it can only be forfeited by non-user or the expiration of its charter.

The owner of the dominant tenement has a right, as well as a duty, as a part of the servitude, to perform, at his own expense, all such works as are necessary for preserving and making use of the servitude, and so he is entitled to have access to make necessary repairs. The owner of the servient estate can do nothing to diminish the use or convenience of the servitude to the owner of the dominant. Nor can the owner of the dominant enlarge his use so far as to increase the burden of the servient, unless in so far as such change of use may be necessary in order to make the servitude effectual. (6 Amer. and Eng. Enc. of Law, 149.)

Your judgment is therefore reversed and patent will issue to the town-site, if otherwise satisfactory, for the land claimed, subject, however, to the easement of the Wason Toll Company's right of way for the road through the land thus patented. (See Pensacola R. R. Co., 19 L. D., 386; *Smith v. Townsend*, 148 U. S., 490-499.)

RIGHT OF WAY—MILITARY AND INDIAN RESERVATIONS.

LA PLATA IRRIGATING DITCH CO.

A right of way for an irrigating ditch that traverses, among other lands, a military reservation, and also an Indian reservation, will not be approved as to any part thereof, where it appears that by the maintenance of said ditch the supply of water necessary for the proper use of said reservations will be seriously impaired.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 31, 1895. (F. W. C.)

I have considered the appeal filed on behalf of the La Plata Irrigating Ditch Company from your office decisions dated June 18, and June 21, 1894, denying its applications for right of way under the provisions of the act of Congress approved March 3, 1891 (26 Stat., 1095).

The ditch in question, according to the maps of location filed on account of which application was made for right of way under the act of 1891, shows that the main ditch began about one-half of a mile north of the north boundary of Fort Lewis military reservation, taking water from the La Plata river. It then passes through the military reservation to the north boundary of the Ute Indian reservation, through said Indian reservation to the south line thereof which is co-incident with the Colorado and New Mexico boundary line. The map showing so much of the ditch was filed in the Durango land office, Colorado. The company also filed a continuation of its location in the Sante Fe, New Mexico, land office.

Your office letter of June 18, 1894, considering the portion within Colorado, found that the part north of the Fort Lewis military reservation traversed by the location is private property, consequently, an approval under the act of 1891 would not carry a grant of right of way over this portion of the location.

You are of the opinion that the portion within the Fort Lewis military reservation might be approved, but that there is no authority for the approval of the map of location so far as it traverses the Ute Indian reservation, reference being made to the decision of the Department in the case of the Florida Mesa Ditch Company (14 L. D., 265).

In view of the fact that the location passes directly from the military reservation to the Indian reservation upon which the application for right of way cannot be granted, you are of the opinion that the entire application should be rejected and in your decision of June 21, 1894, upon the portion of the location in New Mexico, you are of the opinion, as the ditches depend for their water supply and their usefulness on the ditch that passes through the Indian reservation, and for which no right of way can be granted, that that portion of the application should also be denied.

It seems that since the rendition of your decisions in the matter of the application for right of way made by this company, the attention of the Commissioner of Indian Affairs has been called to said application upon which he makes report to this Department in his letter of July 27, 1894, from which it appears that reports had been made to him upon the matter by the superintendent of the Fort Lewis military reservation and also by the agent in charge of the Southern Ute agency.

From these reports it appears that this company between the years 1889 and 1892 actually constructed their ditches through the military and Indian reservations, but the superintendent of the Fort Lewis school reports that if succeeding summers be like the summer of 1894, there can be no question that great detriment to the school would be caused by this ditch, and he recommends that the application for right of way across said military reservation be denied, otherwise the school must either close, or the government be put to the great expense of starting water from the several springs that are on the reservation.

The agent in charge of the Southern Ute agency reports that the flow of the La Plata river is absorbed by this ditch and that if the present flow is contracted it can never be other than a serious detriment to the Ute Indians.

After a careful consideration of the matter, I am of opinion that this application for right of way should not be approved. Your office decision is accordingly affirmed and the application for right of way will stand rejected.

SWAMP GRANT—MILITARY RESERVATION.

STATE OF LOUISIANA.

The grant of swamp lands to the State of Louisiana took effect upon lands of such character within Fort Sabine military reservation, created by prior executive order, subject to the right of the United States to use the same for military purposes during pleasure; and, on the subsequent statutory abandonment of said reservation, the title and right of possession, in and to said lands, vested in the State by virtue of said grant.

The act of February 24, 1871, restoring the lands in said military reservation for sale according to existing laws, did not contemplate any disposal of said lands inconsistent with the title previously granted to the State.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 31, 1895. (J. L.)

The State of Louisiana has appealed from your office decision of September 13, 1893, rejecting her claim under the swamp land laws, of the following tracts of land:

In T. 14 S., R. 15 W.; the west part of section 27 containing 40 acres; all of section 28 containing 240 acres; lots 1 and 4, the SW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 31 containing 291.10 acres; all of section 32 containing 520 acres; all of section 33 containing 640 acres; and the west part of section 34 containing 400 acres; aggregating 2131.10 acres in said township.

In T. 15 S., R. 15 W.; the west part of section 2 containing 20 acres; the west part of section 3 containing 620 acres; the west part of section 11 containing 240 acres; the west part of section 14 containing 440 acres; the west part of section 23 containing 635 acres; the west part of section 24 containing 50 acres; and the west part of section 25 containing 150 acres; aggregating 2155 acres in said township.

In T. 14 S., R. 16 W.; section 36 containing 71.30 acres.

In T. 15 S., R. 16 W., all of section 1 containing 600 acres; all of section 2 containing 160 acres; all of section 11 containing 40 acres; all of section 12 containing 630 acres; all of section 13 containing 320 acres; all of section 24 containing 380 acres; and all of section 25 containing 10 acres; aggregating 2211 acres in said township.

And aggregating in all four townships aforesaid 6497 acres, in the New Orleans land district, Louisiana.

The said tracts front north, west and south on Sabine Lake, Sabine Pass and the Gulf of Mexico. They are bounded on the east by a straight line, running from a point on the shore of the lake in section 27, T. 14 S., R. 15 W., south 29 degrees east, ten miles, to a point on the shore of the Gulf in section 25, T. 15 S., R. 15 W. They lie within the limits of the Fort Sabine military reservation established by the President's order of December 20, 1838, and then transferred by the Commissioner of the General Land Office to the possession and control of the Secretary of War for military purposes. The reservation embraced the whole peninsula lying west of the straight line aforesaid, and bounded by Sabine Lake, Sabine Pass, and the Gulf of Mexico.

At the time of the passage of the swamp land act of March 2, 1849 (9 Stat., 352), all of the lands embraced in said reservation had been for more than ten years severed from the public domain, removed from

the control and supervision of the land department, and appropriated for special uses by a co-ordinate executive department.

On December 7, 1850, the State of Louisiana filed in the district land office at Opelousas, swamp land selection list No. 4, claiming under the act of March 2, 1849, more than 1,000,000 acres of land, including all the land within the reservation. But on the face of the list the surveyor general wrote opposite the descriptions of the subdivisions reserved, the following words: "Part of this township is subject to a military reservation. See letter from the Commissioner of the General Land Office, dated December 21, 1838." The attention of the Commissioner and of the Secretary of the Interior was thus called to the fact that said subdivisions were not within their jurisdiction, supervision or control, and that they had no lawful authority to dispose of them. Consequently said list was corrected. All of the subdivisions and parts of subdivisions lying west of the east line of the reservation were rejected and left out. Those fractional parts of subdivisions intersected by said line, which lay east thereof, were carefully selected and estimated and inserted in the list of selections to be approved. One of the fractions contained only five acres; two others contained only twenty acres each. Pains were taken to make the corrected and approved list express upon its face the decision of the Secretary, to approve proper selections which lay outside of the military reservation, and to disapprove and reject all that lay within. Such corrected list was approved on May 5, 1852, by Secretary A. H. H. Stuart.

In 1854 Congress directed a light house to be built on Louisiana Point near the mouth of Sabine Pass. The Secretary of the Treasury, through the light house board, applied to the Commissioner of the General Land Office for land on which to locate it, and other necessary buildings. He was informed that the land was a military reservation under the jurisdiction and control of the War Department as military property. The Secretary of War was therefore the proper person to consent to the use of a part of it for commercial purposes. The light house and its appurtenances were built in 1856, and are still maintained.

By the act of February 24, 1871 (16 Stat., 430), Congress—

authorized and empowered the Secretary of War to transfer to the custody and control of the Secretary of the Interior, for disposition for cash according to the existing laws of the United States relating to public lands, and after appraisement, to the highest bidder, and at not less than the appraised value, nor less than one dollar and twenty-five cents per acre, the United States military reservation at Fort Sabine, in the State of Louisiana.

It appears that on July 1, 1884, Acting Secretary M. L. Joslyn approved "No. 26, a list of the swamp and overflowed lands selected as inuring to the State of Louisiana" etc. Said list includes all of sections 4, 5, 6, 7, 8, 9, 10, 15, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 32, 33, and 34 of township 15 south, range 15 west; aggregating 11,907.41 acres, and comprising the whole of said reservation, except the school

section 16, in T. 15, and lots 2 and 3, and the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 31, in T. 14, which lie upon a ridge; and the tracts described in the list now before me, which form a margin on the eastern, northern and western sides of the reservation, where the subdivisions are intersected by the boundary lines and made fractional. I am informed by your office decision,

That the facts, 1st. that said tracts were claimed conditionally as subject to a military reserve, 2d. that action on the claim had previously been suspended on account of doubts as to whether or not the lands had been granted, and 3d. that Congress had provided for the disposal of the lands by special legislation—were not brought to the notice of the Secretary, either in the certificates or in the letter submitting the list for approval. On the contrary both the list and the letter of transmittal represented the case as an ordinary one about which no conditions existed calling for the special consideration of the Secretary or of his legal advisers.

Inspection of said list No. 26, and the certificates attached thereto, sustains your statement. The certificates state affirmatively that "said list is found to be free from conflict by sale or otherwise." They contain no reference to the military reservation; or to the fact that on May 5, 1852, Secretary Stuart had considered and rejected the State's claim to the tracts of land included in said list. They do not contain any statement to the effect that the tracts described in the list have been found or decided to be swamp and overflowed lands, by field notes of the surveyors, or by "personal examination by experienced and faithful deputies," as required by the statute, or in any other manner. The attention of the Secretary was not called to act of February 24, 1871, *supra*, or to the fact, that the presentation of said list No. 26 for his approval, raised before him for his decision the question: Did Congress by the swamp land acts of 1849 or 1850 grant to the State of Louisiana swamp lands within the boundaries of Fort Sabine military reservation?

That question is now plainly brought before me by the pending appeal. I decide it in the affirmative.

I am of opinion that the acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519) granted to the State of Louisiana all of the "swamp and overflowed lands made unfit thereby for cultivation," lying within the Fort Sabine military reservation as established by the President's executive order of December 20, 1838, subject, however, to the right of the United States to use the same for military purposes during pleasure, or so long as might be necessary in the judgment of the military authorities; and that when said military reservation was abandoned by operation of the act of February 24, 1871 (16 Stat., 430), the title and right of possession of the State of Louisiana under the acts of 1849 and 1850 aforesaid attached at once in fee simple to the swamp and overflowed lands embraced within said reservation. The act of 1871 aforesaid cannot be construed as intending to make any disposition of said swamp and overflowed lands, inconsistent with the title previously granted to the State of Louisiana

as aforesaid. (*Wilcox v. McConnell*, 13 Peters, 513; and *Leavenworth R. R. Co. v. United States*, 92 U. S., 741; *Hasting and Dakota R. R. Co. v. Whitney*, 132 U. S., 357-360.)

Your office decision is hereby reversed. The tracts of land hereinbefore specified and described will be certified to the State of Louisiana, under the swamp land grants.

HOMESTEAD CONTEST—ABANDONMENT—PROOF OF MARRIAGE.

ROUDEBUSH *v.* WAITMAN.

Testimony to the effect that an entrywoman has married and moved to her husband's home, when the husband himself is at the same time a homestead claimant, is proper evidence under a general charge of abandonment.

In such a case evidence showing that a man and woman are living together in the relation of husband and wife, and are generally considered in the neighborhood as married, may be accepted as establishing the fact of marriage, where such fact is not denied.

Secretary Smith to the Commissioner of the General Land Office, October 31, 1895. (C. J. G.)

The record shows that on July 13, 1889, Lavinia Waitman made homestead entry for lot 1, Sec. 18, Lot 4 Sec. 7, T. 19 N., R. 52 W., and N. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 13, T. 19 N., R. 53 W., Sidney land district, Nebraska.

On May 25, 1893, Ross Roudebush filed affidavit of contest against said entry, claiming

that the said Lavinia Waitman has wholly abandoned said tract, and changed her residence therefrom for more than six months since making said entry, and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law.

Hearing was duly had, and the local office rendered its decision in favor of the plaintiff.

The defendant in this case was formerly married to Watson L. Waitman, and she made entry for the land in controversy after his death. On the day of trial the plaintiff did not introduce testimony to show that defendant had not complied with the homestead law as to settlement and cultivation, but directed the examination of witnesses to proving that the defendant and one O. P. Waitman, nephew of Watson L. Waitman, had, for about two years prior to the date of contest, lived together as husband and wife. It was shown that they were generally considered by the neighborhood as married. Two of the witnesses testified that the defendant had stated to them that she was married to O. P. Waitman. It was shown that shortly before this contest was filed the defendant moved her household goods from her claim to that of O. P. Waitman, and he and the defendant lived alternately on the two claims, residing upon one for a few months, and then moving to the other. One witness testified that defendant told him she would like to hold the claim until her son Bud Waitman became of age, but that she knew they could not hold both claims.

The defendant did not introduce any testimony in rebuttal, nor deny that she is married to O. P. Waitman. She objected throughout the trial to the introduction by the plaintiff of testimony in regard to her marriage, on the ground that notice of contest served upon her contained no allegation as to marriage, but simply charged abandonment and non-residence.

I am of opinion, however, that testimony to the effect that an entry-woman had married and moved to her husband's home, when the husband himself is a homestead claimant, is proper evidence under a general charge of abandonment (11 L. D., 22)—*Bullard v. Sullivan*.

It has been held that the fact of marriage, although conclusively shown, does not of itself constitute ground of forfeiture or substantiate the charge of abandonment. *Shaffer v. Fox* (20 L. D., 185), and cases cited. The husband and wife must each be maintaining a homestead entry at the time of the marriage. In the case before me, however, it is shown that O. P. Waitman, to whom the defendant is alleged to be married, has a homestead claim about two or three miles from the tract in dispute. Consequently, if his marriage with the defendant is shown, her entry must necessarily be cancelled; for "a husband and wife, while they live together as such, can have but one residence, and the home of a married woman is presumptively with her husband." *Bullard v. Sullivan (supra)*.

The question therefore arises as to whether the testimony introduced to prove the marriage of defendant to O. P. Waitman is legally sufficient.

In the case of *People v. Anderson*, referred to in 16 L. D., 137, it is said:

Proof that a man and woman had cohabited together for a long time as husband and wife, had mingled in society as such, is admissible for the purpose of proving a marriage, and in the absence of evidence to the contrary, conclusive as such, in all cases, except in actions of *crim. con.*, divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced.

While there is no direct proof of marriage between the parties to this contest, yet the testimony introduced by the plaintiff may be considered as sufficient to throw the burden of proof upon the defendant, and as she did not introduce any testimony in rebuttal, and made no attempt to deny that she is married to O. P. Waitman, although she had opportunity to do so, I am of opinion that the marriage is sufficiently proved for the purpose of this contest. A concealment of marriage, if one exists, or a disinclination to deny it, if it does not exist, is inexplicable on any other grounds than that the presumption of marriage is correct. It would seem that if these parties are not married, and a denial to that effect would save the homestead, they would surely make such denial. I therefore affirm your office decision.

As to the other issues appearing in defendant's specifications of error, the facts are fairly and sufficiently stated by you, and need not be considered in this connection.

SETTLEMENT CLAIM—TRESPASS—POSSESSION.

BURKE *v.* GAMBLE.

No rights are required under the settlement laws by an unlawful trespass on the undisputed and known possession of another who believes his title to be good.

Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 31, 1895. (F. W. C.)

I have considered the appeal by Michael Burke from your office decision of July 14, 1894, holding for cancellation his homestead entry covering the S.W. $\frac{1}{4}$ of Sec. 2, T. 5 N., R. 1 E., San Francisco land district, California, and that the entry by John T. Gamble made for said land should be held intact, and that his commutation proof submitted thereon should be approved.

This land was selected by the State as indemnity school land on August 8, 1866, and re-selected on October 6, 1868, and, in a controversy involving the State's right under said selection, the land was awarded to the State under its selection on January 16, 1874.

More than four years thereafter, to wit, on April 16, 1878, the State patented the land to one John Woods and by mesne conveyances the land was conveyed to Michael Burke on January 30, 1880, since which time he has been in undisputed possession of the land, the entire tract being fenced.

Upon an application by one Daniel Sullivan attacking the State's selection, your office letter "G" of January 13, 1882, canceled the State's selection, from which action the State failed to appeal and has since made selection of other lands to which it has received title.

Burke, however, seems to have been in ignorance of this action, and continued in possession of the land, the first knowledge of imperfection in his title being ascertained upon investigation caused by the entry upon the lands of John T. Gamble on August 2, 1882.

Gamble, it appears, learned of the cancellation of the State's selection and knew that the land was in possession of Burke when, on August 2, 1882, he, in company with others, drove upon the land in question passing through the gate of one of the adjoining proprietors whose fence formed a part of the boundary of the land in question, and began the erection of a house upon the land.

He states that at the time he entered upon said land he believed it to have a market value of about \$2,500, and sought to take advantage of Burke's ignorance in the matter of his title to the land in question. His house, begun on August 28, 1882, was partly completed when he left the land but upon his return Burke was in possession thereof and refused to allow him to enter. On August the fourth he made homestead entry of the land. This house was afterwards destroyed by Burke but in October following, Gamble again attempted to build a house upon the land which was also destroyed by Burke, and a third attempt was made by Gamble but he was warned off by Burke.

Gamble made no further attempt to take up a residence upon the land but in the following year, to wit, on March 22, 1883, submitted proof upon his entry in which his excuse for not taking up a residence upon the land was that he was prevented therefrom by the forcible acts of Burke.

The local officers rejected his proof and he appealed to your office.

On July 24, 1883, your office canceled the entry by Gamble upon the report of a special agent that Gamble was not a settler upon the land, and that his entry was made for the purpose of speculation.

On August 13, 1883, Gamble filed an appeal from that action. This appeal does not appear to have been transmitted to your office until November 11, 1886. In the meantime, to wit, on December 15, 1884, the local officers had permitted Michael Burke to make homestead entry of the land.

On December 4, 1886, your office considered the appeal filed by Gamble as an application for a hearing and thereupon directed the local officers to order a hearing between the parties in order to determine their respective rights in the premises.

No action appears to have ever been taken upon said order and upon the report of a special agent that he had investigated the case and found Michael Burke in possession of the land and in which he recommended that the order for a hearing be revoked, your office, by letter of November 19, 1890, revoked the order for a hearing.

In the meantime, to wit, on February 4, 1890, Burke had been permitted to make final proof upon his homestead entry which was accepted by the local officers, notwithstanding the pendency of the appeal by Gamble from the decision of your office cancelling his entry.

Gamble then appealed to this Department from your office decision revoking the order for a hearing and re-affirming the action taken by your office in its decision of July 24, 1883, which canceled his entry.

In departmental decision of April 11, 1892, this appeal was considered and in view of the showing made by Gamble, it was directed that his entry should be re-instated and that a hearing be ordered to the end that the witnesses to Gamble's proof might be subjected to cross examination by Burke, if he so desired, and that Gamble might be allowed to show duress and the interference of Burke, and that Burke might be allowed to show why his entry should not be canceled.

It is upon the hearing had under this order that the case is again before this Department.

Upon the testimony adduced at this hearing the local officers were of the opinion that Gamble took advantage of Burke's ignorance and that it is the duty of the land officers to protect the innocent and ignorant from sharpers. For that reason they recommended that Burke's entry be allowed to stand and that the entry by Gamble be canceled.

Your office decision, as before stated, reversed the action of the local officers and held Burke's entry for cancellation, from which action he appealed to this Department.

The facts in the case appear to be plain. Burke, since 1880 has been in quiet possession of this land, the entire tract being under fence, under a title from the State which he believed to be perfect and for which he had paid a valuable consideration.

The State's title failed, but of this Burke does not appear to have had any notice until after Gamble had made an entrance upon the land.

The sole question in the case, it would seem to me, is as to whether this land was, at the time of the entrance by Gamble and the making of his entry, subject to settlement and entry under the settlement laws.

In the case of *Atherton v. Fowler* (96 U. S., 513), it was held that no right of pre-emption can be established by a settlement and improvement on a tract of public land, where the claimant forcibly intrudes upon the possession of one already in possession of the land, the same being enclosed, but that such intrusion, though made under pretense of settling upon the land, is but a naked, unlawful trespass, and can not initiate a right under the settlement laws.

This decision has been repeatedly quoted by the court and must be the guide for the construction of the settlement laws by this Department.

It appears to me that the facts in this case show, when viewed in the light of the above opinion, that Gamble's attempted settlement on this land was but an unlawful trespass and in violation of the rights of Burke.

At the time of Gamble's entrance upon this land it was beyond question in the undisputed possession of Burke, under title which he believed was good, and of which Gamble was cognizant at the time. The fact that his entrance upon the land was made through a gate in the fence that enclosed the tract, in nowise reduced the offence.

There can be no question but that Gamble sought to take advantage of Burke's ignorance in the matter of the status of the State's title, under which he claimed, and it seems to me clearly the duty of this Department to protect Burke in his possession. In the case of *Knight v. U. S. Land Association* (142 U. S., 161), it was held that—

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it.

Your office decision rests upon the decision of this Department in the case of *Marks v. Bray* (1 L. D., 423), in which it was held that

the case of *Atherton v. Fowler*, as now interpreted by this Department, will not sustain a possession manifestly in violation of the law, nor defeat a claim to land by one who has complied with the requirements of the law, in favor of one who has not so complied, etc.

In that case, however, it was shown that Marks knew of the cancellation of the State's claim prior to Bray's settlement, and that he made no endeavor to fortify his position and secure a right to the tract under

the land laws, until more than two months after Bray's settlement. It was, therefore, held that his laches had enabled Bray to exercise his right which the law gave him to file his declaratory statement upon any unappropriated public land. In this respect the facts in that case differ from those in the case now under consideration.

It seems to me that an equitable construction consistent with the true meaning of the settlement laws leads to the application to this case of the principles enunciated by the supreme court in the case of *Ather-ton v. Fowler, supra*, and the awarding of the land to Burke.

I must, therefore, reverse your office decision and sustain the decision of the local office directing that Gamble's entry be canceled and his proof tendered thereon rejected, and that Burke be permitted to complete title upon the entry already made.

SCHOOL LAND—JURISDICTION OF DEPARTMENT.

J. L. BRADFORD.

The Department is without authority to determine whether a State in its disposition of school lands has done so in the manner provided by statute.

*Secretary Smith to the Commissioner of the General Land Office, Novem-
(J. I. H.) ber 2, 1895. (A. E.)*

On June 26, 1895, your office transmitted a letter from J. L. Bradford, Esq., dated May 31, 1895, in which he charges that the State of Louisiana has depleted the school land fund, reserved by Congress for the township schools of said State, by giving a large portion of the same to John McEnery, since dead.

The allegations of Mr. Bradford have been carefully considered, but it is not the province of this Department to take any action in the premises.

The lands referred to were reserved by several acts of Congress relating to public lands within the State of Louisiana, then the Territory of Orleans. These and similar school land reservations by Congress were grants in abeyance of the nature of a dedication to public use, and vested so soon as the schools for which they were reserved came into existence. Until this, the title remained in the government. *Trustees, etc., v. State of Indiana* (14 Howard, 274, et seq.).

By the act of February 15, 1843 (5 Stat., 600), however, Congress made so much of a change in said grants as to confer upon the State plenary and exclusive authority to dispose of said lands in a stated manner. Whether it has done so or not is a question which this Department is without authority to determine.

REPAYMENT—ASSIGNEE—SECTION 2, ACT OF JUNE 16, 1880.

INSTRUCTIONS.

The right of assignees to repayment under section 2, act of June 16, 1880, is restricted to assignees of the land, and does not extend to persons holding an assignment of the claim for the money paid on the entry.

Secretary Smith to the Commissioner of the General Land Office, November 2, 1895. (J. I. H.) (F. W. C.)

I am in receipt of your office letter of October 4, 1895, calling attention to that portion of departmental circular of August 6, 1880, which in construing the second section of the act of June 16, 1880 (21 Stat., 287), reads as follows:

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. To construe said statutes so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy of the government and repugnant to section 3477 of the Revised Statutes.

In said letter you state that you are constrained to believe that this construction is unsound, for the following reasons:

1st. It is unreasonable. There is no good cause subsisting in equity why the assignee of an entryman should not stand in the shoes of the entryman whenever the entryman has done that which is prescribed by section 2 of the act, which is construed by said circular. (You will find said act on the first page of that circular.)

2nd. The claims referred to in section 3477 of the Revised Statutes are not such claims as are embraced in the said act. The claims specified in section 3477 of the Revised Statutes of the United States are, it is submitted, such claims as the United States has not recognized. Here the claims referred to and embraced in the act construed by said circular are distinctly recognized in their character. Their amount is fixed. There is no *issue* remaining between the claimant and the government. There is nothing to be done to ascertain either the claim or its amount. The Secretary of the Interior is directed to pay out upon compliance with the terms of the act.

3rd. It is not possible that the interests of the government can possibly be prejudiced by recognizing the title herein of the entryman provided it is shown that the conditions embraced in section two of said act are complied with; and when all said conditions have been complied with no interests of the government can be prejudiced by paying the assignee instead of to the entryman directly.

It is very evident to my mind that Congress meant to extend the benefit of repayment to assignees of the land, and not to the claim for money against the United States. The general law forbids such transfers, and before a case is taken out of the general law, the act of Congress should expressly provide for repayment to the assignees of a money demand against the United States.

There being no express provision in the act of June 16, 1880, for the repayment to the assignees of a money claim against the United States,

I am of the opinion that this cannot be done without violating the general law embraced in section 3477 of the Revised Statutes. That section provides that no claim upon the United States shall be transferred or assigned until "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

Your view of this question is that "the character of the claim is recognized; the amount is fixed; there is nothing to be done to ascertain either the claim or the amount; and the Secretary of the Interior is directed to pay out upon compliance with the act." Your contention that the Secretary of the Interior is required to make repayment upon a compliance with the act is an admission that some evidence must be submitted to show that the person claiming the fund is entitled to receive it. If this be true, then there is something to be done under the act "to ascertain the claim and its amount."

In my opinion the act of Congress does no more than provide for the repayment of certain money upon certain conditions. The amount in no case is fixed, and in every case the person claiming the fund is required to do something to be entitled to repayment. He is required to "surrender his duplicate receipt and execute a proper relinquishment of all claims to the land."

Further, in case a transferee of the land makes a claim, his right to demand repayment as transferee must be also determined.

I cannot therefore agree with you that "there is nothing to be done to ascertain either the claim or the amount." But if nothing were required to be done in order to ascertain the rightful claimant, and whether he is entitled to repayment, still the transfer of a claim could not be recognized, as these claims are controlled by the general law which prohibits transfers until warrant is issued.

I therefore adhere to the construction placed upon section 2 of said act by the circular of August 6, 1880.

INSTRUCTIONS RELATIVE TO HEARINGS ORDERED UPON SPECIAL AGENTS' REPORTS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., November 4, 1895.

To Registers and Receivers and

Special Agents of the General Land Office.

These hearings are ordered as a part of the proceedings upon an inquiry instituted by the government into the validity of alleged fraudulent or illegal entries. The purpose is to give the entrymen and other known parties in interest full opportunity to be heard in defense of their claims.

Hearings will be set at as early a day as practicable after the order has been received, so that the special agent who examined the case may be present, and while witnesses are accessible.

The register and receiver will consult with the special agent relative to fixing the time and place for taking testimony.

Where possible, notice of hearing will be given by the register and receiver by registered letter or by personal service. If the whereabouts of the party or parties in interest cannot be ascertained, notice should be given by publication in accordance with rules 13 and 14 of the Rules of Practice.

Proof of service should accompany the record in every case, and, where notice is given by publication, a statement by the register and receiver, or a certificate from the special agent, or the affidavit of an officer or other person, must be filed showing that due diligence has been used and the party or parties could not be found.

Notice should be given in all cases at least thirty days before the date fixed for hearing.

Attorneys appearing should be required to file a written appearance stating for whom they appear; and in all cases notice to an attorney of record will be treated as notice to the party or parties for whom he appears.

Special agents should so arrange their business as to have testimony taken at the same time and place in as many cases as practicable. They must be present at hearings with the necessary witnesses, to prove the charges made in their reports, and they will represent the government in the conduct of cases and examination of witnesses.

Special agents are not required to file affidavits for continuances or postponements, nor to make deposits for expenses. Continuances and postponements will be allowed only for necessary cause, and in no case for the purpose of vexation or delay.

Special agents will not enter into stipulations relative to taking testimony, or otherwise, by which the due course of proceedings will be embarrassed or the purpose of the law frustrated.

The expenses of service of notice and the cost of taking the testimony of witnesses for the government, including the government's cross-examination of witnesses for the claimant, will be paid by receivers, who will estimate specially therefor, referring to the date and initial of the letter ordering the hearings.

The cost of reducing testimony to writing, payable by the government, will be the actual and necessary sums paid out for that purpose, and not fees of local officers. Such fees will not be charged to the government.

The expenses of the claimant, including the pay of his own witnesses, the costs of taking their testimony, and the cost of his cross-examination of witnesses for the government, must be paid by himself, and a reasonable deposit for expenses of reducing such testimony and cross-

examinations to writing may be required by the officer taking the testimony.

Upon the termination of a hearing the register and receiver will immediately render a decision in the case, and upon the expiration of the time allowed for appeal transmit the record to this office.

Special agents are not required to file appeals from decisions adverse to the government nor are they expected to file briefs in any case.

This circular is issued to take the place of circular of May 8, 1884 (2 L. D., 807), on the same subject, and will in future govern in all cases to which it applies.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,
Secretary.

OKLAHOMA LANDS—DISQUALIFICATION OF SETTLER.

WELCH *v.* BUTLER.

The departmental inhibition against making the race for Oklahoma lands from Indian reservations, is applicable to lands which the Indians have the right to use and occupy, and not to lands in which the Indians have no such right.

Secretary Smith to the Commissioner of the General Land Office, November 2, 1895. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 7, T. 28 N., R. 3 E., Perry land district, Oklahoma Territory.

The record shows that on September 19, 1893, William M. Butler made homestead entry for the above described tract.

October 3, 1893, Henry Welch filed an affidavit of contest against said entry alleging prior settlement, and the disqualification of the defendant because he (Butler) made the race for the land from the Chillico school reservation in violation of law.

Subsequently, on April 25, 1894, the plaintiff filed a supplemental affidavit of contest alleging:

That he verily believes that the said Wm. Butler has abandoned said tract of land; that said Butler is the head of a family and that said family did not establish a permanent residence upon said land until the expiration of six months from the date of said entry; that although said family appeared upon said claim upon the 14th of March or thereabouts that they left a few days after and he believes that they returned to their home in Kansas and that he also believes that said Kansas home remained furnished and was at that time kept as a place of residence. Furthermore, affiant believes that Wm. Butler has placed said lands in the hands of one real estate agent whose name is Sutherland and whose office is in the town of Newkirk, Oklahoma Territory. That said entryman, Wm. Butler, has supported himself in various other ways that force affiant to believe that he has not wanted or intended to make said land a home for himself and family.

June 4, 1894, the entryman filed a motion to dismiss the contest of Welch because the affidavit of contest did not state a cause of action.

The local officers dismissed the contest of Welch as to the allegation of prior settlement and disqualification and ordered a trial on the charge of abandonment.

Upon appeal your office decision of December 14, 1894, affirmed the action of the local officers in so far as it dismissed the contest of Welch on the allegation of prior settlement and disqualification but reversed their action in ordering a trial on the charge of abandonment.

It appears in his affidavit of contest that Welch states that he settled upon the land in controversy at 11:30 p. m., September 19, 1893. The application of Butler is endorsed by the register: "Received September 19, 1893, at 9:24 a. m." It would thus seem that the charge of prior settlement is not borne out by the record.

This brings up for disposition the question as to whether the race from the Chilocco school reservation disqualified Butler as a homestead entryman in the Cherokee Outlet. These are lands of the United States purchased from the Cherokee Nation and were not open to settlement on account of being reserved by the United States for Indian school purposes. The Department had forbidden runs into the Cherokee Outlet from being made from any Indian reservation. (Acting Secretary Reynolds' order of August 30, 1893.) The inhibition about making the run from Indian reservations refers to lands which Indians have the right to occupy and use and not to lands of the United States to which Indians have no such right. Indians have no such right in the lands used for the Chilocco school and hence the inhibition does not apply to these lands. This disposes of the questions urged upon appeal by Welch, and the decision appealed from is therefore affirmed.

OKLAHOMA LANDS—DISQUALIFICATIONS OF HOMESTEADER.

JACOB KAUFMAN.

The prohibitive provisions in the act opening Oklahoma lands to settlement were directed against persons otherwise qualified to make entry, and not against persons who for other reasons were then disqualified, and by their presence in said Territory took no advantage over others.

Secretary Smith to the Commissioner of the General Land Office, November 2, 1895. (J. I. H.) (E. W.)

I have considered your office letter of September 8, 1894, embodying a report and recommendation concerning the petition of Jacob Kaufman to have proceedings instituted to vacate and cancel the patent issued December 15, 1892, to Arthur W. Dunham, conveying to him the SW. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

The petition is predicated upon two grounds, to wit:

First.—That said Dunham was at twelve o'clock, noon, April 22, 1889, within the Territory of Oklahoma.

Second.—That he—Dunham—never made settlement and residence on said tract.

It appears that your office has caused special agent R. R. Poe, who was furnished with a copy of said petition to investigate said charges of fraud. Your office letter recites that the facts reported by said special agent, corroborated by affidavits, are substantially as follows:

A. W. Dunham, the entryman, went to the territory of Oklahoma, in February, 1888, as an employe of the A. T. & S. F. R. R. Co., and has remained in said territory and in the service of said company ever since; he did not attempt to take up any land when the same was opened for entry April 22, 1889, and in fact was not at that time of lawful age; November 1, 1890, he bought the improvements on said land from one Williams, a prior entryman, paying him \$450 therefor, and upon Williams' relinquishing his claim to said land, Dunham entered the same. This, it will be observed, was a year and a half after the opening, and although Dunham was within the territory at date of the opening, he took no advantage of his presence therein to secure a settlement claim and, consequently, was not disqualified, as an entryman, by reason of such presence.

It is further shown by a number of affidavits, accompanying the special agent's report, that Dunham established his actual residence on said land in due time and maintained the same until he submitted his final proof and perfected his entry.

Inasmuch as it does not appear that any fraud has been committed, in connection with the entry or patent in question, the supplemental report of the special agent relative to the transfer of said land, does not seem to be material. Mr. Jondahl was aware that Kaufman was asserting some kind of a claim to said land, but was advised and believed there was no validity in Kaufman's claim or defect in Dunham's title.

In view of the foregoing facts, I recommend that Kaufman's petition be denied.

It is not clear that the law and the proclamation against prematurely entering the Territory were directed against persons occupying the position of the defendant in this case. The general rule in the interpretation of statutes is, "that the cardinal purpose or intent of the whole act shall control." (Sutherland on Statutory Construction, Sec. 240.) Inquiry should be made to ascertain what was the mischief or defect which the law intended to remedy. (Endlich on the Interpretation of Statutes, Sec. 27.) The purpose of Congress in its legislation was manifestly to secure equality between parties desiring to make entry of these lands so that no one "should have special advantage in the entry of tracts they desired for occupancy" (see *Smith v. Townsend*, 148 U. S., 490, 501). The mere fact of being within the prescribed limits on the day the Territory was opened to entry gave the defendant in this case no "special advantage," because he was a minor, and by that fact shut out from the opportunity of seizing upon land that some other person might otherwise have entered. It is not to be assumed that the law was directed against persons who, for other reasons, were disqualified from making entry—the obvious purpose of the act being to pro-

hibit persons, otherwise qualified to enter land, from going into the territory during the prohibited period. Dunham's presence on the right of way of the railroad, on that day, was not unlawful; he did nothing then nor afterward to prejudice any other person's right; and in my opinion his entry, made long subsequently, when he attained his majority, should be allowed to stand intact.

For these reasons I concur in the conclusion at which your office has arrived, and the petition is accordingly denied.

AMENDMENT OF ENTRY—EXCUSABLE MISTAKE.

THOMAS WALSH.

An amendment of an entry may be allowed, where, due to an excusable mistake, the entry as originally made did not cover the land settled upon and improved by the entryman.

Secretary Smith to the Commissioner of the General Land Office, November 2, 1895. (J. I. H.) (F. W. C.)

I have considered the appeal by Thomas Walsh from your office decision of February 26, 1894, denying his application to amend his homestead entry made September 19, 1893, covering the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 2, T. 37 N., R. 38 E., Spokane Falls land district, Washington, so as to embrace in lieu thereof the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 2, lot 1, and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 11, same township and range.

With letter dated January 25, 1894, the register forwarded the application by Walsh to amend his entry and in said letter he recommended the allowance of the application. From the showing made in support of the application to amend, it appears that Walsh selected, settled upon, and improved the tract now sought to have included in his entry. As he was more than one hundred miles distant from the land office, he sought the advice and services of one Jacob Stitzel, a United States court commissioner, in preparing his homestead papers.

Stitzel had in his possession a copy of that part of the township in question, showing the disposal made of parts of sections 2 and 11, which plat had been secured from the local office sometime prior to the making of the application by Walsh.

It is represented that said copy, as furnished by the local officers, showed that about thirty acres of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 2, was embraced in a mining claim known as the Bonanza mine. This claim traversed the entire SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and rendered that part of the tract south of said mining claim, in the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 2, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 11, non-contiguous with the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 2.

From this information, gathered from the plat in Stitzel's possession he advised Walsh that he would not be permitted by the local officers to make entry of the land as originally settled upon, and, acting upon the advice of Stitzel, he made application for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 2, which was duly accepted by the local officers and the entry allowed, as before stated, on September 19, 1893.

Not long thereafter, he learned that the plat in Stitzel's possession did not show the correct state of facts and from the correspondence between Stitzel and the local office it was learned that the location of the Bonanza mine had been changed, the plat showing the changed location having been filed in the local office May 8, 1893. According to this plat Walsh might have made entry as originally intended, and in January, 1894, he filed his application to amend to embrace the tract originally settled upon and improved by him.

Your office decision denied the application upon the ground that:

The party instead of going to the district land office to make his filing, where the correct status of the land desired could have been ascertained, elected to go before the United States commissioner and make his filing upon incorrect information. . . . Had the party exercised due diligence no error need have occurred.

As before stated, the showing evidences that Walsh settled upon and improved the land now applied for and intended originally to make entry thereof. Due to mis-information he applied for different land, but his mistake in seeking information from the party he did was a natural one he being desirous of saving the expense incidental to making the trip to the local office, and as it is shown that the United States commissioner attended generally to the land business of those persons in that neighborhood who were unable to go to the land office. This commissioner had secured a copy of the township plat from the local office, but, due to the change of location of the Bonanza mine, which was not shown upon his plat, he advised Walsh that entry could not be made as originally intended.

It seems to me the mistake was an excusable one and has been satisfactorily explained. There does not appear to be any adverse claim to the land applied for, so that the question now is between Walsh and the government.

Under the circumstances, I am of the opinion that the showing made is sufficient upon which to allow the amendment, and your office decision is accordingly reversed and the papers returned herewith that Walsh may make an amendment of his entry, as applied for.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887—ADVERSE CLAIM.

HOOK *v.* PRESTON ET AL.

The right of a purchaser from a railroad company to perfect title under section 5, act of March 3, 1887, for the protection of his grantees, is not defeated by an inchoate claim under a warrant location, where the locator by his laches justified said purchaser and his grantees in the belief that the claim under the location had been abandoned.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 2, 1895. (J. I. P.)

By your office letter "F" of May 7, 1894, you transmitted to this Department the appeal of Dawson A. Hook from your office decision of January 15, 1894, rejecting Hook's application to purchase the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 26 S., R. 18 E., Topeka, Kansas, land district, under the act of March 3, 1887 (24 Stat., 556), and holding intact the claim of Nannie M. Preston to said tract, as transferee of Hyacinthe Lasselle, under bounty land warrant No. 96,200.

The tract in question is situated within the overlapping ten mile granted limits of the grant to the Leavenworth, Lawrence and Galveston Railroad Company and Atchison, Topeka and Santa Fe Railroad Company (12 Stat., 772), and the grant to the Missouri, Kansas and Texas Railway Company (12 Stat., 772, by assignment) and (14 Stat., 289). The line of road of the former was definitely located November 28, 1866, and of the latter, February 19, 1867. The land was included in the limits of the withdrawal for the former, which became effective May 5, 1863, and within the limits of the withdrawal for the latter company, which took effect April 3, 1867. It was twice listed by the companies jointly, namely, August 9, 1872, and July 29, 1874.

Miss Preston claims said tract as the transferee of Hyacinthe Lasselle, who, on March 25, 1861, filed in your office military bounty land warrant No. 96,200, to be located upon the tract in question, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the same section; also the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 18, same township and range, March 25, 1861.

It appears, however, that the local officers at Fort Scott never received your office letter enclosing the warrant and application to locate the tract here involved, and that said warrant was never received at that office. The tract books of your office show, however, that Lasselle located other warrants for other tracts in the same section on the 9th of April, 1861, upon which patents were issued August 1, 1861.

A full statement of the facts relative to the tract here in question is found in the case of Missouri, Kansas and Texas Railroad Company *v.* Lasselle (14 L. D., 278), and a repetition of those facts here is not deemed necessary. Suffice it to say that in the case last above named the Department held that the filing by Lasselle in your office of his application to locate said military bounty land warrant, with the

description of the lands sought to be located thereby, gave him an inchoate right to the tract applied for, even though his application never did reach the local office, or was never noted on the books thereof. Said decision, however, further held that the letter from your office to the local office transmitting Lasselle's application and warrant became a part of the records of your office, and that the record there made of said location was sufficient to defeat the grant, the rights under which did not attach until more than six years thereafter.

That decision was rendered on March 18, 1892, and was promulgated May 4, 1892. August 3, 1892, Miss Preston, as assignee of Lasselle, was allowed to locate the duplicate of the military bounty land warrant on the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 19. May 5, 1893, Dawson A. Hook applied to purchase the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section, under the provisions of section 5 of the act of March 3, 1887, *supra*, which application was refused, for the reason that the tract was included in the warrant location of Miss Preston, from which action he appealed.

With Hook's application is an abstract of title, duly certified, showing that the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section was conveyed to him by the Leavenworth, Lawrence and Galveston Railroad Company on December 4, 1874; that the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section was conveyed to him by the Missouri, Kansas and Texas Railroad Company on December 8, 1874, and that by subsequent conveyances from himself title to said tracts had become vested in one James L. Byers, his remote grantee. Hook makes oath that he was in peaceable possession of the land until 1877, when he conveyed the same to Mrs. Hook by warrantee deed; that he had only recently learned that the Department had canceled the selection of the same by the railroad companies; that he purchased the land in good faith, and that at the date of said purchase it was not in the *bona fide* occupancy of an adverse claimant under the pre-emption or homestead laws, and has not been settled upon subsequent to December 1, 1882, by any person claiming the same under the settlement laws, and that his application is made for the purpose of making good his warranty and protecting his grantees.

The question presented by Hook's appeal is, whether or not the inchoate right which the Department in its decision of March 18, 1892, held was possessed by Lasselle in said tract by virtue of his location of his military bounty land warrant, and which is the basis of Miss Preston's location, is sufficient to defeat Hook's right to purchase said tract under section 5 of the act of March 3, 1887, *supra*.

Before passing to the consideration of that question, a review of the pertinent points in the decision of March 18, 1892 (14 L. D., 278), and the facts upon which it was based, is deemed advisable.

The records of your office show that in June, 1875, the Missouri, Kansas and Texas Railway Company asked for a patent to the land here involved, and on June 11, 1875, your office denied said application, for the reason that said tract was covered by the location of Lasselle,

as herein stated. June 17, 1875, the railroad company appealed from the rejection of its application by your office, and as ground for appeal alleged that it was error to hold that Lasselle had any valid claim whatever to said tract. June 24, 1875, your office directed the local officers at Topeka to notify Mr. Lasselle of said decision and the appeal therefrom, and allow him thirty days to file an argument in the case, and on August 2, 1875, said officers reported that notice was given July 2, 1875, as directed, but that no argument had been filed. June 26, 1875, your office also furnished Mr. Lasselle a copy of your office decision of June 11, 1875, and notified him of the appeal of the railroad company, and advised him that he would be allowed thirty days in which to file an argument but none seems to have been filed. August 13, 1875, the case was submitted to the Secretary on said appeal, and on March 1, 1876, a decision was rendered reversing your office decision of June 11, 1875, and awarding the land to the railroad company.

Subsequently the railroad company, by virtue of that decision, again applied for a patent for said land, and notwithstanding the apparent adjudication of March 1, 1876, your office directed the local officers at Topeka to cite all adverse claimants, within thirty days, to show cause why said tract should not be patented to the railroad company. Before final action was taken in the matter, however, your attention was called to the decision of March 1, 1876, whereupon the whole matter was again submitted to the Department for its consideration, and it was upon that submission that the decision of March 18, 1892 (14 L. D., 278), *supra*, was rendered.

Referring to the filing by Lasselle of his application to locate his bounty land warrant in 1861, there is no question but when that application was filed with a description of the land sought to be located, he did all he was required to do under the law and obtained thereby such an inchoate right to the land as did except it from the grant to the railroad company and would, if properly followed up, have entitled him to patent. But from 1861 to 1891, he made but two efforts to assert his claim. He allowed nine years to elapse before he made any enquiry about it, when it was discovered that his application had been lost and never reached the local office. Four years after, the Hon. W. E. Niblack, then a member of Congress, made a further enquiry. Later, Lasselle was advised by your office of the railroad company's appeal from its decision of June 11, 1875, and he made no effort whatever to protect his rights in the premises. And until 1891, a period of seventeen years, when his heirs were notified to show cause why patent should not issue to the railroad company under the decision of 1876, *supra*, no action was taken by either him or his heirs to assert their rights to the tract here involved.

In the mean time Hook, without any knowledge of the claim of Lasselle, concerning which the records of the local office were silent, had

in good faith purchased from the railroad company the tract in question. He had put valuable improvements on it and was for several years in possession of it, he and his grantees.

There is no question in my mind but that Lasselle and his heirs and grantees have been guilty of laches in failing to assert their claim for so many years and in allowing the adverse rights of others to attach to the tract in question.

Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or parties. *Caldwell v. Galliher* (145 U. S., 363).

His failure to notice the railroad company's appeal from the decision of June 11, 1875, of which he was advised, and his silence for seventeen years, warranted Hook and his grantees in believing that Lasselle had abandoned or waived his claim to said tract of land, and the inequity of allowing his claim after all these years to supercede Hook's rights in the premises after the land had by cultivation and improvement become valuable is so apparent that this Department will not permit it.

Your decision is therefore reversed with directions to cancel Miss Preston's location of the tract involved and to allow Hook's application to purchase under the act of March 3, 1887, *supra*, if found to be in accordance with the law.

CORRECTION OF FINAL CERTIFICATE—PATENT—SECTION 2448 R. S.

JOSEPH ELLIS.

An error in a final certificate, as to the name of the entryman, may be corrected *nunc pro tunc*.

Under the provisions of section 2448 R. S., a patent may issue in the name of an entryman, though his death may be disclosed by the record.

The doctrine announced in the case of *Clara Huls*, 9 L. D., 401, modified.

Secretary Smith to the Commissioner of the General Land Office, November
(J. I. H.) 2, 1895. (F. L. C.)

I have considered the appeal by Herbert Kraft, transferee of Joseph Ellis, from your office decision of May 18, 1893, in the matter of the correction of the certificate No. 1,249, issued August 31, 1864, upon the purchase of the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, T. 24 N., R. 3 W., M. D. M., Marysville, California.

It appears that Wells, Fargo and Co., by Mr. Crocker, a clerk in their employ, acting as agents for Joseph Ellis, made cash entry of the above land on August 31, 1864, but through mistake the certificate of purchase was issued in the name of "John" Ellis.

By letter of December 22, 1864, the receiver called attention to the mistake, and to the fact that Mr. Ellis had filed a corrected application,

with a request that the same be substituted for the first issued, and asked instructions.

Instructions were given that notice would have to be published, etc., with which Mr. Ellis does not appear to have complied.

It seems, however, that he took up a residence on the land and resided there until his death in 1886 or 1887.

In 1879 he conveyed the land to Kraft, who, in answer to a rule issued by your office on September 12, 1890, to show cause why patent should not be issued in the name of John Ellis, responded, alleging the death of Joseph Ellis in whose name the certificate should have issued, and that he was the owner under conveyance from said Ellis.

After a consideration of the showing made, your office decision found that a mistake had been made in the issue of the certificate in the name of "John" Ellis, but as it was shown that Joseph Ellis, in whose name the certificate should have been issued, was dead, it was held that the certificate should be corrected to "the heirs of Joseph Ellis, deceased," and that patent would issue thereon accordingly.

In his appeal Kraft urges that for his protection the patent should issue to "the heirs or assigns of Joseph Ellis, deceased."

In the first place, it being clearly shown that an error was made, the certificate should be corrected *nunc pro tunc* so as to show the purchase to have been made by Joseph Ellis, and you will instruct the register accordingly. To correct the certificate so as to show that the purchase was made by the heirs of Joseph Ellis, deceased, would be clearly wrong, as it would evidence a purchase by the heirs many years before Mr. Ellis died; further, it might affect the rights of those to whom Mr. Ellis may have conveyed the land.

In the matter of the issue of patent, the death of the entryman being suggested, the question is raised as to how the patent shall issue—whether in the name of the deceased entryman, thus following the final certificate which conveyed the equitable title, or to the heirs generally without specifically naming them, or to the heirs and assigns as prayed in the petition. In the case of Clara Huls (9 L. D., 401), the second method was adopted by the Department as the correct practice, and the ruling of that case has since been followed—that is, to issue to the heirs generally. The authority for the rule there made was the case of Galloway v. Finley, decided by the supreme court in 1838 (12 Pet., 264).

But upon further consideration of the question involved, I find that in 1871 the same court, having the same question more directly before it, recognized the act of May 20, 1836, now section 2448 of the Revised Statutes, as controlling. The case then under consideration was that of Davenport v. Lamb (13 Wall., 418), and the court recognizing the common law rule, that a patent issued to a person who had previously died would be void from that circumstance, said:

By that law the grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person; and the rule would apply equally to grants

of the government as to grants of individuals, but for the act of Congress of May 20, 1836, which obviates this result.

Said act, as codified in section 2448 of the Revised Statutes, reads as follows:

Where patents for public lands have been or may be issued in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

This provision of the statute appears to be explicit and without ambiguity, and the supreme court seems to have so regarded it. Following the language of the statute, and the view of the court as above quoted, I conclude that in the case before me the patent should issue to Joseph Ellis just as if his death had not been suggested, and then, as provided in said section 2448, the title will inure to and become vested in the heirs, devisees or assignees of the deceased patentee, as the facts may warrant. Such is the order in the case, and the doctrine announced in the Clara Huls case (*supra*), and in other cases which followed it, is modified accordingly.

DEPUTY MINERAL SURVEYOR—APPOINTMENT.

WILLIAM E. JACOBS.

The appointment of non-resident deputy mineral surveyors is a matter in which the discretion of the surveyor-general may be properly recognized.

Secretary Smith to the Commissioner of the General Land Office, November 2, 1895. (J. L. McC.)

William E. Jacobs has appealed from the decision of your office, as set forth in its letter of May 17, 1895, declining to interfere with the action of the surveyor-general for the district of Nevada in refusing to appoint him deputy surveyor.

Mr. Jacobs relies upon the following facts to establish his claim:

There is a belt of mining country lying along the eastern border of Nevada, which is, in a mining sense, a part of Utah. The claims—and this is the point to which I particularly desire to direct attention, and on which I base my claim—are almost exclusively owned by Utah parties residing here. These owners prefer to have their work done by the same surveyors that do their Utah work, with whom they are personally acquainted, and who, residing here, have maps and notes always at hand and easily available, and who may themselves be easily and speedily reached when needed. There is no question regarding the ability of the Nevada surveyors; simply that they are at such a distance from the offices of the mines, and in the case of those residing near this belt of mining country, over star mail routes, that they can not be easily or quickly communicated with in case their maps or survey notes are needed by the mine owners.

In conclusion Mr. Jacobs refers to the departmental decision of February 23, 1895, in the case of Charles W. Helmick (20 L. D., 163), as a precedent for departmental interference in his own case.

The surveyor-general in response sets forth his reasons for not appointing Mr. Jacobs: in substance, that there are more competent deputy surveyors in Nevada than can find employment; that to appoint persons residing outside of the State (a large number of whom have applied) would not only leave resident surveyors unemployed, but involve extra cost to persons needing the services of a surveyor, as they would have to pay the traveling expenses of such surveyors residing in other States outside the State; that as a matter of fact the mines in the Deep Creek mining district (to which Mr. Jacobs refers) are by no means exclusively owned by residents of Utah; that it is not true that said mining district is in a mining sense a part of Utah, inasmuch as a barren waste of salt land extends between that district and Salt Lake City, where Mr. Jacobs resides; that it is not true that said mining district can be more easily reached by him from Salt Lake City than by deputy surveyors residing in Nevada, inasmuch as competent deputy surveyors reside at Muncie, Ely, and Elko, distant respectively forty, sixty, and eighty miles, while said mining district can be reached by Salt Lake City only by a circuitous journey, by railroad, stage, and private conveyance, of more than two hundred miles.

The statute relative to the appointment of deputy mineral surveyors is as follows (Sec. 2334 R. S.):

The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey . . . shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates; and they shall also be at liberty to employ any United States deputy surveyor to make the survey.

The decision in the Helmick case, to which Mr. Jacobs refers, holds that "it is not an essential requisite to the appointment of a deputy mineral surveyor that he should be an actual resident of the land district for which he is commissioned." This does not, however, in my opinion, render it compulsory upon the surveyor-general to appoint every person resident outside the State, who may apply to be appointed, his deputy. I think that a certain discretion in this respect should be allowed the surveyor-general; and therefore do not feel called upon to interfere in this case and order an appointment which he deems unnecessary and improper.

The decision of your office is therefore affirmed.

RAILROAD GRANT—SELECTIONS WITHIN MINERAL DISTRICTS.

CHARLES H. FISHER.*

Railroad companies in giving notice of applications for patent under the circular of July 9, 1894, will be required to describe by sections, and by portions of sections, when less than a section is selected, in the published notice, the lands covered by their applications, except where the list covers all the odd numbered sections in a township, in which case the notice can so state.

Secretary Smith to the Commissioner of the General Land Office, October 11, 1895.

I am in receipt of your office letter of September 18, 1895, making report upon letters from Chas. H. Fisher, Esq., dated June 29, and July 21, last, in the matter of the advertisement (in accordance with departmental circular of July 9, 1894, 19 L. D., 21) of lists of lands selected by railroad companies within mineral districts.

Your report brings to my attention the fact that, under said circular, publication is only required to be made by the company of the townships for which application has been made for lands on account of its grants, the interested public being referred to the local office for information as to the particular subdivisional description covered by the company's application for patent.

While the circular will bear this construction, yet upon consideration, I am satisfied that the publication of notice by townships only will be of little service as a notice to those most likely to be interested. The necessity of traveling to the local office to ascertain the exact tracts applied for by the railroad companies puts the expense upon those least prepared to bear it, and, while it is true that the publication of the subdivisional description applied for will entail an additional expense upon the companies, yet, it would seem that being anxious to secure patents, they should be required to give any notice thought to be necessary by this Department for the protection of individual rights.

The settler in giving notice of his intention to make proof upon his claim is required to particularly describe the lands covered thereby, and I can see no good reason why the notice by the company, if it is to be of any service as information to the public, should not describe the lands applied for with sufficient particularity to accomplish the object intended.

The companies, therefore, will be required hereafter in giving notice under the circular of July 9, 1894, *supra*, to describe by sections, and by portions of sections when less than a section is selected, in the published notice, instead of townships, the lands covered by their applications for patent, except where the list covers all the odd-numbered sections in a township, in which event the notice can so state.

*The above is substituted for the letter of the same date, found on page 297 herein.

This, it is believed, will not greatly increase the expense of publication, and will give sufficient notice to the public.

The local officers will be notified accordingly and you will also advise Mr. Fisher hereof. Herewith are returned his letters for the purpose indicated.

NEZ PERCE INDIAN LANDS OPENED TO SETTLEMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

November 4, 1895.

REGISTER AND RECEIVER,

Lewiston, Idaho.

GENTLEMEN: In view of a proclamation to be hereafter issued by the President, opening to settlement and entry the unallotted and unreserved lands embraced within the limits of the Nez Perce Indian Reservation, you will consider section 16, of the act of Congress, approved August 15, 1894 (28 Stat., pages 326 to 332) which provides under Article 6, that—

It is further stipulated and agreed that any religious society or other organization now occupying under proper authority for religious or educational work among the Indians, any of the lands ceded, shall have the right for two years from the date of the ratification of this agreement, within which to purchase the land so occupied, at the rate of three dollars per acre, the same to be conveyed to such society or organization by patent, in the usual form.

It is further provided—

That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as provided for in said agreement, the lands so ceded, sold, relinquished, and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town-site, stone and timber, and mining laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes, and be subject to the laws of Idaho: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of original entry; and the sum of five dollars per acre for stone, timber and mineral lands, subject to the regulations prescribed by existing laws; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

Any religious society or other organization applying to purchase lands under said Article 6 must make proof, after six weeks' publication, of its occupancy of such lands on October 31, 1892, the date of the agreement, and pay for the same at the rate of three dollars per acre within two years from the date of the act ratifying the agreement.

Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre, one-half of which shall be paid within three years from the date of original entry. No final commissions will be collected where the party submits proof under section 2301 R. S., and the commissions in the original and final entry under section 2291 R. S., will be computed at the rate of \$1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357 R. S. (See sections 2238 and 2290 R. S.) Town-site, stone and timber, and mineral entries will be made for said lands in accordance with the general laws applicable thereto, but the party making entry under the stone and timber and mining laws, will be required to pay for the land at the rate of five dollars per acre.

You will use the ordinary homestead, town-site, stone and timber, and mineral blanks, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries are made under the act of August 15, 1894, section 16, Nez Perce Indian Reservation lands.

These instructions it must be understood are not to be acted upon by you for the allowing of entries, nor will settlement be admissible, until after the time which shall be fixed therefor in the President's proclamation to be hereafter issued as first above stated. A schedule of the lands opened to settlement will be attached to and made a part of the proclamation.

Very respectfully,

Approved,

HOKE SMITH,
Secretary.

S. W. LAMOREUX,
Commissioner.

PRACTICE—NOTICE—PROOF OF SERVICE.

FRANSON *v.* BAKER.

An objection to the jurisdiction of the local office, on the ground that the record does not afford due proof of service of notice, is not well taken where the fact of legal service is not denied.

Secretary Smith to the Commissioner of the General Land Office, November 2, 1895. (C. J. G.)

April 25, 1892, David W. Baker made homestead entry of the NE. $\frac{1}{4}$ of Sec. 30, T. 121, R. 51, Watertown land district South Dakota.

April 18, 1893, Frank Franson filed an affidavit of contest against said entry alleging abandonment and change of residence for more than six months. Notice of contest was issued, and the hearing set.

for June 26, 1893. On that day the parties appeared, the defendant specially, who moved to dismiss the contest, for the reason that no proof of service of the notice of contest had been made or filed in the case, and that the record before the land office failed to show that said office had jurisdiction. In opposition to this motion the contestant asked a short delay in order that one of his attorneys, Stover, who had the notice in his possession, could arrive. Subsequently, on the same day, the contestant filed his affidavit

That the notice of contest in said case was duly issued and that the same was personally served on said claimant, and the verified return properly endorsed on the back thereof. But that said notice and return is lost or mislaid and that he cannot find the same and that it, for that reason, cannot at this time be produced and filed.

On the same day the contestant also filed another affidavit in which he said

That on the 19th day of April, 1893, at Roberts county, South Dakota, he served upon the above named claimant David W. Baker the notice of contest in said case by handing to and leaving with him a true and correct copy thereof.

The claimant excepted to the sufficiency of contestant's affidavits, filed for the purpose of proving service of notice, for the reason that they did not comply with the mode of proof as prescribed by Rule 15 of the Rules of Practice.

The case was then continued to the next morning, when the contestant filed another affidavit to the effect

That he left the original notice of contest with his attorney Stover, and in person delivered a true copy of the original to the claimant David W. Baker at or near the village of Corona in the county of Roberts in the State of South Dakota on the 19th day of April, 1893. That he personally knows the person who is the claimant in this action. That he knows that the copy of notice so served to be the true, correct and complete copy of the original notice of hearing issued by the local office. That he left the original notice of hearing with his attorneys that the same might be safely preserved. That although diligent search and inquiry has been made they have been absolutely unable to discover the original. That the copy hereto attached is as near as your affiant can remember a copy of the original as issued by this office. That your affiant is positive that in all the material features it is correct.

Lee Stover, attorney for contestant, also filed his affidavit in which he says—

That your affiant drew the copy of the original notice of service, which said copy was duly served upon the claimant David W. Baker. That your affiant personally knows that the said copy was a true, verbatim copy of the original notice of hearing issued by the local office in this matter. That the copy attached to the affidavit of Frank Franson, the contestant, is in all material features a true copy of the original notice issued him.

With these affidavits before it the local office considered the proof of service of notice of contest sufficient to give it jurisdiction to try the case. The defendant thereupon withdrew and the contestant submitted his testimony. After hearing said testimony the local office held that the entry should be canceled. Baker having appealed, your office, by

letter of February 16, 1894, concurred in the finding of the local office, and from the rulings of the local office as thus affirmed, Baker now appeals to this Department, but not from the decision holding the entry for cancellation.

The only question, therefore, involved in the appeal, is as to the sufficiency of proof, under the Rules of Practice, of the service of notice of contest. There is no question as to the sufficiency of the service itself. In your office decision it is correctly stated that—

It is evident from the showing made—First, that a verbatim copy of the original notice was served on the defendant. Second, that the copy of the lost original tendered was substantially a copy of the lost original. This, in my judgment, was a sufficient establishing of said lost original, and, so established, it stands in lieu of said lost original, bearing evidence on its face of proper service upon the defendant, and giving to your office jurisdiction to try the case.

The claimant asked dismissal of the contest on the ground of insufficiency of proof of service under Rule of Practice 15, and consequent want of jurisdiction, and his assignments of error are based entirely on the denial of his motion to dismiss.

It appears from the affidavits of the contestant and his attorney that notice was duly served on defendant by reading the same and delivering a true copy. If these affidavits are true, the service was in strict accordance with the rules of practice. It is not denied by the defendant that he was in fact thus served, and his motion to dismiss was on the ground, not that he had not been legally served, but that said service had not been legally proved. There is no claim by him that the service itself was defective, only that the *proof* of said service was not legal, and was not in the files. The defendant not only does not deny service of notice, but he does not file counter affidavits to this effect as an offset to those of contestant.

Rule of Practice 15, which provides how proof of personal service shall be made, was intended to apply to, and can only be invoked in cases where the fact of service is denied. Where service is admitted or not denied, and the service is legal and duly made, the mode of proof of it is immaterial. (*Hausen v. Ueland*, 10 L. D., 273.)

While, as the defendant asserts, actual knowledge on the part of the claimant of a pending contest does not bring him into court, yet the fact that he, together with his attorney and witnesses, as shown by the evidence, was in court on the day of the hearing, may be taken into consideration in determining whether or not he had actual notice. The notice of contest takes the place of a writ of summons in common law courts. And if defendant was duly served with notice of contest, as the affidavits of the contestant and his attorney conclusively show, then the manner of making proof of service of said notice is not material.

From an examination of this case it does not appear that the defendant was deprived of the right or opportunity of introducing any proof, or of availing himself of any legal rights, for want of sufficient notice of

contest. His objection to the mode of proof of service of notice is merely a technical one which can not affect the real merits of the case or his legal rights as defendant. As the testimony of the witness called in behalf of the contestant sustains the charge of abandonment, the entry should be canceled. Your office decision, therefore, in sustaining the ruling of the local office and in holding the entry for cancellation, is hereby affirmed.

SURVEYS IN INDIAN TERRITORY—ACT OF MARCH 2, 1895.

OPINION.

In the prosecution of surveys in the Indian Territory under the supervision of the Director of the Geological Survey, as provided by the act of March 2, 1895, the Secretary of the Interior may authorize oaths to be administered by any official who may be convenient to the persons in the field.

Assistant Attorney-General Hall to the Secretary of the Interior, November 5, 1895.

I have before me, by your reference, a letter addressed to you by the Director of the Geological Survey, asking for a modification of the office manual of the Land Office, which governs subdivisational surveys of the public lands; and also whether it would be legal for notaries public to administer oaths to persons employed by the Geological Survey in making surveys in the Indian Territory. The reference especially asks for an opinion of the Assistant Attorney-General as to the legality of oaths administered by notaries-public.

There is no act of Congress which would authorize a notary-public to administer an oath in such case (see 131 U. S., 50). But I find on examination of an act of Congress approved March 2, 1895 (28 Stat., 900), which conferred upon the Secretary of the Interior the discretion to direct that the survey of the Indian Territory should be performed under the supervision of the Director of the Geological Survey, that authority is given to the Secretary to prescribe regulations for making said survey. That statute provides that said surveys shall be executed under instructions to be issued by the Secretary of the Interior, and provides further that when any such surveys shall have been so made, and plats and field notes thereof prepared, they shall be approved and certified to by the Director of the Geological Survey, and that such surveys, field notes, and plats shall have the same legal force and effect as heretofore given to the acts of surveyors-general. The only portion of the work which is required to be done according to existing laws is, that the subdivisational surveys shall be executed under the rectangular system. All other matters of procedure are left to the discretion and direction of the Secretary of the Interior. This view of the matter is strengthened by the last clause of the statute upon this subject, to wit: "That all laws inconsistent with the provisions hereof are declared to be inoperative as respects such surveys."

Under this authority, I see no reason why the Secretary of the Interior may not authorize oaths to be administered by any official who may be convenient to the persons in the field.

If Mr. Fitch, the topographer in charge of the work, is an officer of the government, and under oath, I can see no reason why he should be required to take an additional oath. If an oath is to be administered to Fitch, or to the men who work under his direction, the Secretary has authority to direct by what official this may be done.

Approved,

HOKE SMITH,
Secretary.

RAILROAD GRANT—APPLICATION FOR PATENT—PROTEST—MINERAL
LANDS.

BENJAMIN v. SOUTHERN AND CENTRAL PACIFIC RAILROAD
COMPANIES.

A protest in which no specific allegation is made as to the presence of mineral in any particular tract covered by a railroad company's application for patent, does not warrant a hearing thereunder as to the character of the land, or further suspension of the list, where due notice of the application for patent thereon has been given as required by the departmental regulations of July 9, 1894.

Secretary Smith to the Commissioner of the General Land Office, November
(J. I. H.) 5, 1895. (F. W. C.)

I have considered the appeal filed on behalf of Edward H. Benjamin from the action of your office in dismissing certain protests filed under a notice published by the Southern Pacific Railroad company, in accordance with the requirements of departmental circular of July 9, 1894 (19 L. D., 21), of a list of lands for which it had applied for patent.

By said circular it is directed—

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

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

Upon receipt of said list you will cause it to be examined, and a clear list to be prepared of all lands embraced therein that are not within a radius of six miles from any mineral entry, claim, or location, which list shall be transmitted to the Department for its approval. If any of the lands embraced in said list of selections are found upon examination to be within a radius of six miles from any mineral entry, claim, or location, you will cause a supplemental list of such lands to be prepared, and return the same to the register and receiver of the district in which they are

situated, and notify the railroad company that they have been so returned. The register and receiver will at once cause notice to be published in such newspapers as shall be designated by the Commissioner of the General Land Office, containing a statement that the railroad company has applied for a patent for the lands, designating the same by townships, and has filed lists of the same in the local land office; that said lists are open to the public for inspection; that a copy of the same, by descriptive subdivisions, has been conspicuously posted in said land office for inspection by persons interested, and the public generally; and that the local land officers will receive protests, or contests, within the next sixty days, for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

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

In accordance with said directions supplemental list No. 22, Southern Pacific Railroad Company (branch line) was published and Edward H. Benjamin, for himself and on behalf of the California Miners' Association, filed a protest against the patenting of any of the lands covered by said list, alleging:

A. That all of the tracts and subdivisions aforesaid are situated in and cover notorious mineral belts.

* * * * *

B. That said lands, and said tracts and subdivisions, and the whole thereof, are more valuable for mineral than for agricultural purposes.

C. That all of said lands, and said tracts and subdivisions embraced in said publication and said list of descriptive subdivisions are mineral lands.

Upon consideration of said protest your office letter of May 25, 1895, dismissed the same for the reason that it was too general in its nature to warrant the ordering of a hearing thereon.

The circular of July 9, 1894, *supra*, provides:

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

Benjamin appealed from the action of your office in dismissing his protest, and in the letter of transmittal it is stated:

While not unmindful of the fact that a mere protestant, as such, has no right of appeal, under the rules of practice, I have deemed it proper, inasmuch as these appeals involve a construction of departmental circular of July 9, 1894 (19 L. D., 21), to forward them for your consideration.

With the appeals I inclose the protests filed by Edward H. Benjamin, also copies of the office decisions relative thereto.

As this matter is an important one involving the adjustment of the railroad grants, now being made by this office, it is requested that these appeals be given immediate consideration.

It appears that similar protests have been filed against the Southern Pacific Railroad (main line), list No. 22, and Central Pacific Railroad, list No. 54.

It is apparent that said protests furnish this Department with no additional information other than that possessed before the advertisement of the lists, and the argument in support of the same, on appeal, is devoted more to the question of the propriety and authority of this Department in the adoption and promulgation of the rules established by the circular of July 9, 1894, for the purpose of separating the mineral from non-mineral lands within the limits of railroad land grants; than to the merits of the protest.

It may be granted that the question as to the manner of acquiring information tending to show a party claimant entitled or not entitled to public land claimed, is not material, but this in nowise aids the protests under consideration.

If the general allegation that *all* lands in mineral belts are mineral is deemed sufficient upon which to order a hearing, then wherein the necessity of putting the company to the expense incident to the publication of the list, for the fact of the location is readily established by inspection of the maps.

This fact is cited in appellant's brief as evidencing the necessity for an examination or exploration of the lands in mineral belts by the government, viz:

Again, take T. 14 N., 10 E., the survey of which was made in 1870; with a few exceptions, this township was returned as agricultural, yet the land office records show that since that time eighty two mines have been officially surveyed for patent, and that such mineral surveys cover at least one-fourth of the township. Numerous other cases can be cited in the mining counties of tracts being returned agricultural in character, while, as was subsequently shown, there were valuable mines thereon in active operation at the time the survey was made no intimation of the existence of which was given however upon the official plat.

It would seem from the above that these lands have been many times explored by those in search of mineral lands, and it would seem to be fair to presume that all the mineral lands in the townships named have been located.

One of the facts considered at the time of the promulgation of the circular of July 9, 1894, was that many of the lands applied for by the railroad companies had been surveyed many years ago, and while the return of the surveyor as to mineral or agricultural lands was in no manner deemed to be controlling, yet the fact that these lands had been open to exploration for many years, and that locations had been made of part of the lands, tended to show that they had been duly explored and the notice was destined to protect those then engaged in developing any of the lands covered by the company's lists, or to afford any one having particular information as to the mineral character of

any of the lands, an opportunity to present it. Doubtless these explorations made by persons in search of claims during the many years that the lands have been open to exploration have been more thoroughly made than would be the case if personally examined by a commission appointed for the purpose. Even if they should now be examined by a commission, the future would, perhaps, disclose many errors made in said examination.

The necessity for a commission is greater where the country is unexplored and the result necessarily doubtful than where, after many years, numerous locations have practically fixed, by location, the mineral lands.

In the States of Montana and Idaho, Congress deemed a mineral commission necessary, but that fact rather argues against the necessity for such commission in California, as viewed by Congress, than in favor of it.

One thing is patent, Congress has made no provision for a government examination of the lands within railroad limits in California, and it is my duty to administer the laws as found upon the statute books.

By the act of March 3, 1887 (24 Stat., 556), the Secretary of the Interior was directed to immediately adjust all railroad land grants, and while it may be true that the railroad companies are in nowise injured by delay in the issue of patents, yet, I can find no authority in this fact, after exhausting the means at my disposal to ascertain the nature of the land included in the grant, or suspending the issue of patents for the reason that perchance in some of the lands patented mineral may be discovered.

This portion of California has been explored over and again many times, and it, after due notice given of the company's application for patent, no specific allegation is made of the presence of mineral in any particular subdivision covered by the list, I can see no necessity for ordering a hearing or further suspending the issue of patent thereon.

Your action dismissing the protests under consideration is therefore affirmed.

SECOND HOMESTEAD ENTRY—WATER SUPPLY.

LEWIS WILSON.

A second homestead entry may be allowed, where the land embraced in the first does not afford a supply of water fit for domestic use, and the entryman does not appear to have been wanting in diligence or good faith.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 5, 1895. (J. L. McC.)

Lewis Wilson has filed a motion for review of departmental decision of October 10, 1894, unreported, which briefly and formally affirmed the decision of your office, dated May 18, 1893, sustaining the action of the local officers in rejecting his application to make homestead entry for the SW. $\frac{1}{4}$ of Sec. 18, T. 15 N., R. 16 W., Kingfisher land district, Oklahoma—the same being a second homestead entry.

The motion for review is accompanied by the affidavit of the applicant, setting forth somewhat more in detail than did those transmitted to the Department an appeal, the circumstances which led to his making a second entry. He states that he was a federal soldier in the late civil war; that at the time of the opening of the Cheyenne and Arapahoe reservation to settlement and entry in 1892, it was his purpose to make entry of land therein, but that at said date he was sick in bed; that he therefore, in accordance with the provisions of sections 2304 and 2309 of the Revised Statutes, employed an agent to file soldier's declaratory statement for him; that said agent filed said soldier's declaratory statement upon the SE. $\frac{1}{4}$ of Sec. 27, T. 16 N., R. 16 W., that when Wilson recovered from his illness and moved his family to the land thus selected for him, he found that it was cut up by hills and canons, and that it was impossible to get water in sufficient quantity for man or beast, it being bitter and unfit for use, on account of the whole tract being underlaid with gypsum and salt; that thereupon the applicant, under legal advice, applied for an amendment of his entry to the SW. $\frac{1}{4}$ of Sec. 15, T. 15 N., R. 16 W.—in effect, the right to make a second entry, embracing the land last described; that in view of what appeared to him a reasonable belief that his application would be granted, he removed to said tract, upon which he has built a house, dug a well, broke forty acres of the land, and made other improvements to the value of about eight hundred dollars; that he is an ex-slave, in poor health, and has no other property in the world excepting this land and the improvements thereon.

The above affidavit is fully corroborated by those of other parties well acquainted with the land and the facts.

The Department has repeatedly held that "one who files a soldier's declaratory statement, and entrusts the selection of the land to an agent, is bound thereby, and disqualified to exercise the homestead right on another tract." (See decision in case of John Benham, and others therein cited, 19 L. D., 274.) But whether he selected the land himself, or through an agent, he may, if the circumstances so warrant, make another entry.

The Department, in the case of William E. Jones (9 L. D., 207), held, as per syllabus, that

A second entry is permissible, where the first is made in good faith, but the land covered thereby is not inhabitable on account of the non-potable character of the water contained thereon.

In the case of Charles F. Babcock (9 L. D., 333), the Department held (as per syllabus) that

The inability of the entryman to secure water for domestic use on the land first entered is a sufficient cause for the allowance of a second entry, if due diligence and good faith are made apparent.

Under all the circumstances set forth, in view of the entryman's apparent good faith, and inasmuch as the question is one wholly

between the entryman and the government, I am inclined to believe that this is a case in which a second entry should be allowed, and so direct.

The departmental decision of October 10, 1894, rendered upon a partial and insufficient presentation of the facts, is therefore hereby recalled and annulled.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

MOORE *v.* MCGUIRE.

Settlement on railroad land, without an application to purchase from the company prior to January 1, 1888, cannot be regarded as giving the status of "licensee," under section 3, act of September 29, 1890, to one who alleges that such settlement was induced by a circular letter of the company.

Secretary Smith to the Commissioner of the General Land Office, November
(J. I. H.) 5, 1895. (F. W. C.)

With your office letter of July 16, 1895, was forwarded a motion filed on behalf of Philip McGuire for review of departmental decision of June 1, 1895, in the case of E. Moore *v.* Philip McGuire, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 33, T. 14 S., R. 7 E., San Francisco land district, California. This motion was entertained and returned for service by letter of July 24, 1895. The motion has been returned served and arguments have been filed on both sides so that the matter is now ready for consideration.

This land was within the primary limits of the grant for the Southern Pacific Railroad, but being opposite the portion unconstructed, was forfeited and restored to the public domain by act of Congress approved September 29, 1890 (26 Stats., 496).

In accordance with instructions issued by your office these lands were opened to entry in 1892, and on November 21, of that year McGuire made homestead entry of the land before described.

Subsequently to the allowance of said entry Moore applied to purchase the entire S. $\frac{1}{2}$ of said Sec. 33, under section three of the forfeiture act, and in support thereof submitted his final proof citing McGuire as adverse claimant.

Upon the record thus made, your office decision of October 20, 1893, made the following finding of facts which does not appear to be disputed:

The testimony tends to show that plaintiff went upon Sec. 33, T. 14 S., R. 7 E., about December, 1883, and settled upon the NE. $\frac{1}{4}$ thereof, where he has continuously lived ever since. Since the date of his settlement, he has continuously been in possession of the S. $\frac{1}{2}$ of said section thirty-three, using it for grazing purposes, but has never cultivated any portion of it. He inclosed it, with a wire fence, together with section 4, of the adjoining township. When he went on the section, he paid one Miller \$7,000 for 280 acres in fee, and the possessory right to the land in controversy, part of section 27, and the aforesaid section 4. July 22d, 1889, he applied to purchase the land in controversy, together with NW. $\frac{1}{4}$ of section 33, and all of

section 27, from the Southern Pacific Railroad Company. He purchased the NE. $\frac{1}{4}$ of Sec. 33, upon which he lived, from the railroad, received a quit-claim deed therefor, and afterwards entered the same as a homestead. The testimony does not show when the purchase was made.

The railroad company acknowledged his application to purchase aforesaid by writing, dated July 22nd, 1889. Moore testifies, that he made his settlement and purchase from Miller, with the intention of purchasing the whole of Sec. 33, from the railroad, and that he had seen a circular published by the railroad company inviting settlers to go on this land. There is no other testimony showing that such a circular was published. There is no evidence that Miller ever had any contract with, or license from the railroad to purchase the land in controversy.

Upon this finding your office decision held that Moore was not entitled to purchase under the provisions of section three of the forfeiture act.

Upon appeal your office decision was reversed by departmental decision of June 1, 1895, under the authority of the holding made in the case of *Eastman v. Wiseman* (18 L. D., 337). In the motion for review it is urged that this case is not controlled by the decision in the case of *Eastman v. Wiseman*, *supra*, for the reason that in that case there had been an application made to the railroad company prior to January 1, 1888, to take advantage of the benefit extended by its circular letter inviting persons to settle on its lands, while in the present case an application to purchase was not filed with the company until after January 1, 1888, and in support of this distinction the decision of this Department in the case of *James C. Daly*, on review (18 L. D., 571), is referred to. In that case it was said:

The Department has held, in the case of *Eastman v. Wiseman* (18 L. D., 337—syllabus), that the provisions of said section three "extend to one who takes possession of and improves lands under the circular invitation of the company, and in accordance with said circular applies to purchase said lands of the company." But *Daly* does not show, as was shown in the case cited, that he ever applied to purchase the land now in question. In that case the applicant received a postal card informing him that his application had been received, stating (*inter alia*) that *bona fide* settlement, or improvement of such character as would be evidence of his intention to purchase, was necessary before any right by virtue of his application could be obtained; and this postal card was held to be, by implication, a license to take possession of the land.

Under this construction it is clear that to assume the existence of a circular letter inviting settlers to settle upon and occupy the lands of the Southern Pacific Railroad, yet proof of settlement, without an application made to the company, can not be construed to be a license within the meaning of the terms of the forfeiture act. It must therefore be held that the motion is well taken, and the previous decision of this Department is recalled and vacated and your office decision of October 20, 1893, denying the right of purchase in *Moore* is affirmed.

DESERT LAND CONTEST—SUSPENDED ENTRY.

FARNELL ET AL. v. BROWN (ON REVIEW).

On the revocation of an order suspending a desert entry, time will not run as against the entryman in the matter of reclamation, in the absence of proper notice to him of said revocation.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 5, 1895. (E. M. R.)

This case involves section 32, T. 27 S., R. 25 E., Visalia land district, California.

The record shows that on April 2, 1877, Henry A. Brown made desert land entry for the above described tract.

August 15, 1893, John W. Farnell, Franklin Orr, Mira Orr and Sara M. Corin filed their joint application to contest this entry, alleging that the land was grassy land and that the entryman had failed to reclaim the land in the time required by the law.

On the same day the local officers rejected the application to contest "because the allegations attack only the non-reclamation of the land and are premature in that three years from date of entry exclusive of the period of suspension have not elapsed.

Upon appeal, your office decision of November 7, 1893, was rendered affirming the action of the local office.

April 12, 1895 (20 L. D., 324), the Department reversed your office decision, it being held that the contest was not prematurely brought, and the cause ordered to hearing.

A motion for review on the ground that the decision of the Department was rendered on an incomplete record having been made, the case is before the Department for final action.

In the former decision rendered it was held that this entry had been in existence three years and one day when the affidavit of contest was filed. This statement of fact was arrived at as follows:

The time that elapsed between entry and suspension must be counted and added to the time that begins to run at revocation of suspension. And, in this case, from April 2, 1877, the date of entry, to September 28, 1877, the date of suspension, was five months and twenty-six days, and from February 10, 1891, the date of revocation of the suspension to August 15, 1893, the date of the offering of the affidavit of contestants, was two years six months and five days, and these two spaces of time aggregate three years and one day.

It now appears that the entryman in this case did not receive any notice of the decision of February 10, 1891. It is shown that from May 9, to June 1, 1891, the local officers, by ordinary mail, notified the desert entryman of the decision of February 10, 1891, and on August 15, 1893, your office instructed the local officers that this notice was insufficient, inasmuch as the Rules of Practice required notice to be sent by registered mail.

It thus now appearing that no proper notice was ever sent to the entryman, in so far as this record shows, the order of suspension did not commence to run against him at the time mentioned in the decision under review and the contest was prematurely brought and must be dismissed.

The former decision is therefore rescinded, revoked and set aside.

There is contained in the record the final proof of the entryman, which is returned to your office for such action as is necessary.

Overruled,
27 L. D. 464

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

NORTHERN PACIFIC R. R. CO. v. LOOMIS ET AL.

The status of a tract of land at the date of its selection determines the right of the company thereunder; and, if at such time there exists an adverse claim sufficient to bar said selection, the subsequent abandonment of said adverse claim can not inure to the benefit of the company under its selection so made.

Secretary Smith to the Commissioner of the General Land Office, November
(J. I. H.) 5, 1895. (J. L. McC.)

On November 19, 1888, this Department rendered a decision, which was affirmed on review August 6, 1894, in the case of the Northern Pacific Railroad Company v. Frederick Loomis, involving the S. $\frac{1}{2}$ and lots 3 and 4 of the NW. $\frac{1}{4}$ of Sec. 5, T. 15 N., R. 44 E., Spokane Falls land district, Washington.

The land is within the indemnity limits of the grant for the Northern Pacific Railroad.

Said decision held, in effect, that Loomis's application to make homestead entry of the land, having been made prior to the company's indemnity selection (of March 20, 1884), conferred upon him the right to make such entry.

On January 24, 1895, your office notified Loomis that he would be allowed thirty days in which to perfect his entry, but he never applied to do so.

It would appear that Loomis had long before the last-named date abandoned the land, from the fact that on December 26, 1888, one William S. Hulin made timber-culture entry of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; and on January 31, 1891, he made cash entry of lots 3 and 4.

It will be seen that Hulin's entries were made subsequent to the date of the company's selection, and while the question as to the validity of the same was pending before the Department.

The local officers advised your office of Hulin's entries (*supra*); and on May 17, 1895, your office directed the local officers as follows:

Loomis's homestead application stands finally rejected; the case is closed; and cash entry No. 4354, made by William S. Hulin on the lots 3 and 4, and the timber-culture entry No. 3296, made by the same party on the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, December 26, 1888, will remain intact.

From the above decision the company appealed. The ground of appeal (so far as necessary to quote) was as follows:

Error not to rule that, the original contest having been as to the respective rights of Loomis and the company, and Loomis having failed to exercise his right, and his application having been finally rejected for this land, the company's right under its selection of March 20, 1884, remains intact.

Error not to rule that the entries of Hulin, having been admitted during the pendency of the contest between the company and Loomis, were illegally allowed, and having been made subsequent to the company's selection, they could not defeat its rights.

This appeal your office returned to counsel for the company, with a letter of which the following is the essential portion:

I am in receipt of an appeal, filed by you in behalf of the Northern Pacific Railroad Company, from the decision of this office of May 17, 1895. In so far as the Northern Pacific Railroad Company is concerned, that action simply closed the case of Frederick Loomis against the company, its selection having been canceled on December 3, 1888. The company has no further interest in lots 3 and 4, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 15 N., R. 44 E., Walla Walla, Washington; and I must decline to receive and file the said appeal, and return the same herewith.

If your office canceled the company's selection on December 3, 1888, it is manifest that such cancellation was unauthorized and improper, in view of the departmental decision of November 19, 1888, inasmuch as the time within which the company had the right to file a motion for review had not expired. The company did file a motion for review, and its right was thereby preserved until the departmental decision (on review) of August 6, 1894.

The question remaining for consideration is, whether Loomis's abandonment of his claim inured to the benefit of the company, or whether, in order to make valid a selection, the company must present its application at a time when the land is free from adverse claims?

This question was decided adversely to the company in the case of the same company against Abner Willis (292 L. & R., 131), in which it was held:

The status of the land at the date of selection determines the company's right under such selection. (Missouri, Kansas, and Texas Ry. Co. v. Beal, 10 L. D., 504; Hensley v. Missouri, Kansas and Texas Ry. Co., 12 L. D., 19; Bright v. Northern Pacific R. R. Co., 6 L. D., 613; Hastings and Dakota Ry. Co. v. St. Paul, Minneapolis and Manitoba Ry. Co., 13 L. D., 535.) It would seem from these decisions that if, at the date of selection, or application to select, such a claim had attached to the land as would bar the selection, the same must be rejected; and the subsequent abandonment of such adverse claim can not inure to the benefit of the company under the selection made during the existence of the same; but in order to make valid selection of land within its indemnity limits, it must present its application at a time when the land is free from adverse claims.

As hereinbefore indicated, the fact that your office erroneously canceled the company's selection on December 3, 1888, was not sufficient reason for refusing to transmit its appeal; but even where the right of appeal is wrongfully denied, "an application for certiorari will not be

granted, where it appears that the decision of the General Land Office rendered substantial justice in the premises." (*Blackwell Townsite v. Miner*, 20 L. D., 544.)

If the record were to be transmitted, the decision of the Department thereon would be that substantial justice had been done in allowing Hulin's entries to remain intact. The application for certiorari is therefore denied.

SWAMP LAND GRANT—LAKE—RELIECTION.

STATE OF OREGON *v.* WILLEY.*

Lands covered by a permanent body of water at the date of the swamp grant are not of the character of lands granted, and did not pass to the State under said grant.

Secretary Smith to the Commissioner of the General Land Office, December 4, 1894. (J. I. H.) (J. L.)

I have considered the appeal of A. C. Willey from your office decision of May 13, 1892, in the case of *The State of Oregon v. A. C. Willey*, in which your office affirmed the decision of the local officers and directed the pre-emption filing of Willey to be held for cancellation and the claim of the State of Oregon under the swamp land grant to remain intact on the records of your office. The land involved is the south one-half of the southeast quarter, and lots number 6 and number 7 of section 7, T. 40 S., R. 24 E., Willamette meridian, Lakeview Oregon land district. The record shows the following case:

On December 29, 1888, Douglas W. Taylor, United States surveyor general for Oregon, forwarded to your office a selection list, No. 61, of lands claimed by the State of Oregon as swamp and overflowed lands, under the act of March 12, 1860, upon the faith of the joint affidavit of T. A. Henderson and Charles Lohrengel; in said list No. 61, the land claimed by A. C. Willey is included.

On January 16, 1889, A. C. Willey filed his declaratory statement, No. 3375, for pre-emption of said land, and therein alleged settlement on May 28, 1885. Notice of said filing was given to the governor of Oregon, who, on February 6, 1889, applied to the local officers for a hearing to prove the swampy character of said land.

On March 22, 1890, Willey filed his application to make final proof, and notice thereof was duly published and posted, and the time fixed for May 13, 1890, and, in obedience to your office letter "K" of February 21, 1890, the local officers ordered a hearing in the case and gave due notice thereof to all parties interested for the same day.

On May 13, 1890, the parties appeared with their attorneys and witnesses, and Willey made and submitted his final pre-emption proof, which was held for consideration to await the result of the hearing ordered, which hearing was, in consequence of the pressure of other business, postponed by the local officers, from day to day.

* Not heretofore reported.

On May 17, 1890, the parties being present with their attorneys and witnesses, the hearing was had. On April 13, 1891, the local officers rendered their joint decision recommending that Willey's declaratory statement, No. 3375, be canceled, and that the claim of the State of Oregon to said land be confirmed.

Willey appealed to your office.

On May 13, 1892, your office affirmed the decision of the local officers, and Willey appeals to this Department. The attorney for the grantee of the State of Oregon, in his brief of argument before your office, well said, that "the only question presented is as to the *character* of the land on the 12th day of March, 1860." That "in order to enable the Secretary of the Interior to determine this question he may resort to any method that will throw light upon this subject." That "any and all evidence that can be obtained from the records or from any other reliable source, including records of other Executive Departments, can be considered in determining the question at issue." And that "the burden of proof is upon the State of Oregon to prove the swampy character of the land on the 12th day of March, 1860." The lapse of time and the difficulty of finding living witnesses who personally knew the *locus in quo* in the year 1860, and before, referred to in the brief, may increase the weight of the burden but can not shift it. The first survey of T. 40 S., R. 24 E., W. M., was made August 11th to 13th, 1879, by Deputy Surveyor William H. Byars, who is now United States surveyor general for Oregon, and his plat and field notes, duly approved, are of record in the Land Office.

In the general description on the face of his plat it is certified that "This (Warner) marsh or lake is now much lower than usual, yet covers a large portion of the township." In his affidavit dated June 15, 1889, filed in the case of *Morrow et al. v. Oregon et al.*, decided by this Department, December 19, 1893, Mr. Byars made oath that "the meander line of Warner Lake was then (in August, 1879,) run and established by me, was at the margin of the water, as it then stood in the lake," and in his deposition taken June, 1890, and filed in this case, he testified that the marshy nature of the ground, the growth of vegetation, and the general appearance of the shore-line indicated that the overflow was permanent and that debris deposited on higher ground, and that the marks on the tules indicated that the waters of Warner Lake had formerly been higher than they were when he surveyed this township in August, 1879.

Said township was next surveyed in August and September, 1887, by Deputy-Surveyor John H. Neal, and his plats and field notes, duly approved, are of record in the Land Office. By comparing the plats of Byars and of Neal the extent of the recession of the waters of Lake Warner within a period of eight years, and the consequent changes on the surface of the land, are made manifest.

One witness, John DeGarmo, whose affidavit is filed in the aforesaid case of *Morrow v. Oregon*, testified that in April, 1889, the water was

seven and a half feet lower than it was in 1877, a period of twelve years. Most of the witnesses for the appellee seem to agree that the recession and changes manifested as aforesaid took place within six years. That the waters began to recede in 1881 and that the lake was not crossed on horseback until the year 1884.

In order to determine the condition and character of the land in contest, and its position with reference to the waters of Lake Warner on the 12th day of March, 1860, it is necessary to study the history of the lake in the interval between 1860, the date of the grant, and 1887, the date of Neal's survey, in the light of the testimony of the witnesses.

No witness has been found who knew the premises in the year 1860.

Peter Peterson, who is a cousin of R. F. McConnaughy, alleged grantee of the State of Oregon, and chief witness for the State, furnished in March, 1889, his affidavit, which is filed in the case of *Morrow v. Oregon* aforesaid, and in June, 1890, he was examined and cross-examined, as a witness in this case, and his statements are consistent. His testimony proves the following facts:

In the latter part of July, 1864, he, with others, spent two days along the margin of Warner Lake and three or four days around on the foot hills in view of the lake; was traveling on horseback, looking out for a road for a party of emigrants and for a company of Oregon volunteers. The country at that time was unsurveyed and unexplored (except by United States engineers in 1843 and 1853), and there were no monuments, no stakes, but there were natural land-marks, some large rocks contiguous to the west line of the land in contest, which then protruded out of the water, and now enable him (the witness) to identify the location of the land in contest. Since the lake has dried up, these rocks stand from six to seven feet above the surface of the land, and the water-mark of 1864 is about three feet higher on these rocks. In 1864, these rocks were situated inside the lake and about sixty or one hundred yards from the shore, and about one hundred or one hundred and fifty yards west of the west line of the land in contest; so that said land at its most westerly line must have been inside of the lake, and from one hundred and sixty to two hundred and fifty yards distant from the shore.

This witness says:

I did not pass over this land nor desire to try to pass over it. I was only prepared to travel on land. There may have been tules on the highest elevation of the bottom of this tract, but the low lands, I think, had water too deep for tules to grow. I observed vegetation within about a quarter of a mile of the shore. There were tules on the central portion of the tract on the two extreme ends—the east and west ends; it was open water. The winter of 1863-64 was one of extreme drought.

Mr. Peterson saw the lake at a distance several times in the fall of 1864 and during the years 1865, 1866, and 1867; and the changes in its appearance were hardly perceptible only what would appear between spring and fall. In 1868 the water was much higher than the two previous years; it extended out into the greasewood in many places. In 1869 he just observed the lake from a distance.

In 1870 he passed on the road within about a quarter of a mile of the west line of the land in contest with a freight team, and did not see any land there. In January, 1872, he again passed on the road west of where the land is situated, but did not see it. In 1873, 1874, and 1875 he passed near the land in contest, as near as he could get without going through the water. In 1875 he pursued a yoke of runaway cattle into the water, but he could not say whether he went far enough to get on this land or not; the whole of it was under water—"standing water of the lake—Warner Lake." Mr. Peterson further testified that in October, 1875, the water was eighteen inches lower than it was in 1864; "the water had receded about a foot and a half from 1864 to 1875;" and that during that whole period of eleven years, the land in contest was covered with water and a heavy growth of tules in places.

The witness was in the vicinity every year from 1875 to 1884, probably two or three times a year. There was but little change in the waters except that they were higher in the spring time than in the fall, and there was a slight recession of the waters from 1881 to 1884. "In 1884 was the first time we were enabled to cross the lake on horseback." "I crossed it on horseback in October, 1884; since then it has entirely dried up."

I have examined carefully all the testimony in this case and have reviewed the evidence in the case of *Morrow v. Oregon*, *supra*, and find nothing to impeach successfully the testimony of Mr. Peterson as to the foregoing facts, but much to corroborate it.

Thomas Anderson and George Conn, whose affidavits were filed by the appellee in the case of *Morrow v. Oregon*, proved that in August, 1865, they, as members of a scouting expedition of Oregon volunteers, crossed Warner Lake at about the south line of township 37 S. on an improvised bridge made of flags, grass, and tules. That the water was too deep to be forded with animals. That one of the men rode off the bridge and went into the water out of sight, and that the place where this occurred, in 1865, was dry land in March and April, 1889. John M. Sanders, who is recorded as a witness for R. F. McConnaughy, in this case, also gave an affidavit dated April 3, 1889, which is filed in the case of *Morrow v. Oregon*. In the year 1868 he was hauling freight for the United States government between Fort Bidwell and Fort Warner along the road that ran along the west shore of Warner Lake and passed near the location of the land in controversy, regularly, making many round trips. He proved that from May to November, 1868, both inclusive, all four subdivisions of the land in contest were submerged and covered with water, a part of the large body of water called "Warner Lake." That most of the way around Warner Lake was and is a well-defined beach, a permanent water-line; and that in 1868 the water came up to it.

In reply to the questions of McConnaughy's counsel Mr. Sanders testified that if he had been surveying the land in 1868, he would have

designated it as a lake, and that in the years between 1868 and 1870 he would not have attempted without a boat to go over these lands which he passed over dry on May 1, 1890. E. E. Dodge, witness for the State of Oregon, whose affidavit is also filed in Morrow's case, proves that in the year 1867 he passed along the east side of Warner Lake from the south end to the "stone bridge" near the northern portion; that the waters covered the whole land from shore to shore east and west; that the land in contest was entirely covered with water; that the distance from the west line of this land in contest to the water mark on the western beach is about three hundred yards. "I could see the foot hills down close to the lake, or nearly so." "Judging from the water-mark on the beach on the west side, it could not be otherwise than that all of this land in contest was overflowed at that time." Joseph Burns, who is also a witness and affiant for the State of Oregon, proves that in May, 1867, he was within 200 or 250 yards of the land in contest, and that it was covered with water. The land was out of sight. "It looked like a lake; it was a lake, too; it looked to me like an old lake."

D. R. Jones, witness and affiant for the State of Oregon, proved that in May, 1868, the land in contest was covered with water—a part of Warner Lake; that a large rock set out in the flat between the road and the west end of this land; and "the water was clear up to the road along there the most of the time; I mean to the foot hills close to the road; I refer to the road that runs along the west side of the lake from where I lived to Bidwell;" that signs on the sands around the margin of the lake and signs on the rocks indicated that the waters of Lake Warner had been from one to two feet higher than they were in the spring and summer of 1868; that the road ran right at the foot-hills and the "lone rock" that stood out in the water was one hundred or two hundred yards east of the road.

There is in the record much contradictory and irrelevant testimony in respect to the condition of the land in contest and the rest of the uncovered bottom of Warner Lake subsequent to the year 1887, the date of Neal's survey. Considering the whole case, it is impossible to avoid the conclusion that on the 12th of March, 1860, the waters of Warner Lake were at least as high as they were in August, 1864, at which time it is proved that the tract of land in contest was submerged and was part of the bed or bottom of the permanent and ancient body of water known as Warner Lake.

Upon the facts clearly proved by the testimony in this case, and in accordance with former rulings of this Department in the cases of the State of California, 14 L. D., 253, and of *J. L. Morrow v. State of Oregon*, R. F. McConnaughy *et al.*, decided December 19, 1893 (17 L. D., 571), your office decision of March 13, 1892, is hereby reversed. The selection of the State of Oregon of the lands in contest included in swamp land selection list No. 61, approved by the surveyor general and forwarded to your office December 29, 1888, is hereby rejected. And

you will direct that Willey's rights under his declaratory statement No. 3375, be adjudicated under his final proof in the same manner in all respects as if the claim of the State of Oregon had not been interposed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—SETTLEMENT RIGHTS.

NORTHERN PACIFIC R. R. CO. *v.* McMAHAN.*

The ruling heretofore made herein (17 L. D., 507), that a corroborated affidavit of settlement antedating an indemnity withdrawal might be accepted as conclusive against the withdrawal, in the absence of a showing by the company denying the alleged settlement, was made pending the review of the doctrine announced in the case of said company against Guilford Miller to the effect that such a withdrawal was in violation of law, and, as such holding has since been reaffirmed, a showing of settlement prior to such a withdrawal is not now requisite, as the company acquired no right thereby.

The right to make homestead entry of a tract within such a withdrawal is not defeated by a prior application of the entryman to purchase the land from the company.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad Company from your office decision of February 9, 1894, denying its application for a hearing in the matter of the application by Richard McMahan to make homestead entry of the SE. $\frac{1}{4}$ of Sec. 15, T. 15 N., R. 44 E., W. M., Spokane Falls, Washington.

This land is within the indemnity limits of the grant for said company, and was included within its list of selections filed March 20, 1884. Prior to this time, to wit, on April 14, 1883, McMahan presented his homestead application for this land accompanied by a duly corroborated affidavit in which he alleged settlement on the land April 1, 1873, and continued residence since April 1, 1874, having improved the land to the value of about \$1,000.

By your office decision of December 8, 1883, said application was rejected for conflict with the withdrawal made for indemnity purposes on account of the grant for said company, from which action McMahan appealed to this Department, resulting in departmental decision of November 19, 1888, not reported, which reversed your office decision on the authority of the holding made in the case of the Northern Pacific Company *v.* Miller (7 L. D., 100).

The company filed a motion for the review of said decision of November 19, 1888, which was considered in departmental decision of November 4, 1893 (17 L. D., 507), in which it was held that a corroborated affidavit of settlement and residence antedating an indemnity withdrawal might be accepted as conclusive against the withdrawal, in the absence of a showing on the part of the company furnished within a specified time that the settlement and residence were not made as alleged.

* Not reported in Vol. 20.

In this decision it was directed that the company be advised of the allegation of McMahan, and, in the event that it should fail to file affidavits tending to show that settlement and residence were not made, as alleged, within thirty days from notice, that his application be allowed and its selection be canceled, but that should such affidavits be filed, a hearing would be proceeded with as in other cases made and provided.

At this time the holding made in the Miller case, *supra*, to the effect that the indemnity withdrawal made on account of this grant was in violation of law, was under review, but since that time said holding has been re-affirmed in the decision of the department in the case of Northern Pacific *v.* Davis (19 L. D., 87). The company was advised, however, under the directions given in departmental decision of November 4, 1893, in this case, and duly filed the affidavit of its land commissioner to the effect that McMahan had applied to purchase the land of the company, and that his subsequent occupation of the land must be considered as maintained under the company's license.

Under the holding made in the Miller case, and re-affirmed in the Davis case, there can no longer be any question as to the effect of the withdrawal made for indemnity purposes on account of its grant, and it must be held that within the indemnity limits this company has no such claim as would bar a settlement right until the presentation of its list in due form to select the land, which, in the present instance, was on March 20, 1884. Prior to this time, to wit, on April 14, 1883, McMahan had tendered his homestead application for this land, and as the company had at that time no rightful claim to the land, even to admit that he had prior to this time applied to this company to purchase the land, yet he was free to repudiate the same, it being at that time open to general disposition under the land laws, and to make claim to the land under such laws.

The rejection of his application was therefore improper without regard to any question of previous settlement, and said application pending on appeal, was a bar to the company's right to make selection of the lands under the indemnity provisions of its grant.

It is, therefore, unnecessary to determine the question of the quality of McMahan's residence prior to the presentation of his application, and your denial of the company's application for a hearing is therefore affirmed.

You will advise McMahan of his right to complete his entry upon the application heretofore presented, and thereupon the company's selection will be canceled.

NORTHERN PACIFIC R. R. CO. *v.* MCMAHAN.

Motion for review of departmental decision of April 8, 1895, 21 L. D., 402, denied by Secretary Smith, June 17, 1895.

SOLDIER'S ADDITIONAL CERTIFICATE OF RIGHT.

JOHN M. RANKIN (ON RE-REVIEW).

It was the intention of Congress in the act of August 18, 1894, to validate all outstanding certificates of soldier's additional homestead rights in the hands of bona fide holders.

One who buys a certificate of additional right without notice of the illegality of said certificate at its inception, or of its invalidity for any other reason, is a bona fide purchaser under said act.

The departmental decisions of March 28, 1895, 20 L. D., 272, and of June 12, 1895, are recalled and revoked.

Secretary Smith to the Commissioner of the General Land Office, November 6, 1895. (J. I. H.) (F. L. C.)

I have considered the motion filed by John M. Rankin for re-review and reversal of departmental decisions of March 28, 1895, and June 12, 1895, in his case.

In the decision by the Department, on the appeal from your office decision, is set out as follows:

From the statement of facts contained in your office decision it appears that Ole Torgerson on January, 1867, made homestead entry for the W. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 24, T. 113 N., R. 21 W. at the St. Peter land office, Minnesota, upon which entry final certificate was issued May 11, 1869, which entry was duly patented.

On September 10, 1878, W. C. Hill made application in behalf of Torgerson for the issuance of a certificate of additional right, which application was rejected November 15, 1878, and on November 20, 1879, the register at New Ulm, Minnesota, forwarded a new application by Torgerson for the issuance of a certificate of additional right, which application was granted, the certificate duly issued and forwarded to the local office on January 16, 1880.

Due to a mistake in the posting of your office records a proper notation of the issuance of said certificate of additional right was not made, and on February 23, 1889, Mr. L. D. Stone, on behalf of Torgerson, made application for the issuance of a certificate of additional right of entry, and on March 1, 1889, a second certificate of additional right was issued in Torgerson's name.

Mr. Rankin, who it appears was at the time of issuance of said certificate acting as attorney for Mr. Torgerson, purchased of said Torgerson the right of entry under the second certificate issued March 1, 1889.

It appears that soon after the issuance of said certificate your office discovered the error, and understanding that it was in the possession of Mr. Rankin, on March 23, 1889, he was advised of the duplication and requested to surrender the certificate, which request he failed to comply with and on August 23, 1894, made the entry in question under said second certificate of additional right.

In your office decision it is stated—

"A note is made opposite the entry of this certificate (referring to the first certificate of additional right, issued January 16, 1880,) showing that it has been located, but as the proper notes were not made on the tract books, the entry of the exact tract of land entered thereunder cannot be traced."

In the contention before your office Mr. Rankin claimed that his entry was confirmed by the act of August 18, 1894, which provides—

"That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the general Land Office under section twenty-three hundred and six of the Revised Statutes of the United States or in pursuance of the decisions or instructions of the Secretary of the Interior of date March tenth, eighteen hundred

and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved and patent shall issue in the name of the assignees."

But your office decision held that

"Said act does not validate a soldier's additional homestead certificate which was illegal at its inception, or which was found invalid for any other reason than an attempted sale or transfer, but it only declares that such a sale or transfer should not operate to invalidate any such certificate and that such certificate should be held and taken as valid, notwithstanding such sale or transfer." (20 L. D., 272.)

Mr. Rankin insisted that the certificate issued to Torgerson on January 16, 1880, was a fraud upon the rights of Torgerson, as the same was not made by him or at his instance.

The decision of the Department, on appeal, affirmed the decision of your office construing the act of 1894 as not applicable to such a case as that presented by Mr. Rankin; but directed that an investigation be had to determine whether or not the certificate issued in the name of Torgerson January 16, 1880, had been fraudulently issued. Mr. Rankin filed a motion for review of this decision, which motion was overruled by departmental decision of June 12, 1895.

In the motion for re-review and reversal of these two decisions it is alleged—

That you erred in the decision of June 12, 1895, first, in not giving due weight and effect to the report of the Senate Committee on Public Lands, Report No. 539, Second Session, fifty-third Congress, as disclosing the intent of Congress in passing this act, which report in specific terms embraced and adopted the Honorable Commissioner's report of March 28, 1894, on Senate Bill No. 1590.

In order to dispose of this ground in this motion for re-review, and to arrive at a correct conclusion as to the intent of Congress in enacting the provision contained in the sundry civil appropriation Act, approved August 18, 1894, (28 Stat., 397), which relates to soldiers' additional homestead certificates, it is necessary to examine the report of the Commissioner of the General Land Office upon the bill which became the law upon this subject, as well as the action of the two houses of Congress touching the same.

This legislation was first proposed as an amendment to the sundry civil bill, and was by the committee on public lands of the Senate referred to the Commissioner of the General Land Office for report. Upon the necessity or propriety of such legislation as proposed by the Senate committee on public lands, the Commissioner reported as follows:

Over 5,500 of these certificates were issued, covering an estimated area of 400,000 acres. Most of them have been located, and the entries made thereunder patented, but entries made under a small number of them have been canceled for various reasons.

The lands which the outstanding certificates cover approximate about 10,000 acres.

The Department has uniformly held that the additional right is a personal right and not assignable. But under the body of the seventh section of the act of March 3, 1891, (26 Stat., 1095), the rights of *bona fide* purchasers, for a valuable consideration who made such purchase after final entry and prior to March 1, 1888, are protected, and a number of entries of the class under consideration have been passed to patent under this provision of law. Also, under departmental decision of August 11, 1893, in the case of Carroll Salsberry (17 L. D., 170), entries of this class may be approved under the proviso of said section 7, of the act of March 3, 1891, where the said entries had been pending in this office for more than two years after the date of the final receipt, and no contest or protest had been filed against them.

Further legislation was had looking to the protection of the rights of transferees in entries made under the certificates of right, which is found in the act making appropriations for sundry civil expenses, approved March 3, 1893, (27 Stat., 593), and which provides:

"That where soldiers' additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate."

In some cases, it has been found that certificates were erroneously issued; that at the time of the issuance thereof the soldier was not entitled to enter additional land as set forth therein. In such cases, the soldier, acting directly, or through an agent by power of attorney, may have entered land and disposed of his right thereto to innocent purchasers, relying on the certificates of right issued by this office; in other cases, certificates of right had been secured through the presentation of spurious and fraudulent papers, and these have passed into the hands of innocent purchasers. The provisions of the act of March 3, 1893, seem to fully cover these classes of cases, and afford relief to the purchasers thereof, such as they are equitably entitled to.

The bill under consideration proposes to allow the location of certificates of right heretofore issued by this office where such certificates have been transferred or sold to purchasers in good faith, without regard as to whether the parties in whose names they were issued are entitled to the additional right or not, or whether said certificates were issued on spurious or fraudulent papers and also to enact that all such transfers or sales shall be treated and considered as valid, and that patent upon all such locations shall be issued in the name of the transferee.

The purpose of Congress is undoubtedly to recognize as legal and valid all assignments or sales of these certificates heretofore made and to recognize the validity of all future transfers. This, in my opinion, is strictly in accord with the rights and equities of the situation. I therefore have the honor to suggest that the bill be amended to read as follows, viz:

"That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of the date of March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof.

"Sec. 2. That where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value, and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved and patent shall issue in the name of the assignees."

Thus it will be seen that the Commissioner of the General Land Office recommended that certificates in the hands of *bona fide* purchasers should be recognized as valid, without regard to whether the parties in whose names they were issued were entitled to the right or not, or whether such certificates were issued on spurious and fraudulent papers, and also to validate any transfers or sales that might have been made of such certificates. The Commissioner, in order to carry out his views, recommended, as will be seen, a substitute for the legislation proposed by the Senate, and transmitted the same, through the Secretary of the Interior, to the Chairman of the Committee on Public Lands of the Senate, believing that the provisions of the proposed legislation fully carried out his views on the subject.

The Senate committee on public lands made a report upon said proposed legislation, and incorporated* therein the report of the Commissioner. In that report the Senate committee said:

The total number of acres covered by the certificates issued under the order of March 10, 1877, as stated in the report of the Commissioner of the General Land Office upon the pending bill, is 400,000, of which only 10,000 acres remain unlocated and unsatisfied.

It would appear from the report of the Commissioner upon the pending bill that the land department has not recognized the legal right of the beneficiary to transfer his claim. On the contrary, it appears that such right, by recent decisions, at least, has been denied and entries made otherwise than by the soldier in person and for his own immediate benefit have been held illegal.

To remedy the hardships thus necessarily resulting, Congress, as pointed out by the Commissioner in his report upon the pending bill, has already enacted remedial legislation covering particular cases. By the act of March 3, 1891 (26 Stat., 1095, Sec. 7), the rights of *bona fide* purchasers, for valuable consideration, of lands entered with such certificates, who made purchases after final entry and prior to March 1, 1888, are protected. And by act of March 3, 1893 (27 Stat., 593), purchasers of land entered with such certificates where the certificate is found to be erroneous or invalid for any cause are permitted to purchase the land of the United States at the government price.

The pending bill (S. 1590), as referred to the committee further extends the protection of remedial legislation to the general situation by authorizing the Secretary of the Interior to permit locations of certificates transferred and sold in good faith, by directing that such transfers shall be considered valid, and by directing that patents upon all such locations shall issue in the name of the transferee. This bill was referred by the Committee to the Secretary of the Interior for a report of his views thereon, and in response to said reference the Secretary of the Interior, under date of March 31, 1894, transmitted to the Committee a full report by the Commissioner of the General Land Office, which is herewith submitted and made part of this report. This report of the Commissioner fully endorses the purposes contemplated by the pending bill, and states that the same is in accord with the rights and the equities of the situation. To more fully and properly accomplish the object intended, however, the Commissioner recommends the adoption of a substitute for Senate bill No. 1590.

* * * * *

The Committee fully agree with the Commissioner of the General Land Office that the rights of *bona fide* holders of these certificates should be protected by appropriate legislation. We believe the pending bill, as amended by the Commissioner, is simply a measure of justice to *bona fide* purchasers and holders of these certificates. There is no doubt that the commercial world dealt in these additional rights and

bought and sold the same in absolute good faith, relying upon the certificate of the United States as evidence of the right itself, and of the legal power of the holder to sell and assign the same. The great bulk of the certificates has been already located and patented. Only about 10,000 acres, one-fortieth of the entire amount, remain unsatisfied. We are of the opinion that all holders of these outstanding certificates who purchased the same in good faith and for valuable consideration should be protected in their rights as fully and perfectly as have been the holders of the other 390,000 acres, already located and patented. This protection will be fully afforded by the passage of the proposed bill.

The Senate acted favorably upon this report, and passed the bill as proposed by the Commissioner of the General Land Office. The sundry civil appropriation bill, as thus amended went to the House, and in that body the amendment was agreed to on the faith of the recommendation of the Commissioner of the General Land Office whose report was set out as a part of the proceedings of the House, when said provision of the sundry civil appropriation Bill was acted upon. Thus it will be seen that both houses of Congress acted upon the idea that the bill proposed by the Commissioner of the General Land Office was intended to, and would, validate all outstanding soldiers' additional homestead certificates in the hands of *bona fide* holders.

My attention was not called to the history of this legislation when either the decision on appeal or the decision on review was made. I had nothing to guide me in construing the act of 1894, except its language and previous legislation upon this subject. I could not see that the previous legislation could aid at all in construing the act of August 18, 1894, *supra*, because the language in the last line of the first section of said act, to wit, "notwithstanding any attempted sale or transfer thereof," seemed to limit said section to validating cases of attempted sale or transfer of soldiers' additional homestead certificates. But in the light of the history of this legislation, I am constrained to believe that the words, "all soldiers' additional homestead certificates heretofore issued," etc., should not be limited to validating the transfer of certificates, but that it was the intention of Congress to validate all certificates heretofore issued, and in the hands of *bona fide* holders. This view is strengthened by the fact that the matter of transfers is dealt with by the second section of the act, and the language "notwithstanding any attempted sale or transfer thereof," at the end of the first section, should not be construed to limit the operation of the act short of the obvious intent of Congress.

I have therefore reached the conclusion that the original departmental decision on appeal in this case, and the decision on motion for review, are erroneous in construing the act of August 18, 1894, as not applicable to a certificate which was illegal in its inception, or which was found invalid for any other reason than attempted sale or transfer of same.

On the subject of the good faith of Rankin in purchasing the certificate, the following facts are disclosed—The application was made by

Torgerson in 1879, and, though a certificate was issued in 1880, the records did not disclose that fact. When Rankin applied in behalf of Torgerson for the certificate in 1889, the record showed that no action had been taken on Torgerson's application, and Torgerson assured Rankin that he had never applied for or received a soldier's additional homestead certificate. The circular of the Secretary of the Interior under which the issuance of certificates was discontinued, of date February 12, 1883, distinctly provides that the circular is not applicable to pending applications for certificates. This application was pending at the time, and, according to the practice of the Department, it was proper and right that the certificate should issue in 1889 if none had been previously thereto issued. After Rankin procured the certificate for Torgerson, and after he had purchased it from Torgerson and paid a consideration for it, it was discovered in the Land Office that a certificate had already been issued to Torgerson on January 16, 1880, but by omission of the clerks of the Land Office, the fact had not been noted on the tract books.

These facts, I think, disclose good faith on the part of Rankin, in the purchase of the certificate. As now shown by the records of the Land Office, Torgerson was not entitled to a soldier's additional [entry] at the date of the last certificate, but this cannot affect the right of Rankin if he purchased without knowledge of this fact, for the act of Congress validates such certificates in the hands of *bona fide* purchasers. Rankin's good faith cannot depend upon his knowledge that the Department had invariably decided that such certificates were not assignable, for this was common knowledge, and Congress doubtless understood that the public generally were informed upon this subject. Quite a number of the courts, however, had decided that such certificates were assignable, and many persons bought, believing that the view of the law taken by the courts was correct.

With full information on this subject, Congress validated all certificates which had been issued and found in the hands of *bona fide* purchasers, and validated all such transfers.

In view of this history and of the action of Congress, I hold that a knowledge of the departmental decisions against transfers is not an evidence of bad faith, and he is a *bona fide* purchaser who bought without notice of illegality of the certificate at its inception, or of its invalidity for any other reason.

Departmental decision dated March 28, 1895, on appeal, and the decision on motion for review, dated June 12, 1895, are therefore recalled and set aside; the decision of your office of November 17, 1894, is reversed, and the entry of John M. Rankin will be allowed to stand.

SCHOOL LAND—SURVEY—SETTLEMENT RIGHT.

CHARLES P. CLYDE.

Settlement on a school section, after actual survey in the field, confers no right upon the settler in the event of the final approval of the survey.

Secretary Smith to the Commissioner of the General Land Office, November 6, 1895. (I. D.)

Chas. P. Clyde appeals from your office decision of July 30, 1894, wherein you rejected his homestead application for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of Sec. 16, T. 3 N., R. 7 W., S. B. M., Los Angeles land district, California.

This land is part of the state school land under the acts of Congress of March 3, 1853, Sec. 6 (10 Stat., 246) and February 26, 1859 (11 Stat., 385), and by the express terms of said acts sections sixteen (16) and thirty-six (36) were reserved from entry or settlement from the date of survey.

Only settlers who had made *bona fide* settlement on a school section before the survey was made are sought to be protected by the proviso of said acts.

In this case the survey was approved by the surveyor-general of the State in November, 1885, while the settlement claimed was not made until September, 1890, and Clyde could obtain no rights by virtue of the settlement made after the survey.

To hold that a survey is not yet made so as to notify parties of the location of sections sixteen and thirty-six until its final approval, would invite settlers to locate on those sections after the boundaries were known. The act of Congress passed February 26, 1859 (11 Stat., 385), says:

Where settlements, with a view to pre-emption, have been made before the survey of the land in the field, which are found to have been made on sections sixteen and thirty-six, those sections shall be subject to the pre-emption claim of such settler:

If any one, after actual survey in the field, shall have located within the boundaries of sections sixteen and thirty-six he does it at his hazard, and if the survey shall finally be approved, his settlement can avail him nothing.

It is not meant to hold that a government survey when made in the field, fixes the rights of the government, or of parties as between each other, except as stated herein. Section 2275 for the relief of settlers on what may afterward become school sections, cannot be enlarged in its terms.

Your office decision is affirmed.

MINING CLAIM—AMENDED REGULATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,*Washington, D. C., November 7, 1895.*

Paragraphs 32, 50 and 51 of the "United States Mining Laws and Regulations Thereunder," approved December 10, 1891, are amended to read as follows:

32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz: Where he claims to be the locator, or a locator in company with others who have since conveyed their interest in the location to him, a full, true, and correct copy of such location notice should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims only as purchaser, a copy of the location record must be filed under seal or upon oath as aforesaid, with an abstract of title, under seal or oath as aforesaid, brought down to date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record other than those set forth in the accompanying abstract:

The abstracts herein required may be certified to by the proper recorder, or by any abstracter or abstract company, duly authorized by State or Territorial statute, if abstracts so certified by abstracters or abstract companies are by statute receivable as evidence in the courts of such State or Territory, in the same manner and to like extent that abstracts certified by the recorder are now admitted: Provided, that proof be furnished that the abstracts so certified by abstracters or abstract companies are receivable as evidence in the courts as aforesaid.

50. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with a prior valid lode claim and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

51. Where, however, the lode claim for which survey is being made, was located prior to the conflicting claim, and such conflict is to be

excluded, in order to include all ground not so excluded the end line of the survey may be established within the conflicting lode claim, but the line must be so run as not to extend any farther into such conflicting claim than may be necessary to make such end line parallel to the other end line and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting claim, and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,
Secretary.

RAILROAD GRANT—TERMINUS OF ROAD—INDEMNITY SELECTIONS.

NORTHERN PACIFIC R. R. CO.

The authority of the Northern Pacific Company, under its grant, to fix the initial point of its road on Lake Superior can only be exercised subject to the approval of the Department.

The right of said company to fix the terminus of its road, if once exercised, is thereby exhausted, and the company thereafter has no authority to establish another place as the initial point of its road.

The right of said company to form a connection with Lake Superior as its eastern terminus could be exercised either through actual construction of its own road, or through association or consolidation with some other company, and by the latter course said company, through an apparent consolidation with the Lake Superior and Mississippi railroad, from Thomson's Junction, in Minnesota, to Duluth in the same State, secured such terminus, and thereby exhausted its right to fix the eastern terminal point of its road, by construction of its own line, if such consolidation was in fact effected. But if such consolidation was not such an association or confederation as contemplated by the granting act, then the eastern terminus of the grant is at Superior City, Wisconsin, the first point at which said company, by its own road, reached Lake Superior.

The acceptance of the constructed road to Ashland, Wisconsin, east of Superior City, cannot be set up by said company as an adjudication of its terminal right, and that such question is therefore *res judicata*, for the only power to fix said terminal was exhausted when the road made its previous connection with Lake Superior, as contemplated by the grant, and no act of the executive thereafter, in approval of another terminal point, could confer any right in such matter.

It appearing that lands east of Superior City have been made the basis of indemnity selections in North Dakota, and that the action of the Department hitherto has given color to such claim, it is hereby directed that the company be allowed sixty days from notice hereof within which to specify a new basis for any selections avoided by this decision.

Secretary Smith to the Commissioner of the General Land Office, November 13, 1895. (V. B.)

On March 17, 1894, you transmitted clear list No. 21, embracing 320 acres of land, selected as indemnity for lands lost within its granted limits by the Northern Pacific Railroad Company, and you recom-

mended that I approve the same. The selection is of the W. $\frac{1}{2}$ of Sec. 27, T. 133, R. 53, Fargo land district, North Dakota, whilst the basis therefor is the N. $\frac{1}{2}$ of Sec. 9, T. 46 N., R. 5 W., Ashland land district, Wisconsin.

A question of considerable moment is involved in the matter of the approval of this list, in regard to which you have expressed no opinion, though your view thereon is inferred from the recommendation that I approve the list. The question is, whether or not the Northern Pacific Railroad Company has a land grant within the State of Wisconsin, and, if so, does that grant extend east of the City of Superior? If it has no grant east of that point, the basis for this selection is not within its granted limits, and consequently the selection must fail.

The questions involved were argued orally by counsel for the Northern Pacific Railroad Company; also by briefs; and in order to consider them properly, it is necessary to go at some length into matters connected with said grant and its location.

The act of July 2, 1864 (13 Stat., 365), incorporated the Northern Pacific Railroad Company and made the land grant to aid in the construction of a—

continuous railroad beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound with a branch *via* the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, etc.

Section 3 of the act requires that the line of road be definitely fixed by filing a plat thereof in the office of the Commissioner of the General Land Office, and authorizes the selection of indemnity for lands then ascertained to be lost to the grant, for stated causes. It further provides that if the location shall be found to be upon the line of any other railroad for which Congress has made a land grant, "so far as the routes are upon the same general line" the amount of land before granted shall be deducted from the grant to the Northern Pacific. The road owning the previous grant of land was authorized to assign the same to the Northern Pacific or to "consolidate, confederate or associate" with said company "upon the terms named in the first section" of the act.

Section 6 of the act contemplates that, prior to definite location, "the general route shall be fixed" by filing a map of the same; whereupon the odd sections, within the granted limits, on each side of the line, were to be excluded from sale, entry or pre-emption until the definite location is made.

It is insisted in behalf of the Northern Pacific Railroad Company that the point of beginning on Lake Superior was to be determined by the company; and that Ashland, on Lake Superior, near the eastern line of Wisconsin, has been thus determined by it to be the initial

point of the railroad. In support of this contention, it is asserted that the *intention* of the company must control, and that intention must depend entirely upon the evidence showing or tending to show whether the power conferred was exercised by the company in favor of that point.

It is asserted that evidence of this intention is shown as early as March 6, 1865, when the president of the company transmitted to the Department a diagram showing the proposed general route of the road from Lake Superior to Puget's Sound, which diagram showed the point of beginning a short distance east of Ashland, at the mouth of Montreal River, in Wisconsin; that again in 1870, when the company presented a second map of general route, the place of beginning was fixed at the same point; that in the subsequent definite location of the road "the company still held in view this location at the eastern end of the State, and surveyed and definitely located its line from Thomson in Minnesota to a point in Twp. 47, R. 2 W., about eight miles west of the point indicated on its map of general route;" that, on August 24, 1884, the board of directors of the company formally fixed Ashland as the point of beginning of its road on the lake; and finally that thereafter the company "began the construction of its road on the lake from that point to a junction with the road already constructed."

These facts, it is insisted, sufficiently indicate the purpose of the company to make a point near Ashland "the terminus" of the road; having the authority to establish the initial point; and, in pursuance of the intention thus shown, having established it at Ashland, the government is bound to recognize that as the beginning point and adjust the land grant therefrom westward.

The absolute and unquestioned right to select and determine finally the initial point or terminus, as here contended for, cannot be conceded. The law never intended to vest such absolute power in the railroad company. It requires in all cases that the line of location must be approved by the Land Department. A company may file a dozen maps, but no rights will accrue thereby to it without the approval of this Department. *Van Wyck v. Knevals*, 106 U. S., 360, 366.

A right to approve necessarily implies a right to disapprove. See *Buttz v. Northern Pacific R. R. Co.*, 119 U. S., 52, 72; and also the case of *St. Paul, etc., v. Northern Pacific R. R. Co.*, 139 U. S., 1, 13, where the supreme court says:

Where the termini of a railroad are mentioned for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable route. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant;

and these requirements as to the filing and approval of maps relate to all parts of the proposed route from beginning to end, including the termini. For it is as much the duty of the Department to see that the

termini are selected in accordance with the granting act as that the road is properly located upon "the most direct and practicable route" between those points. It cannot therefore be properly said that the railroad company is clothed with the absolute and exclusive right to select and finally determine either the initial or terminal point, as here claimed.

But without discussing this question further, it is to be observed that the records of your office fail to bear out the assertion of the company fully, in some respects which may be material to the matter under consideration.

The so-called map of general route of 1865, though never accepted by the Land Department, is among the files of your office. Upon inspection thereof, it is seen to be a map of the public land States and Territories of the United States, prepared by the General Land Office in 1864, and across which is drawn the line of the so-called general route.

In his letter of March 6, 1865, transmitting the map, the president of the railroad company stated that under the authority of the board of directors he has—

designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound in Washington Territory, *via* Columbia River, etc.

It will be observed that reference is made only to a line from a point "in the State of Wisconsin;" but the map transmitted does not conform to this statement. And, as the withdrawal, if made, was to be in accordance with the line as delineated on the face of the map, that must be accepted as disclosing more definitely the intention of the company than a mere letter of transmittal by one of its officers.

On reference to said map two lines in red ink are seen on the face thereof at the eastern end; one starts at a point on the south side of Lake Superior, at the northeast corner of the State of Wisconsin, where the Montreal River empties into the lake; the other starts at a point on the north side of Lake Superior, in Minnesota, which is now the city of Duluth. These two lines run westward and unite in Dakota about one hundred miles west of the Minnesota boundary. But from Lake Superior, at the mouth of the Montreal River, in Wisconsin, westward to the point of union, a wave line, in red ink, is drawn over the red line of this route, cancelling and destroying the same.

It would thus seem that, so far from this map of 1865 showing a purpose to locate the initial point of the road on the south side of Lake Superior, in Wisconsin, such purpose, if entertained, was, on reflection, abandoned, and Duluth, on the lake, in Minnesota, was selected as the only starting point. This is further confirmed by a critical inspection of the lines of the map, from which it appears that the line as originally drawn from the Montreal River to Puget's Sound

is a delicate red line uniform throughout its length, as though drawn by an instrument; whilst the wave line of cancellation is much heavier and evidently drawn with a pen, as is the line from Duluth to the point of connection westward in Dakota.

Proceeding with the examination chronologically, there is found in the files of your office a map bearing date 1867, and stated on its face "to accompany the report of Edwin P. Johnson, Chief Engineer, Northern Pacific Railroad." Across its face is drawn a line along the route of the road from Lake Superior to Puget's Sound, with two initial points, one starting at Bayfield on Lake Superior in Wisconsin, near the northeastern boundary thereof; the other at Superior City on Lake Superior near the western boundary of Wisconsin, both points being west of the Montreal River. Here seems to be evidence of an abandonment of the former selection of the initial point at Duluth and the selection of *two* other initial points in Wisconsin, neither of which were touched by the first map, but the two points, Duluth and Superior, although in different States, are so near to each other that the change from Duluth to Superior would be but a slight deviation from an original purpose, if it existed, to select Duluth.

Coming along to the map of general route of August 13, 1870, we find another change; the two lines of the map of 1867, from Bayfield and Superior City, and the line from Duluth shown by the map of 1865, are abandoned, and a single line starts from the mouth of the Montreal River, the most eastern point in Wisconsin, and runs nearly due west, crossing the Lake Superior and Mississippi Railroad on its way to Duluth at Thomson's Junction. Nothing is to be gathered from this map further than it was an effort of the company to claim all, and even more than it was entitled to under its grant. For we find that on the same map the line in Washington Territory skirted Puget's Sound for more than two hundred miles, ending only when the international boundary was reached.

Whilst not much light is shed upon the subject by these preliminary lines, they serve to show very plainly that the company had up to 1870 no fixed purpose or intention to establish the initial point on Lake Superior at any particular place. But, on the contrary, they show that, if that matter was considered, five different points were at different times contemplated as possible starting places.

In November, 1871, the first map of definite location, of the eastern part of this great transcontinental line, was filed. That location started from the point where the line of general route of 1870 crossed the Lake Superior and Mississippi Railroad at Thomson's Junction, and ran, not towards Lake Superior, but westward to Fargo, in Dakota. And it is a matter of fact that at that time the Northern Pacific Railroad Company had leased and was operating the Lake Superior and Mississippi Railroad from the junction at Thomson to Duluth; thus availing itself of that provision of the granting act which authorized

it to "consolidate, confederate and associate" with another land grant road whose route was upon the same general line, in order to accomplish the purpose for which it was chartered, viz, to build a road from Lake Superior to Puget's Sound; for by this confederation the Northern Pacific reached Lake Superior at Duluth in Minnesota.

Indeed, the map of construction of this part of the road, prepared by the engineer of the company, and sworn to October 5, 1871, shows the connection with Duluth as though a continuation, on the same general line of route, of the Northern Pacific, and has no indication of any connection or proposed connection with Lake Superior at any other point. With this connection the company remained content for over ten years, making no attempt to follow the line of general route indicated by the map of 1870, which was then apparently abandoned. Certainly the intention of going to Montreal River was never carried into effect.

It may be well to note here, as part of the history of the time, having relation more or less to, and somewhat explanatory of, the subsequent action and present claims of the Northern Pacific Railroad Company, that by section 3 of the act of May 5, 1864 (13 Stat., 66), a grant of land was made to the State of Wisconsin to aid in the construction of a railroad from Portage City to Bayfield, and thence to Superior City, on Lake Superior. The entire line of this road was definitely located November 10, 1869; said location running from Portage City northwardly through Ashland to Bayfield, thence westerly to Superior City. This road, now known as the Wisconsin Central, was subsequently built from Portage to Ashland; but has not been built beyond. It will be noted also, by reference to the map, that the line of this road, as definitely located, is for a considerable, if not for the whole, distance between Bayfield and Superior City, "upon the same general line" as the subsequent definite location of the Northern Pacific between Superior City and Ashland. As the Wisconsin grant was the older by two months, if the road there under had been built, it would have been entitled to all of the odd numbered sections within the lapping limits of the two roads, to the exclusion of the Northern Pacific. And in addition to this, "so far as the routes are upon the same general line" the amount of land granted to the Wisconsin Central would, in the language of the proviso to the third section of the Northern Pacific act, "be deducted from the amount granted" to that company. Thus the Northern Pacific would not have received any of the granted lands within the common limits, nor have been entitled to indemnity for the same; as obviously Congress did not intend to make two land grants for roads along "the same general line."

It is thus seen that on May 5, 1864, Congress made a grant to Wisconsin in aid of the construction of a railroad from Ashland to Superior; and it is hardly credible that within a month thereafter Congress made or intended to make another and larger grant to another road to secure

practically the same object. Indeed, this antecedent legislation, and other considerations, strongly impress me with the belief that it was in the mind of Congress that the Northern Pacific Railroad should start from a point at the western end of Lake Superior, either in Minnesota or Wisconsin, and from nowhere else; as this would certainly be the most direct route between the termini.

When it became apparent that the Wisconsin Central did not intend to build its road further than Ashland, the Northern Pacific management seems again to have changed its mind and determined to reach out for a further extension of its line and grant to the eastward; its obvious purpose being to make connection with the Wisconsin Central at Ashland.

In pursuance of this purpose, on July 5, 1882, the Northern Pacific Railroad Company filed a map of definite location eastward from Thomson in Minnesota to Bad River in Sec. 15, T. 47, R. 2 W., in Wisconsin, a point east of Ashland, but west of the Montreal River. Prior to the filing of this map of definite location the road was actually constructed to Superior City, at the southwestern end of Lake Superior, in Wisconsin, and near the western boundary thereof. This part of the road must have been constructed prior to April 17, 1882, because on that day said map of definite location was sworn to by the chief engineer of the company, and shows on its face that the road was then constructed to Superior City. This map is followed by the formal map of construction, dated July 24, 1882, required to be filed prior to the examination and acceptance of that portion of the road by the government.

On August 24, 1884, more than two years after the construction of the road to Superior City, the west end of Lake Superior in Wisconsin, it is claimed that the board of directors formally fixed Ashland as the initial point of the road, which action it is now insisted was the first official and determinative act in the premises, and is conclusive upon this Department in that respect. Thereafter the road was constructed between Ashland and Superior City, and a map of construction thereof filed January 20, 1885.

These are the facts, succinctly stated, as shown by records of your office, bearing more or less directly upon the question under consideration. And from them it is not disclosed by the preliminary maps that the company had any fixed or continued purpose to establish an initial point on Lake Superior; on the contrary, the greatest vacillation is shown; each map suggesting tentatively a different point, so far as they may be accepted as suggesting anything.

A mere naked intention, of itself, cannot acquire or fix rights. But when it is shown to have existed prior to or contemporaneous, and is harmonious, with overt acts, it may be accepted as evidence of deliberation and fixity of purpose, ultimately consummated by the act itself; and to that extent the intention may be more or less valuable. But here, where evidently there was no fixed purpose, the alleged intentions

are utterly valueless as throwing any light whatever on the subject under consideration. It is therefore necessary to turn to the overt acts of the company in compliance with requirements of law, in order to find a solution of the question.

The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, and making land grant thereto is both a grant and a law.

It was a present grant, but vested in that company the title to no particular tract of land until the line of the railroad was definitely fixed.

At the termination of the period within which the road should have been built, no location of any part of the road had been made further east than Thomson's Junction, in Minnesota, and the Northern Pacific Railroad made connection with Lake Superior, its statutory eastern terminus, only over the Lake Superior and Mississippi Railroad from said junction to Duluth, in the manner hereinbefore stated.

By this confederation, consolidation or association with another land grant railroad company "upon the terms named in the first section" of the granting act, that is, to make "a continuous" railroad from Lake Superior to Puget's Sound, the Northern Pacific had complied with the terms of its charter. If no other connection with Lake Superior had ever been attempted or made, and steps had been taken to forfeit the grant because of the failure to build a "continuous" road from "a point on Lake Superior," etc., it cannot be doubted that the fact of its connection with the lake, as above stated, would have been held to be a full compliance with the granting act, and a complete and successful answer to any contention otherwise. It would seem, therefore, that the company having made a connection in this wise with "a point" on Lake Superior, within the time required by law, it cannot now be heard to say that it did not do so; or be allowed to change its mind and establish another place as its initial point.

The language of the act of Congress is plain and unambiguous. It says "a point" on Lake Superior, not "points." Here is no room for construction or misconstruction, but plainly one place and one point is meant, and nothing more. For surely, the right to construct from "a point" on Lake Superior cannot be construed as authorizing the company to lay out its road skirting for miles along the shore of the lake, so as practically to monopolize the use of the waters and harbors thereof and the land adjacent thereto. *Prosser v. Northern Pacific Railroad Company*, 152 U. S., 59, 64.

The road, then, was to be built by the most "eligible" route from "a point" on Lake Superior "to some point on Puget's Sound." This requirement might be complied with in either of two ways; viz: by actually constructing its own road, or by confederating or consolidating with another land grant road whose route was "upon the same general line." In Washington Territory it adopted the former plan; in Minnesota it availed itself of the latter plan. In both cases the

law was complied with, and in that respect the company would seem to have exhausted its rights under its charter.

It is a well settled rule of law that the powers of a legislative corporation are such only as are conferred by statute; the charter is the measure of power, and the enumeration of those powers is the exclusion of others (*Thomas v. Northern Pacific Railroad Co.*, 101 U. S., 71, 82). It is likewise well settled that where authority is given to do an act, that power is exhausted when once exercised, unless it clearly appears that it was intended the exercise thereof was to be continuous. (*East Tennessee, etc., Ry. v. Frasier*, 139 U. S., 288.) It will not be contended in the present instance that authority was given to the Northern Pacific Railroad Company to establish more than one point or terminus on Lake Superior, or to continue to establish points or termini at different places from time to time as might meet the views of its changing officers, and the rule seems to be without exception that, where authority to locate a railroad is given to a company, when that location is made, the power is exhausted, and the company cannot thereafter change that location at will. (*Pierce on Railroads*, 254-5; *Delaware Canal Co. v. Erie Railroad Co.*, 9 Paige, 328; *State v. Norwalk, etc., Co.*, 10 Conn. Rep.; *Mason v. Brooklyn Railroad Co.*, 35 Barb., 374; *People v. New York and Hudson River Railroad Co.*, 45 Barb., 73; *Van Wyck v. Knevals*, 106, 366.)

In the light of the facts disclosed, and under the well settled rules of law as cited, it would therefore appear that the Northern Pacific Railroad Company having made its connection with Lake Superior at Duluth, whether accompanied by a formal declaration to that effect, or not, could not properly change that terminus for another.

It is to be observed in this connection that the records of your office do not contain any copy of the contract of consolidation and confederation of the Lake Superior and Mississippi Railroad Company with the Northern Pacific Company; and what has been said in relation thereto has been gathered from the current history of the times and matters of general notoriety, and may be found in the recognized standard and official railway guides, wherein are inserted advertisements of the running of trains over the Northern Pacific Railroad, and also a map illustrating its lines of roads; all showing its connection with Lake Superior at Duluth by its own line of road, in just the same manner that its connection with the lake at Ashland is shown. I am therefore warranted in assuming that such confederation does exist, and has existed for the time stated.

If it should appear on further investigation that said consolidation, confederation or association is not such as is contemplated in the granting act, I am clear that the eastern terminus, or initial point of the Northern Pacific Railroad, must be found at Superior, in Wisconsin.

This is the first point at which that company connected by its own road with Lake Superior, and it thereby became the initial point con-

templated by the granting act. It is beyond credence that Congress ever contemplated that after having once made this connection it should be allowed subsequently to enlarge its land grant, by skirting along the lake to other points farther east. The terms of the act were gratified when the road was constructed between a point on Lake Superior to Puget's Sound, and farther east the grant could not be extended, nor could that point be changed to another without legislative sanction.

This point was before this Department and expressly ruled upon by my predecessor, Secretary Lamar, in the matter of the Atlantic and Pacific Railroad Company, 4 L. D., 458. That grant was to aid in building a railroad whose route was to begin near the town of Springfield, in Missouri, and run to the Colorado River; "thence by the most practicable and eligible route, to the Pacific." That company claimed a right to fix its terminus on the Pacific. Selecting San Francisco as that terminus, in 1872 it filed a map of definite location of the line to that point. The map was filed in four sections, one of which starting from the western boundary of Los Angeles county, passed westward through San Buenaventura, a point on the Pacific Ocean, to San Miguel Mission, in the direction of San Francisco. Thus showing an intention to make San Buenaventura, not a terminus, but only an intermediate point. The Land Department agreeing with the company in its claim of a right to fix the point of terminus, accepted and approved the maps of definite location, as represented, and made withdrawals along the line to San Francisco.

Subsequently, in 1886, a rule was laid upon the company to show cause why the orders of withdrawal of lands between San Buenaventura and San Francisco should not be revoked and the lands restored to the public domain. In deciding the question it was said, by Secretary Lamar, on p. 460—

While this legislation leaves the company, with the approval of the Secretary of the Interior, to determine what is an eligible and practicable route to the Pacific, it makes the Pacific, when reached, the terminus of the road; and when the Pacific was reached by a route which was selected by the company and approved by the Secretary, the terminus was reached and it was beyond the power of either or both to extend the road about three hundred and eighty miles beyond the terminus fixed by law, and increase the grant of the lands by the government to that extent. The same assumption of power that could justify the extending of the line in this case, after the ocean was reached, could have carried it to the northern line of Washington Territory or the southern line of California,—which certainly was not the intent of the act of 1866. Hence, as there was no power in the officers of the government to thus extend the grant, after the legal terminus of the road had been reached at the Pacific Ocean, the acceptance of the maps of definite location between the points described in the rule, was without power and void.

It is urged in behalf of the Northern Pacific Company that the President having accepted the constructed road to Ashland, the matter of the initial point is no longer an open question; in other words, the matter is *res judicata*.

The same argument was urged in the case of the Atlantic and Pacific Railroad, just cited, because of the acceptance of the map of definite location, and the withdrawals thereunder, by the officers of the Land Department. In answer thereto, Secretary Lamar said:

The principle only exists when the tribunal which renders the decision has jurisdiction of or power over the subject decided. As the only power to approve maps of definite location in this case is conferred by the act of 1866 and that power only extended to the Pacific Ocean, when that terminus was reached the power was exhausted and the approval of all beyond was in excess of the authority of the departmental officers and could have no greater obligatory legal force than should have been accorded to like action by any other person who was not an officer of the Department.

An attempt is made in this case to draw a distinction between the two cases because in the one the Secretary accepted the map, and in the other the President accepted the road. But such distinction cannot be made, for both the President and the Secretary are but the officers of the law, and have no authority in the premises except that given by the statute. Any act done by either outside of the law would be equally futile.

Counsel for the company, in their efforts to escape the force of the decision of Secretary Lamar, which absolutely and completely covers their case, attack it as bad law. They say it is "not sustained by the facts nor in harmony with the purposes of the statutes;" is "a reversal of the previous deliberate decision of the Department," and "was manifestly born of the exigency of the times." This insinuation as to the motive for the decision is manifestly improper and is deserving of severe rebuke.

As to the contention that said decision is bad law, reference is made to the case of the *United States v. Southern Pacific Railroad*, 146 U. S., 570, wherein the Supreme Court cite approvingly said decision, and, after referring to the fact that maps of definite location were filed and accepted to San Francisco, say, on p. 596:

Subsequently, and when Mr. Justice Lamar was Secretary of the Interior, the matter was re-examined, and it was properly held that under the act of 1866, the grant to the Atlantic and Pacific was exhausted when its line reached the Pacific Ocean. San Buenaventura was, therefore, held to be the western terminus, and the location of the line approved to that point. The fact that its line was located, and maps filed thereof in sections, is immaterial.

Entertaining these views, I cannot approve the list sent me, as it is based upon a claim for lands lost east of Superior City, where, according to my views, the Northern Pacific Company had no grant.

I have not herein undertaken to determine finally the point of the eastern terminus, or initial point, of the Northern Pacific Railroad, or the exact point at which its grant begins, because that question is not necessarily before me, and the record is not as full as it ought to be. But I am very clear in my conclusion that said grant does not exist east of Superior City, in Wisconsin, and consequently said list is rejected.

For the present you will suspend action upon all cases involving the question of the company's right to a grant between Thomson's Junction and Superior City. Thomson's Junction will be treated as the terminal until it is determined whether the same extends to Superior City.

I further learn upon inquiry at your office that the lands east of Superior City were made the basis for the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have, perhaps, been sold by the company.

The previous action of this Department giving color to the company's right to a grant east of Superior City, and the application of the rule that the indemnity lands should be selected nearest to those lost, were the probable causes for the specification of these lands as a basis for the selections referred to.

In view thereof, I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections, where the charge is that the basis was made of lands east of Superior City, or application to enter under the settlement laws, will be received.

RAILROAD GRANT—INDEMNITY SELECTION—EXPIRED FILING.

SOUTHERN PACIFIC R. R. Co.

Land covered by an uncanceled pre-emption filing is not subject to indemnity selection, though the statutory life of said filing may have expired without final proof and payment having been made thereunder.

Secretary Smith to the Commissioner of the General Land Office, August 3, 1895. (J. I. H.) (F. W. C.)

With your office letter of July 11, 1895, was submitted for my approval, as the basis for patent, list No. 24, of the Southern Pacific Railroad Company (main line), containing 4,444.40 acres of land selected on account of the grant for said company, from lands within its indemnity limits.

In your certificate to this list it is stated "that the said lands so far as the records of the General Land Office show, are free from conflict," etc., while the certificate of the railroad division of your office upon said list states that said lands are "free from adverse claim save for certain expired declaratory statements covering them, etc."

It is presumed, therefore, that the effect of your certificate is to adjudge these lands to be clear and free from adverse claim, although they are shown by the record to be covered by what is known as expired pre-emption filings.

The question therefore presented for consideration in this list is as to whether such lands are subject to indemnity selection?

Whatever may have been the previous rulings of this Department as to the effect of an uncanceled, although expired, pre-emption filing, I have to call your attention to the decision of the supreme court of the United States in the case of *Whitney v. Taylor*, decided at the last term of the court and reported in 158 U. S., page 85. In that case the question presented for the consideration of the court was as to whether a tract covered by a pre-emption filing at the date of the attachment of rights under a railroad grant was excepted therefrom.

In considering the question as to the effect of a pre-emption filing, the court, after referring to the decision in the cases of *Hastings and Dakota R. R. Co. v. Whitney* (132 U. S., 357); *Kansas Pacific Railway Co. v. Dunmeyer* (113 Wall., 629); *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535); and *Newhall v. Sanger* (92 U. S., 761), held as follows:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

In said case the court took occasion to consider the effect of a declaratory statement as compared with a homestead entry, and upon this point the opinion states as follows:

This declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes. 'This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale, for the time allowed the settler to perfect his entry and pay for the land.' *Johnson v. Towsley*, 13 Wall., 72, 89. By neither the declaratory statement in the pre-emption case nor the original entry in a homestead case is any vested right acquired as against the government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention. It is true one must be verified and the other need not be, but this does not create any essential difference in the character of the proceeding; and when the declaratory statement is accepted by the local land officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case, and its entry on the land books.

From the above it will be seen that the court holds that a pre-emption filing, so long as it is permitted to remain of record, is a reservation as against a railroad grant. While it is true that the court had under

consideration in said case the effect of an unexpired filing upon a tract within the primary limits of the grant, yet the reasoning of said opinion applies with equal force to an expired and uncanceled filing on land within the secondary or indemnity belt. The lands within the primary and indemnity limits are both granted, the particular difference between the two being the time of the attachment of rights. Within the primary limits the company's right attaches upon definite location, while within indemnity limits it does not attach until selection. But any claims that would serve to prevent the attachment of rights under the grant to a tract within the primary limits, because existing at the date of definite location, would, by parity of reasoning, if existing at the date of selection of indemnity land, serve as a bar to the acceptance of such selection.

For these reasons I herewith return the list under consideration without my approval.

TOWN LOTS—PRIVATE SALE—PUBLIC OFFERING.

BARZILLAI PRICE.

There is no authority for the disposition of town lots at private entry, under section 2381 R. S., until after public offering thereof.

Secretary Smith to the Commissioner of the General Land Office, November 19, 1895. (A. M.)

In the matter of the application of Barzillai Price for the appraisal and sale of lots 26 to 30 inclusive, in block 29, Pagosa Springs, Colorado, by departmental letter of August 30, last, the valuation of \$10.00 placed on the .2702 of an acre involved, by the board of town trustees, was accepted in lieu of a special appraisal, and you were directed to take the necessary steps to dispose of the lots under section 2381 Revised Statutes.

I now have before me the letter of the Assistant Commissioner of the General Land Office, dated the 22nd ultimo, stating that publication of notice of sale and the necessary expenses thereof will far exceed the accepted valuation of the lots, and asking if the lots can be disposed of at private entry without first offering them at public outcry.

The offering of lands at public outcry, originating in the act of Congress approved April 24, 1820,—3 Stat. 566—is recognized as a condition precedent to sales at private entry, and has for its evident object the gain to the government resulting from competition between bidders.

Among the earliest rules adopted by the board of equitable adjudication was that numbered 11 providing for the confirmation of entries covered by private sales, permitted by land officers, where the tracts had not been previously offered at public sale, etc.

The adoption of this rule on October 3, 1846, was an expression of judgment by the Secretary of the Treasury and the Attorney General

that a sale at private entry was not legal unless preceded by a public offering. This question is discussed in departmental decision in the case of *Pecard v. Camens*, and other cases, 4 L. D., 152, to which reference is made.

Section 2381 provides that it shall be the duty of the Secretary of the Interior to offer lots of the character of those under consideration, "for sale at public outcry to the highest bidder, and thence afterwards to be held subject to sale at private entry." These requirements are not alternative but sequential.

It will be necessary, therefore, in this instance, to proceed in the customary way and first offer the lots at public outcry before they will be subject to sale at private entry.

You will accordingly direct the register and receiver at the land office in which the tracts are situated to post in a conspicuous place for the usual period, in their office, a notice of public sale, to be held on a date to be fixed by yourself, which sale shall be conducted by them in their office. You will also cause a notice to be posted in some conspicuous locality in the town of Pagosa Springs.

By pursuing this method the requirement of the statute will be complied with at a trifling outlay.

FULLER *v.* GAULT ET AL.

Motion for review of departmental decision of September 23, 1895, 21 L. D., 176, denied by Secretary Smith, November 22, 1895.

COMMUTATION OF HOMESTEAD FOR TOWNSITE PURPOSES.

MAURICE A. WOGAN.

In the commutation of a homestead entry for townsite purposes under section 22, act of May 2, 1890, the entryman is required to pay for the acreage embraced in the streets and alleys of the proposed townsite.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895. (J. L. McC.)

Maurice A. Wogan has appealed from the decision of your office, dated October 11, 1894, rejecting his application for repayment of a portion of the purchase money paid by him for the NW. $\frac{1}{4}$ of Sec. 7, T. 22 N., R. 6 W., Enid land district, Oklahoma.

Commutation homestead entry of said land was made for townsite purposes—townsite of Kenwood—under section 22 of the act of May 2, 1890 (26 Stat., 81). According to the official plat the area of said technical quarter-section was 153.17 (one hundred and fifty-three and seventeen one-hundredths) acres, of which 11.80 (eleven and eighty one-hundredths) acres were reserved for public purposes—leaving 141.37

(one hundred and forty-one and thirty-seven one-hundredths) acres, for which Wogan paid, at the rate of ten dollars per acre, \$1,413.70 (fourteen hundred and thirteen dollars and seventy cents).

He now asks the repayment of \$671.50 (six hundred and seventy-one dollars and fifty cents), on the ground that he ought not to be called on to pay for such portions of the townsite as are used for "public purposes;" that he has inadvertently, without at the time fully understanding his rights, paid for 67.15 (sixty-seven and fifteen hundredths) acres used for "public purposes"—to wit, streets and alleys; therefore asks that \$671.50 (six hundred and seventy-one dollars and fifty cents) be repaid him, "under the provisions of the statute in such cases made and provided."

I concur with your office in the conclusion that the area covered by streets and alleys was properly included in Wogan's entry; that the \$1,413.70 (fourteen hundred and thirteen dollars and seventy cents) given in payment therefor was properly paid; and that the application for repayment ought not to be granted.

The decision of your office is therefore affirmed.

REPAYMENT—TRANSFER OF ENTRY—ACT OF OCTOBER 1, 1890.

HENRY C. MEAD.

An entryman who transfers a commuted homestead entry, under the act of October 1, 1890, from single minimum land to land held at double minimum, is properly required to pay the additional \$1.25 per acre, and consequently is not entitled to repayment thereof.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895. (F. W. C.)

I have considered the appeal by Henry C. Mead, from your office decision of June 1, 1894, denying his application for the repayment of \$1.25 per acre, required to be paid for his entry of the NE. $\frac{1}{4}$ of Sec. 32, T. 14 N., R. 13 W., Santa Fe land district, New Mexico, in the matter of transfer, under the provisions of the act of October 1, 1890 (26 Stat., 647) of his homestead entry made November 7, 1887, covering the NE. $\frac{1}{4}$ of Sec. 11, T. 39 N., R. 31 E., St. Cloud land district, Minnesota, upon which commutation proof was made and cash certificate issued May 23, 1888, said last-mentioned entry having been canceled on April 13, 1892, for conflict with the Northern Pacific Railroad company.

At the time of the commutation of the entry made for land within the St. Cloud land district, Mead was required to pay for the land at the rate of \$1.25 per acre. This entry having been made after the 15th of August, 1887, within what was known as the second indemnity belt of the Northern Pacific grant, in disregard of the company's rights in said limit, was canceled for conflict with said grant, as before stated, by your office letter of April 13, 1892, and by the provisions of the act

of October 1, 1890, *supra*, claimant was entitled to transfer his entry to other vacant surveyed government land subject to entry under the homestead and pre-emption laws and to receive final certificate and receipt therefor, in lieu of tracts proved upon within the second indemnity belt of said grant.

In making the transfer, as provided in said act, claimant selected double minimum land, or land held at \$2.50 per acre, and in making the transfer to this land he was required by the local officers at Santa Fe, New Mexico, to pay an additional \$1.25 per acre, which payment was made under protest, and for the return of which the present application is made, it being urged that under the act of 1890 the transfer could be made to any government land subject to homestead and pre-emption entry, whether single or double minimum.

Upon consideration of said act of October 1, 1890, I am unable to agree with this contention. The sole purpose of said act was to preserve the entryman's rights in the matter of settlement and improvement made upon land to which he could not secure title. This was the sole purpose of said act and there is nothing in the act to show that it was the intention to permit the transfer to be made to double minimum lands without requiring the payment of the additional \$1.25 per acre.

The second section of said act provides for the transfer of claims made within the second indemnity belt which were unperfected, and in said second section it is required that payment for said final selection shall be made as under existing laws.

Your office decision is accordingly affirmed, and the application for repayment will stand rejected.

HOMESTEAD CONTEST—LEAVE OF ABSENCE.

CARPENTER *v.* FORNESS.

A leave of absence is no protection against a subsequent contest on the ground of failure to establish residence, where the evidence shows that when such leave of absence was granted the entryman in fact had not established residence on the land.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895. (C. W. P.)

This case involves the NE. $\frac{1}{4}$ of section 28, T. 16 N., R. 12 W., Kingfisher land district, Oklahoma Territory.

The record shows that Jacob Forness made homestead entry, No. 9385, of the above described tract, on October 22, 1892, under soldier's declaratory statement, made on May 6, 1892, and on the same day filed an application for leave of absence for one year, alleging that he established residence on the land October 13, 1892, had built a house, broken ten or twelve acres of the land, and contracted for the building of considerable fence; and that it was necessary for him to be at Kansas City, Missouri, to nurse an invalid wife and child. Leave of absence was thereupon granted by the register and receiver.

On February 17, 1893, G. W. Carpenter filed an affidavit of contest, alleging that—

the said Joseph Forness has not complied with the homestead laws in regard to residence, improvements and cultivation of said land, in this, to wit: On the 6th day of May, 1892, Joseph Forness filed his soldier's declaratory statement, No. 704, and on the 22d day of October completed his homestead filing, and on October 31, 1892, obtained a leave of absence from said land to October 22, 1893. That Forness has never established residence on said land. That the said Joseph Forness was never on said land to exceed three hours time, and that on the 20th day of October, 1892. That the only improvements said Forness ever put on said land is a board shanty, twelve by fourteen feet, with shed board roof. That said Forness never has, and is not now, occupying said land.

The contestant having died, leaving a wife and infant child surviving him, his widow, Iva Carpenter, was substituted as contestant on May 6, 1893, and the case was heard on October 19, 1893, before the register and receiver, who dismissed the contest. The contestant appealed. Your office reversed the decision of the local officers and held the entry for cancellation.

Forness appeals to the Department.

The testimony is correctly stated in your office decision, and I agree with you that it shows that Forness never established residence on the land.

The leave of absence granted by the local officers on October 22, 1892, cannot protect Forness for the reason that the testimony shows that when the leave of absence was granted he had not established residence upon the land. *Silva v. Paugh* (17 L. D., 540; on review, 18 L. D., 533).

Your office decision is therefore affirmed.

RITTWAGE *v.* McCLINTOCK.

Motion for review of departmental decision of October 1, 1895, 21 L. D., 267, denied by Secretary Smith, November 22, 1895.

MEANDERED STREAM—CHANGE OF CHANNEL.

MAX LOIBL.

Land lying within the banks of a meandered stream, and forming a part of the bed thereof as surveyed, but subsequently left dry by a change in the channel thereof, can not be entered under the homestead law, where patents have issued for the adjacent lands.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895. (J. L.)

The land involved in this case is the dry bed of a channel of Platte river in Section 6, T. 6 N., R. 19 W., Lincoln land district, Nebraska, lying between a range of lots numbered 5, 6, 7, and 8, respectively, on

the north or left bank on said channel, and a range of lots numbered 9, 10 and 11, respectively, on the south or right bank of said channel, and on an island. When the official survey was made in 1868, said dry bed was full of water, was a part of the Platte river, and was meandered by the surveyors on both banks, as appears by the map on file. All of the lots aforesaid have been patented to private persons; each of whom acquired a water front upon said channel with all the rights of riparian owners.

In the shiftings of the waters of Platte river during twenty-five years, it seems that the channel aforesaid has gone dry, and uncovered its bed; which is alleged to contain 39.95 acres, and forms a strip of land extending east and west across section 6 between the two ranges of lots aforesaid.

Max Loibl filed an application to make homestead entry of said strip of land, which appears on the official maps as a part of the bed of Platte river. The local officers rejected the application. On appeal, your office, by letter "C" of September 21, 1894, affirmed their decision. And Loibl has appealed to this Department.

The application was properly rejected. Your office decision is hereby affirmed.

HOMESTEAD ENTRY—MARRIED WOMAN—RESIDENCE.

THOMPSON *v.* TALBOT.

A single woman who has made homestead entry forfeits her rights thereunder, if she subsequently marries a man who is at such time also asserting a homestead claim on which he thereafter submits final proof, as both husband and wife, during the marital relation, can not maintain contemporaneous residences upon different tracts under the homestead law.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895.
(J. I. H.) (I. D.)

The plaintiff in the case of Martin Thompson *v.* Flora E. Putnam Talbot appeals from your office decision of June 27, 1894, dismissing his contest and permitting Mrs. Talbot to complete her homestead entry for the NW. $\frac{1}{4}$, Sec. 27, T. 120 N., R. 52 W., Watertown land district, South Dakota.

Your office decision holds that by reason of the rulings in the cases of Hattie E. Walker (15 L. D., 377); Bomgardner *v.* Kittleman (17 L. D., 107), and Hamilton *v.* Harris (18 L. D., 45), an entrywoman does not lose her right to complete entry because of marriage, pending contest. But in this case the evidence shows that Robert S. Talbot filed homestead entry for one hundred and sixty acres near the tract Miss Putnam had settled on, his entry being made April 8, 1892, and final proof July 29, 1893.

Talbot and Miss Putnam were married December 24, 1892, and lived together from that time on his homestead. Her settlement was made

April 15, 1892, and her application to make homestead entry was made August 9, 1892.

A husband and wife living as one family can not maintain separate residences at the same time, and as the husband has been permitted to prove up on his residence the wife can not also prove up on account of her residence in the same house with her husband and during the same period. Lydia A. Tavener (9 L. D., 426) and Wm. A. Parker (13 L. D., 734).

In the case at bar, Talbot has made proof, and both husband and wife can not have contemporaneous residences upon different lands for homestead purposes, while maintaining their marital relations. Jane Mann (18 L. D., 116). Both cannot be the head of a family.

Your office decision is reversed. Mrs. Talbot's entry is canceled and Thompson will be permitted to make entry if no other claim intervenes.

ABANDONED MILITARY RESERVATION—APPRAISAL.

FORT RIPLEY.

The appraisal of the improvements on an abandoned military reservation is a prerequisite to the sale of the land and improvements together.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
November 22, 1895. (A. M.)

On examining the re-appraisal of the old portion of the abandoned military reservation of Fort Ripley, Minnesota, submitted with the letter of the 12th instant from the Assistant Commissioner of the General Land Office, it is noticed that while the lands in the five lots involved, embracing 174.47 acres, have been re-appraised, the buildings thereon have not been re-appraised.

A statement is appended to the re-appraisal, signed by General Appraiser E. L. Merritt, to the effect that a larger sum can be realized by the sale of the lands and buildings together, than if sold separately, and that the buildings cannot be sold if coupled with the requirement that they be removed.

It appears that your office called Mr. Merritt's attention to the failure to re-appraise the buildings and that he reported that

no value was placed on the buildings at either Fort Wilkins or Fort Ripley. The commission, in both instances, was positive the buildings would bring nothing if sold alone, but would assist the sale of the land if sold with it.

Your office letter refers to the authority of law for the sale of the buildings and lots together, and, in view of the statement of Mr. Merritt, recommends such action in this instance.

The failure of previous attempts to sell these lots and buildings by reason of excessive valuation and the expressed opinion that they should for the best interests of the Government be sold together leads the Department to conclude that such course should be pursued in this case.

It must, however, be borne in mind that while it is true that section 3 of the act of July 5, 1884—23 Stat., 103—authorizes the Secretary of the Interior to sell the buildings together with the lots on which they are situated, or, in his discretion, to cause the buildings to be sold separately, it does not authorize him to dispose of the buildings, either with or without the lots pertaining thereto, till a valuation has been placed on such buildings. The section of the act referred to requires—

That the Secretary of the Interior shall cause any improvements, buildings, building materials, and other property which may be situate upon any such lands, subdivisions, or lots not heretofore sold by the United States authorities, to be appraised in the same manner as hereinbefore provided for the appraisements of such lands, subdivisions, and lots, and shall cause the same, together with the tract or lot upon which they are situate, to be sold at public sale, to the highest bidder for cash, at not less than the appraised value of such land and improvements . . . or he may in his discretion cause the improvements to be sold separately, etc.

The above quotation is that portion of the statute directly applicable to the matter under consideration, and the only discretion authorized therein is that whereby improvements may be sold separately from the lots on which they are situated.

The requirement that the Secretary shall cause the appraisalment of improvements is mandatory, and its sequel appears in the further requirement that if the lots and improvements are sold together it shall be to the highest bidder for cash at not less than the appraised value of such land and improvements. This figure can only be ascertained by re-appraisalment of the buildings. The valuation thus resulting, however inconsiderable, added to that of the lands, already ascertained, will fix the minimum price below which bids cannot be recognized under the law.

In view of the foregoing it is clear that the re-appraisalment of the buildings cannot be dispensed with and the papers are returned herewith that the omission may be supplied.

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RAILROAD GRANT—INDEMNITY—MEXICAN CLAIM.

SMEAD *v.* SOUTHERN PACIFIC R. R. Co.

Indemnity may be properly allowed for an odd-numbered section embraced within a Mexican grant on which patent has been issued by the United States.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895. (J. L. McC.)

I have considered the case of Elihu Smead *v.* The Southern Pacific Railroad Company, involving the NE. $\frac{1}{4}$ of Sec. 15, T. 8 N., R. 17 W., Los Angeles land district, California.

The tract described lies within the indemnity limits of the grant to said company.

*Vacated,
29 L. R. 135*

The company first selected the tract on January 16, 1885, but at that time failed to specify the loss for which said selection was made; on October 14, 1887, it designated the S. $\frac{1}{2}$ of Sec. 29, T. 4 N., R. 18 W., as its loss; and on November 28, 1888, it substituted therefor the S. $\frac{1}{2}$ of Sec. 29, T. 1 N., R. 14 W., as the basis.

Smead applied to enter the tract December 10, 1889. His application was rejected because of the prior selection thereof by the company. He appealed to your office; and upon its decision of August 1, 1894, adverse to him, he appealed to the Department.

The first ground of appeal is that your office "erred in holding in this case that the priority of selection determined the priority of rights."

In ordinary cases such is the rule; but in the other six allegations of error he sets forth his reasons for contending that such is not the proper rule "in this case."

The S. $\frac{1}{2}$ of Sec. 29, T. 1 N., R. 14 W., the basis of indemnity, is embraced in a Mexican grant—the Ex. Mission de San Fernando, lot 373—and was patented on January 8, 1873. The substance of the remaining allegations of error is that said land never was government land belonging to the United States, and therefore the company is not entitled to indemnity therefor.

The language of the granting act (July 27, 1866, 14 Stat., 292–295), is that whenever, prior to the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office, any of said (odd-numbered) sections or parts of sections "shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

The tract in controversy had been "granted;" it had been "reserved;" it had been "otherwise disposed of" than to a private purchaser or a homesteader or pre-emption claimant. It is true, the land had been "granted," "reserved," "disposed of," by Mexico; but the recognition of the validity of that grant by the United States appears to me tantamount to a grant by the United States. That indemnity should be allowed therefor comes, in my opinion, within both the letter and the spirit of the act, and within the intent of the law-making power.

The decision of your office is therefore affirmed.

APPLICATION TO MAKE HOMESTEAD ENTRY—FINAL PROOF.

BERRY *v.* TOWNER.

An application to enter, held to await action on the prior application of another, protects the applicant as against subsequent claims, but in no manner can affect the disposition of the prior pending claim.

The second applicant in such case is not an adverse claimant of record and entitled to special notice of intention to submit final proof, where the prior application is allowed and the entry is commuted for townsite purposes.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1895. (C. W. P.)

The record shows that on September 29, 1893, William Cobb applied to enter the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 10, T. 22 N., R. 6 E., Perry land district, Oklahoma Territory, and that his application was rejected by the local officers on November 4, following; that on November 6, following Gill Towner applied to enter said land, and that his application was suspended pending action on the rejected application of Cobb; that on November 8, following L. D. Southard applied to enter said land, and that his application was suspended pending action on the rejected application of Cobb, and the suspended application of Towner; that on December 12 following James J. Berry applied to enter said lands, and that on January 12, 1894, his application was suspended for conflict with the rejected application of Cobb and the suspended applications of Towner and Southard; that on February 2, 1894, Cobb filed a waiver of his right to appeal from the rejection of his application, and that on March 7, following Towner was allowed to make homestead entry of said land.

On January 12, 1894, Berry filed an appeal from the action of the local officers in suspending his application.

On April 27, following Towner filed an application to commute his homestead entry to cash entry for townsite purposes, with notice of making final proof. On June 21, following final proof with plats were filed.

Berry did not appear on the day set for taking final proof, to protest against the same.

Your office decided on the appeal of Berry as follows:

From the record it is clear he cannot have his application, which was subsequent to that of Towner, given preference to it. Therefore, your action in allowing the entry of Towner is confirmed, and the relief prayed in the appeal of Berry is denied.

Berry appealed to the Department.

There is no error in your office decision. Berry's application protected his rights against subsequent claims, but Towner's application was prior to Berry's, and was not at all affected by Berry's application.

Berry is not an adverse claimant of record, and was not entitled to special notice of Towner's intention to submit final proof.

Your office decision is affirmed.

RAILROAD GRANT—TERMINUS—LATERAL LIMITS.

NORTHERN PACIFIC R. R. CO.

Instructions with respect to the establishment of a terminal line near Portland, Oregon, in accordance with the departmental decision in the case of *Spaulding v. Northern Pacific R. R. Co.*, and also as to a proposed change in the lateral limits of the grant along the constructed road north of said city.

Secretary Smith to the Commissioner of the General Land Office,
(J. I. H.) *November 27, 1895.* (F. W. C.)

I am in receipt of your office letter of October 26, 1895, submitting for the consideration of this Department the matter of the establishment of a terminal in the neighborhood of Portland, Oregon, in accordance with the decision in the case of *Spaulding v. Northern Pacific R. R. Co.* (21 L. D., 57), in which it was held:

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second, northward, under the joint resolution of 1870, and so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act.

The line of general route filed by the Northern Pacific Railroad Company runs to the north of the Columbia river, its nearest point being about six miles north of Portland.

In the establishment of the terminal from the point selected, being Vancouver, Washington, the line runs in a northeasterly directions at right angles to the general course or direction of the general route to the east of that point, but as it appeared that a terminal had been drawn upon the map on file in your office due south from Portland, Oregon, for the purpose of ascertaining the lands in conflict with the grant for the Oregon and California Railroad east of Portland, it is proposed to connect Vancouver and Portland with a line not in the direction of the terminal established north of Vancouver.

This is not permissible.

The terminal must form a continuous line and be at right angles to the last section of the general route to the east of the terminal point.

You will, therefore, continue the terminal line established to the north of Vancouver, upon the same angle of direction until it meets the limits established to the south of the line of general route.

It is further proposed to make the change indicated as "D" on the diagram submitted.

This change is of the lateral limits established years ago upon the road running north of Portland which has been constructed.

The purpose of this change is not made apparent, and I cannot sanction the same.

The limits upon the portion of the road unconstructed should only be continued to the point of connection with the lateral limits established upon the part constructed.

The diagram is herewith returned that it may be changed in accordance with the directions herein given.

RAILROAD GRANT—FORFEITURE—ACT OF JUNE 22, 1874.

IVOR H. MJOEN.

The act of June 22, 1874, is general in its terms and applicable alike to lands patented or unpatented, upon which there were actual settlers at the date of said act; and, to the extent of the rights of such settlers, the condition upon which the extension of time was given, operated as a forfeiture of the grant, and a restoration of such lands free from the operation thereof.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (W. F. M.)

On October 12, 1895, there was filed here the petition of Ivor H. Mjoen in which he represents that he made settlement on the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and lot 1, section 25, township 148 N., range 49 W., within the land district of Crookston, Minnesota, on November 15, 1872, with the view of entering the same under the pre-emption laws; that he was then and is now a qualified entryman, and that he has resided with his family on the land continuously ever since his settlement and still resides thereon, and that the value of his improvements exceeds two thousand dollars; that he has made three several attempts and applications to file his declaratory statement for the land and that his application was in each instance refused on the ground that the land had inured to the State of Minnesota for the benefit of the St. Paul and Pacific Railroad Company, or its successors in interest, the St. Paul, Minneapolis and Manitoba Railroad Company.

The land in controversy was selected for the benefit of the last named company November 28, 1873, certified April 30, 1874, and patented January 14, 1875.

The petitioner alleged that

it was error and unauthorized to certify or patent the said land to the State of Minnesota, because before that time, to wit, on June 22, 1874, by the first section of the act of that day (18 Stat., 203), this land had been forfeited to the United States for the benefit of your petitioner; that the said railroad company was in default when this act was passed, and for this default Congress had the right, without the consent of said railroad company, to declare a forfeiture of the entire grant; but instead of exercising this right, Congress only declared a forfeiture of so much of the grant as was at the date of the passage of the said act occupied by actual settlers.

The petition concludes with a prayer for relief under section 2 of the act of March 3, 1837 (24 Stat., 556), which provides that, in certain cases, it shall be the duty of the Secretary of the Interior to demand a

relinquishment or reconveyance to the United States of lands erroneously certified or patented, or, in default of the relinquishment or reconveyance thus demanded, it imposes upon the Attorney General the duty to

commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

The act of June 22, 1874 (18 Stat., 203), is entitled "An act to extend the act of March third, eighteen hundred and seventy three, entitled 'An act for the extension of time to the St. Paul and Pacific Railroad Company for the completion of its roads,'" and its first section is as follows:

That the provisions of the act of Congress approved March third, eighteen hundred and seventy three, entitled 'An act for the extension of time to the St. Paul and Pacific Railroad Company for the completion of its roads,' be and the same are hereby revived and extended until the third day of March, A. D., eighteen hundred and seventy six, and no longer upon the following conditions: That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any such lands, shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

Discussing this act, this Department has said:

This language is general and applies to all lands, whether patented or not patented, upon which there were actual settlers June 22, 1874. To the extent of the rights of actual settlers, the condition upon which the extension of time was given by Congress operates as a revocation of the grant. The status of lands occupied by actual settlers was declared to be as though they had never been granted. It is, in effect, an extension of the protection intended to be given by the excepting clause in the original grant, and, hence, in its administration, all lands coming within the terms of the act of June 22, 1874, *supra*, must be disposed of as though no patent had been issued. *Tronnes v. St. Paul, Minneapolis and Manitoba Ry. Co.*, 18 L. D., 101.

The comprehensiveness and clearness of this language leaves nothing to be said either by way of elaboration or construction. The lands falling within the categories of the act were by its terms forfeited to the United States and restored to the public domain free from any rights of the company, and subject only to those of the settlers.

This being true, it would seem to be in the last degree supererogatory to comply with the literal prayer of the petition. The title being in the United States, there is no right in the company to be by it reconveyed, either voluntarily upon the demand of the Secretary of the Interior, or at the end of a proceeding to be instituted and prosecuted by the Attorney General. The second section of the act of March 3, 1887, therefore, has no application to the case of the petitioner.

The view herein expressed will serve to indicate the rights as well as the remedy of the petitioner. His right is to enter the land if he is entitled to do so under the act, and if his right be denied or questioned,

either by the government or by the company, his remedy is a hearing to determine the right.

Relief in the form in which it is prayed for must, therefore, be denied; but his rights are otherwise saved, to be asserted in the customary manner.

It is proper to state here that the petitioner made a similar application in 1889, which was the subject of departmental letter of August 8, of that year (183 L. & R., 333), and that the decision was adverse to him; but it is not deemed he is concluded by that letter from the enjoyment of his rights under the act of 1874, *supra*, as it is now construed.

MINING CLAIM—DISCOVERY—INTERSECTING CLAIM.

APPLE BLOSSOM PLACER *v.* CORA LEE LODGE ET AL.

In the absence of an adverse claim it will be presumed that a lode exists in land legally located as a lode claim.

An entry will not be allowed on a lode claim that appears of record as embracing non-contiguous tracts.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (P. J. C.)

For a detailed statement of earlier facts in connection with this controversy, reference is made to the case of Apple Blossom Placer *v.* Cora Lee Lodge (14 L. D., 641). By order of Mr. Secretary Noble a hearing was ordered as between the parties therein named

to determine whether known lodes existed on that part of the placer ground in conflict with the lodes above referred to, at the time the patent for the placer ground was applied for.

On April 30, 1890, M. J. Delhomaca *et al.* filed a protest against the Apple Blossom placer entry, alleging their location of the Tramp and Homestake lodes on part of the ground; also that the land claimed in the placer entry was not in fact placer ground and that no gold had ever been discovered thereon or taken therefrom.

It is stated that by order of your office Delhomaca *et al.* were permitted to intervene in the hearing ordered by said departmental judgment. A hearing was ordered, at which all parties appeared, and as a result the local officers held that no known lodes existed on the ground when the Apple Blossom placer was allowed, and recommended that the protests be dismissed, and that that portion of the Cora Lee, Ella Sherwood, Tramp and Homestake claims in conflict with the Apple Blossom placer, as entered, be canceled.

The lode claimants appealed, and your office, by letter of April 24, 1894, decided—

In my judgment the evidence fails to show that at the time patent was applied for, the ground embraced in said conflicts with the four lodes, to wit: the Ella Sherwood, Cora Lee, Tramp and Homestake, contained any known veins or lodes. Said

mineral entry No. 200 is, therefore, held for cancellation to the extent of the conflicts between said Ella Sherwood and Cora Lee lodes and the said Apple Blossom placer. Your recommendation that the conflicts between said Apple Blossom placer and the Tramp and Homestake lodes be canceled is superfluous, from the fact that entry has not been made, nor patent applied for on said claims, and hence no such action is necessary, although your decision finding that no lodes were known to exist on said conflicts at date of applying for patent for said Apple Blossom placer is concurred in by this office.

It was also decided that the local officers erred in failing to pass on the allegations of Delhomaca *et al.*, that the ground had no value for placer mining purposes; that this allegation was sustained by the evidence, and held that the placer entry "is hereby held for cancellation."

From this judgment the lode claimants only have appealed.

It seems to me that in the absence of an appeal by the placer people there is no issue before the Department. There is no conflict between the lode claimants at all. The hearing ordered by the Department was to ascertain if there was a known lode within the placer limits "at the time the placer ground was applied for." But this was only for the purpose of settling a controversy between two applicants for patent.

By your office judgment, under the evidence taken at the hearing on the protest of Delhomaca, it is determined that the placer claim is not subject to entry as such, and that judgment has become final:

So that it only remains to determine the rights of the lode claimants. It will be observed that the judgments below are only to the effect that no lode was known to exist at the time the placer patent was applied for, but from an examination of the testimony I think it is clear that mineral has been disclosed. In the absence of any adverse claim it will be presumed that lodes do exist in land legally located as lode claims.

There is no objection, therefore, to the Cora Lee and Ella Sherwood passing to patent under a proper entry, and your office judgment will be affirmed wherein is overruled the action of the local office holding for cancellation the Tramp and Homestake locations.

An amended application, however, for the B. & M., Cora Lee, Little Maud, and Ella Sherwood will have to be made and entry made thereunder. The B. & M. and the Little Maud seem to be all right, but they are included in the application with the others, and in the entry of all four of the lode claims thus made under one application, that part of the Cora Lee and Ella Sherwood awarded by the court to the placer claimants, is excepted and excluded from the entry. This exception is described by metes and bounds, and, as I read it, carves out of about the centre of these two claims, which lay parallel, entirely across their width the five acres awarded the placer claimants. The result of this is that neither claim is contiguous, and the entry as it stands includes the ends only of both. An entry of a mining claim, the contiguity of which is thus broken, cannot be permitted. Now that the adverse claim of the placer people has been abandoned, there can be no objec-

tion to receiving the application for the claims as an entirety. Or, if the applicants elect to do so, they may abandon either of the pieces and enter the other, their application being accompanied by the certificate of the surveyor-general that the part applied for contains the requisite improvements.

Your office judgment is thus modified.

MINING CLAIM—DISCOVERY—CHARACTER OF LAND—EXPENDITURE.

TAM ET AL. *v.* STORY.

As between mineral claimants wherein it is alleged by one that the lode claim of the other was not based on a valid discovery prior to location, it is no part of the defense to show the existence of a valuable deposit of mineral. The value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in controversies between mineral and agricultural claimants.

The purchaser of a lode claim from a prior locator is entitled to all the mineral veins and lodes in such claim, and to the benefit of all expenditures made by his grantor in the development thereof; and the right to such benefit is not defeated by a subsequent amended location wherein the purchaser makes use of a discovery of his own within the limits of said purchase and on a junior location embraced for the greater part within the boundaries of said purchase.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (J. I. P.)

By your office letter "N" of May 22, 1894, you transmitted to this Department the appeal of Lucy M. Story from your office decision of April 6, 1894, holding for cancellation mineral entry No. 2223, "Single Tax Lode," Helena, Montana, land district.

The history of this case is found in 16 L. D., 282, and only so much of it as is pertinent to the questions presented by the record before me will be repeated.

It appears that on January 1, 1889, Lucy M. Story located in the Helena, Montana, land district, the Single Tax and Free Trade lode claims; that the greater part of the premises embraced in said location were at that time covered by the "Addie Laurie Lode" claim, then a valid subsisting location, in which Mrs. Story had an interest. Between the date of her location of January 1, 1889, and December 18, 1889, Mrs. Story, at various times, purchased all the other interests in the Addie Laurie lode claim, and became its owner. On December 9, 1889, being at that time the owner of three-fourths of the Addie Laurie lode claim, she amended her location of January 1, 1889, so as to embrace the premises occupied by the Addie Laurie claim, and named her amended location the Single Tax lode claim. January 4, 1890, said amended location was recorded. January 18, 1890, the order of survey was made. April 30, 1890, an application for patent was made, and after due publication, no adverse claims being filed, the local officers allowed final entry No. 2223, August 7, 1890.

Thereafter, on April 7, 1892, John L. Tam and John W. Cotter filed a protest against said entry, alleging—

1. That said claimant has failed to locate said claim and fix the boundaries thereof as required by law.

2. That she had not, at the time and place of posting location notice, discovered a mineral bearing vein.

3. That she never made or caused to be made or done, five hundred dollars' worth of work or improvement upon said Single Tax lode claim, or the ground embraced therein.

4. That said protestants are the owners of an undivided interest in the Single Out and Double Out lode claims, which include the ground embraced in the said Single Tax lode claim; that said Single Out and Double Out lode claims were duly located by said protestants, and that said locations are still subsisting and valid.

By its letter of March 13, 1893, (16 L. D., 282), the Department, in effect, directed a hearing on the first three propositions contained in said protest.

A hearing was had before the local office, commencing April 21, 1893, both parties being present. Upon the evidence presented the local officers, on September 13, 1893, found that "none of the plaintiffs' allegations that are material have been sustained by the evidence," and recommended the dismissal of the protest.

On appeal, your office reversed the local office, and held said mineral entry No. 2223 for cancellation for the reason—

1. That said claim is not shown to contain a valuable deposit of mineral.

2. That claimant has not complied with the law in the matter of labor done or improvements made upon said claim.

An appeal by Story brings the case here.

The only question presented by this controversy is whether or not the claimant failed to comply with the mineral law as alleged by the protestants. The mineral character of the land in question is not here involved. That is conceded, in that both parties are seeking to acquire title to it, under the mineral laws. The second charge in the protest does not go to the character of the tract embraced in the Single Tax lode, but goes to the validity of the *location* of said claim, in that no discovery of a vein or lode of mineral bearing rock had been discovered within the limits of said claim *prior* to its location.

The claimant was not required to show "that said claim contains a valuable deposit of mineral." It was no part of her defense. Nor was a contrary showing a part of the protestants' case. Hence the first reason given in the decision appealed from why said mineral entry should be canceled, viz: "that said claim is not shown to contain a valuable deposit of mineral" is entirely outside of the issues, and is unwarranted by the evidence in the case.

The local officers, as stated, found that the protestants on whom was the burden of proof, had failed to sustain any of their allegations.

Your office decision concurs as to the first allegation, and as to the second, said decision holds that "it would appear that a discovery had been made upon the claim sufficient to warrant a location." This is what the protestants were called upon to negative or disprove, and the holding of your office decision, as to said discovery, is in effect a finding against the protestants on their second allegation. But your office decision modifies said holding by the following—

But, it may be stated, there is a difference between location and entry as to the discovery required..

The discovery of a vein, whether rich or poor, great or small, will warrant the miner in making a location, for otherwise, he might not be able to secure the reward for his labor, but, before making entry, it must be shown that the claim contains a valuable deposit of mineral.

I do not concur in that statement of the law. There must be a discovery before location. (Section 2320, Revised Statutes; *Waterloo Mining Company v. Doe*, 17 L. D., 111.) But after discovery and location a subsequent compliance with the provisions of section 2325 of the Revised Statutes entitles the explorer to patent, and no showing beyond his first discovery is required by the mining laws or the regulations or decision of this Department. Indeed, after discovery and location, this Department has held that "his right of possession is as complete as if he had a government patent, provided he continues to put each year the required amount of labor and improvements thereon," (*Branagan v. Dulaney*, 2 L. D., 744) and the supreme court of the United States has held that so long as he complies with the statute as to annual labor and improvement, his title is "the highest known to the law." Evidently, then, the value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in a controversy between mineral and agricultural claimants. If the explorer deemed the deposit of sufficient value to warrant the annual labor and expenditure required, he thereby shows his good faith, and a compliance with the other provisions of section 2325, Revised Statutes, entitles him, on application, to entry and patent.

Bearing on this subject the United States circuit court, for the State of Nevada, in the case of *Book et al. v. Justice Min. Co.*, 58 Federal Reporter 106 at pages 124 and 125 uses the following language:

If this theory were adopted by the courts, it would invalidate many mining locations. Logically carried out it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he had discovered, would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest that it would lead to absurd, injurious and unjust results, destructive of the rights of prospectors and miners, in their honest, patient, and industrious efforts to explore, discover and develop the veins and lodes that exist in the public mineral lands of the United States.

The act of Congress is not susceptible of any such construction. It does not impose any conditions as to the value or extent of the ore. It simply provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

I concur with your office decision that there was a sufficient discovery to warrant the location, and that the protestants have also failed to sustain their first allegation.

This brings me to the third charge in the protest, being the second reason given in your office decision, for the cancellation of said mineral entry, viz: "that claimant has not complied with the law in the matter of labor done or improvements made on said claim."

It is not disputed that the surface ground embraced in the Single Tax location is the same as that formerly embraced in the Addie Laurie claim, of which Mrs. Strong, at the date of the amended location of the Single Tax claim, was the three-fourths owner, and nine days after, the sole owner. On the Addie Laurie claim, as such, there has been expended from \$1,000 to \$1,100 in labor and improvements, and on the Single Tax, as such, from \$40 to \$100. If the labor and improvements done on the Addie Laurie can be placed to her credit on the Single Tax claim, then the law, as to labor and improvements, has been complied with. Your office decision holds that she is not entitled to that credit, in the following language—

It has been before decided that work done or money expended upon ground, subsequently embraced in a mining location may not be considered as having been done or expended for the development of said subsequently located claim.

See Trickey Placer, 7 L. D., 52, and Commissioner's decision of November 27, 1893, *in re Clark v. Taylor*, Contest No. 1082, Sacramento land district.

The Trickey Placer, above cited, is not a case in point. The question in that case was whether expenditure made on the construction of a ditch, outside the limits of the claim, before it was located and not made for the purpose of developing the claim, could be accepted in proof of the required expenditure, and the Department held not. The judgment in the case of *Clark v. Taylor*, decided by your office, was reversed by the Department May 16, 1895, and hence is not a controlling authority in this case.

At the date of the amended location of the Single Tax claim, Mrs. Story was the principal owner of the Addie Laurie and a few days later its sole owner. She had acquired her right by purchase, and by virtue of section 2325, was entitled to credit for the expenditures made thereon by her grantors. If she saw fit to change the name of her claim from Addie Laurie to Single Tax, she should not, because thereof, be deprived of her rights acquired by purchase. It is insisted, however, by protestants that the location of the Single Tax claim was not a re-location of the Addie Laurie, but was an independent location, made on a new and different discovery of another lode or vein; that in order to constitute a re-location, the original lode or vein must constitute the basis thereof.

Mrs. Story as the purchaser of the Addie Laurie, was entitled to all the mineral veins and lodes within the limits of that claim, and of the benefits of the expenditures of her grantors for its development. She

could sink a shaft anywhere within its limits. The discovery shaft of the Single Tax was within those boundaries, and was one she had a right to sink. Had that shaft not been made the basis of a location, for the purpose of changing the name of the Addie Laurie to Single Tax, no question would have arisen as to her right to claim the benefit of the expenditures made by the prior owners of the Addie Laurie for its development, and it should not be allowed to do so because of that fact. No ones rights were involved thereby, and the attempt of the protestants to defeat the entry for that reason, is more technical than meritorious.

Your office decision is reversed, and mineral entry No. 2223 held intact, with instructions to dismiss the protest.

APPLICATION TO ENTER—RIGHT OF ENTRY.

LINDSEY *v.* ADAMS.

The fact that an application to enter embraces in part land not subject to entry does not defeat the right of the applicant to such portion of the land as is open to appropriation.

In case of simultaneous applications the right of entry may be disposed of to the highest bidder.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (F. W. C.)

I have considered the appeal by Robert H. Lindsey from your office decision of April 19, 1894, sustaining the action of the local officers in rejecting his application to make homestead entry as to the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 10, T. 5 N., R. 28 E., La Grande land district, Oregon, for conflict with the desert land application of Arthur L. Adams covering the same land.

It appears from the record that the applications of Lindsey and Adams to enter the lands respectively applied for by each were forwarded to the local office by the mail and both were noted as received at the same time, to wit, on January 11, 1894, at 10:30 a. m.

Lindsey's application covered the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lots 1, 2 and 3, of Sec. 10, and lot 4 of Sec. 9, T. 5 N., R. 28 E., while the application by Adams embraces the SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, said Sec. 10.

It further appears that no action was taken upon these applications at the date of their receipt nor for several days thereafter.

On January 16, 1894, before any action had been taken upon his application Lindsey discovered that lots 1, 2 and 3, of Sec. 10, and lot 4 of Sec. 9, were State lands and wired the local officers to eliminate said tracts from his application and to consider the same as only applied to the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 10.

This telegram was received at the local office the following day, to wit, January 17, 1894, and the next day the local officers, acting upon Lindsey's application rejected the same as to the tracts in conflict with the State's claim, and treating the telegram as an application to amend, denied the same on account of the pending application by Adams, thus rejecting Lindsey's application *in toto*.

Lindsey appealed to your office resulting in the decision now under consideration, from which he has further appealed to this Department.

It is plain to my mind that the telegram by Lindsey should not be considered as an application to amend in the light of an application to cover a different tract, but rather a notice on his part of an election to accept the tract not in conflict with the State's selection.

It is admitted that as to the portion in conflict with the State's selection the application was properly rejected, so that the real question presented by this appeal is as to whether an application, which when presented embraces tracts not subject thereto and also tracts properly subject to the application, can be treated as a valid application so far as to preserve the applicant's rights as of the date thereof to the tracts properly subject thereto.

In the case of *Cornelius v. Kessel* (128 U. S., 456) it was held:

Where a tract of land is subject to entry as public land the validity of the entry of such land is not affected by the fact that another tract not subject to disposal as public land was entered at the same time and enclosed in the same entry.

While in that case the land involved had been actually entered, that is, the application had been accepted and noted of record, yet the underlying principle of that decision would seem to control the real question here involved being as above stated.

From a careful review of the matter I am of the opinion that Lindsey's right under his application as to the tract here in question is in nowise invalidated by the fact that other lands were also embraced in said application which were not subject thereto, and as the applications of Lindsey and Adams were simultaneous I must reverse your office decision and direct that the right of entry as to the tract involved be disposed of to the highest bidder. *McCreary v. Wert et al.* (21 L. D., 145.) Herewith are returned the papers in the case.

APPLICATION TO ENTER—DESCRIPTION OF LAND.

JOHN T. HADDOX.

An application to enter that is indefinite in its description of the land can not be allowed.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (J. L.)

On May 7, 1891, John T. Haddox applied to make homestead entry of "all of the government land in fractional sections 14, 23, and 26, T. 1 S., R. 11 W., containing one hundred and sixty acres, lying and being

between the Ranchos, La Puente, San Francisquito, and Potrero de Felipe Lugo." The local officers rejected said application on the same day, "because the tracts applied for are within the limits of certain Spanish grants, viz: Ranchos, San Francisquito, Potrero de Felipe Lugo, and La Puente." From said decision Haddox appealed. On September 11, 1894, your office, finding that said decision was in accordance with law and the facts in the case, affirmed the same. Whereupon Haddox appealed to this Department.

The law, and the rules and regulations prescribed by this Department, require that, "to obtain a homestead the party should select and personally examine the land, and be satisfied of its character and true description. He must file an application describing the land he desires to enter." (See General Circular of 1892, p. 10). This means that the applicant must know enough about the tract to be able to describe it by legal subdivisions as they appear upon the approved official maps. An application for "all of the government land in three fractional sections" lying north and south of each other, leaving the land office to fish for contiguous fractions aggregating one hundred and sixty acres, is inadmissible. It violates the regulations, and is vague and indefinite. For this reason, as well as for the reason stated in your office decision, the same is hereby affirmed.

Overruled so far as in conflict,
29 L. O. 401

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MINING CLAIM—POSSESSION—EXPENDITURE.

STEWART ET AL. v. REES ET AL.

Under section 2332 R. S., possession of a mining claim, with work thereon, for a period equal to the time prescribed by the statute of limitations for mining claims in the State wherein such claim is situated, entitles the claimant to a patent thereto in the absence of any intervening adverse claim, even though it may appear that such claimant may have failed, through oversight, in making the requisite statutory expenditure thereon.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *December 4, 1895.* (P. J. C.)

The record shows that one John A. Pashley discovered, on January 9, 1871, the Jaw Bone lode, in the Indian Creek district, Helena, Montana, land district, and that he with nine others, located the same with two hundred feet for the discoverer, and two hundred feet in addition on the length of the lode for each of the locators.

Subsequently, Thomas M. Rees became possessed of said Jaw Bone lode through purchase, and on February 8, 1889, made application for patent therefor, together with the Jaw Bone mill site, lots 38, A and B, survey No. 2475.

During the period of publication the mill site was adversed and a suit brought thereunder.

On December 10, 1892, Rees filed a relinquishment and abandonment of said millsite, and made application to purchase the lode claim alone. A receiver's receipt was issued to him on that day, being mineral entry No. 2789.

On December 30, 1892, William Stewart *et al.*, filed a protest against said entry, alleging that they were the owners by location and possession of the Weaver lode claim, which corresponds in all respects by metes and bounds, and is identical with the Jaw Bone lode; that the owner of the Jaw Bone lode did not do the annual assessment or representation work on the same for the year 1890, and that for the year 1891 the work done amounted to but forty dollars; and that no annual assessment work had been done for the year 1892. They claimed that by reason of the failure to do the annual assessment work, the claim was subject to re-location under the United States statutes.

Your office, by letter of April 19, 1893, directed the local officers to order a hearing

to determine whether the required annual assessment work was performed by Rees, or by any one for him so as to maintain possession of the said Jaw Bone lode claim according to law for the year to which the entry was made or so that the claim was not subject to re-location as abandoned property by the protestants herein prior to the date of the entry.

The hearing was had before the local officers, and as a result they found that in December, 1891, the claimant resumed work on the claim, and at that time caused one hundred dollars' worth of annual labor to be done thereon; but that under section 2324 of the Revised Statutes he should have had two hundred and twenty dollars' worth of work performed; that the amount expended entitled him to retain possession of one thousand feet along the lode, and precluded the re-location of said lode as abandoned ground to that extent; that the claimant should be permitted to elect the one thousand feet that he would retain by reason of this annual assessment work, and that he would be entitled to possession and patent for any ground on said lode contiguous to the one thousand feet not included in any subsequent re-location; and that the claimant should have a survey made, segregating the land so selected, and that the entry be held for cancellation to the extent of the residue of the claim.

The protestants appealed, and your office, by letter of April 13, 1894, concurred in the finding of the local officers that one hundred dollars had been expended on the claim during the year 1891, and held that the "entry was allowed on one application based on one location, and evidenced by one location certificate." Therefore the claim was indivisible, and an entirety, and if the requirements of the statute had not been complied with in the matter of annual improvements, it became subject to forfeiture as an entirety, and held the entry for cancellation to the extent of the conflict with the location of the protestants.

Subsequently the claimant filed a motion for rehearing, on the ground that at the former hearing they were limited in the presentation of their

case to the terms of your said office order, which narrowed the issue down to the work done for the year 1891, and that he should have been permitted to prove that he or his grantor had held and worked said claim for the period given and the time prescribed by the statute of limitation for mining claims under the State or Territory in which the claim may be situated, which, in the absence of any adverse claim, which was the case here, was sufficient to establish a right to a patent thereto, under section 2332 of the Revised Statutes.

Your office, on June 24, 1894, denied this motion.

On June 30, 1894, the claimant filed an appeal, assigning error as follows—

First. It was error to hold that said mineral entry was forfeited and open to re-location in October, 1892, when it was shown and conceded that work had been resumed in 1891 sufficient to maintain possession for that year.

Second. Error not to have held that such resumption and possession prevented a legal re-location until the expiration of the year 1892, and a failure to do the work for that year.

Third. Error in not referring the foregoing propositions upon the protest of Stewart *et al.*

Fourth. Error in recognizing the protest of Stewart *et al.*, and allowing same after publication and proof by Thomas Rees.

It is conceded by the protestants that the claimant did some work on this mining claim in 1891, the value of which they place at forty dollars, while the claimant's witnesses put the amount at one hundred dollars. I concur with the finding of your office, which is in accord with that of the local officers, that the burden of proof was upon the protestants, and that they failed to overcome the *prima facie* case made by the claimant in this regard; and concur in the decisions below that the amount of labor done in 1891 was of the value of one hundred dollars. I also concur in your office judgment, holding that the charge as to the annual improvements for the year 1892 was premature at the time of this protest, inasmuch as the year had not expired within which the claimant might have done the work, and that no consideration should be given to that allegation.

The question presented by this appeal is a novel one, so far, at least, as the reports of the Department show.

Section 2324 of the Revised Statutes provides that—

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made for each one hundred feet in length along the vein, until a patent has been issued therefor; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

The Jaw Bone claim, as before stated, is two thousand two hundred feet in length, by one hundred feet in width. Under the plain terms of the statute, just quoted, it was necessary that two hundred and twenty dollars' worth of work should be annually performed thereon. One hundred dollars was the amount expended for the year 1891. The question raised, therefore, is, what are the rights of the parties here, claimant, re-locators and the protestants, under the law.

I think it may be said with perfect propriety that the protestants here are seeking to avail themselves of a technical failure on the part of the claimant to meet the requirements of the law, and thereby get possession of what appears to be a valuable mine. The report of the deputy surveyor shows that at the time of the survey there were on the mining claim three shafts, thirty, fifty, and ten feet deep, all timbered, and five tunnels, one of four hundred and fifty feet; one of two hundred and fifty feet, and three of fifty feet each, all timbered. The aggregate value of these improvements is fixed at \$7,440. To what extent these workings developed the lode is not shown, but it is fair to assume that the vein had been exploited to a considerable extent, as the mine had been largely worked in its earlier history. In addition to this development it is shown that the claimant had a stamp mill on the mill-site, valued at \$8,000. To secure the mining claim, together with all the improvements thereon, the protestants have expended about one hundred and forty dollars, according to their own estimate.

The case was tried by both parties on the theory that one hundred dollars' worth of work, or improvements, was all that was required, and this was the only issue presented or tried. There was no suggestion in the protest or in the evidence that a greater amount was required. The protestants tried to prove that the work was not worth one hundred dollars, and the claimant established the fact that it was. The point as to requiring ten dollars for each one hundred feet was barely suggested by counsel in their brief before the local officers, for the first time, so far as the record discloses. It is evident that at the time of the hearing this point was not considered. The claimant only contracted for one hundred dollars' worth of work, and that is the amount of money he paid. He did not seek to place any greater estimate, but was satisfied with that. So that it is apparent the claimant was acting in good faith, under the impression that he was complying with the law as applied to mining claims located after March 10, 1872, and as evidence of that, his affidavit of annual expenditure filed in the local office at the time entry was made states that at least one hundred dollars' worth of work was done by him each year for the years 1889, 1890, 1891, and 1892. Whether he had lost sight of the fact that his claim was located under the law of 1866, does not appear, but in view of the fact that he did not become possessed of the property until 1875, it is not unreasonable to suppose that he may have honestly overlooked this point.

It must be conceded that so far as is disclosed by the evidence, there has not been a full compliance with the law by the claimant. But it is a general principle of law that forfeitures are not favored, and in view of the apparent good faith of the claimant, the Department is justified in extending to him any opportunity to aid him in the protection of the property.

Without passing upon the other questions presented by the appeal, therefore, I have determined to grant claimant's motion for a re-hearing.

Section 2332, Revised Statutes, reads:

Where such person or association, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitation for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way to any mining claim or property thereto attached prior to the issuance of a patent.

It would appear from the this statute that if the claimant has been in possession and worked the Jaw Bone for the period described by the statute of limitations for mining claims in Montana, prior to the re-location by the protestants, he is entitled to have the same passed to patent, at least, as against these protestants. (*Glacier v. Willis*, 127 U. S., 471; *420 Mining Co. v. Bullion Co.*, 1 Mont. M. R., 114.)

In the affidavit accompanying the motion it is shown that the period of the statute of limitations of Montana for mining claims is five years; that the claimant and his grantors were in possession of and worked the Jaw Bone for ten years preceding the application for patent, and expended in work and improvements the sum of \$75,000 prior to 1891. If these matters can be shown, then, in my judgment, the protest should be dismissed.

It should be borne in mind that the application for patent was made in February, 1889, and the re-location made more than three years thereafter, in October, 1892, the entry of the mining claim having been suspended meantime, by reason of the adverse proceedings against the millsite. Thus it was through no laches on the part of the claimant that his entry had not been completed.

The case will therefore be remanded to the local office, with instructions to order a hearing, for the purpose of showing the possession and working of the claimant and his grantors prior to the application for a patent.

Your office judgment, on the motion for re-hearing, is therefore reversed.

CONTEST—PREFERENCE RIGHT—NON-CONTIGUOUS LAND.

McCORMACK *v.* VIOLET.

A successful contest against an entry from which one of the tracts covered thereby is eliminated as non-contiguous, on an intervening order of the General Land Office, confers no right as to the tract so released from the entry under attack.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (J. L.)

The land involved in this case is lot 10 of section 3, T. 11 N., R. 3 W. containing 16.24 acres, in Oklahoma City land district, Oklahoma.

The case comes before this Department upon the appeal of James M. McCormack from your office decision of July 31, 1894, affirming the decision of the local officers of January 2, 1894, rejecting said McCormack's application to make homestead entry of lots 6, 7, 8, 9, and 10 of section 3, aforesaid, for conflict as to lot 10 with Oscar H. Violet's homestead entry No. 6695, and his soldier's final certificate No. 186 of lot 10.

The facts are as follows—

On April 23, 1889, Calvin A. Calhoun made homestead entry of lots 6, 7, 8 and 9 of said section 3, lying contiguous to each other on one side of the North Canadian River, and of lot 10 of the same section lying on the other side of said river. The river had been meandered by the surveyors, and was delineated as a meandered stream on the official township map. Hence the subdivision into lots, of the NW. $\frac{1}{4}$ of said section 3.

Calhoun's entry was contested, on May 21, 1889, by one Echelberger, who alleged prior settlement and "soonerism;" and on May 27, 1889, by McCormack, who alleged prior settlement and bad faith on the part of Calhoun; and "soonerism" on the part of both Calhoun and Echelberger.

On January 25, 1890, one Robert B. Linthicum contested Calhoun's entry as to lot 10, alleging that said lot 10 was not contiguous to lots 6, 7, 8 and 9, being separated therefrom by a meandered stream; and that Calhoun had wholly abandoned said lot 10, and had never established residence thereon. Whereupon your office, by letter "C" of February 17, 1890, suspended Calhoun's entry, and allowed him thirty days within which to relinquish the land on one side or the other of the river.

Consequently, on March 17, 1890, Calhoun relinquished said lot 10 to the United States, and his entry was canceled as to that lot. From and after that date Calhoun's entry was recognized and treated by the officers of the Land Department, and by all parties in the ensuing controversy, as embracing only lots 6, 7, 8 and 9 of section 3 aforesaid.

The record does not show why Robert B. Linthicum did not exercise his preference right as successful contestant of said lot 10. On March 18, 1890, Oscar H. Violet made homestead entry No. 6695 of said lot 10,

which was thereby segregated from the public domain. On August 14, 1893, Violet made final proof as a soldier who was entitled to credit for service in the army, and on December 29, 1893, he was awarded final certificate for said lot 10. His final proof shows that he established his residence within six months after the date of his entry; built a six room frame house; made other commensurate improvements; and maintained residence and cultivation to the date of his final proof. Acts which must have been visible and notorious throughout the neighborhood.

On June 20, 1890 (after the cancellation of Calhoun's entry as to lot 10, and after Violet's entry thereof), Thomas J. Bailey filed an affidavit of contest against Calhoun and Echelberger for "soonerism," and also against McCormack for bad faith and speculation.

On October 20, 1890, Calhoun, Echelberger, McCormack and Bailey appeared as parties before the local officers, and waiving formalities and technicalities, proceeded with a hearing, the primary object of which was to cancel Calhoun's homestead entry as it then stood upon the records of the local office. The register and receiver had no jurisdiction over lot 10, which had been, as aforesaid, eliminated from Calhoun's entry. Their judgment, after the hearing, was in these words: "We therefore recommend that the contests of Echelberger and Bailey be dismissed, the homestead entry No. 19 of Calhoun be canceled, and that the contestant McCormack be awarded the preference right." The cancellation and the preference right referred to in said decision, were necessarily understood to be limited by Calhoun's entry, as it then stood uncanceled, embracing only lots 6, 7, 8 and 9, and excluding lot 10, which had been eliminated months before, in accordance with the rules, regulations and practice of the Land Department then in force.

On appeal by Calhoun, Echelberger and Bailey, your office, on June 8, 1892, found that lot 10 had been eliminated from Calhoun's entry by cancellation upon his relinquishment, and that "the contest has proceeded in respect to the remaining tracts," and therefore affirmed the decision of the local office. On November 22, 1893, this Department affirmed the concurrent decisions of your office and the local officers, after finding expressly that "lot 10 is not now in controversy." It is clear that McCormack's contest was sustained, and a preference right awarded him, only as to lots 6, 7, 8 and 9 of section 3, by all three of the decisions pronounced in his favor.

On May 29, 1891, in the case of Hattie Fuhrer (12 L. D., 556), this Department decided that the North Fork of the Canadian River should not have been meandered by the surveyors, and that thereafter it should not be regarded as a meandered stream. It was not the purpose or effect of the new rule thus promulgated to reopen cases that had been previously decided and closed, or to unsettle rights which had been acquired under a practice which the Department had sanctioned.

Your office decision was clearly right, and it is hereby affirmed.

The time prescribed by law for the exercise of McCormack's preference right has expired. Nevertheless, if there be no intervening adverse right under the rule prescribed in *Allen v. Price* (15 L. D., 424), and in circular of March 30, 1893 (16 L. D., 334), or otherwise, your office will permit McCormack to make entry of lots 6, 7, 8 and 9 of section 3, T. 11 N., R. 3 W., within thirty days after service of notice of this decision, if he elect to do so.

STATE SELECTION—HOMESTEAD SETTLEMENT—RIGHT OF ENTRY.

STATE OF WASHINGTON *v.* STREETER.

The State, in its selections for the benefit of scientific schools, can not take advantage of a homestead settler's failure to make entry within the statutory period after the land is open to such appropriation.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (J. L.)

This case involves the NE. $\frac{1}{4}$ of Sec. 27, T. 20 N., R. 12 W., Olympia land district, Washington. On April 19, 1894, James Streeter made homestead entry, No. 1220, of said tract of land, alleging settlement on April 15, 1892.

On July 24, 1894, your office directed the local officers to call upon the board of land commissioners for the State of Washington to show cause within thirty days why list No. 2 of selections for scientific schools filed March 6, 1894, should not be cancelled as to said tract of land, for conflict with homestead entry, No. 1220, for said tract made by James Streeter on April 1st, 1894; he alleging settlement on April 15, 1892, which was prior to the survey of the land.

Notice was served and the authorities of the State of Washington failed to take any action in the premises.

On September 28, 1894, your office after reciting the facts aforesaid, held the said list No. 2 for cancellation as to the tract above described. And on October 18, 1894, the State of Washington appealed to this Department.

The approved plat of the township aforesaid was received at the district land office on October 25, 1893, and the lands therein were opened for entries on November 24th. Streeter (for reasons stated in an affidavit filed with his application to enter), did not apply to make homestead entry of the tract upon which he was a settler, until after the end of three months after the dates aforesaid. He thereby forfeited his claim to the "next settler," in the order of time, on the same tract of land, who had given notice and otherwise complied with the settlement laws, if any such settler had appeared. See act of May 14, 1880 (21 Stat., 140), and sections 2265 and 2266 of the Revised Statutes. The State of Washington was not a settler, and therefore was not benefited by Streeter's delay aforesaid. At the time when the State's selection list No. 2 was filed, the tract of land in controversy had been and was appropriated by Streeter's homestead settlement.

Your office decision is hereby affirmed.

SALE OF ISOLATED TRACT—FEES—QUALIFICATION OF PURCHASER.

ISHAM R. DARNELL.

The local officers are not entitled to collect a fee from one who purchases at a public sale land sold as an isolated tract.

The purchaser at the sale of an isolated tract is not required to furnish an affidavit according to form 4-102 b.

(J. I. H.)

(J. L.)

This case involves the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 9, T. 2 N., R. 35 W., McCook land district, Nebraska. On June 26, 1894, said land was sold at public auction as an isolated tract in pursuance of section 2455 of the Revised Statutes of the United States. Isham R. Darnell, being the highest bidder, became the purchaser at one dollar and twenty-five cents per acre, and tendered the purchase money. The local officers demanded in addition the sum of five dollars as their fee for superintending the said sale, and required the purchaser to make and file an affidavit according to form 4-102 b. Darnell refused to do either, and the local officers reported that there was no sale.

Darnell appealed. On June 24, 1894, your office sustained Darnell's refusal to pay the five dollars, but held that he should make and file the affidavit required. And Darnell appealed to this Department.

I concur with your office in finding that there is no law authorizing the collection of any fee in addition to the price bid for the land. In the case of Charles H. Boyle, *ex parte*, reported in 20 L. D., 255, this Department decided that the purchaser at the sale of an isolated tract under section 2455 of the Revised Statutes, cannot be required to furnish an affidavit according to form 4-102 b.

Your office decision is, therefore, reversed. Darnell will be permitted to consummate his purchase, and perfect his cash entry, by paying to the local officers the price bid for the land.

PRACTICE—APPEAL—SURVEY—ERRONEOUS PLAT.

JOSIAH FLYNN.

An appeal will not lie from a refusal of the Commissioner to extend the public surveys over a tract of land.

Where the plat of survey does not correspond with the field notes, it should be corrected so as to exhibit the sub-divisions called for by the field notes.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (J. A.)

December 1, 1894, you transmitted the appeal of Josiah Flynn from the decision of your office of September 21, 1894, denying his petition for the correction of lottings on the plat of survey of T. 13 S., R. 1 W., Oregon City, Oregon, land district.

December 14, 1893, Josiah Flynn filed a petition with the surveyor-general, stating that donation land claim No. 37 of John Wibel was

located by special plat in sections 3, 4, 9 and 10, in said township, and that the north line of said claim was platted as being on the east and west division line of section 4; that claimant is the owner of land in the northeast fractional quarter of said section 4; that it appears from the field notes of survey of said donation claim that the northeast and northwest corners of said claim are respectively thirty and one hundred and thirty links south of the east and west division line of said section 4, thus leaving a strip of vacant land south of petitioner's land. He therefore requested that the plat of said township be corrected to correspond with the field notes of survey, and that the strip of vacant land be numbered so that he can make adjoining farm entry therefor.

The surveyor-general declined to recommend the petition, assigning as reason for his action that the matter involved is too trivial and that "a ruling in harmony with the petition would open a vast amount of work for the Department, and much unnecessary litigation."

In a letter to the surveyor-general, dated September 21, 1894, your office stated that the official plat of said township shows that the public surveys close on donation claim No. 37, and that there is consequently no vacant public land lying between said donation claim and the north half of said section 4. Flynn's application was therefore denied, and the surveyor-general was directed to inform him that he may appeal from said ruling.

The decision of your office does not deny Flynn any right. The attempted appeal is therefore dismissed. See *E. Y. Brashears et al.*, 16 L. D., 513.

I find that the field notes of the survey of said township and of the survey of donation claim No. 37 show that there is a strip of vacant land fifty-five chains and fifty links long, one hundred and thirty links wide on the west end and thirty links wide on the east end, between said donation land claim and the north half of said section 4. On the plat of survey of said township this strip of land is not lotted. The plat must be corrected to correspond to the field notes of the surveys, and it is so ordered.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

DILLON *v.* UNION PACIFIC RY. CO.

For the purpose of protecting a *bona fide* occupant, a railroad company may waive its right to a selection made under the act of June 22, 1874, and select another tract in lieu of the land first relinquished.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (F. W. C.)

With your office letter of September 24, 1895, was forwarded an application for writ of certiorari in the case of Isaac Dillon *v.* Union Pacific Railway Company, involving lots 3, 4, 5, and 6, Sec. 34, T. 14 N., R. 34 W., North Platte land district, Nebraska.

From the papers transmitted, it appears that by your office decision of March 13, 1895, the timber culture entry made by Isaac Dillon for the land above described, was held for cancellation for conflict with said company's right under a selection said to have been made of this land by the company on September 19, 1877, under the provisions of the act of June 22, 1874 (18 Stat., 194).

From said decision Dillon filed an appeal which he failed to serve upon the company, and your office decision of July 29, 1895, declined to accept the appeal, and for that reason the present writ of certiorari is filed.

From the statements made in the appeal filed by Dillon, it appears that in the year 1882 he purchased the land in question from the Union Pacific Railway Company, and in the following year the company canceled its contract of purchase and returned him the money paid for the land, assigning as a reason therefor that the company had not selected the same and was not the owner thereof.

Your office decision states that the company made selection of this land, as before stated, in 1877, per list No. 6, but the register of the land office at North Platte, Nebraska, certifies that he has examined said railroad list No. 6, on file in that office, and that the lands hereinbefore described do not appear upon said list.

Said list on file in your office has been examined since the case reached this Department and the lots in question are found to be included within said list. Upon the list is a note that the selection of the land in question was suspended for the reason that it appeared to be in conflict with an indemnity school selection, list No. 1, selected October 7, 1872, and approved July 6, 1877.

In his appeal Mr. Dillon states that by your office letter "G" of February 7, 1884, his timber culture entry made May 2, 1883, for this land, was held for cancellation for conflict with an approved school indemnity selection covering this land. Thereupon he made application to the State of Nebraska for the lands involved herein, and received a contract of purchase therefor. On November 25, 1884, the local officers were advised by your office that the alleged indemnity selection of this land for school purposes was error and that the lands were opened to entry by the first legal applicant.

Mr. Dillon, it appears, has since continued to use, cultivate and occupy the land, having made final proof upon his timber culture entry on March 13, 1886, upon which final certificate issued.

With the papers forwarded by your office is a letter dated July 17, 1895, from Messrs. Shellabarger and Wilson, attorneys for the Union Pacific Railway Company, in which it is stated that as

the land in question has been in the possession and occupancy of parties holding under timber culture entry No. 193, for many years the company is now willing to relinquish its rights acquired by such indemnity selection provided, however, they may be permitted to again select other lands in lieu thereof.

As before stated, the list on file in your office shows that the company made selection of this land in 1877, but as it is willing to waive any claim acquired by reason of such selection in favor of Mr. Dillon, a further consideration of its rights under said selection is unnecessary, and Mr. Dillon's entry will be relieved from suspension and examined with a view to the issue of patent thereon.

This selection was made, as before stated, under the act of June 22, 1874, in lieu of other lands relinquished by the company in favor of settlers, and the waiver of its claim under the selection under consideration, can in no wise prejudice the company's right to make another selection of other lands under the provisions of the act of 1874 in lieu of land relinquished by it in the first instance.

RAILROAD GRANT—LANDS EXCEPTED—INDIAN OCCUPANCY.

KINSWA *v.* NORTHERN PACIFIC R. R. CO.

The unauthorized occupancy and possession of public land by an Indian does not operate to except the land covered thereby from the grant to the Northern Pacific.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (I. D.)

The plaintiff in the case of Isaac Kinswa (Indian) *v.* Northern Pacific R. R. Co., appeals from your office decision of June 26, 1894, rejecting his application to make homestead entry for lot No. 9, Sec. 3, T. 12 N., R. 2 E., M. W. M., Vancouver land district, Washington.

This land is within the primary grant for the Northern Pacific Railroad Company, the withdrawal for which took effect August 13, 1870.

Kinswa lived on the land for twenty years before the grant; fenced it, cleared and cultivated it, built a house on it, and made it his home. In 1880 he made application to make homestead entry of it, which was refused because of the grant to the railroad company, and that being an Indian, his occupancy at the time the rights of the company attached did not except it from the grant.

He then applied to the company to purchase it and paid \$54 for it, being a fair price at that time for the land, not including his improvements, but it does not appear that he took any receipt or paper from the company.

September 11, 1870, this Department issued instructions to permit Indians who had renounced their tribal relations to make homestead entry, and it is urged that, under that order, his occupancy is such as would except the land from the grant. It is also urged that sections fifteen and sixteen of the act of March 3, 1875, cover this case. Vol. I. Supplement to Revised Statutes, page 167:

SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may

hereafter abandon, his tribal relations, shall; on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the (4) benefits of the act entitled, "An Act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act:

SEC. 16. That in all cases in which Indians have heretofore entered public lands under the homestead-law, and have proceeded in accordance with the regulations prescribed by the Commissioner of the General Land Office, or in which they may hereafter be allowed to so enter under said regulations prior to the promulgation of regulations to be established by the Secretary of the Interior under the fifteenth section of this act, and in which the conditions prescribed by law have been or may be complied with, the entries so allowed are hereby confirmed, and patents shall be issued thereon; subject, however, to the restrictions and limitations contained in the fifteenth section of this act in regard to alienation and incumbrance. (March 3, 1875.)

But in this case Kinswa had not "entered public lands under the homestead law." He simply had occupied the land, and his possession was unauthorized.

The order of 1870 referred to seems to have been without authority of law. Under the rules of the Department in the Northern Pacific Railroad Company *v.* Old Charlie *et al.* (18 L. D., 549), the right of the company under the grant was not defeated by Kinswa's possession.

This Department has no jurisdiction to enforce the performance of any contract to purchase that may have been made between the company and Kinswa.

Your office decision is affirmed and Kinswa's application to make homestead entry is denied.

FINAL PROOF PROCEEDINGS—HOMESTEAD CONTEST.

PETERSON *v.* BIRCH.

A party who does not appear to protest against final proof on the submission thereof, but subsequently files a contest against the entry, charging non-compliance with law, is not entitled to have the claimant placed on the witness stand for the purpose of cross-examining him on his final proof testimony.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (J. McP.)

Charles G. Peterson has appealed to this Department from your office decision of July 2, 1894, dismissing his contest against the final entry of James Birch.

It appears from the record that Birch made homestead entry No. 2815, for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 18, T. 51 N., R. 16 W., Duluth, Minnesota, land district, the land involved herein, on July 20, 1886; that on July 20, 1893, he offered final proof, and that on the last mentioned date the local officers at Duluth approved the final proof and issued final certificate No. 1622 thereon; that on October 25, 1893, you directed the local officers to order a hearing to consider the charges preferred against

said entry, filed September 20, 1893, by Charles G. Peterson; that when the case was called for trial, Peterson asked that Birch be placed on the witness stand in order that he might be cross-examined as to the testimony given by him on final proof; that the local officers refused to call Birch; that Peterson excepted to the ruling, and proceeded to examine other witnesses; that upon the conclusion of the case as made by Peterson, Birch demurred to the testimony offered, and refused to call any witnesses; that the local officers overruled Birch's demurrer, but after having considered the case, decided that Peterson had failed to make out a *prima facie* case, and dismissed his contest; that Peterson appealed to your office, whereupon the decision of July 2, 1894, of which Peterson now complains, was rendered by you.

The questions presented by the appeal are (1) was it error to refuse to call Birch for the purpose of cross-examination on his final proof testimony, and (2) was the showing made by Peterson sufficient to warrant the cancellation of Birch's entry?

I do not think it was error to refuse to call Birch for the purpose of cross-examining him on the testimony given in the final proof proceedings. Peterson did not appear when final proof was tendered by Birch, nor file any protest against the approval of the same, but two months subsequent to the acceptance of the proof and the issuance of final certificate he appeared, filed an affidavit charging that Birch did not reside on the land, and "that any proof of *bona fide* settlement that may have been heretofore made by said Birch on said tract and under said entry is wholly false and fraudulent." Peterson was given an opportunity to establish these charges, and the first step that he proposed to take was to subject Birch to a cross-examination on his final proof testimony.

The testimony given by the defendant in the final proof proceedings is not competent testimony, so far as its consideration in this case is concerned. It cannot be regarded as a part of the testimony in the case, and the defendant could not rely on it, in case the plaintiff made out a *prima facie* case. It would be manifestly unjust to the entryman to have him subjected to cross-examination on testimony given in an entirely different proceeding, and which could not be considered in his behalf.

I do not mean to say that Peterson had not the right to make Birch a witness for *plaintiff* to prove by him, if he could, the truth of the charges contained in the contest affidavit, but he expressly announced, when he called the defendant, that his object was to cross-examine him on his final proof testimony. I do not think, therefore, that it was error for the local officers to refuse the request.

While the final proof offered by Birch could not be considered as testimony in the case at bar, yet due regard must be given to the fact that the final certificate has been issued. *United States v. O'Dowd*, 11 L. D., 176.

It follows, that inasmuch as final proof has been offered and approved, and final entry allowed, the proof being regular and sufficient on its face, the burden of proof is on the contestant, and that he must show affirmatively that the final entry was procured by false and fraudulent testimony.

There was no positive testimony introduced in support of the charge that defendant had failed to reside on this land, and nothing indicative of such a failure, except, perhaps an inference, arising from the fact that the house in which he claims to have resided was a very poor one, and the improvements made on the land were not very extensive. Little, if any, weight, however, can be accorded this testimony, as three of the witnesses who testified as to the condition of the house, and as to the appearance of the cleared ground, did not see the land until the spring of 1893, almost seven years after the original entry was made, and only one witness saw the land prior to 1893, and he was on the land in November, 1891. He was questioned as to the condition of the house, and as to the existence of crops, but was not asked whether or not Birch was then absent from the land.

It is true that the testimony of these witnesses tends to show, and is not disputed that the testimony given by Birch's witnesses in support of his final entry, greatly exaggerated the extent and value of the improvements made by Birch, but it is shown by the witnesses for appellant that Birch did have a house on the land, and that he had about one acre of land cleared and some of it in cultivation.

There is no requirement of law as to the number of acres that a homesteader shall cultivate, nor is there any specification as to the size or value of the house in which he may reside.

Your office decision is affirmed.

TIMBER AND STONE ACT—OFFERED LANDS.

EDWARD P. HEATH.

The right of entry under the timber and stone act of June 3, 1878, and the act of August 4, 1892, amendatory thereof, does not extend to "offered lands," though the offering was made subsequent to the passage of the original act.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (J. L. McC.)

Edward P. Heath has appealed from the decision of your office, dated June 6, 1894, holding for cancellation his entry, under the timber-land act, for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 26, T. 143, R. 26, St. Cloud land district, Minnesota.

Said decision held that the land was not properly subject to entry under the acts of June 3, 1878 (20 Stat., 89), and August 4, 1892 (27 Stat., 348), having been offered May 3, 1883, at public sale, and never since having been withdrawn from entry.

In his appeal the appellant alleges that the language of the act permitted the entry as timber-land of all lands "which have not" (i. e.,

prior to the passage of said act,) "been offered at public sale;" and that, as the land in question had not, prior to June 3, 1878, been offered, but remained unoffered until May 3, 1883, therefore it is subject to entry under said act. In support of this contention he cites *United States v. Budd* (144 U. S., 154), and departmental instructions of February 21, 1893 (16 L. D., 326), especially the paragraph at the top of page 329: "Only those lands which belonged to the class of 'unoffered' lands on June 3, 1878, the date of the passage of the act, can be entered under its provisions." As this land "belonged to the class of 'unoffered' land on June 3, 1878," he contends that it is subject to entry under the act of that date.

The law cited is not, in my opinion, properly susceptible of so limited an interpretation. Because lands which were "offered" on June 3, 1878, were excluded from entry under the timber-land law, *non constat* that lands "offered" at a later date were also excluded. The decision of your office holding the entry for cancellation is affirmed.

CONTEST—INTEREST OF THE GOVERNMENT—PREFERENCE RIGHT.

BETTS *v.* SHUMAKER.

The government is always a party in interest, and may insist on a judgment of cancellation, if the evidence *clearly* shows a failure to comply with the law, whether the contestant is entitled to such action or not.

Where an entry is thus canceled, the right of the contestant, as a preferred entryman, will not be determined until such time as he seeks an exercise thereof.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1875. (W. A. E.)

John G. Shumaker has appealed from your office decision of July 9, 1894, affirming the decision of the register and receiver, and holding for cancellation his homestead entry, made September 5, 1892, for the SW. $\frac{1}{4}$ of Sec. 12, T. 103 N., R. 63 W., Mitchell, South Dakota, land district.

The affidavit of contest, filed March 7, 1893, alleges failure on the part of the entryman to establish residence on the land embraced in his said entry.

A partial hearing was had before the local officers on June 17, 1893, and the case was then continued, on motion of defendant's counsel, to September 18, 1893. On the latter named date the contestant introduced one additional witness and rested his case, whereupon the attorney for defendant moved to dismiss the contest on the ground that the charges had not been sustained, none of the testimony introduced by the contestant relating to a period prior to the date of contest. This motion being denied, the case was closed without the introduction of any testimony on behalf of the defendant.

The evidence submitted by the contestant shows that on March 7, 1893, the day the contest affidavit was filed, the only improvements on

the land consisted of a cabin, twelve feet square, with shed roof, no door or window, or other means of entrance; that there were cracks between the boards, the roof would not shed water, there was no furniture in the cabin, and no indications that it had ever been inhabited. Lewis Edwards, who lives in plain sight of the cabin, and has known the tract in controversy for about two years, testifies that he has never seen the defendant on the land but once, and that was on April 29, 1893, when the defendant spent one night there. Some time between April 24, and June 15, 1893, a door and window were cut in the cabin, and an old stove, a lamp, a stool made of boards, and some hay were placed therein. There was no further change in the condition of the cabin and its contents up to the date of final hearing in the case. Notice of contest was served upon the defendant at Charter Oak, Iowa, where he is engaged in business.

While it is true that none of the testimony relates distinctly to a period prior to date of contest, yet it is clear that for more than six months prior to final hearing the defendant had not resided upon the land, and he gives no excuse for his failure in this respect. The government is always a party in interest and entitled to judgment on the facts, however such facts may have been disclosed, and whatever the rights of the private parties to the contest may be as against each other. *Saunders v. Baldwin*, 9 L. D., 391.

The entry will be canceled, and the question as to whether the contestant should be allowed a preference right of entry will be suspended until such time as he seeks to exercise his supposed right by actually making an entry of the tract by virtue of that right. *Moore v. Lyon*, 4 L. D., 393.

Your office decision is affirmed.

RAILROAD GRANT—WITHDRAWAL—ADJUSTMENT—APPLICATION TO
ENTER.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* ST. PAUL MINNEAPOLIS, AND
MANITOBA RY. CO.

So long as a railroad company is able to specify satisfactory bases for indemnity selections it can not be held to have acquired lands in excess of its grant.

An application to make homestead entry of lands embraced within an existing indemnity withdrawal can not be allowed.

The priority of right on the part of the Northern Pacific as against the Manitoba Company, recognized by the Supreme Court in the case of the Northern Pacific R. R. Co. *v.* St. Paul and Pacific R. R. Co. (139 U. S., 1), is not applicable to lands within the indemnity limits of the former that were not included in the withdrawal therefor on its map of general route filed in 1870.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 7, T. 130 N., R. 36 W., St. Cloud land district, Minnesota.

The record shows that the above described tract is within the indemnity limits of the grant for the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent Extension), and also within the thirty miles first indemnity limits of the Northern Pacific Railroad grant.

The withdrawal for the St. Paul, Minneapolis, and Manitoba Railway Company was ordered February 15, 1872, and that for the Northern Pacific Railroad company on January 10, 1872.

July 31, 1884, the St. Paul, Minneapolis and Manitoba Railway company filed a list of selections in the district land office for the benefit of the St. Vincent Extension grant embracing the tract described above. A specification of lost lands, equivalent in area to the indemnity lands asked for, was made but not arranged tract for tract.

On June 15, 1894, in response to the rule required by the Department in the case of *La Bar v. Northern Pacific Railroad Company* (17 L. D., 406), a re-arranged list was made by said company for the same land as that set out in the list of July 31, 1884, tract for tract.

On October 5, 1886, Stephen Costello made homestead application for the above described tract, which was rejected by the local officers for the reason that the tract of land is within the twenty miles indemnity limits of the St. Paul, Pacific, St. Vincent Extension Railway Company, now the St. Paul, Minneapolis and Manitoba Railway Company, and selected July 31, 1884.

From this action Costello appealed and on July 19, 1894, your office decision was rendered affirming the action of the local officers.

The grounds of error alleged before the Department are the same as those presented to your office, and are as follows:

First.—That the company can not legally make selection for lieu or indemnity lands until it has ascertained and filed the amount of lands lost in the granted limits, made selections therefor, and the selections approved by the Secretary of the Interior;

Second.—That the company had already received title to more lands than it was entitled to under its grant.

In the Cedar Rapids case (110 U. S., 39), it was held that the right to select indemnity lands accrued with the definite location of the line of the railway.

In this case, on July 19, 1894, your office decision states upon the other question raised by the appeal of Costello—

The St. Vincent grant has not been fully adjusted but it is known, and the specification of loss in connection with the selection under consideration clearly shows that lands have been lost from the grant, and so long as the company is able to specify satisfactory bases for indemnity selections it cannot be held to have acquired lands in excess of its grant.

The conclusion drawn from the facts stated is correct and is affirmed.

As a further reason for the rejection of Costello's application, your office decision states that the withdrawal of February 15, 1872—

for the St. Vincent grant created a reservation and the land was not thereafter subject to disposal for other than railroad purposes. *Hestetun et al. v. St. Paul, Minneapolis and Manitoba Ry. Co.* (12 L. D., 27), where it was held (syllabus): "An application to enter cannot be allowed for lands embraced within an existing indemnity withdrawal."

See also *McFarlane v. Hastings and Dakota Ry. Co.* (12 L. D., 228), where it was held *inter alia*—

The withdrawal of indemnity land 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.

In May, 1892, the Northern Pacific Railroad Company applied to select said quarter section specifying a basis for such selection. Its application was rejected on account of the prior selection of the St. Paul, Minneapolis and Manitoba Railway Company. From this rejection the company appealed and your office decision of July 19, 1894, affirmed the action of the local officers in rejecting said application.

The Northern Pacific Railroad Company contends that this case should be governed by the case of the Northern Pacific R. R. Co. *v.* The St. Paul and Pacific Railroad Co. (139 U. S., 1). That case is not applicable because the land is not within the limits of the Northern Pacific R. R. Company's grant, as determined by the map of general route filed in 1870. See *Northern Pacific R. R. Co. v. Walters et al.* (13 L. D., 230); *Northern Pacific R. R. Co. v. Pettitt* (14 L. D., 591); *Meister v. St. Paul, Minneapolis and Manitoba Ry. Co.* (14 L. D., 624).

In addition to these views, the pending application of Costello to make homestead entry of this tract would have excepted the land from selection by the Northern Pacific Railroad Company.

For the reasons stated your office decision is affirmed.

RAILROAD GRANT—CHARACTER OF LAND—CERTIORARI.

BARNSTETTER v. CENTRAL PACIFIC R. R. CO. ET AL.

A hearing had as to the agricultural or mineral character of a number of tracts of land, claimed under a railroad grant, and a judgment thereon that a specific tract included therein is in fact agricultural, will not preclude a subsequent inquiry as to the character of said tract, on the protest of a mineral claimant, prior to the issuance of patent therefor, if the showing made is clear and convincing.

On the filing of an application for certiorari the local officers should be at once directed to suspend all action under the decision in question.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (F. W. C.)

I have considered the application for a writ of certiorari filed on behalf of Oscar Klose, in the matter of the action of your office in refusing to accept and forward an appeal filed by him from the order for a hearing made in your office letter of May 7, 1895, to determine the character of the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 7 E., M. D. M., Sacramento, California, issued upon a protest filed by James D. Barnstetter, alleging the same to be included in a mining location.

This land is within the limits of the grant for the Central Pacific Railroad Company.

Upon an application made on behalf of said company, to establish the non-mineral character of a number of tracts situated in four townships, among which was the SW. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 7 E., notice issued from the local office setting July 29, 1885, as the date for hearing.

No one appeared to contest the allegation made in behalf of the company, and the testimony of Kinzer Hardesty and W. H. Camp was offered to establish the non-mineral character of the said SW. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 7 E.

Both parties testified that they were by occupation farmers; that they had known the land for about three years; that some prospecting had been done upon the tract in gulches but nothing was discovered that led to mining since; that about fifteen years before the hearing a quartz ledge had been worked on said tract but the same was abandoned as worthless; that it is good grazing land, one hundred acres being capable of cultivation, and that a house had been built there, twenty-five acres cultivated and other improvements made upon the land.

Upon this showing said land was declared non-mineral by your office decision of February 28, 1890.

This land was afterwards listed by the company for patent and submitted for the approval of this Department in list No. 54, together with other lands listed by the company. Said list was returned by departmental letter of February 2, 1895, for the reason that

an examination of said list shows that the lands embraced therein are within a clearly defined mineral belt and I do not deem it safe to patent the same without publication of notice as required by departmental circular of July 9, 1894 (19 L. D., 21).

On April 3, 1895, the local officers transmitted a protest by James D. Barnstetter against the patenting of the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section three, to the railroad company alleging the same to be included in a mining location and praying for a hearing.

On April 9, 1895, the local officers transmitted the remonstrance of Oscar Klose against granting the petition for a hearing filed by Barnstetter, alleging that the question of the character of the land was *res adjudicata*; that he had purchased the land of the company upon the decision of your office in 1890, finding the same to be non-mineral; and that Barnstetter having failed to establish his title to the land in the courts is seeking the support of the government in his effort to prove the mineral character of the land which it has not acquired since it was fairly declared to be non-mineral.

In the consideration of the showing made your office letter "N" of May 7, 1895, found that "the affidavits filed on behalf of the intervenor overcome those filed by the mineral claimant who failed to locate the

mining claim until 1893, although alleging many years acquaintance with the land," but ordered a hearing for the reason that until patent issues the Department is empowered to inquire into the status of the lands, and as the list including this tract had been returned for publication under the circular of July 9, 1894 (*supra*), the allegations made by Barnstetter were evidently considered sufficient upon which to direct a hearing under said circular.

Application is made for a writ of certiorari upon the ground that the question as to the character of this land, that is, whether mineral or non-mineral, is *res adjudicata*. As thus presented the question is very similar to that considered in the decision in the case of *Zadig et al. v. Central Pacific R. R. Co. et al.* (20 L. D., 26) in which it held:

Pending protest proceedings, in which a general charge is made that certain lands claimed under a railroad grant are in fact mineral in character, will not defeat the rights of a mineral claimant, who sets up a specific claim, to be subsequently heard on a similar allegation as to the character of the land in the event that the first proceedings fail.

The effect of a decision in a previous proceeding, similar to that held in this case upon the company's application to show the non-mineral character of certain lands returned as mineral within the limits of its grant, is very different from an adjudication arising upon the assertion of claim under the settlement laws as against the return of the surveyor.

In the latter case, the adjudication being that the land is non-mineral, would estop subsequent inquiry as to the character of the land as against such claimant in the absence of a charge of fraud in the first proceeding, for to defeat his claim it must have been known to be mineral land at the date of his entry.

In the case of a railroad grant, however, the discovery of mineral at any time prior to the issue of patent defeats the grant and the purchaser from the company takes only in the event that the land passes under the grant.

Where there has once been a hearing, however, the showing made to support a second hearing should be very clear and convincing, but your action in ordering a second hearing will not be disturbed unless it is shown that the discretion exercised was clearly an abuse of the authority reposed in you.

Your office decision states that the affidavits filed in this case were forwarded to the local office as the basis for the hearing ordered, and as copies of the same do not accompany the application for the issue of the writ, I am unable to determine the nature of the showing made.

I must, therefore, deny the application and the papers accompanying the same are herewith returned.

In this connection I learn that it is not the practice of your office in cases similar to the one under consideration to direct the suspension of proceedings under the order for a hearing upon the filing of an application for certiorari.

Rule of practice 83, provides:

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

The suspension of action here referred to would seem to be the suspension of *all* proceedings arising under the decision from which the appeal is sought to be taken, and in future, I have to direct, that upon the filing of an application for certiorari from the decision or action of your office, that the local officers be at once advised and directed to suspend action under the decision in question.

HOMESTEAD CONTEST—PREMATURE CHARGE—MOTION TO DISMISS.

HAGUE *v.* GILLIARD ET AL.

Where an affidavit of contest against a homestead entry is premature when presented, and properly subject to rejection for such reason when offered, but such action is not taken, and the local officers subsequently, and after the expiration of more than six months from the date of the entry under attack, authorize publication of notice, the contest should not thereafter be dismissed as premature on the motion of a stranger to the record.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (C. W. P.)

The land involved is the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 1 and 2 of section 30, T. 17, R. 7, Kingfisher land district, Oklahoma Territory.

The record shows that on April 29, 1892, Benjamin Gilliard made homestead entry of said land; that on October 25, 1892, Reuben Hague filed affidavit of contest, alleging that Gilliard had failed to establish residence on said land, and that he (Hague) "is a settler upon said tract of land;" that on October 31 following, Richard W. Brown and Matthew A. Williams filed affidavits of contest, alleging abandonment and failure to establish residence by the entryman.

No notice of Hague's contest appears to have been issued by the local officers, and on January 9, 1893, Hague filed an affidavit for notice by publication, which was granted by the local officers; but the record does not show whether publication was made or not. Hague died on or about March 10, 1893, and on March 20, following, Anna Hague appeared at the local office and asked to be substituted in place of her deceased husband, as contestant. This motion was granted. On April 24, 1893, she asked for an order to make service by publication.

On a motion filed by said Williams to dismiss Hague's contest on the ground

That on the 25th of October, 1892, there was filed in said office by one Reuben Hague contest No. 1830 against said entryman and said tract of land alleging abandonment

and failure to settle upon same as required by law, and also that affiant was a settler upon said tract of land; that said contest, No. 1830, was prematurely filed, and the allegations are insufficient to cancel said entry, and the contestant gains no right by said contest or by said settlement,

The said contest was dismissed by the local officers, and a hearing was allowed on Williams' contest; from which action Anna Hague appealed, and Williams and Brown filed answers thereto.

Your office reversed the judgment of the register and receiver, and ordered that Anna Hague be allowed to proceed with her contest, and that the contests of Williams and Brown stand subject thereto.

R. W. Brown appealed to the Department.

Had the local officers refused to accept Hague's affidavit of contest on the ground that it was premature, their action would have been correct, but instead of that they appear to have taken no action until Hague filed an affidavit for notice by publication on January 9, 1893, when they authorized him to give said notice. This was long after the expiration of six months from the day of entry, and I think that after such action the contest should not have been dismissed on the ground that it was premature.

In *Hemsworth v. Holland* (8 L. D., 400), it was held that the rule that a contest is prematurely brought, if filed before the expiration of six months and a day, applies only to the contestee, for the reason that he can at any time before the expiration of that period defeat the contest by curing his laches. And in *Seitz v. Wallace* (6 L. D., 299), it was held that, as an affidavit of contest is only in the nature of an information and not essential to a contest, and jurisdiction is acquired by service of notice, and not by the contest affidavit, the authority of the Land Department to entertain a contest is not abridged by the fact that the affidavit of contest was filed before the expiration of the period covered by the charge, where the notice was served *after* such period.

The rules of Practice require it (the affidavit) as evidence of good faith on the part of the contestant, but contests have been allowed when no affidavit has been filed at all.

And in *Hoffman v. Gerould* (13 L. D., 124) it was held that, when an affidavit of contest setting forth a statutory ground of cancellation has been filed and notice issued, the contest is regularly initiated, so far as a stranger to the record is concerned, and cannot be dismissed prior to the day fixed for hearing and without notice to the contestant. In *McClelland v. Crane* (Id. 258), McClelland on or about March 20, 1888, appeared at the local office with the intention of filing a contest against the entry of one William Munch, made March 23, 1887, on the ground that the claimant had not complied with the law as to the first year's requirements. He was advised by the local officers and his attorneys that a contest filed at that time would be premature and that he had better wait until the year had expired. On March 23, 1888, Crane appeared at the local office and filed a contest against the entry.

On the next morning McClelland returned to the office and was allowed to file his contest. Notice was issued on both affidavits, service obtained, and a hearing had. On the trial McClelland moved to dismiss Crane's contest on the ground that it was prematurely brought. His motion was overruled, and McClelland appealed. The Commissioner affirmed the action of the local officers, and McClelland appealed to the Department. It was held by the Department that as the hearing was fixed for a time long after the expiration of the year in which default was charged, and the notice could not have been served until the expiration of that year, and as jurisdiction vests in the local office by reason of notice, and not by affidavit of contest, the contest was not prematurely brought.

On the authority of these cases, I am satisfied that Hague's contest—so far as the rights of the subsequent contestants, Williams and Brown, are affected by it—was not premature, and I affirm your office decision.

HOMESTEAD CONTEST—DESERTED WIFE.

STRATTON *v.* KECK.

The validity of a homestead entry made by a deserted wife is not impaired by the subsequent return of the husband and resumption of the marital relation, where such entry is made in good faith, and with no intent on the part of the wife of ever resuming marital relations with her husband.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (C. W. P.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of section 10, T. 18 N., R. 4 W., Kingfisher land district, Oklahoma Territory.

The record shows that Elizabeth C. Keck made homestead entry of said tract December 17, 1892.

January 3, 1893, Charles Stratton filed affidavit of contest, alleging abandonment and failure to comply with the homestead law, and that Mrs. Keck

is not a qualified homesteader, for the reason that she is a married woman, and is now residing with her husband, and the said Elizabeth Keck was at the date of entry a married woman, and not a divorced or abandoned wife.

A hearing was had. The local officers held that the charge of abandonment and failure to comply with the homestead law was not proven, and that

on December 17, 1892, the defendant occupied the position of a deserted wife, and, as such, was qualified to make homestead entry.

Contestant appealed. Your office affirmed the judgment of the local officers. Contestant appeals to the Department.

The testimony shows that about November 15, 1892, the defendant had a quarrel with her husband in regard to certain property that each claimed; that they were aged people and had been married four

or five years. At the time of their marriage both of them had children nearly of age. Disturbances were frequent, and on November 15, 1892, the husband left their home and took up his abode with his son, manifestly with the intention of never returning to his wife. They were then living on their homestead, (the NW. $\frac{1}{4}$ of Sec. 17, T. 18, R. 4) and the husband was also cultivating the land in dispute,—the SE. $\frac{1}{4}$ of Sec. 10, T. 18 N., R. 4 W., holding possession as heir at law of a deceased daughter. It also appears that a long time prior thereto, on February 1, 1892, the defendant filed an affidavit against her husband's entry, alleging that he was threatening to relinquish his homestead, and that she had reason to fear that he would desert her and relinquish the land for the benefit of his son, Lee Keck, and she asked that her rights in the premises be protected. On November 15, 1892, after the desertion of the defendant, her husband relinquished his homestead entry, and his son, Frank Keck, made entry thereof. On November 26, 1892, the defendant filed a contest against Frank Keck's entry, alleging that she was the first *bona fide* settler and had been living thereon since August 2, 1889. On December 10, 1892, defendant filed at Guthrie her complaint for divorce. On December 15, 1892, the parties, for the purpose of ending all litigation and dividing the property between them, entered into an agreement whereby it was agreed that the land in dispute, which the husband held as heir of his daughter, should be relinquished and the defendant permitted to make entry thereof. In pursuance of this agreement the husband filed his relinquishment, the defendant made her entry, and her husband moved his corn, oats and other property from their home to his son's, where he was then living. After Christmas, about December 27, 1892, a reconciliation was effected between them, and they resumed their marital relations.

The charge of abandonment and failure to comply with the homestead laws is not supported by the evidence. I agree with your office that the testimony shows that the status of Mrs. Keck, at the time she made her entry, was that of a deserted wife, depending upon her own resources for support, and entitled to make a homestead entry as the head of a family. Her subsequent reconciliation and renewed cohabitation with her husband goes only to her good faith; and considering all the circumstances, I can come to no other conclusion than that she made her entry in good faith, and without any intention of ever resuming marital relations with her husband.

Believing your office decision to be right, it is affirmed.

RAILROAD GRANT—CONDITION SUBSEQUENT—FORFEITURE.

ROUSE *v.* CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

The forfeiture of a railroad grant, on the failure of the company to construct its road within the period fixed by the granting act, can only be enforced through the courts, or by action of Congress. An applicant for public land can not set up such failure, to secure favorable action on his application, nor avail himself of the fact that the company in constructing its road deviated from the original line, if the land claimed is within the granted limits of the road as originally located and finally constructed.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 1, T. 102 N., R. 30 W., Marshal land district, Minnesota.

The record shows that the above described tract is within the primary or ten miles limit of the Southern Minnesota Railway, and was at the date of the granting act of July 4, 1866, and of the attachment of rights of the company thereunder, February 25, 1867, unappropriated public land.

October 13, 1890, C. E. Rouse made timber culture entry for the above described tract.

May 22, 1894, your office decision held the entry for cancellation for conflict with the rights of said railway company from which decision the plaintiff appealed.

Plaintiff urges in his appeal that inasmuch as the act of July 4, 1866 (14 Stat., 87), provided in section four that if the railroad was not completed to the western boundary of the State within ten years, all of the lands granted and not patented should revert to the United States. That the grant was accepted by said company on February 25, 1867, and that—

by the act of the Minnesota legislature of March 6, 1878, the charter of the Southern Minnesota Railway company was forfeited and its rights and privileges were granted and transferred to the S. M. Ry. Ex. Co., and at the same time the new company commenced building a railroad from Winnebago City to the western boundary of the State on an entirely new and different route and one unknown to the Department at Washington; that said act of the legislature was never ratified by any act of Congress and the same was never extended by any authorized power, and that if the plain provisions of the granting act are adhered to and executed the company's claim must fail as to this tract.

In 1879 Attorney General Devins, under date of November 29, of that year (16 Op., 397), held the condition here to be a subsequent condition and that it would take legislative or judicial forfeiture to restore the lands to the public domain.

In the *Schulenberg v. Harriman* case (21 Wall., 44; 88 U. S., 44), it is held, *inter alia* (syllabus):

First, that the act of June 3, 1856, and the first section of the act of May 5, 1864, are grants *in praesenti* and passed the title to the odd sections designated to be after-

wards located; when the route was fixed their location became certain and the title, which was previously imperfect, acquired precision and became attached to the land;

Second, that 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 legislation or judicial proceedings to enforce a forfeiture of the grants.

Again, in *Van Wyck v. Knevals* (106 U. S., 360), after holding that the grant was one *in praesenti*, the court held—in referring to the St. Joseph and Denver City Railroad Company which had failed to complete its road within the time mentioned in the act—

On the failure of the company to complete the work, a forfeiture of the grant, if it resulted therefrom, can be enforced only by the United States through judicial proceedings, or the action of Congress. A third party cannot set it up to validate his title, nor avail himself of the fact that the company in constructing deviated from the original line, if the lands which he claims are within the prescribed distance from it and the road as built.

This case appears to be exactly in point inasmuch as it is asserted in brief of counsel for defendant that the land in controversy is within the ten miles limits, both as the line was originally located and as subsequently constructed which allegation is not denied by the appellant.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—LANDS EXCEPTED—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. Co. v. RANKIN.

A settlement right existing at the date of definite location excepts the land covered thereby from the operation of a railroad grant. The subsequent change of the settler's intention to take the land as a pre-emption claim, and his appropriation thereof under the desert land law, are matters not affecting the right of the company.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 15, T. 4 S., R. 9 E., Bozeman land district, Montana.

The record shows that on May 7, 1889, David P. Rankin made desert land application for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 14, the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of Sec. 22, the fractional N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the fractional SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21, T. 4 S., R. 9 E.

This land is within the limits of the grant to the Northern Pacific Railroad Company, the definite location of the line of which road was filed in your office July 6, 1882. It was also within that portion of the Crow Indian Reservation, made under the treaty of May 7, 1868 (10 Stat., 649), which was sold by the Indians to the United States on June 12, 1880. Its sale was ratified by Congress April 11, 1882 (22

Stat., 42). It, therefore, on that date, became a part of the public domain (5 L. D., 138).

The only portion of the above described tract that had any claim existing to it at the date of the definite location of the road on July 6, 1882, was the tract involved.

It appears from the evidence in this case that some time in June, 1882, one David P. Rankin, the defendant respondent went upon this land, and erected the foundation of a house; enclosed the land with a fence, and put up notices of his intention to take this land under the pre-emption law. At that time the land was not surveyed, the survey being made August 4, and 10, 1886, and was filed in the local office June 25, 1888.

At the hearing ordered before the local officers, on June 30, 1893, they rendered their decision in favor of Rankin. Upon appeal, your office decision of May 11, 1894, affirmed their recommendation.

The question is: Will acts of settlement by a qualified pre-emptor, who gave notice by posting that he intends to take the land under the pre-emption law, serve to operate to defeat the grant to the railroad company?

It will be noticed that the acts of settlement of Rankin were only about a month prior to the date at which the rights of the railroad company could have attached. The general rule seems to be that each of these cases must depend upon the particular facts surrounding it.

Subsequently to the survey of the land, the respondent made desert land application for this, together with other land, thereby abandoning his prior intention of pre-empting the tract, but it does not appear that the railroad company can be heard to object to this, as Rankin's settlement and occupancy defeated the attachment of the grant upon the filing of the map of definite location.

The evidence seems to show, without contradiction, an intention upon the part of David P. Rankin to pre-empt this land, and such acts of settlement and occupancy existing at the date at which the rights of the railroad company would otherwise attach, as were notice to the world of his intention; and the fact of a change of intention upon the part of the respondent thereafter, is a matter in no wise of legal moment to said company, inasmuch as its right had already been determined.

The decision appealed from is therefore affirmed.

CONTEST—RELINQUISHMENT—PREFERENCE RIGHT.

SPROAT *v.* DURLAND.

A relinquishment executed after a hearing on a contest, and award of preference right thereunder to the contestant, cannot operate to defeat or impair the right so recognized.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (C. J. G.)

The land involved in the above entitled case is the NE. $\frac{1}{4}$ of Sec. 34, T. 12 N., R. 3 W., Oklahoma land district, Oklahoma.

The record shows that Katie A. Woodruff made homestead entry for this tract April 27, 1889. Soon thereafter M. C. Lawrence, Otto C. Durland, C. W. Ashinger and J. A. Blackburn made applications to contest Woodruff's entry, alleging prior settlement. Durland's affidavit of contest was filed May 8, 1889, and in addition to the charge of prior settlement he alleged the disqualification of Woodruff by reason of her premature entry into the Territory. These cases were consolidated, a hearing was ordered, at which Blackburn defaulted, and the other parties submitted testimony. The local office dismissed the contests of Lawrence and Ashinger, recommended the cancellation of Woodruff's entry, and awarded preference right to Durland. From this decision Lawrence, Ashinger and Woodruff appealed, but by your office letter of September 3, 1892, said decision of the local office was affirmed. Lawrence and Woodruff then appealed to this Department.

On April 22, 1893, and while Woodruff's appeal was pending before this Department, Samuel Sproat, the plaintiff herein, made application to contest Woodruff's entry, for the reason that she had entered the Territory of Oklahoma during the prohibited period prior to April 22, 1889. He also alleged that Durland and Lawrence were disqualified from entering the land in controversy for the same reason.

April 29, 1893, Katie A. Woodruff relinquished her entry and withdrew her appeal to this Department. Her entry was canceled and Otto C. Durland was allowed to make homestead entry No. 6976.

June 1, 1893, M. C. Lawrence filed the withdrawal of his appeal in the local office.

In view of Woodruff's relinquishment, the papers which were in this Department on appeal were returned to your office without action.

July 3, 1893, Samuel Sproat filed an affidavit of contest against Durland's entry. This was in the nature of an amendment to his former affidavit of contest referred to above. He alleges

that the said entry of defendant Otto C. Durland is illegal and inoperative as against affiant for the following reasons, to wit: 1st. That plaintiff Samuel Sproat is and was on April 29, 1893, an actual bona fide settler and resident of and upon said tract on said 29th day of April, 1893, and was settled and residing thereon at the very moment that the relinquishment of Kate Woodruff's (now Howe) entry was filed in said U. S. Land Office, and had lasting and valuable improvements on

said tract, and is entitled to make entry thereof as the prior legal settler thereon, and that affiant is a duly qualified homestead entryman under the homestead laws of the United States.

2nd. That said entry No. 6976 is illegal and void, as affiant is informed and verily believes, for the reason that said Otto C. Durland entered the Oklahoma country and upon the lands opened to settlement and entry by the act of Congress of March 2, 1889, and the President's proclamation of March 23, 1889, issued thereunder, between the 23d day of March and prior to 12 o'clock noon of April 22, 1889, in violation of said act of Congress and of said proclamation.

August 3, 1893, Sproat filed a motion to have the case held in abeyance until the contest case of *Durland v. Woodruff* should be disposed of, and said motion was granted.

The action of this Department in the case of *Durland v. Woodruff* was promulgated by your office letter of January 14, 1894, and the case was closed accordingly.

On the day set for the hearing of Sproat's charges, April 16, 1894, Durland

demurred to the affidavit of contest herein, in so far as the same attempts to set up any prior settlement on the part of said plaintiff, for the reason that said affidavit of contest wholly fails to state a valid prior settlement claim against this defendant, it appearing from the record that this defendant is the successful contestant in the case of *Otto C. Durland v. Katie A. Woodruff et al.*, involving the tract now in dispute.

Defendant especially states that he interposes no objection to the plaintiff's proceeding with the charge of "soonerism" contained in plaintiff's complaint.

The plaintiff thereupon withdrew his allegation that Durland had entered the Territory of Oklahoma during the prohibited period, but amended his affidavit of contest by charging that Woodruff's relinquishment was not the result of Durland's contest. Notwithstanding this amendment the local office sustained the defendant's demurrer. From this action the plaintiff duly appealed.

In your office decision of May 22, 1894, you stated,

I find the allegation that Woodruff's relinquishment was not the result of Durland's contest was sufficient to warrant an investigation, therefore your action sustaining the demurrer is not sustained,

and you ordered a hearing accordingly.

May 29, 1894, Durland by his attorney filed in your office a motion for review.

After a reconsideration of the case, your office on August 3, 1894, rescinded your action of May 22, 1894, and refused to allow a hearing on plaintiff's allegations. Whereupon Sproat appealed to this Department. His specifications of error are directed substantially to Woodruff's relinquishment and its presumptive relation to Durland's contest, and the rights of contestant as an alleged prior settler.

The principal questions to be considered by this Department are, whether the relinquishment of Katie A. Woodruff was or was not the result of Otto C. Durland's contest, and if it was not, then whether the fact of her relinquishment gave the preference right of entry to Samuel

Sproat, granting as alleged that he was a *bona fide* settler on the land at the date of said relinquishment. Also, whether the fact of the relinquishment, on whatever grounds it was executed, can defeat the preference right of Durland gained by his successful contest of Woodruff's entry. The authorities agree that a relinquishment filed during the pendency of a contest is presumptively the result of the contest. *Webb v. Loughrey et al.* (9 L. D., 440), and the cases therein cited.

It has been repeatedly held also, that

a relinquishment filed during the pendency of a contest will not be permitted to defeat the right of a contestant, if the evidence submitted warrants cancellation of the entry on the charge as laid by him. *O'Connor v. Hall et al.* (13 L. D., 34.)

Following in the line of these decisions, therefore, your office decision of May 22, 1894, was manifestly erroneous. The ordering of a hearing for the purpose of investigating whether or not Woodruff's relinquishment was the result of Durland's contest was evidently on the principle that while a relinquishment filed during the pendency of a contest is *prima facie* the result of the contest, still such a presumption may be overcome. The object of the proposed hearing was to allow Sproat an opportunity to show that the relinquishment of Woodruff's entry was not the result of Durland's contest; in which event Durland's rights would depend upon his ability to sustain the charges as laid by him in his contest affidavit. There are many cases in which this principle has been invoked and relied upon. But the case before me differs from most of the decisions referred to in that the relinquishment was made after a hearing on Durland's contest affidavit was had, after he had proved his allegations and had been awarded a preference right of entry. The question of whether a relinquishment filed pending a contest is or is not the result of the contest, seems to apply to cases where the contestant has not already established the allegations of his affidavit of contest. There are many such cases. There is no question, therefore, that where a relinquishment is filed after initiation of contest and before hearing, a contestant is given opportunity to establish the truth of his allegation; which done, the relinquishment is not permitted to defeat his preference right. By parity of reasoning it follows that a relinquishment filed subsequent to hearing ought not to defeat his entry when the contestant has already established his allegations.

Granting that the relinquishment in this case was not the result of the contest, and that Durland is thereby thrown upon his ability to sustain the charges as laid by him in his affidavit; he has already done this to the satisfaction of the local office and your office. He has never invoked the aid of the relinquishment, but independently thereof has proved the charges alleged by him, and consequently the relinquishment has no effect on his preference right, no matter whether it was the result of the contest or of purchase.

It must be borne in mind that Durland had gained his preference right through his successful contest of Woodruff's entry, on the ground

of illegality. That right attached prior to the filing of her relinquishment. Durland had proved that Woodruff's entry was unlawful. During the pendency of the contest the land was segregated, and by the concurring decisions of the local office and your office the right to enter this land was given to Durland. Consequently no act of Woodruff's should be allowed to defeat that right. Woodruff's relinquishment and the withdrawal of her appeal to this Department left Durland in the position he was placed by the decision of September 3, 1892, which gave him preference right. In her relinquishment and the withdrawal of her appeal to this Department Woodruff surrendered every right she was contending for in said appeal. The concurring decisions of the local office and your office had never been reversed. The action of this Department in returning the papers without further action, after the relinquishment was filed and the appeal withdrawn, was virtually a judgment of cancellation in favor of Durland; and the basis of that action was a presumption that the relinquishment was a result of the contest. And the contest of Sproat cannot be regarded in any other light than a proceeding to vacate or annul a judgment of the Department already rendered.

A second contestant cannot question collaterally the sufficiency of the evidence upon which the judgment of cancellation in a prior contest against the same entry is founded. *Campbell v. Middleton et al.* (7 L. D., 400.)

Even if it were material to know the cause of Woodruff's relinquishment it might be very well presumed from the circumstances. Her entry was held for cancellation by the concurring decisions of the local office and your office, and pending her appeal she filed the relinquishment. This made action by this Department on her appeal unnecessary; but to all intents and purposes her entry was canceled. The fact of her relinquishment did not affect the concurring decisions, as to cancellation, already rendered. And with these concurring decisions before it, and the subsequent relinquishment by Woodruff and the withdrawal of her appeal, this Department could very legitimately conclude that said relinquishment was the result of Durland's contest, to whom had already been awarded the preference right of entry. And this notwithstanding the corroborative affidavit filed by the plaintiff.

While it is argued, that where the relinquishment is not the result of the contest no preference right attaches, and that the purchaser of a relinquishment pending his contest acquires no preference right as against a settler on the land, yet in the case before me the contestant Durland had already secured his preference right by proving the charges set forth in his affidavit; a right which could not be defeated by the act of relinquishment on the part of the entrywoman whose entry he had successfully contested. It can hardly be claimed that a relinquishment executed subsequent to a hearing and award of preference right can have a retroactive influence to delay or defeat the exercise of that right. It seems fair to suppose that had there been no relinquishment,

and taking all the circumstances surrounding this case into consideration, the case pending on appeal by Woodruff would have resulted in sustaining the concurring conclusions already reached. From the standpoint of equity alone, it would seem that Durland should not be deprived of the fruits of his diligence.

It is unnecessary to consider at length whether or not plaintiff's contest affidavit stated any cause of action on his claim of prior settlement. Durland filed his affidavit of contest May 8, 1889. His right attached by relation as of the date when his affidavit was filed (*Westenhaver v. Dodds*, 13 L. D., 196). Besides, in view of Durland's successful contest against Woodruff's entry, the allegation of prior settlement is immaterial (*Paulson v. Richardson*, 8 L. D., 597; *Gilmore v. Shriner*, 9 L. D., 269).

I therefore affirm your office decision of August 3, 1894, wherein you deny the plaintiff a hearing.

TOWNSITE ENTRY—CONTIGUOUS TRACTS—MINERAL LANDS.

MCCHRISTAL ET AL. *v.* EUREKA TOWNSITE.

A townsite entry may be allowed to embrace non-contiguous tracts where the original application was for contiguous lands, and the subsequent non-contiguity is caused by the exclusion of mineral lands covered by said application.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (E. M. R.)

This case involves the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lots 2 and 3, of Sec. 18, T. 10 S., R. 2 W., and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, of Sec. 13, T. 10 S., R. 3 W., Salt Lake City land district, Utah.

The record shows that on November 17, 1890, Charles Foote, probate judge of Juab county, Utah, applied to make cash entry, under section 2387 of the Revised Statutes of the United States, of a tract of land for the benefit of the inhabitants of Eureka in said county.

On November 26, 1890, the application was rejected because

the application does not describe the land by legal subdivisions, and while the tract is alleged to be non-mineral in character, certain mining locations and entries within the area applied for are excluded, thus leading to the conclusion that the land is mineral and not subject to townsite entry.

From that decision no appeal was filed, but, subsequently, on January 23, 1891, another application was filed by the same party, for the benefit of the same townsite, for the above described tract.

In the affidavit of the applicant, corroborated by one McMurphy and one Price, it is set forth that the land was occupied by about twenty-five hundred persons and that there were situated thereon ten stores, four hotels, fifteen saloons, one Odd Fellows' building, one bank, one school house, three churches and six hundred dwellings. It was also

set out that there were various mining claims which had never been surveyed, located on the land, and that it was therefore impossible to exclude them, even if it were so desired; that in fact all the land included within said application for patent was non-mineral in character, and applicant asked that a hearing might be ordered to determine—

- First.—The mineral or non-mineral character of the lands herein applied for;
- Second.—The fact of prior occupancy as herein set forth;
- Third.—Of other matters material in determining the rights of a townsite applicant as against all other parties in interest.

On November 23, 1890, it being at a time between the date of the rejection of the first application and the filing of the second, John McChrystal filed a corroborated protest alleging that the ground embraced in the first townsite application is mineral in character, and praying that a hearing might be ordered to determine the truth of the protestant's allegations.

The local officers ordered a hearing, and set June 1, 1891, as the date therefor. The hearing was called on August 12, 1891, at which time Judge Foote filed a relinquishment of so much of the ground applied for under the townsite application, as was within the limits of the Last Chance, and the northern extensions of the Zulu, the Valley, and the Ridge mining claims.

On August 13, 1891, being the year following the date of the filing of the protest of McChrystal and the day succeeding the filing of the relinquishment of Judge Foote of the above described tracts, M. L. Powers *et al.*, filed a protest against said townsite application. Prior to this time, on August 1, 1891, the local officers notified your office of their action, as has been set out, and requested that entries Nos. 1621 and 1651 for the Coffey lode and the W. W. C. lode and mill-site, be suspended for conflict with the townsite application.

On September 2, 1891, your office notified the local officers to suspend the hearing ordered until further advised.

On September 25, 1891, your office informed the local officers that their proceeding in ordering a hearing was irregular, for the reason that it appeared that final certificates had issued for a portion of the land involved, but waived the irregularity. They were, however, directed to continue the hearing to determine—

First.—Whether the lands embraced in the townsite application, or any portion thereof, were known to be valuable for mineral at the date of said application, January 23, 1891, and if any are found to be thus valuable, clearly designate the same;

Second.—Whether the lands, or any portion thereof, were ascertained to be valuable for mineral subsequent to said townsite application and prior to their use and occupancy for residence and business purposes, and if they are so found, the same should be clearly identified and stated.

Owing to instructions sent, the judge of the district court of Juab county, instead of the probate judge, made an application, but under

the departmental decision of August 22, 1892 (15 L. D., 205), in the Woodruff Townsite case, it being there held that—

The probate judge in the Territory of Utah is the judge of a county court, and as such judge is the proper officer to perfect a townsite entry for an unincorporated town in said Territory—

the application of John W. Blackburn, district judge, was treated by your office as being without force or effect, and the case comes up upon the application, as has been set out, of the probate judge.

Upon the hearing ordered, the local officers rendered their decision in favor of the townsite claimants, and upon appeal, your decision of September 27, 1893, was rendered in which was sustained the action of the local officers. Further appeal brings the case before the Department, the errors alleged being upon the following grounds:

First.—In holding that the land is non-mineral in character;

Second.—In not considering the questions of priority as between the mineral and townsite claimants;

Third.—In not finding that the town of Eureka proper is upon the excluded ground and not upon the land applied for;

Fourth.—In not finding that the townsite is for speculative purposes and not for the benefit of the whole;

Fifth.—In not finding that the townsite application is of the same character as the excluded ground;

Sixth.—In not finding that all the ground applied for is mineral in character.

Examination has been made of the voluminous record in this case—the hearing upon which extended over several months—which contains much irrelevant matter that would not have been before the Department had the local officers exercised the discretion vested in them by rule of practice 41—"To summarily put a stop to obviously irrelevant questioning."

There can be no question of the fact that such a town as Eureka exists, but it is contended by the mineral claimants that the major portion of this town is upon that part of the land included within the mining claims that were excluded from the application for patent by the probate judge. An examination of the record upon this point shows that a considerable portion of the business part of the town is, in fact, so excluded, but it does not bear out the contention of the mineral claimants that the application is for land upon which the town has not been built. The greater portion of the town is upon the land for which patent is now asked, the improvements thereon amounting to over \$200,000.00.

Upon this question as to the character of the land, it appears that it was returned by the surveyor-general as non-mineral in character, and your office decision and that of the local office concur upon the finding of fact that the land within the application was properly so returned.

In the main I find that the evidence justifies the decisions heretofore rendered in this case, with the following exceptions:

It is in evidence that the character of the land east of Church street, or a line in the neighborhood thereof, is non-mineral in character, but

it is practically admitted by witnesses for the townsite that the land west of that street is of a different nature and is mineral in character, or, to speak more specifically, the Norway and Ole Bull mining claims are of such character.

In addition to the positive testimony of the witnesses for the mineral claimants, that these claims with others were mineral in character, the witness Henderson, for the townsite, locates the line of demarkation between the mineral and non-mineral ground as being east of the shaft on the Norway claim, and testifies that the Ole Bull claim is mineral in character. The witness Jones, an expert in behalf of the townsite, after testifying to the existence of this line of demarkation between the mineral and non-mineral land in the neighborhood of Church street, says that "the Norway might pay." The witness, Price, who is one of the corroborating witnesses for the townsite, in speaking generally of the non-mineral character of the land within the townsite, says that he would except the Norway from such lands.

The action of the townsite claimants themselves in excluding the Last Chance and the northern extensions of the Zulu, Valley and Ridge mining claims, said claims lying along the western border of the townsite application and being, with the exception of the northern extension of the Ridge, west of Church street, and the fact of the acknowledgment by them that the land so excluded is mineral in character, are additional reasons why the Norway and Ole Bull claims should also be withheld from the land to be patented for said townsite application, and it is not the purpose of this decision to recognize the character of these claims further than has been set out.

In consideration of the testimony of the witnesses for the townsite claimants, as has been set out, and of the action of said claimants in relinquishing the claims named, I am led to believe that the character of the land within the Ole Bull and Norway claims is such as would justify a prudent business man in further expenditures upon these mining claims, despite the fact that as yet no mineral in paying quantities has been taken from their workings. I therefore direct the exclusion of these claims from the patent to the townsite.

Your office decision asserts that the townsite application is in conflict with the following claims:

The Red Bird lode, M. E. 860, patented November 12, 1883;

The Alpha lode, M. E. 926, patented January 12, 1885;

The Talisman lode, M. E. 928, patented July 23, 1884;

The Ridge lode, M. E. 945, patented May 12, 1885;

The Coffer lode, M. E. 1621, patented April 23, 1892;

W. W. C. mill-site, M. E. 1651, patented May 11, 1892.

The townsite application for these tracts is therefore rejected.

Said application is also found to conflict with the following mining claims: The northern extensions of the Zulu, Ridge and Valley lodes; the Last Chance lode; all of which have been excluded by the townsite application. Said application likewise conflicts with the Granite lode,

the northern extensions of the Eagle and Blue Bell lodes, the Boom mill-site, the Augusta mill-site, the Wolf Tone lode, the Homestake lode; and the Home Rule lode. Also with the Diablo, the Robert E. Lee, the Little Chief, the Acquarius, the Mary L. mill-site, the Horn Silver mill-site, the Salamon's Treasure mill-site, the W. H. Wilton mill-site, the Anaconda mill-site, and the Homestake mill-site.

There being no objection to the relinquishment by the townsite of the land within the Last Chance and the northern extensions of the Zulu, Valley and Ridge lode claims, it is accepted.

The Boom mill-site was located October 1, 1887, and on January 24, 1891, mineral application No. 1966 was filed therefor. It appears that the ground is non-mineral, is used and occupied for mining purposes, and was located long prior to the townsite application. The application for the area embraced by said mill-site is therefore rejected.

The Augusta mill-site has, since the commencement of this cause, dismissed its application for patent and abandoned the same.

The disposition of the various mineral claims made by your office decision, with the exception of the Ole Bull and Norway, is affirmed.

The exclusion by the company of the mining claims enumerated, leaves a tract of land within the townsite application, lying south and south-west of the Last Chance and north of the northern extensions of the Valley and Zulu claims, and non-contiguous to the rest of the land applied for.

This case is not similar to one in which a townsite application was originally made for patent for non-contiguous tracts, and while not wishing to express an opinion upon such a case, it is sufficient to say that the original application here was for contiguous tracts which, by reason of the segregation and exclusion of certain mining claims, have become non-contiguous. Inasmuch as the original application was for contiguous lands, I see no reason why patent should not be issued for the non-contiguous tracts.

The decision appealed from is accordingly modified.

TOWN LOT—RAILROAD RIGHT OF WAY.

C. W. MORRIS.

Land embraced within an approved location of a railroad right of way is not subject to subsequent appropriation as a town lot.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (E. E. W.)

The above named petitioner, C. W. Morris, is an applicant for deed to a lot on the right-of-way of the Chicago, Rock Island and Pacific Railroad, in Enid, Oklahoma.

By the act of Congress of March 2, 1887 (*24 Stat., 446*), the railroad company was granted a general right-of-way one hundred feet wide,

and one hundred feet additional through depressions. A map submitted by the company, showing a right-of-way two hundred feet wide through the land upon which the town of Enid is now situated, was approved by the Secretary of the Interior March 30, 1889, and the survey and plat of the town-site, showing the same, was approved by the Commissioner of the General Land office September 14, 1893.

After the country was opened to settlement, this applicant, and other persons, went on this right-of-way and surveyed and platted twelve lots between the fifty-foot and one hundred-foot limits, and numbered them from A to M, excluding J. Morris's application is for lot B.

The trustees rejected the application, and Morris appealed. The Commissioner of the General Land office affirmed the action of the trustees, and then Morris appealed to the Department.

There is no error in the decisions of the offices below. The right-of-way granted by the act of Congress had been definitely located, and the location confirmed by the Secretary of the Interior, and was not subject to entry. Moreover, the trustees can only make deeds to lots embraced in the townsite entry, and according to the survey and plat.

The decision of the Commissioner of the General Land office is affirmed.

HOMESTEAD ENTRY—SECTION 2, ACT OF JUNE 15, 1880.

HAGGERTY *v.* NEW ORLEANS PACIFIC RY. CO.

An exercise of the right of purchase accorded by section 2, act of June 15, 1880, as to part of the land covered by a homestead entry, exhausts the privilege of purchase conferred upon the entryman by said act.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 4, 1895. (F. W. C.)

I have considered the appeal filed by J. D. Haggerty, assignee of Joseph Marcantel, from your office decision of October 20, 1894, denying the application made to purchase under the provisions of section two of the act of June 15, 1880 (21 Stat., 237), the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 13, T 6 S., R. 1 W., New Orleans land district, Louisiana.

On March 26, 1873, Joseph Marcantel made homestead entry for the entire NW. $\frac{1}{4}$ of said Sec. 13, which entry he relinquished February 3, 1880. Following the passage of the act of June 15, 1880, to wit, on March 20, 1883, Marcantel purchased the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, under the provisions of the act of June 15, 1880. The balance of the NW. $\frac{1}{4}$ was selected by the New Orleans Pacific Railway Company, in whose indemnity limits the tract lies, December 28, 1883, on account of which selection the company is laying claim to the land.

On December 19, 1892, Marcantel presented a second application to purchase under the act of June 15, 1880, said application covering the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 13. Said

application was rejected by the local officers on account of the pending selection made by the railroad company, from which action he appealed to your office.

Your office decision of October 20, 1894, sustained the action of the local officers, from which an appeal had been taken to this Department.

The appeal is taken by J. D. Haggerty, as assignee of Joseph Marcantel.

Haggerty claims to have purchased Marcantel's rights under his application on September 12, 1893, for which he paid \$155. In the appeal it is further set up that Marcantel has died since these proceedings were begun.

Admitting that Joseph Marcantel had the right to purchase the land covered by his homestead entry under the act of June 15, 1880, yet by his purchase of a portion thereof he exhausted his right, the same being in effect a completion of his homestead entry as to the tract purchased. *Nix v. Allen* (112 U. S., 129). The balance of the land covered by his entry was therefore properly subject to the company's selection on December 28, 1883, and Marcantel gained no right by the presentation of the second application to purchase, on December 19, 1892, which could be transferred to Mr. Haggerty.

Your office decision is accordingly affirmed.

COMMUTED HOMESTEAD—EQUITABLE ACTION.

W. T. STEVENS.

Where the commutation of a homestead entry is allowed on a period of residence less than that required by law, and the entryman thereafter in good faith sells one of the tracts covered by his entry, he may be permitted to furnish supplemental proof showing subsequent residence on the unsold portion of his claim, and his entry thereupon be submitted for equitable action.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *December 5, 1895.* (J. L. McC.)

W. T. Stevens has appealed from the decision of your office, dated June 28, 1894, holding for cancellation his homestead entry for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 21, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 4 of Sec. 28, T. 37 N., R. 9 E., Wausau land district, Wisconsin.

The ground of said decision was that the entryman had not resided upon the tract described for fourteen months after date of entry, as required by section 2301 of the Revised Statutes, as amended by section 6, act of March 3, 1891.

The record shows that Stevens filed his application January 18, 1891, claiming settlement December 20, 1890 (the date when the land was opened to settlement). On that same day (December 20, 1890), one James Brown made homestead entry for the land, which entry was relinquished and canceled on June 11, 1891. From the date of Stevens'

entry, September 21, 1891, until commutation proof, was one month and seventeen days.

It is clear that the proof was properly rejected.

At some time subsequently to final proof the entryman sold lot 4 of the tract described (said lot 4 containing thirty acres); and your office finds that the entryman

is thereby disqualified to and is unable to make supplemental proof, since he cannot do so as the actual party in interest, nor complete said proof by the non-alienation affidavit required.

Therefore your office not only rejects the final proof already made, but holds the entry for cancellation.

Mr. Stevens states, under oath, that he made proof

believing that six months' residence was all that was required to enable him to commute, and was so informed by the officers of the local land office; that since the time of making final commutation proof he has cultivated his homestead and raised crops thereon each year, and has planted a crop the present season; that he has three acres under cultivation and has cleared several acres more.

He states further that he has not sold nor alienated any portion of said homestead except said lot 4 of Sec. 28, as aforesaid.

There is no legal prohibition against selling after having made final proof, and there is nothing whatever to show bad faith on the part of the entryman, who undoubtedly believed at the time he sold that he had a right to sell. In view of the facts above set forth, I think he should be allowed to make supplemental proof showing residence for at least fourteen months after entry upon the unsold portion of the land; after which (inasmuch as it will be impossible for him to make a non-alienation affidavit), the entry may be submitted to the board of equitable adjudication for confirmation.

The decision of your office is modified accordingly.

HOMESTEAD ENTRY—CONFLICTING SETTLEMENT RIGHTS.

HOPKINS *v.* WAGNER ET AL.

In a case involving priority of settlement wherein it cannot be determined which of the parties was the first settler in fact, the claimants may make an amicable division of the land; or, in the event of their inability to agree, the right to make entry may be awarded to the highest bidder.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 5, 1895. (I. D.)

All parties in the case of Horace E. Hopkins *v.* Curtis L. Wagner and Montraville M. Duncan, appeal from your office decision of June 25, 1894, in which you hold that because of failure of proof showing prior settlement of either, and failure on the part of said parties to effect a compromise, the land shall be offered to the highest bidder of said parties.

The land involved is the SE. $\frac{1}{4}$ of Sec. 8, T. 16 N., R. 7 W., I. M., Kingfisher land district, Oklahoma. This land is within the Cheyenne and Arapahoe reservation, which was opened to settlement April 19, 1892, at twelve, m.

April 19, 1892, Duncan filed soldiers' declaratory statement. April 20, 1892, at 10:19 a. m., Wagner made homestead entry for it, and immediately afterward, on the same day, one W. A. Taylor applied to make homestead entry which was rejected because of Wagner's prior entry, and at 11 a. m., of the same day, Hopkins applied to make homestead entry which was also rejected for the same reason.

May 11, 1892, Duncan made homestead entry under his prior soldier's declaratory statement.

May 20, 1892, Hopkins filed his affidavit of contest, alleging his own prior settlement.

At the hearing, after notice to all parties, Taylor failed to appear. The evidence is voluminous and a careful reading of it leaves the mind in hopeless uncertainty as to which of the three men, Duncan, Wagner, or Hopkins, reached the land first.

The local officers say in an elaborate opinion:

In fact we believe that it is absolutely impossible for this office, or any other party, to say with any degree of certainty, or satisfaction to themselves, which was really the prior settler on the land in dispute.

And your office decision says:

I am utterly unable from the record now before me to determine who is the first settler.

Each of the three has followed up his apparently simultaneous settlement by improvements, and continued to reside on the land in what seems to be entire good faith.

To dismiss the contest on the ground that Hopkins has failed to show his prior settlement by a preponderance, leaves Duncan and Wagner standing in the case, so that the rule requiring preponderance can not be applied.

Your office decision held that, under the circumstances the three claimants would be permitted to make an amicable division of the one hundred and sixty acres, and that in case of their inability to agree the local officers should sell the land to the highest bidder between said three parties.

Your office decision is affirmed and the parties are given sixty days, from notice of this decision, within which to agree, after which the local officers, after proper notice to said parties will offer them the land as herein decided.

RAILROAD GRANT--WITHDRAWAL ON GENERAL ROUTE--INDEMNITY
WITHDRAWAL.

NORTHERN PACIFIC R. R. Co. ET AL. v. LILLETHUN.

The withdrawal on general route contemplated by section 6, act of July 2, 1864, extends only to lands within the primary limits of the grant.

A withdrawal of land for indemnity purposes in violation of the provisions of the grant, for the benefit of which the withdrawal is made, confers no right upon the grantee, and is no bar to the acquisition of settlement rights.

An application to enter, pending on appeal, precludes the allowance of an indemnity selection for the land covered thereby.

Secretary Smith to the Commissioner of the General Land Office, December 12, 1895.
(F. W. C.)

I have considered the appeals by the St. Paul, Minneapolis and Manitoba Railway Company and the Northern Pacific Railroad Company, from your office decision of June 22, 1887, holding for allowance the application by Christoffer T. Lillethun to enter the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 1, of Sec. 29, T. 135 N., R. 43 W., fifth p. m., Minnesota.

This land is within the primary ten miles limits of the grant made to aid in the construction of the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent Extension) and was also included within a withdrawal upon the filing of the map of general route by the Northern Pacific Railroad Company, but upon the definite location of the last mentioned road, it fell without the granted, and within the indemnity limits, and an application to select the same as indemnity was presented by said company July 8, 1885.

Lillethun's application to make entry of the land was presented in 1883, and in an affidavit accompanying said application he alleged settlement in 1876. It might here be stated that on June 23, 1880, the governor of Minnesota executed a relinquishment of all claim on account of the Manitoba grant in favor of Lillethun, under the State act of March 1, 1877 (Special Laws of Minnesota, 1877, page 257).

In view of the decision of the supreme court in the case of the Northern Pacific Railroad Company v. The St. Paul, Minneapolis and Manitoba Railway Company (139 U. S., page 1), said relinquishment is not material, for the reason that the withdrawal on account of the map of general route of the Northern Pacific company served to defeat the operation of the grant for the Manitoba Railway Company, and your action denying the claim of said last-mentioned company, is therefore affirmed.

The land being within the indemnity limits of the grant for the Northern Pacific Railroad company it can have no claim thereto prior to the

presentation of its application to select on January 8, 1885. *Jennie L. Davis v. Northern Pacific Railroad Company* (19 L. D., 87.)

Said decision is a re-affirmance of the Guilford Miller decision (7 L. D., 100), in which it was held that—

The language of section six of the granting act, which expressly directed that the homestead and pre-emption laws should be "extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company," was a mandate effectually prohibiting the exercise of the executive authority to withdraw any "lands on the line of said road;" and an order, made on definite location, continuing in effect, for indemnity purposes, such a withdrawal is in violation of law and without effect, except as notice of the limits within which the company would be entitled to select indemnity.

In the argument of this case the before referred to decisions are attacked on two grounds, viz:

1. That the withdrawal contemplated by the statute was of both the granted and indemnity lands and,
2. That the withdrawal heretofore made of the indemnity lands on account of this grant was, while in force, a bar to the acquirement of settlement rights.

As to the first proposition, I am very clear that what was intended by the statute making the grant for this company was only to withhold the lands to the extent of the primary limits upon the filing of the map of general route, for until definite location of the road, there can not be said to be any loss to the grant, and until then no right to indemnity exists.

It has been the uniform construction by this Department that the withdrawal contemplated by the sixth section of the act of July 2, 1864 (13 Stat., 365), upon the filing of the map of general route, was only of lands within the primary limits.

Against this uniform construction it is urged that the sixth section clearly contemplates the withdrawal of the odd-numbered sections in both the primary and secondary or indemnity limits, where it extends the homestead and pre-emption laws to all other lands on the line of the road, except those "hereby granted" to said company. And it is said that inasmuch as indemnity lands, as well as lands within the primary limits, are granted by the act, the former as well as the latter come within the designation of the lands "hereby granted."

It is true that when the railroad company obtains title to indemnity lands it is because of the grant and in this sense it may be said that indemnity lands are granted.

But because of this I do not think that the words "hereby granted", as used in this grant, are intended to embrace indemnity lands. These words, or others of like import, are to be found in most of the congressional grants in aid of the construction of railroads. And this Department and the courts have almost uniformly held that, in the terminology of the laws relating to these grants, such words have a distinct and well known meaning, and are used to describe lands which may be found

within the primary limits upon definite location. Says the Supreme Court in *Barney v. Winona R. R. Co.* (117 U. S., 228-232)—

In the construction of land grant acts, in aid of railroads, there is a well-established distinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. It is these "granted lands" of the prior grant falling within the six-mile limit that, in our opinion, are reserved, and not the possible indemnity lands which might be subsequently acquired.

Again, the provisions relating to the indemnity lands in this grant as in others, require that they "shall be selected" by the company under the direction of the Secretary of the Interior. In the case of the *St. Paul R. R. Co. v. Winona R. R. Co.* (112 U. S., 720-730), the Supreme Court said—

both the acts of 1864 and of 1865 speak of the additional sections to be *selected*, a word wholly inapplicable to lands in place, which are not ascertained by selection, but are fixed and determined by the location of the line of the road.

It is not necessary to make further citations as to a construction so well settled, and which may be said, emphatically, to be uniform.

It is true that in some instances the statutes require the land department to withdraw the indemnity lands from sale, settlement or entry, as was done by the act of March 3, 1865 (13 Stat., 526), where it was directed that as soon as the maps were filed "it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act;" or in the act of July 4, 1866 (14 Stat., 87), where the same language was used.

But these instances are few and exceptional, and in every one of them it will be found that there was an express direction, or its equivalent, not merely to withdraw the lands "hereby granted," but all the lands which are so located, that they may pass to the company either as granted or indemnity lands.

The act under consideration does not, in my opinion, admit of any such construction. Clearly there is no express direction as in the last acts cited. And not only is there nothing to justify an implication to that effect, but the whole context of the sixth section seems to repel any such contention. But we are not without judicial construction as to the extent of the statutory withdrawal on filing of the map of general route.

It is to be recollected that the grant to the Northern Pacific was of twenty alternate sections per mile on each side of the line of the road, constituting a belt of forty miles in width on each side, in the territories, and of ten alternate sections on each side, constituting a belt of twenty miles on each side in the States.

In the case of *Buttz v. Northern Pacific R. R. Co.* (119 U. S., 55), where the court was considering the matter of the statutory withdrawal

on map of general route in the then Territory of Dakota, it was said that upon the filing of that map "the law withdraws from sale or pre-emption the odd sections to the extent of *forty* miles on each side" of the line of road. And in the case of the St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co. (139 U. S., 1-7), where the question related to the withdrawal on map of general route in the State of Minnesota, the court say that, upon the filing of that map, the withdrawal was of the odd numbered sections "within *twenty* miles on each side of said line, for the benefit of the company."

Thus, it is plain that the Supreme Court construes the act to withdraw only lands within the primary limits when it orders the withdrawal of the odd sections "hereby granted."

For the support of the second proposition, viz: as withdrawal was made of indemnity lands upon the definite location of this road that the same was a bar to settlement while it existed, the decision of the Supreme Court in the case of Wood v. Beach (156 U. S., 548), is referred to. In this case the court finds that the fourth section of the act of July 26, 1866 (14 Stat., 290), making a grant for the Missouri, Kansas and Texas Railway, directed the withdrawal of the indemnity lands and that the executive order issued was in obedience to the direct mandate of Congress.

It was accordingly held that Wood acquired no equitable rights by the occupation and settlement made after withdrawal.

In this decision the court quotes approvingly from Wolsey v. Chapman (101 U. S., 755), based on Riley v. Wells.

In these cases the withdrawals in question while not based upon statutory direction, were made in the exercise of a wise discretion and under grants which contained no legislative inhibition against such withdrawals.

For this reason the cases depended upon by counsel, can in nowise influence my action in considering the effect to be given to the indemnity withdrawals made on account of the Northern Pacific grant, the sixth section of which contains, under the previous construction of this Department with which I concur, an inhibition against the withdrawal of indemnity lands.

Prior to January 8, 1885, the date of the presentation of the company's application to select this land, Lillethun had presented his application which was at that time pending on appeal from the rejection of the same by the local officers. Lillethun's application was a bar to the selection by the Northern Pacific Railroad company and your office decision sustaining the rejection of the company's application to select this land is therefore affirmed and Lillethun will be permitted to make entry as applied for.

ELWOOD R. STAFFORD ET AL.

Motion for review of departmental decision of October 11, 1895, 21 L. D., 300, denied by Acting Secretary Reynolds, December 16, 1895.

JURISDICTION—COMMUTED HOMESTEAD—EQUITABLE ACTION.

FRANCIS A. LOCKWOOD.

It is within the power of the Secretary of the Interior, by virtue of his supervisory authority, to correct (*sua sponte*) what appears to have been erroneous in his former action, where the subject matter is yet under the jurisdiction of the Department.

The decision in the case of Herbert H. Augusta (on review), 21 L. D., 200, cited and followed, and the former action herein accordingly modified, with directions for the disposition of suspended cases involving the same question.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) *December 16, 1895.* (J. L. McC.)

On March 15, 1893, the Department rendered a decision in the matter of the commutation homestead entry of Francis A. Lockwood, for certain land in the Waterville land district, Washington.

Lockwood had made homestead entry of said land on March 18, 1891; and on September 23, 1891, he offered final proof.

The final proof showed that he settled upon the land in May, 1890; that during that month he built a house thereon, into which he moved on June 2, ensuing; that he continued to live upon the land thereafter, until final proof, and in the interim broke forty acres of land, dug two wells, set out thirty fruit trees, and put up more than a mile of fence.

His final proof was approved, and he was allowed to make cash entry of the same.

The papers were transmitted to your office, which suspended his entry "for the reason that proof was not made in conformity with section 6 of the act of March 3, 1891, which requires fourteen months' residence from date of entry."

Lockwood appealed to the Department, which affirmed the decision of your office (16 L. D., 285).

He was served with a copy of said departmental decision, but took no action with reference thereto.

On December 14, 1893, one C. W. French filed a petition setting forth that on April 25, 1892, he purchased the land in question, from Lockwood, for a valuable consideration and in good faith; that it was impossible for Lockwood to return to the land to reside, or to make a non-alienation certificate; and he prayed that the case might be referred to the board of equitable adjudication for confirmation.

This application was denied by your office, and, on appeal, by the Department (20 L. D., 361).

On May 8, 1895, your office was directed to suspend action in said case until further advised.

Since the last named date, a careful reconsideration of the question involved has been made, particularly in the case of Herbert H. Augusta, on review (21 L. D., 200). Augusta's entry was referred to the board of equitable adjudication.

It is within the power of the Secretary of the Interior, by virtue of his supervisory authority (even in the absence of a motion for review), to correct what appears upon further consideration to have been erroneous in his own action while the subject matter is yet under the jurisdiction of the Department (*Northern Pacific Railroad Company v. Bass*, 14 L. D., 443).

I find the case at bar to be in all essential respects similar to that of Herbert H. Augusta (*supra*). Having made final proof to the full satisfaction of the local officers, after the issuance of final certificate Lockwood sold the land. He had certainly complied with the spirit, if not the letter, of the law, as to length of residence. The transferee purchased on the faith of the certificate of the register and receiver. There is no adverse claim.

I am informed that no steps have been taken by your office (owing to the countermanding order of the Department) toward carrying into effect the departmental decision of April 18, 1895, sustaining your action in holding Lockwood's entry for cancellation.

Said departmental decision is therefore hereby recalled and revoked; and the papers in the case are herewith returned, in order that the entry may be referred to the board of equitable adjudication for confirmation.

The departmental order of May 8, 1894, directing the suspension of action in all cases involving the same question, is also hereby revoked, in order that similar action may be taken in those among said cases that are essentially similar to that now under consideration.

DENNY ET AL. *v.* NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of September 28, 1895, 21 L. D., 252, denied by Acting Secretary Reynolds, December 16, 1895.

TIMBER LAND PURCHASE—DEFERRED PAYMENT.

CALEB J. SHEARER.

The Department will not authorize the withdrawal from disposition of land applied for under the timber and stone act, beyond the day fixed for proof and payment; but if the applicant is then unable to make payment for the land, he may thereafter do so, after republication, in the absence of any adverse claims.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 16, 1895. (F. W. C.)

I have considered the appeal by Caleb J. Shearer from your office decision of June 2, 1894, rejecting his application made for a republication of the notice of intention to make proof and payment on sworn

statement No. 1464, made October 5, 1893, under the act of June 3, 1878, covering the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and lot 3, Sec. 3, T. 61 N., R. 24 W., 4th p. m., Duluth land district, Minnesota.

It appears that notice was published by Shearer of his intention to make proof and payment on April 17, 1894, upon which date he was unable to make the payment and on the following day filed the application for republication now under consideration.

It is unnecessary to here recite the facts presented by Shearer in support of his application for republication, tending to show his good faith in the matter of his application to purchase the land in question. Suffice it to say, that this Department will not authorize the withdrawal from disposition of land applied for under the act of June 3, 1878, beyond the day fixed for proof and payment in the order of publication issued by the local officers.

Where, however, the party applying to purchase under said act is unable to make payment upon the day fixed in the notice, but thereafter is able, and desires, to do so, I see no reason why he should not be permitted, after the publication of a new notice and in the absence of adverse claims, to complete his purchase of the land applied for.

This is not in conflict with the holding made in the case of John M. McDonald (20 L. D., 559), for in that case the application was to *extend* the time within which payment might be made and it was held that—

the government will not withhold from disposition valuable timber lands for an indefinite length of time, or for any time after the day fixed for proof and payment, etc.

In so far as your office decision refused to reserve the land for Shearer beyond the day set in his published notice, the same is accordingly affirmed, and the papers are returned with directions that Shearer be advised, if he is yet desirous of purchasing this land, that he may publish a new notice, and, in the absence of adverse claims, he will be permitted to complete purchase of the land.

MOTION FOR REVIEW—CLERICAL ERROR.

PAIRE *v.* MARKHAM.

Motion for review of departmental decision of September 24, 1895, denied, and attention directed to a clerical error occurring in said decision.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 16, 1895. (P. J. C.)

I have considered the motion for review of departmental decision of September 24, 1895 (21 L. D., 197), filed by counsel for William W. Paire.

It appears that Spencer S. Markham submitted proof and made application to purchase lots 6 and 7 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 13 S., R. 10 E., Salt Lake City, Utah, land district, both parties having previously filed their coal declaratory statements therefor. A hearing

was had on the protest of Paire, and the local office recommended that the proof be accepted. On appeal your office reversed their action, and on appeal the Department overruled your office judgment. Review of this decision is now asked, but the specifications of error refer only to such questions of fact as are discussed and decided in the original opinion, and no new question of law or fact is suggested thereby.

In the examination of the opinion, however, for the purpose of this motion, it is found that a very annoying clerical error has occurred in it, in this, that in the last paragraph on page 197, in reference to the northwest corner and north line of the tract, where the words "defendant's," "defendant" and "defendant's" appear, the words "protestant's" "protestant" and "protestant's," in the order here written, should have been printed. While this error does not affect the merits of the case, the correction makes the discussion intelligible, and by substituting the words as herein indicated expresses the determination of the Department on the point argued.

The motion is overruled.

CONTEST—PREMATURE CHARGE—DESERT LAND CONTEST.

WHITE v. DODGE.

The local officers may properly reject an application to contest an entry, if in their judgment the charge therein is premature.

On the revocation of an order suspending a desert land entry, time will not run against the entryman until due service of notice upon him of such revocation.

Acting Secretary Reynolds to the Commissioner of the General Land Office
December 16, 1895. (E. M. R.)

This case involves the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of Sec. 2, T. 26 S., R. 24 E., Visalia land district, California.

The record shows that George L. Dodge made desert land entry for the above described tract on March 30, 1877.

On April 10, 1894, William H. White filed his affidavit of contest against the entry of Dodge, alleging failure to reclaim, within the time allowed by law.

April 27, 1894, the local officers rejected the application to contest on the ground that—

the allegations attack only the non-reclamation and are premature in that three years from date of entry, exclusive of the period from date of suspension to date of notice of its revocation, have not elapsed. Notice of the revocation was registered to claimant August 21, 1893.

Upon appeal, your office decision of June 25, 1894, was rendered, wherein was affirmed the action of the local officers. Further appeal brings the case before the Department upon the following assignments of error:

1. Error in denying and refusing a hearing upon the facts alleged in the affidavit of contest, without first acquiring jurisdiction of the parties and the subject-matter, by issuing notice or citation to be served upon the claimant.

2. Error in denying and refusing a hearing upon an affidavit of contest filed in the local office April 10, 1894, charging non-reclamation of the land when as admitted the desert land entry was made March 30, 1877, and suspended September 12, 1877, and suspension revoked January 12, 1891.

In *Syphert et al. v. Cady* (18 L. D., 465) it was held *inter alia* (syllabus):

The local officers may properly reject an application to contest an entry if in their judgment the charge as laid against the entry does not justify a hearing,

and on page 467 of the opinion, it was said more at length—

Counsel for appellant argues that the local officers had no authority to dismiss the contest affidavit without ordering a hearing; and cite *McClellan v. Crane* (13 L. D., 258), where it was held that an objection as to the sufficiency of an affidavit of contest can only be raised by the defendant, and not by him prior to the day set for hearing, but in the case cited a hearing had been ordered and the question was raised between the contestants. This is also true of the case of *Jasmar et al. v. Molka* (8 L. D., 241).

In both of the cases cited by counsel the applications to contest were *accepted* at the local offices and hearing ordered. This Department has never held that the local officers could not reject an application to contest.

In reference to the second ground of error, it appears from an examination of the record that, if the existence of the entry be computed from the date of the revocation of the order of suspension, more than three years, exclusive of the time covered by the suspension, had elapsed.

On the other hand, if computed from the date of the service of such notice on the entryman, the three years of the lifetime of the entry has not expired.

This raises the question whether the suspension ordered by the Department on September 12, 1877, should be considered as continuing until the departmental order of January 12, 1891, revoking the same, or until due service of notice of such revocation was given to the entryman?

In *Farnell et al. v. Brown*, on review (21 L. D., 394), the Department held that, on the revocation of an order suspending a desert-land entry, time will not run against the entryman until due service of notice upon him of such revocation.

In the case at bar, three years from entry had not elapsed, excluding the period from the suspension of the entry until service of notice upon the entryman that the order of suspension had been revoked.

It follows that the contest was prematurely brought, and must be dismissed.

The decision of your office appealed from is therefore affirmed.

PRACTICE—REVIEW—REPORT FROM LOCAL OFFICE.

INSTRUCTIONS.

Report from the local office should be received before closing a case that has been before the Department.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 18, 1895. (J. L. McC.)

By letter ("H") of October 25, 1895, in connection with the motion for review in the case of Peery *v.* Thornton your office made the following recommendation to the Department:

I therefore respectfully recommend that blank form No. 4-502 be dispensed with, and that form No. 4-501 only (a copy of which is herewith enclosed) be used in closing cases that have been before the Department.

Blank form No. 4-502, directed to the register and receiver, notifies them that "no motion for review has been filed by resident counsel," and therefore closes the case.

Blank form No. 4-501 advises the register and receiver that your office is in receipt of their letter reporting that no motion for review has been filed, and so closes the case.

It has not unfrequently occurred that no motion for review has been filed *by resident counsel* within thirty days from their receipt of notice of a decision, and that thereupon the case has been closed, the entry canceled, and sometimes some other party permitted to make entry of the land—and that, through some unforeseen occurrence, this has led to very embarrassing complications. Experience has shown that it would be much the safer plan always to await the report from the register and receiver before closing a case and canceling an entry.

I therefore concur in the recommendation of your office that the use of blank form No. 4-502 be hereafter dispensed with, and so direct.

OKLAHOMA LANDS—CHEROKEE OUTLET—SETTLEMENT RIGHTS.

TOWNSITE *v.* MORGAN ET AL. AND SAME *v.* TRAUGH ET AL.

A homestead entry made with the intention of disposing of the land for townsite purposes, and not with the intent of acquiring a home on the public domain, will be canceled as illegal, and not within the spirit and intent of the homestead law.

The inhibition as to entering upon or occupying lands within the Cherokee Outlet runs from the date of the President's proclamation, August 19, 1893, opening said lands to settlement.

A homestead declaratory statement filed by an agent who enters said territory within the inhibited period is invalid, and will not support an entry based thereon.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. H.) December 18, 1895. (C. J. W.)

I have before me, on appeal, certain cases consolidated and considered together by your office on March 14, 1895, in which the record history of the cases is fully stated, a summary of which is as follows:

September 16, 1893, at 12:43 p. m., Marion G. Traugh by his agent, George W. Leighnor, filed homestead declaratory statement for the SW. $\frac{1}{4}$ Sec. 30, T. 23 N., R. 20 W., I. M.

September 16, 1893, at 2:46 p. m., Wellington A. Traugh, by his agent, Marion G. Traugh, filed homestead declaratory statement for the SE. $\frac{1}{4}$, Sec. 30, T. 23 N., R. 20 W., I. M.

September 18, 1893, at 11:12 o'clock a. m., Thomas Strode made homestead entry No. 17 for the NE. $\frac{1}{4}$, Sec. 30, T. 23 N., R. 20 W., I. M.

September 18, 1893, at 9:20 o'clock a. m., Frank P. Morgan made homestead entry No. 8, for the SW. $\frac{1}{4}$ Sec. 30, T. 23 N., R. 20 W., I. M.

September 18, 1893, at 10 o'clock a. m., A. P. Maltsberger made homestead entry No. 10 for the SE. $\frac{1}{4}$ Sec. 30, T. 23 N., R. 20 W., I. M., subject to H. D. S. filings.

September 18, 1893, at 9:30 o'clock a. m. George W. Milton filed soldiers' declaratory statement for the SE. $\frac{1}{4}$, Sec. 30, aforesaid township and range.

September 21, 1893, Thomas Strode filed an application and affidavit in your office to amend his homestead entry No. 17, so as to embrace SE. $\frac{1}{4}$, Sec. 30, T. 23 N., R. 20 W., in lieu of the NE. $\frac{1}{4}$ Sec. 30, etc., covered by his said entry, which application to amend was transmitted to this office by you November 25, 1893, with a recommendation that said application be allowed.

September 23, 1893, John R. Mosley filed a contest against Morgan's homestead entry, claiming priority of settlement. Notice was issued by the register and receiver and the case set for hearing October 30, 1893, at 10 o'clock a. m. On said date the parties appeared and continuance was granted until November 13, 1893. On this day J. D. F. Jennings, probate judge of "N" County, Oklahoma Territory, appeared and filed a motion to intervene and become a party to the contest in the interest of parties settled upon the S. $\frac{1}{2}$ of Sec. 30 (land above described) and claiming the same as a townsite. Upon the motion of Morgan by his attorney, your office denied the motion and application of Jennings to intervene, upon the ground that he had no legal status in the case. R. J. Ray, attorney for Mosley, while present in court on the day set for hearing, made no motion to continue, nor to proceed, and Mosley failing to appear in person to prosecute his contest, the same was dismissed in your office, and all parties notified, whereupon Jennings, P. J., duly appealed and Mosley filed a motion and affidavit for a rehearing.

January 2, 1894, T. L. O'Bryan made application to enter the NE. $\frac{1}{4}$ of Sec. 30 (land herein) which application was rejected by your office because the same was covered by H. E. No. 17, of Thomas Strode, and thereupon said O'Bryan, January 3, 1894, filed a contest affidavit against Strode attacking his said entry, hearing fixed by your office for February 23, 1894, on which day Strode appeared and filed a paper disclaiming any settlement on said SE. $\frac{1}{4}$, etc.

February 27, 1894, Olaus Oak filed an application and affidavit to intervene in the O'Bryan contest on the ground of prior settlement.

February 28, 1894, the hearing of the contest of O'Bryan proceeded, Olaus Oak, intervenor, alone appearing to defend. Judgment being in favor of Oak, O'Bryan duly appealed.

March 15, 1894, Wellington A. Traugh made homestead entry No. 385, for the SE. $\frac{1}{4}$, Sec. 30.

By letter "G" of this office of date January 20, 1894, based on a report of a special agent, A. R. Johnson, and other relevant papers received, the register and receiver were directed to order a hearing "for the purpose of determining the rights of the various claimants under the townsite and agricultural laws to the whole or any legal subdivision of the S. $\frac{1}{2}$ of Sec. 30, T. 23 N., R. 20 W., I. M.

Upon receipt of said letter the local officers duly notified all parties claiming interest in the aforesaid S. $\frac{1}{2}$, Sec. 30, that a hearing would be had in said matter March 15, 1894, at which time the following claimants appeared in person and by attorney, to wit:

Townsite claimants by their authorized representatives J. D. F. Jennings and G. W. Milton, F. P. Morgan, Thomas Strode, Wellington A. Traugh, John W. Parks

and A. P. Maltzberger. All entered their general and special appearance. There was also present on behalf of United States Special Agent A. R. Johnson.

March 10, 1894, Marion G. Traugh filed a statement addressed to the local officers setting forth "that your petitioner will not be able to be present at the hearing of said claimants for said real estate set for the 15th day of March, 1894. Your petitioner herewith submits this statement under oath as evidence in said matter, which he asks to be considered with other evidence taken at said hearing, and that the same may be filed and made a part of the records of your office in the matter of said hearing, for your consideration and the consideration of the General Land Office.

George W. Milton, after the hearing was ordered, relinquished or disclaimed all right or interest in the SE. $\frac{1}{4}$ of Sec. 30, etc., and hence did not appear as claimant at date of hearing.

Your decision of March 14, 1895, has become final as to all claimants for this land except Morgan, Wellington A. Traugh and the townsite claimants.

Morgan and Traugh each appeal from said decision; Morgan claiming the SW. $\frac{1}{4}$, and Traugh the SE. $\frac{1}{4}$. These appeals do not rest upon the same grounds and will therefore be considered separately.

Morgan concedes the fairness of the statement of facts which was made the basis of your office decision, but alleges in substance that the conclusions of law drawn from said evidence are erroneous, and especially the finding that said Morgan made his entry with speculative intent. The land in question belonged to the public domain and was open to settlement and entry by any qualified homestead entryman at 12 o'clock, noon, September 16, 1893. It is not seriously denied that Morgan was the first to reach the land on the day of the opening, and after 12 o'clock, noon, and to drive stakes upon the same, and to proclaim his intention to claim and occupy it as a homestead. It is insisted by counsel for townsite claimants that his acts of settlement were not sufficient in law to operate as an appropriation of the land to homestead purposes. Your office found that Morgan reached the land at 1:15 o'clock p. m., September 16, 1893; that a few minutes thereafter he staked the SW. $\frac{1}{4}$ and announced that he claimed it as a homestead. That he made his entry on September 18, 1892, and immediately thereafter proceeded to build a house on said quarter, fourteen by twenty feet, consisting of two rooms. These acts, following each other in the order stated, would seem to be sufficient to constitute a valid settlement so far as the acts themselves are concerned.

There is some dispute between counsel as to whether your office found Morgan to be free from disqualification because of his presence inside the prohibited territory, after the date of the proclamation opening it, and before the day of opening. I do not understand your office to have considered or passed specifically upon this question, as distinct from the speculative intent, which it was held vitiated his entry. It is not deemed necessary to consider it here, but the failure to do so, is not to be taken as an adjudication that the presence of Morgan on this land during the prohibited period, did not, under the circumstances, disqualify him as a "sooner." Your office decision seems to rest upon the

conclusion that the circumstances attendant upon Morgan's selection of, and settlement upon, this land; that his acts connected therewith and the information he sought and obtained in reference to its value for other purposes than agriculture do not tend to show that he was seeking it as a home for himself and family simply as a part of the public domain, and in accordance with the spirit and principles of the homestead laws; but rather that he selected this tract for speculative purposes intending and expecting to make disposition of it for townsite purposes. *Guthrie Townsite v. Paine et al.* (13 L. D., 567-568).

It may be and often is difficult to understand motive and intent, but there is light all along the way to guide the inquirer to the true reason why Morgan wanted this tract, rather than the many others which he passed by, and over, in his race for this one. He knew it already had the nucleus of a town upon it and had full information as to the purpose and expectations of the Denver colonists and he made his race to and for this tract, concerning which all this information had been gathered. Guided by the light of the record and evidence in the case, it seems to me that it would be difficult to reach the conclusion that Morgan was actuated by the spirit of the homeseeker, rather than that of the speculator.

Your office properly held that as to the Cherokee Outlet, the inhibited period dates from the date of the proclamation of the President opening it to settlement August 19, 1893. This holding is not believed or intended to be in conflict with the rule as laid down in the case of *Rittwage v. McClintock* (21 L. D., 267), and in the case of *Griffard et al. v. Gardner* (21 L. D., 274), in which it is held that the prohibition in section 14, act of March 2, 1889 (25 Stat., 980), against entering the Territory of Oklahoma prior to the time fixed therefor, is general in its character, and applicable to lands thereafter acquired from certain Indian tribes, from the date of its acquisition.

Neither the act of February 13, 1891 (26 Stat., 749), nor the act of March 3, 1891 (26 Stat., 989), under which the cases of *Rittwage v. McClintock* and *Griffard et al. v. Gardner* arose, contains any specific prohibition and it was the absence of such provision which led to the application of the prohibition contained in the act of March 2, 1889, to these two cases, there being nothing in said acts to indicate that said prohibition was not intended to be operative in conjunction with them. Very different is the act of March 3, 1893, under which this case arises (27 Stat., 641). Here the special act having undertaken to deal with the question of prohibition is to be followed, rather than the general law which, it is supposed, was deemed inapplicable, for the reason that the time at which said last named act would become operative was uncertain and made to depend upon its subsequent acceptance by the Cherokee Nation, and the acceptance by it of the first payment for the land.

The proclamation of the President in pursuance of said act was the first notice to the public that all the conditions of the act had been complied with and that it had become fully operative. This view is further supported by the following provision of said act in reference to the opening of said Territory to settlement:

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands.

Concurring in the conclusion reached by your office that Morgan's entry should be canceled, because made with speculative intent, it is deemed unnecessary to pass upon any other question connected with his entry, since this should be the disposition made of it without reference to the rights of the townsite claimants.

There remains for consideration the appeal of Wellington A. Traugh whose entry covers the SE. $\frac{1}{4}$ of Sec. 30. His exceptions to the findings of your office include both questions of fact and of law. He insists that your office erred in finding as a fact that his agent Marion G. Traugh, failed to make and file the "sooner" affidavit of such agents required by proclamation of the President (17 L. D., 240), and insists that said affidavit was made and filed by said Marion G. Traugh. On page 440 of the record, C. W. Herod, a clerk in the land office at Woodward, states that to the best of his knowledge and belief the affidavit was filed. On page 494 of the record Wilson A. Hammock, the register, states that they were particular to require this "sooner" affidavit in all cases.

It does not appear that Marion G. Traugh testified at all. I think, in the absence of proof that the affidavit was not filed, the legal presumption would be that it was, and that its mere absence from the files would not overcome that presumption, especially where the officers in charge of the records express the belief that it was filed and had been subsequently lost or misplaced. But if it was made and filed, as insisted, if it should be found to be untrue, the mere fact of filing would not avail anything. It was proven that Marion G. Traugh was inside the Territory at Woodward station for some hours on the 15th of September, the day before the opening, and he has been adjudged a "sooner" and his homestead declaratory statement canceled. The appellant, however, insists that the presence of his agent and brother at Woodward on the 15th was the result of accident, the train leaving him there while he was at dinner, and that he gained no advantage over others while there, and he also insists that his said agent was there without his knowledge or consent, and that therefore he should not suffer on account of it. He further insists that if said filing should for any reason be deemed invalid,

that it was error not to hold that his subsequent homestead entry, made on March 10, 1894, was valid and good, for the reason that there is no claimant on said land who made settlement prior to said 10th day of March, 1894.

On the 20th of May, 1895, appellant also filed what he calls a supplement to his appeal, supported by his own and two other affidavits, in which he claims that he has resided on his claim continuously since March, 1894, and that all townsite settlers have abandoned the land and moved to the government townsite, except one who made his settlement subsequently to his own, and asks that a special agent be appointed to examine and report upon the present status of the claim with reference to settlers. Such report is deemed unnecessary as it would not be evidence if made. The question arises whether or not, on the showing made, the case should be remanded for further hearing as to Traugh's claim to the SE. $\frac{1}{4}$ of Sec. 30.

This need not be considered if Traugh's entry is not good as between himself and the government, in the absence of adverse claimants. In determining this question, all the facts set out by him in support of the good faith and validity of his entry may be considered together. He made his brother his agent to file his homestead declaratory statement, and that agent went to Woodward, in the immediate vicinity of the land filed on, the day before the opening and spent some hours there, and on the day of the opening filed on this land. It is said that he was left there by accident, but it is not shown that he was. It is also said that he obtained no information touching this land while there, but this is not shown or attempted to be shown save by mere assertion. He selected a claim for himself as well as for his brother. His homestead declaratory statement was filed by an agent at 12 o'clock and 43 minutes on September 16, 1893, in the face of the fact that it was eighteen miles to the nearest border line. When his filing was in peril he made no appearance and submitted no testimony. The fact that his filing was made by an agent on the day of opening and so soon as to show that the agent was a sooner, is strong evidence of the fact that he made selection both for himself and his brother the day before.

The circumstances attending these filings, brand them as unfair. The evidence and circumstances render them inseparable in determining whether they were made with due regard to the law and the rights of others. Neither can stand. Can appellant stand on his subsequent entry made six months later? The evidence makes it clear that the land in question was valuable and eagerly sought after by many. This filing was all that prevented its speedy entry and settlement by other applicants. Manifestly it can have no more validity than the homestead declaratory statement upon which it is predicated.

I conclude that your office properly held this homestead entry for cancellation. No question touching the qualification of persons to make settlement on townsite lots is now involved. Your office decision pro-

vides that upon said decision becoming final as to present parties to the record, touching the S. $\frac{1}{2}$ of Sec. 30, T. 23 N., R. 20 W., the settlers and occupants on said tract may proceed through a board of townsite trustees, to be hereafter designated, to make townsite entry of the said land under the act of May 14, 1890 (26 Stat., 109).

Should said settlers propose to have said land or any part thereof entered for townsite purposes, under said act, the individual qualifications of settlers upon townsite lots will be settled and determined as in other cases under townsite laws.

MINING CLAIM—AGRICULTURAL RETURN.

RHODES ET AL. v. TREAS.

The presumption arising upon the location of a mining claim that the land included therein, though returned as agricultural, is in fact mineral, exists only in the case of a legal location, wherein a discovery is shown in compliance with law.

Secretary Smith to the Commissioner of the General Land Office, December (J. I. H.) 28, 1895. (P. J. C.)

The record before me shows that John W. Treas made homestead entry, August 16, 1893, of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 24, Tp. 20 N., R. 17 W., Harrison, Arkansas, land district, and in December, 1893, E. J. Rhodes, for himself and his associates, filed an affidavit of contest against the same, alleging that the land is mineral in character, was more valuable for mineral than agricultural purposes, and that at the date of said homestead entry the land was claimed by himself and his co-locators as a mining claim.

A hearing was had before the local officers, and they decided that the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, was more valuable for mineral than agricultural purposes, and recommended that the homestead entry be canceled to this extent. The mineral claimants appealed, and your office, by letter of June 27, 1894, affirmed the action below; whereupon they prosecute this appeal, assigning several grounds of error, both of law and fact, among which is that the burden of proof was upon the agricultural claimant in establishing the character of the land.

The testimony shows that Rhodes and seven others, on December 29, 1891, located the SE. $\frac{1}{4}$ of Sec. 24 as the Silver Moon Placer Mine, and on the same day located, as the Famous Placer Mine, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the same section. These tracts were located as placers upon the zinc supposed to be contained therein. So far as the evidence discloses, the only discovery made by the claimants, upon which these two locations of one hundred and sixty acres each were made, was on the east side of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the

SW. $\frac{1}{4}$, within a short distance of the line between the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$. Substantially, all the work that has been done has been done upon this twenty acre tract. It is said that there is a little outcrop of zinc in the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, but I do not understand that the mineral claimants regard this as their discovery. At all events, it is not claimed that it is of any value as mineral.

The rule is that where there has been a legal location of a mining claim on land returned as agricultural, the burden of proof shifts to the party attacking the mineral entry. (*Northern Pacific v. Marshall et al.*, 17 L. D., 545.) But the mineral claimant must show a *legal* location, that is, he must show a discovery in compliance with law, which in the location of a placer claim of one hundred and sixty acres means a discovery on each twenty acres included in the tract. (*Ferrell et al. v. Hoge et al.*, 18 L. D., 81.) This has not been done in the case at bar.

Aside from the twenty acre tract upon which the work has been done, I think the contestants have failed to show any mineral value in the land. Your judgment is therefore modified, and the homestead entry will be held for cancellation only as to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 24, and remain intact as to the balance.

The Department does not desire to be understood as deciding that public lands containing zinc are subject to entry under the placer mining law. That question is not properly before the Department in this proceeding. The question here is as to the character of the land, rather than as to the method by which such land may be secured.

OKLAHOMA LANDS—QUALIFICATIONS OF HOMESTEADER.

PERRY *v.* KROTZ.

The provision in section 20, act of May 2, 1890, that "no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any state or territory shall hereafter be entitled to enter land in said territory," extends to one who holds such an amount of land under a deed of absolute conveyance, subject only to defeasance on breach of condition subsequent on the part of the grantee.

Secretary Smith to the Commissioner of the General Land Office, December (J. I. H.) 28, 1895. (P. J. C.)

The land involved in this appeal is lots 3, 4 and 5 and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, T. 11 N., R. 6 E., Oklahoma, Oklahoma Territory, land district.

On December 19, 1891, Joseph Krotz made homestead entry of said tract. On June 19, 1893, Henry Perry filed an affidavit of contest, alleging on information and belief that said entry was made in fraud of law in that at the date of said entry Krotz was seized in fee simple of one hundred and sixty acres of land in the State of Kansas.

A hearing was ordered, and on the day set therefor, August 16, 1893, the parties entered an agreed statement of facts by which it is shown

that the claimant is the identical person named in a warranty deed from Josephine Krotz for land described, consisting of one hundred and sixty acres; also that a certain "agreement between Joseph Krotz and Josephine Krotz" is in full force and effect; that Josephine is living on the land, and that Joseph "is not in default on said undertaking, but has kept the provisions of said agreement to the present time."

The deed mentioned conveyed to Joseph Krotz the land described in Kansas, for the expressed consideration of \$1,000, and is a deed of covenant and warranty absolute. The agreement mentioned is as follows:

Know all men by these presents that I, Joseph Krotz, of Richland township in the county of Republic and State of Kansas, am indebted to Josephine Krotz in the sum of one thousand dollars, as follows, to wit:

Whereas, I the said Joseph Krotz, have this day purchased the NE. $\frac{1}{4}$ Sec. 28, town 3 south of range one (1) west, Republic Co., Kansas, on the following conditions, to wit: that I Joseph Krotz, for the consideration of the sum of one thousand dollars in hand paid by the said Josephine Krotz, the receipt of which is hereby acknowledged, do by these presents bind myself, my heirs, executors and administrators, and assigns firmly by these presents to furnish the said Josephine Krotz a good and reasonable support and furnish her a house on said described land and pay all medical attendance necessary for the good of the said Josephine Krotz's health and all necessaries of life for the comfort of the same, and at her decease give her a decent burial and pay all funeral expenses, and on a failure of the said Joseph Krotz to do any of the above requirements then the deed executed by the said Josephine Krotz upon the NE. $\frac{1}{4}$ Sec. 28 town 3 south of range 1 west dated December 27th, 1882, is to be void, otherwise to remain in full force and effect.

Both deed and agreement were dated December 27, 1882; both acknowledged on that day; and both filed for record in the office of the recorder of deeds where the land is situated on November 20, 1891.

On this state of facts the local officers decided that "Krotz was the owner in fee simple of one hundred and sixty acres of land" in Kansas at the time he made his entry, and was therefore disqualified under the provisions of section 20 of the act of May 2, 1890 (26 Stat., 81), from acquiring land in Oklahoma, and recommending the cancellation of his entry. On appeal, your office, by letter of March 26, 1894, reversed the action below, holding that the two instruments referred to should be construed together, and that they did not vest in the defendant a fee simple title, "but a limited and conditional title only." The contestant prosecutes this appeal, assigning errors of law.

The paragraph of the statute referred to reads—

and no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory shall hereafter be entitled to enter land in said Territory of Oklahoma.

The evident intent of Congress in incorporating this provision in the statute was to prohibit any one who was "seized in fee simple" of one hundred and sixty acres of land from acquiring any of the public lands in Oklahoma, and where this condition existed the individual was disqualified from so acquiring any land in that territory, the purpose being evidently to reserve this land for the less fortunate citizen.

The terms of this statute differ materially from other acts of similar import. For instance, in the general homestead act, as amended by the act of March 3, 1891 (26 Stat., 1095), the disqualification runs against one who is "the proprietor of more than one hundred and sixty acres." The word "proprietor" was also used in the pre-emption laws (section 2260, Revised Statutes) in the same connection.

It is conceded by counsel that the deed and agreement should be construed together. It is a familiar rule that where two instruments executed between the same parties at the same time, involving the same subject matter, executed with the same degree of solemnity, and recorded together, should be construed as one. (*Jackson v. McKenney*, 20 Amer. Dec.; *Wing, Exec., etc., v. Briggs et al.*, 37 Vt., 169, at p. 178.) So that in the consideration of this matter the agreement will be treated the same as if it were incorporated in the deed itself.

The question here presented is whether at the time of the entry by Joseph Krotz he was "seized in fee simple" of one hundred and sixty acres of land. The department is not called upon to pass upon the nature of the rights or remedies as between the grantor and grantee in this deed. It is sufficient for the purpose of determining the question as to the entryman's qualification, under the statute quoted, to ascertain what estate he has under the deed. It is clear to my mind that, technically speaking, he is seized of a fee simple title on condition subsequent, on the performance or non-performance of which it may be enlarged or defeated. (2d Wash. on Real Prop., 4th Ed., 2.) The instrument is a common deed of bargain and sale, with covenants of warranty to the grantee, his heirs and assigns forever; then follows the condition on which the estate created may be defeated. Joseph Krotz being seized of the estate, may convey or devise the same, or transmit by descent the inheritance to his heirs, though the estate would continue defeasible, of course, until the condition be performed, or destroyed (*Taylor et al. v. Sutton*, 15 Ga., 108.)

In Connecticut a deed of the usual covenants or seizure and warranty was made to a High School Association for the accommodation and use of said school. Then this: "The conditions of the within deed are such, that whenever the within named premises shall be converted to any other use than those named within," and the parties shall persist in their use for any purpose other than that named, "the said parties forfeit the right herein conveyed," the grantor to pay for the buildings at an appraised value. Suit was brought in equity to forfeit the estate. The court says—

In my opinion the conveyance was a fee simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs and assigns forever. . . .

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not *until* they should convert the property to other uses than those specified in the deed, nor *so long as* they should continue to use it for the purposes specified, but forever, with a proviso or condition

expressed in the deed that if they should convert the property to other uses they should *forfeit* their estate. (Bennett Warnet v. Joseph H. Bennett *et al.*, 31 Conn., 468.)

Again a father deeded to his son certain real estate, with the condition that he pay money to a creditor and to the grantor's daughter, in which event "this deed to be in full force and virtue, otherwise to be null and void." The court said—

Now, from an inspection of the deed it is evident that it was intended to pass the fee of the estate immediately to the grantee, subject, however, to be defeated by breach of the conditions expressed in the deed. (Howard v. Turner, 6 Me., 106.)

An estate on condition expressed in the grant itself is where an estate is granted, whether in *fee simple or otherwise* with an express qualification annexed, whereby the estate granted shall either commence, be enlarged or be defeated, upon performance or breach of such qualification or condition. Conditions subsequent are such by the failure or non performance of which an estate already vested may be defeated. (2 Cooley's Blackstone, 152.)

Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated. . . . So long as these estates upon subsequent conditions continue unbroken, they remain in the same situation as if no such qualification had been annexed. (4th Kent's Com., 126.)

Authorities on this proposition might be multiplied, but I think sufficient are quoted to show that Krotz is, in contemplation of the statute under consideration, seized in fee simple of the Kansas land. The condition attached to it is a personal one resting entirely upon him. It is not in the power of any one but himself to defeat the fee simple estate he holds. The estate in him was perfect at the instant of time when the entry in controversy was made, because all the conditions were complied with. It would have been no more so if at that same instant of time the grantor had died, thus rendering his estate absolutely indefeasible. Suppose the grantor, Josephine, should die at any time before final entry by Joseph Krotz of this land, without condition broken, could it be maintained that he was qualified to make final entry of the land? Having in view the intent of Congress in the passage of this act, that those owning one hundred and sixty acres of land should not be permitted to avail themselves of the homestead law in Oklahoma, I think it would be doing violence to the law to say that he could be permitted to complete his entry.

Again, this condition in the deed is one in which a stranger such as the government is in this case, has no interest whatever. (The Board, *etc.*, v. The Trustees, *etc.*, 63 Ill., 204.) No one but the parties to this deed can call into question this instrument. As to all the world, except them, Joseph Krotz has the absolute fee simple estate in that land; he alone can defeat it, and only the grantor can forfeit it. It would seem as if every incentive to personal interest would prompt him to comply with its terms in the future as he has in the past, and after him that his grantee or his heirs, would be prompted by the same self-interest to see that no breach of the condition was made.

While, for the purpose of deciding the question presented here it is sufficient perhaps to hold that this is a condition subsequent, yet it may

well be doubted whether a court of equity would not hold it to be a covenant. The invariable rule is that forfeiture of estates is abhorrent to equity, and where stipulations in conveyances can be construed into a covenant and compensation can be made in money, courts of equity will not lend their aid to work a forfeiture. (*Gallaher et al. v. Herbert*, 117 Ill., 160; *Lindsay v. Lindsay*, 62 Ga., 546; *Anthony et al. v. Stephens*, 46 Id., 241; 4th Kent's Com., 131.) The plain terms of this condition convey to the mind the intent of the parties, which was that a home should be provided a living, medical aid and a decent burial furnished the grantor. It is not at all certain that on a breach by the grantee, after his compliance for nearly eleven years, a court of equity would not declare this a covenant and render judgment accordingly, notwithstanding the words of forfeiture. In any event, I apprehend, the grantor would have her election as to the remedy she would pursue.

I cannot escape the conviction that Joseph Krotz was, in contemplation of the statute, at the time of the entry of the land in dispute, seized in fee simple of one hundred and sixty acres of land in Kansas, and for this reason disqualified from making entry in Oklahoma.

Your office judgment is therefore reversed, and Krotz's entry will be canceled.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

AUSTIN *v.* LUEY ET AL.

The right to perfect title under section 5, act of March 3, 1887, may be properly accorded to one who appears to have bought the land in question from a railroad company and paid the agreed price therefor, even though no deed has been executed by the company.

The right of purchase under said section will not be defeated by a mineral claim, unless it is made to appear as a present fact that the land is more valuable for the mineral therein than for agricultural purposes.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (C. J. W.)

The land involved in this case is the fractional NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 9, T. 16 N., R. 9 E., Sacramento, California. It is within the primary limits of the grant to the Central Pacific Railroad Company under the act of July 1, 1862 (12 Stat., 489), but was excepted from the operation of the grant by reason of a pre-emption filing and settlement made thereon by a qualified pre-emptor, Charles Foster, at the date the right of the company attached (September 14, 1866,) under its grant. The claim of the company to said tract was rejected by the Department January 30, 1886 (*Central Pacific R. R. Co. v. S. S. Luey*, 120 L. & R., 223), and Luey's filing for the land theretofore rejected by the local officers (July 26, 1882,) was by direction of your office allowed.

The controversy over this tract of land was the subject of a decision by the Department March 7, 1891, in the case of *S. S. Luey v. Cornelia*

Austin (214 L. & R., 390-399); again, on review which was denied March 16, 1892 (238 L. & R., 239).

In said decision it was held that since the land was excepted from the grant, the same had been at all times subject to entry after the township plat of the public survey was filed in the local office (March 16, 1868). It was also found that Cornelia Austin was the first settler on the land; that she, with her husband, made settlement thereon in the year 1859, and remained there until March, 1862, when they sold their improvements to one Wilson; that they repurchased from said Wilson in 1867; that she and her husband lived on the land until 1870, when Mr. Austin died; that she thereafter continued to reside upon and improve the land, her improvements amounting in value to about \$3,000.00.

It was further found from Mrs. Austin's admissions and exhibits that she depended upon the railroad company for her title; that she had assisted the company as against the efforts of certain mineral claimants, and obtained a decision from this Department (July 10, 1872), holding the land to be agricultural in character; that she employed counsel and secured the attendance of witnesses in behalf of the company as against Luey, who successfully resisted the company's claim.

After the company's claim was defeated, Mrs. Austin communicated with your office in relation to her right to make homestead entry for the land; your office advised her (March 31, 1886,) that she could, if qualified, "file or enter said land, and the priority of right as between you and Luey can be determined when either party submits final proof; or, if preferred, you can first institute a contest against Luey's filing, and, if the same is successful, you can then enter the land."

On April 17, 1886, she made homestead entry of the land. Luey's filing was allowed one month prior to her entry.

The Department further held from these facts that Mrs. Austin did not settle on the land with the intention of claiming the same under the settlement laws; and that since Luey's filing was placed of record prior to the date of her homestead entry, the latter had the superior right to the land, both parties having settled thereon and both showing that they were in every way qualified to make entry.

From certain exhibits in the case, it appeared that Mrs. Austin might be able to show that she or her husband had purchased the land from the railroad company. It appeared, also, from Luey's statement and affidavits in the case, that a part of the land embraces what is known as the "Emancipation Quartz Mine," and that the same had been successfully mined since 1888.

A petition was also filed in the case by Edward Gagen and John Fox, the alleged owners of the mine, supported by sundry affidavits tending to show that the mine was a valuable one. Petitioners asked for a hearing to prove the character of the mine.

The Department thereupon ordered a hearing to enable Mrs. Austin to show that she, or her husband, purchased the land from the railroad company, and, if so, to give her the right, if she so desired, to purchase the land under the 5th section of the act of March 3, 1887 (24 Stat., 556). Also, to enable the mineral claimants to show the character of the alleged mine, with a view to a segregation of the same, should the hearing establish its mineral character.

The effect of the decision was to award the land to Luey, should the hearing show that Mrs. Austin or her husband was not a purchaser from the company, and that the land was agricultural and not mineral.

The hearing was accordingly had, and the register held that Mrs. Austin was entitled to purchase the tract under the act of 1887; also that the land has very little present value for mining purposes, and is of more value for agricultural purposes, thus awarding the right to Mrs. Austin to purchase the whole tract. The receiver, having been of counsel for Mrs. Austin, took no part in the decision.

On appeal, your office, by decision dated April 13, 1894, affirmed that action, and the mineral claimants have appealed to this Department.

The question presents itself did Mrs. Austin or her husband have such contract or agreement with the Central Pacific Railroad Company in reference to this land, as to bring her within the provisions of the act of Congress of March 3, 1887 (24 Stat., 556). If Austin, or Mrs. Austin, ever had a deed from said company, it has been lost or misplaced. It does not seem likely that such deed was ever actually executed. The testimony indicates that there may have been written evidences of such contract, which Mrs. Austin, since her husband's death, has not been able to find. The written evidence of a contract with the railroad company in reference to the purchase of this land by the Austins, as far as disclosed by the record, is as follows:

B. B. Redding, land agent of the company, in a letter addressed to J. M. Walling, attorney, in reference to this land, under date of December 23, 1878, says:

The records of our office shows that this land is now clear to the railroad company, and we have had it marked to be included in the next listing and patent, when it will be sold to Mrs. Austin at the agreed price. I think all difficulties have been removed, and there is nothing now to prevent the company from obtaining title.

By letter of April 10, 1879, the company, by its agent, B. B. Redding, stated to Mrs. Austin:

Your letter of March 7th duly received. We have it entered on our books that whenever the company gets title to the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 9, T. 16 N., R. 9 E., Silas Austin or his heirs is to purchase it from the company at \$2.50 per acre. No other person can get it, but we have not got title to it yet and will not get title to it until a case now pending in the supreme court of the United States is decided. You state that the money was sent to the railroad agent last December in full for this land. We have received no money for this land. We could not receive it until we got title to the land. We can not sell it or take any money for it until we get title to it. . . . I can only say to you that our books show that you, or the heirs of Silas Austin are to purchase this land whenever the company gets title.

By letter of June 20, 1879, said agent says:

Yours of June 16th received in relation to NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 9, T. 16 N., R. 9 E. We have got this land now in shape to be listed. We will have it listed and patented in a short time when you will be notified to send the money and receive your deed. Everybody has been notified, including Mr. Kitts, that the land could be sold to no one but to you, therefore you need have no fear in relation to the matter. We do not want the money until we get the patent from the Government, when you will be duly notified.

By letter of October 17, 1879, the said agent says:

Your letter of October 11th received. Mr. Symington was here and knew as well as you do that no other person living, when the patent comes, can buy the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 9, T. 16 N., R. 9 E., from the railroad company, but you. . . . If you will be kind enough to be patient and rest your soul in patience, I will give my personal attention to see that you get title to this piece of land when the patent is received. You need have no fear or be uneasy about it. If you will have confidence in me I will give it personal attention.

In letter of December 23, 1879, the agent says:

The records of our office show that this land is now clear to the railroad company and we have it marked to be included in the next listing and patent, when it will be sold to Mrs. Austin at the agreed price.

May 24, 1883, William S. Miles, land agent of the Central Pacific Railroad Company, writing to Mrs. Austin, says:

Just as soon as it (the patent) comes I will inform you, and should the railroad company receive patent for the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec 9, T. 16 N., R. 9 E., they will be able to give you a title without further delay, then if the heirs of Silas Austin are willing to release the company from its contract with him, the deed can be made to your son. . . . We regret the company could not have made its title to you before this time.

Mr. Swezy, attorney for Mrs. Austin, testified that in June, 1892, after hearing was ordered by the Department, he went to the land department of the company to investigate the records; that he endeavored to get Mr. Mills, the land agent, to testify by deposition as to the letters and correspondence in his office relating to the sale of the land; that Mr. Mills declined to do so, stating that he had not time to look up the matter, and did not want to be bothered about it.

It appears in evidence that in June, 1892, Mrs. Austin, through her attorney, paid the company \$50.00, being the balance of the payment for the land.

On July 18, 1892, W. H. Mills, the land agent, wrote Singer and Swezy, Mrs. Austin's attorneys, as follows:

The application of Silas Austin to purchase the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 9, T. 16 N., R. 9 E., M. D. M., was filed in this office on 15th May, 1869.

During the year 1869 Silas Austin defended the company's right to the tract in a contest in the United States Land Office with mineral affiants, and he paid the expenses of the contest. In consideration of the sum so paid, and a further payment in the sum of One Hundred (\$100) Dollars the land was during the year 1869 agreed to be sold to the said Silas Austin, which further payment sum was afterwards reduced to Fifty (\$50) Dollars, and fully paid.

Mrs. Cornelia Austin is entitled to a deed conveying to her all right, title and interest of this company, in and to the land heretofore described, which will issue to her in due course of business.

This last letter seems to admit the receipt of the purchase money for the land. It admits performance upon the part of the Austins of all that they were to do in consideration for the land, and that a deed was then due Mrs. Austin conveying to her all right, title and interest of the railroad company in and to said land. Aside from the mere matter of form, this letter is a receipt for the purchase-money for the land, and an obligation to make a deed. It is signed by an agent of the corporation presumably authorized to bind the company. The railroad company could be compelled to execute title, if it had title. It justifies the conclusion that the Austins paid for the land. Other evidence shows that they went into possession in 1867 and have occupied it continuously ever since and have put on improvements valued at \$3,000. We have therefore written acknowledgment of the receipt of the purchase-money, twenty years' continuous possession, and improvements valued at \$3,000, to take this case out of the operation of the statute of frauds, if that statute applied.

When we come to consider the spirit and purpose of the act of Congress of March 3, 1887 (24 Stat., 556), I think it will be apparent that it was intended to cover contracts other than those evidenced by deed, since it applies exclusively to lands sold or contracted away by railroad companies before such companies had themselves obtained title or patent. Obviously, the terms purchase and sale, as used in said act, are not to be understood in their technical and limited meaning, but rather in their widest and most comprehensive meaning, which would, I think, include such contracts for the sale of such lands, as had been performed in whole or in part by the purchaser, or as had resulted in the occupancy and improvement of the lands, no matter how such contracts were evidenced, so that they were clearly and satisfactorily proven.

Certainly Congress did not proceed upon the idea that the companies, as a rule, would execute deeds before they obtained patents, nor did they intend to exclude from the provisions of the act all contracts in reference to sales which were not evidenced by the execution of a deed.

Section five of the act of March 3, 1887 (24 Stat., 556) provides as follows:

Where any said company shall have sold to citizens of the United States—as a part of its grant—lands not conveyed to or for the use of such company, 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 patent shall issue, etc.

I conclude that the facts bring Mrs. Austin within the provisions of the section of the act just quoted, and that she is entitled to patent

for the land (except such part as may be mineral) on paying the government price therefor.

There remains for consideration the mineral rights of Gagen *et al.* as presented by their appeal. If it were a question between Luey, or his administrator, and the mineral claimants, it would be easier of solution. It is apparent from the record that Luey and these claimants were making common cause against Mrs. Austin, and that Luey made no real defense against the contentions of the mineral claimants, but, apparently, aided them. Mrs. Austin defended earnestly, but under unfavorable circumstances.

On April 13, 1894, your office, in passing upon this branch of the case, addressing the local officers, said:

A hearing in the above entitled matter was held in your office January 10, 1893, in pursuance of the decision of the Honorable Secretary of the Interior, in the matter of Luey *v.* Austin, dated March 7, 1891, in which you were directed to conduct a hearing, after due notice to all parties in interest, to determine the character of the land, as to mineral or non-mineral, and to allow Mrs. Austin to show that she or her husband was a purchaser from the C. P. R. R. Co., with a view if she so elect to purchase the same under the provisions of the act of March 3, 1887 (24 Stat., 556).

At said hearing all parties appeared in person and by their attorneys and offered evidence. Mrs. Austin claimed the right to purchase the forty acres (fractional) described in the caption by virtue of the fifth section of the act of March 3, 1887, *supra*.

Luey claims the same land by virtue of a pre-emption filing, and Gagen claims that part of said land embraced in the "Emancipation" lode claim located in part on said tract. From the evidence so submitted the register decided July 7, 1893, holding the land to be agricultural in character, and according to Mrs. Austin the right to purchase the land in controversy under the provisions of the act of March 3, 1887. (The receiver declined to join in said decision for the reason that he had acted as attorney for Mrs. Austin in said matter prior to his appointment to office.) From said decision the mineral claimant, and the administrator of said Luey (said Luey having died since the hearing) have respectively appealed to this office. With your letter dated August 18, 1893, you transmitted the record and evidence to this office, and said matter is before me on appeal.

The mineral appellant complains of nine errors in your said decision, two of which I deem material, viz:

1. Error not to have rejected the evidence of Mrs. Austin and her witnesses touching the character of the land, because of her alleged failure to bring herself within the provisions of the act of March 3, 1887.
2. Error to have found from the evidence that that part of the land in controversy embraced in said "Emancipation" lode claim is more valuable for agricultural purposes than for its minerals.

I have duly considered the record and evidence in this matter, and hold that neither of these exceptions is well taken.

1. In the determination of the character of the land the United States is a party in interest, and therefore any evidence offered tending to prove the character of the land should have been received and considered by you, irrespective of the disposition to be made of the land in the event of its being found to be non-mineral in character. The fact that Mrs. Austin is an applicant for the land could not alter the effect of the testimony offered to show the character of the land.

2. As to the second exception of mineral appellants: It should be remembered that said mineral claimants came into this case in the capacity of protestants, that by decision of the Honorable Secretary of the Interior dated June 10, 1872, the land

involved herein was held to be non-mineral in character, and it is therefore incumbent upon said mineral appellants to make such a showing as would justify a reasonably prudent man in expending his money for the development of this property as a mining claim, and that as a present fact said land is more valuable for its minerals than for agricultural purposes. And these facts must be proven affirmatively by a preponderance of the evidence.

It appears from the evidence that the "Emancipation" lode claim was located by one Fox on July 13, 1878, is partly located on the land in controversy, and that by mesne conveyance the said Gagen owns an interest in said claim. It further appears that in the development of this claim two tunnels have been constructed, one of them was abandoned in 1887, after having been operated since 1867, and having produced a little more than seven thousand dollars worth of gold, but it appears from the evidence and exhibits that no part of this "old" tunnel is on the land in controversy but is on section eight.

It appears that since the abandonment of the "old" tunnel a "new" tunnel has been constructed which commences on section eight, and extends into the land in controversy, and from which said "new" tunnel more than seven thousand dollars worth of gold has been taken, but there is nothing to show what part of this return was taken from the land in controversy, neither does it appear from a preponderance of the evidence that there is a well defined ledge or vein on the land in controversy. It does appear, however, that whatever the formation may be, whether a vein or simply a "seam", it has been worked down to the water level, and has been practically abandoned since 1889, and cannot be worked on account of the water until extensive surface workings are constructed, and whether or not it can then be worked at a profit, so far as the evidence shows is a matter of conjecture. On the contrary the land is shown to be valuable for agricultural purposes, producing hay, fruits and vegetables in great variety, and at a profit.

The mineral claimants in their appeal insist: first that Mrs. Austin was not entitled to be heard in the case, and next, that your office erred in finding that said land was more valuable for agricultural than mineral purposes, and that the mine was practically abandoned. The evidence upon which these findings rest is to some extent conflicting, and I am not prepared to say, since your office and the register, who heard the case alone, concur in the findings that they are not supported by a preponderance of the evidence. Special objection is made to the finding that the mine was exhausted above the water level and was not shown to be of present value as a mine, and had been practically abandoned, for the reason that the seeming abandonment was attributable to the refusal of Mrs. Austin and her son to allow hoisting machinery to be erected on the surface of the land occupied by them.

The theory of the mineral claimants is that the lode or vein on their own property, extends across their line into that occupied by Mrs. Austin. The continuance of the lode or seam below the water level could about as well be tested near the dividing line on their own property as on this, and there appears nothing to have prevented the making of this test, but the fact remains that evidence is wanting of the presence of ore in paying quantities below a water level, and at the date of the protest of claimants.

Your office dismissed said protest after consideration of all the evidence, and your decision is approved.

RAILROAD LANDS—ACT OF OCTOBER 1, 1890—PRE-EMPTION.

MCLHARGEY *v.* JOHNSON.

In the absence of a filing or entry allowed for lands in the second indemnity belt of the Northern Pacific grant, there is no claim subject to transfer under section 2, act of October 1, 1890.

One who fails to make pre-emption final proof within the statutory life of the filing can not be permitted to perfect his claim in the presence of an intervening adverse right.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (I. D.)

Involving the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 15, T. 55 N., R. 8 W., offered land, Duluth land district, Minnesota.

McIlhargey on September 23, 1891, filed his pre-emption declaratory statement for said land alleging settlement September 16, 1891. The receipt he took was endorsed across its face: "Under section 2, act of Oct. 1, 1890," and he claims that he was entitled under said section to transfer a claim he had theretofore held on the NE. $\frac{1}{4}$ of Sec. 23, T. 55 N., R. 12 W., with settlement thereon of November 7, 1887, being unoffered lands within the second indemnity belt of the grant to the Northern Pacific Railroad company. The tract last described was selected by the Northern Pacific R. R. Co., October 17, 1883, and McIlhargey's declaratory statement was offered for filing November 9, 1887. The land was finally awarded to the railroad company.

Johnson made homestead entry for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, which included part of the land in controversy.

McIlhargey having filed his pre-emption declaratory statement on the tract in controversy September 23, 1891, applied to make final proof therefor on August 10, 1893, accompanied with his affidavit of that date, averring that his filing was made under Section 2 of the act of October 1, 1890 (26 Stat., 647). That section provided that qualified entrymen under the homestead or pre-emption laws who in good faith settle upon and improve land in said second indemnity belt "having made filing or entry of the same, and for any reason other than voluntary abandonment failed to make proof thereon, may, in lieu thereof, within one year after the passage of this act, transfer their claim to any vacant surveyed government lands subject to entry," etc.

But McIlhargey had no filing or entry on the land in township 55, as indeed it was not subject to entry on November 9, 1887, the time he applied to file on it, and the receipt he attaches to his appeal shows that the local officers did not receive and file it, but, as appears by endorsement thereon, held it in abeyance subject to the prior rights of the railroad company. He therefore had no claim under said section 2, to transfer.

But aside from that, when he filed his pre-emption declaratory statement on the land in controversy September 23, 1891, alleging settlement September 16, 1891, it was upon offered land, and the time within which final proof should have been made expired September 16, 1892. He urged that he did know the difference between "offered" and "unoffered" lands and supposed he had thirty-three months from settlement within which to make proof, but the receipt he took, dated September 23, 1891, which he attaches as an exhibit to his appeal, describes the land in controversy as "offered" land, and says on its face that "the time within which final proof is required is on offered lands in twelve months from date of settlement."

His application to make final proof on August 10, 1893, was denied by the local officers and no appeal was taken. His second application of March 3, 1894, to make final proof was also denied by the local officers, and is rejected by your office decision from which this appeal is taken.

The denial of his application to make final proof because of the expiration of time and the intervening homestead entry of Johnson, must be sustained. This disposal of the case renders it unnecessary to consider the motion to dismiss McIlhargey's appeal.

Your office decision is affirmed.

RAILROAD LAND—SECTION 3, ACT OF SEPTEMBER 29, 1890.

GATES ET AL. v. McILROY.

The right of purchase accorded a licensee under section 3, act of September 29, 1890, is not affected by an expired lease of the occupant's right under which no adverse claim is asserted.

Secretary Smith to the Commissioner of the General Land Office, December (J. I. H.) 28, 1895. (C. J. W.)

I have considered the appeal of Robert H. McIlroy in the above entitled case from your office decision of June 1, 1894, wherein is reversed the action of the local office in recommending that the homestead entry of Edwin R. Gates for the NE. $\frac{1}{4}$, Sec. 11, T. 15 S., R. 7 E., San Francisco land district, California, be canceled, and McIlroy be allowed to purchase the same. The land in controversy was included within the grant to the Southern Pacific Railroad Company, forfeited by the act of Congress approved September 29, 1890 (26 Stat., 496). The record shows that James Parmer claimed, under the third section of said act, the S. $\frac{1}{2}$ of Sec. 35, T. 14 S., R. 7 E.

R. H. McIlroy claims, under the third section of said act, the E. $\frac{1}{2}$ of E. $\frac{1}{2}$, Sec. 35, T. 14 S., R. 7 E., and the NE. $\frac{1}{4}$ of Sec. 11, T. 15 S., R. 7 E.

Edwin R. Gates made homestead entry for the NE. $\frac{1}{4}$, Sec. 11, T. 15 S., R. 7 E., August 15, 1892.

McIlroy gave notice of his intention to make final proof, and Gates and Parmer were summoned to appear at the hearing had February 15,

1893. During the trial, Parmer withdrew his claim, leaving the contest between Gates and McIlroy.

After hearing the testimony the local office rendered its decision, holding that the entry of Gates should be canceled, and that McIlroy should be allowed to purchase the lands claimed by him.

Gates in due time appealed to your office, and after an examination of the record the aforesaid opinion of the local office was reversed, the final proof of McIlroy was rejected, and the entry of Gates held intact.

From this decision McIlroy appeals to this Department.

The only questions that need be considered by this Department are, whether or not McIlroy had such a deed, written contract with, or license from the Southern Pacific Railroad Company as is contemplated by the act of September 29, 1890; and if he had such contract or license was he qualified to purchase the lands in controversy on the date of said act.

On the question of his contract with or license from the railroad company McIlroy testifies substantially that about September, 1870, he bought from one Samuel Ackley the possessory right to these and other lands for the sum of \$2,000, cash; that in 1872 he got a circular in pamphlet form, printed by the Southern Pacific Railroad Company, requesting citizens to settle on their lands, to take them up and improve them, under which he made application to purchase the N. $\frac{1}{2}$ of Sec. 11, T. 15 S., R. 7 E.; that the circular was to the effect that the company wanted their lands taken up and improved, and that the parties who made improvements should have the first preference to buy, when said lands were for sale, and that the improvements should cut no figure in the price; that he did not have a copy of the circular and has asked Mr. Madden, the land agent of the railroad company, for a copy, but had failed to get one; that he had received an answer to his application from the Southern Pacific Railroad Company, printed on the usual form; that said answer has been lost or destroyed, the last time he saw it being in 1890, and he has been unable to find it after diligent search; that he has never lived on said land, but that he has cultivated 35 or 40 acres of it and grazed the remainder. Counsel for McIlroy introduced a certified copy of his application to purchase the aforesaid land from the railroad company, dated January 15, 1873.

Following the decision in the case of *Eastman v. Wiseman*, 18 L. D., 337 (syllabus quoted), wherein it was held that "The provisions of Section 3, of the forfeiture act of September 29, 1890, according a preference right of entry to persons who are in possession of forfeited lands under 'license' from a railroad company, extend to one who takes possession of and improves such lands under the circular invitation of the company, and in accordance with said circular applies to purchase said land of the company," your office properly held that McIlroy established such a license from the Southern Pacific Railroad Company as is contemplated by the act of September 29, 1890.

It is claimed by Gates that notwithstanding McIlroy was once in possession of this land by virtue of his license from the railroad company, he subsequently parted with his possession and his right to become the purchaser of it, and is now estopped from asserting such right as against him. As evidence of the fact that McIlroy had parted with his rights as a licensee of the railroad company, an instrument signed by said R. H. McIlroy and John Byer was introduced and is as follows:

EMMETT,

January 1, 1886.

Know all men by these presents that I, R. H. McIlroy, have this day sold the right to John Byer to take up and improve the NE. $\frac{1}{4}$ of Sec. 11, in T. 15 S., R. 7 E. M. D. M., for the sum of \$100 (one hundred dollars) and the use of said land to farm and graze until said land shall be restored back subject to homestead and pre-emption, and for one year after said land does go back to government, then it is further agreed between the parties that at any time said John Byer shall want to sell out he shall give said McIlroy or his successor the first privilege to buy said land above described, and it is further agreed that the \$100 (one hundred dollars) is to be paid in work at times when said McIlroy shall need it on his ranch as that may be agreed, upon for such labor. As witnesseth our hands and seals this day above written.

Signed and sealed in the presence of Wm. N. McIlroy.

R. H. MCLROY (seal)
JOHN BYER (seal)

Does this instrument amount to an assignment of McIlroy's right to become a purchaser of the land under the forfeiture act, *supra*?

The instrument recites that McIlroy has sold to Byer the right "to take up and improve (the land in question) and the use of said land to farm and graze, until said land shall be restored back subject to homestead and pre-emption and for a year after it goes back to government." The instrument expired by its own limitation September 29, 1891, if it was ever made operative by delivery. There is no evidence, however, that it was ever delivered to Byer. It comes from the custody of McIlroy and gets into the record in a questionable way, through one who had previously been McIlroy's attorney. Byer is claiming nothing under it, nor does Gates, who introduced it, claim under it. It is at most a lease of McIlroy's rights. If he could assign them he could also lease.

The testimony is not clear as to whether Byer was in possession September 29, 1890, or not. If he was, he was there as McIlroy's tenant. This instrument, in my opinion, does not affect McIlroy's rights under said forfeiture act. It is insisted, however, that he is estopped from exercising such rights as against Gates by reason of his acts and representations to Gates touching the condition of the claim. If he encouraged Gates to take possession of the land and to expend labor and money upon it, as a claim open to settlement and occupancy, laying no claim to it himself, as Gates and his wife say he did, then he is estopped; on the other hand if Gates went on as McIlroy's tenant, with the understanding that if McIlroy could not purchase under said

forfeiture act, then Gates could hold for himself, and that the improvements were made by Gates, with a full knowledge of McIlroy's claim, as testified by McIlroy and his son, then McIlroy is not estopped.

This is purely a question of fact and the testimony in reference to it is so nearly balanced that it becomes difficult to say where the preponderance is. On one side is Gates and wife, and on the other is McIlroy and his son. The circumstances, to my mind, rather support McIlroy's insistence. The local officers, who had the advantage of personal observation of, and acquaintance with, the parties, seem to have believed McIlroy's version of the facts. I am inclined to the same view of it, and therefore your office decision is reversed, the finding of the register and receiver is affirmed, and the right to purchase the land under the forfeiture act of September 29, 1890, is awarded to McIlroy.

PRIVATE LAND CLAIM—ACT OF MARCH 2, 1889.

WHEELER *v.* THE BESSY HEIRS.

The special act of January 10, 1849, authorizing a location in full satisfaction of a certain confirmed settlement claim is a grant of an estate in land which at the death of the grantee descends to his heirs.

The provisions of section 1, act of March 2, 1889, with respect to the disposition of land at private entry, are in no wise applicable to the location authorized by said special act of 1849.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (J. L.)

This case involves six hundred and forty acres of land within the former Greensburgh land district, Louisiana, to be located in accordance with the act of January 10, 1849 (9 Stat., 753).

Under the act of Congress "for ascertaining and adjusting titles and claims to lands in that part of Louisiana which lies east of the Mississippi and island of New Orleans," Antoine Bessy, *alias* Anthony Bessee, established his right to a particular tract of land containing six hundred and forty acres in the parish of East Baton Rouge, Louisiana, and procured a certificate therefor, showing its location and boundaries, to be used as the basis for an order of survey by the surveyor general. It appeared upon actual survey that the land so acquired "by virtue of settlement and inhabitation," conflicted with some claim held under a different and superior title. Whereupon Bessy or Bessee applied to Congress for relief. And on January 10, 1849, the following act was passed:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the surveyor general of the State of Louisiana is hereby authorized and directed to locate for Anthony Bessee, in full satisfaction of his six hundred and forty acre confirmed settlement claim in the parish of East Baton Rouge, Louisiana, the like area, according to the lines of the public surveys,

upon any unappropriated land belonging to the United States in the Greensburgh land district, Louisiana, and upon the return of a certificate of such location to the General Land Office, a patent shall issue to the said Bessee.

Approved, January 10, 1849.

Anthony Bessee died in Baton Rouge, Louisiana, on the 7th day of January, 1852.

On April 29, 1872, D. W. C. Wheeler by D. J. Wedge, Esq., his attorney, filed an application with the surveyor general for "scrip," or certificates of location for six hundred and forty acres of land to be issued under the third section of the act of June 2, 1858 (11 Stat., 294). Wheeler claimed that on April 23, 1872, for the sum of fifty dollars, he purchased from the administrator or "succession" of Antoine Bessy, deceased, the following property, to wit:

A purchase land claim against the United States government for six hundred and forty acres of date 1811, No. 338, shown by Cosby and Skipwith's Reports of 1821, U. S. State Papers.

Upon said application the surveyor general on June 29, 1872, prepared eight certificates of location numbered 233 A, B, C, D, E, F, G, and H, respectively, for eighty acres each, and on July 31, 1872, transmitted them to your office for approval and authentication. On September 3, 1872, your office acknowledged receipt of said certificates, and called the attention of the surveyor general to the fact that the special act of Congress above quoted in full, authorized and directed the surveyor general to locate for said Anthony Bessee six hundred and forty acres upon any unappropriated land in the Greensburgh land district, Louisiana, in full satisfaction of the claim which was offered as the basis of said certificates, and directed him to report at an early day whether such location was ever made, and if not, why the party in interest failed to avail himself of the provisions of said special act of Congress.

On August 21, 1891, Louise Bessy and Adele Bessy, claiming to be the only heirs of Antoine Bessy, *alias* Anthony Bessee, deceased, filed with the surveyor general a request, that in accordance with the special act of January 10, 1849, he locate for them six hundred and forty acres of land on unappropriated land belonging to the United States in the Greensburgh land district, and specified according to the lines of the public surveys, the particular tracts upon which they wished the location to be made. On August 25, 1891, the surveyor general by letter addressed to Messrs. Robert B. and George Lines, attorneys for said heirs, refused to make such location upon the ground, that the act of Congress of March 2, 1889 (25 Stat., 854), provided that after the passage of said act no public lands of the United States, except those in the State of Missouri, shall be subject to private entry.

From said decision Louise and Adele Bessy appealed. On October 28, 1891, your office called the attention of the surveyor general to the suspended claim of Wheeler aforesaid, and directed that notice of the

claim and of the appeal of the Misses Bessy, be served upon Mr. D. J. Wedge, the attorney for Wheeler. Mr. Wedge was notified on November 16, 1891. On May 8, 1893, he caused to be filed the evidence of purchase under which Wheeler claims. And on May 20, 1893, Messrs. Holcomb & Johnston, of Washington, D. C., entered their appearance as attorneys for Wheeler, and advised the Commissioner that the case was "in order for action."

On June 18, 1894, your office held the aforesaid certificates of location for cancellation, and directed that location in the Greensburgh land district may yet be made under the act of January 10, 1849, and that patent may properly issue for the land so located to the heirs of Anthony Bessee, who is now deceased.

Wheeler has appealed to this Department.

The Misses Bessy filed with their application to the surveyor general, and as part thereof their joint affidavit, which shows *prima facie* the following facts:

Antoine Bessy, *alias* Anthony Bessee, had only two children; a son named Alexis, who died in the year 1840, leaving a widow, Helen Johnson, who is dead, and three children, Paul, Louise and Adele; and a daughter named Cecile, who died without issue in the year 1868. When Anthony died on January 7, 1852, his heirs were, his daughter and three grandchildren aforesaid. When Cecile died without issue in 1868, the three children aforesaid, her nephew and nieces, were her heirs jointly. Paul died without issue in the year 1881, and his heirs were his two sisters, Louise Bessy and Adele Bessy; who thus show that they are now the only heirs of Anthony.

The facts thus shown are not contradicted or questioned by Wheeler or any of his attorneys. They may be assumed to be true for the purposes of this decision.

The act of Congress of January 10, 1849, is a grant to Anthony Bessee for valuable consideration, of an estate in land which at his death descended to his heirs.

"The purchase land claim," which Wheeler thought he bought at the "succession" or administrator's sale on April 23, 1872, had no existence then. It had been extinguished by full satisfaction on January 10, 1849, by operation of the special act aforesaid.

I concur in your office opinion that, the act of March 2, 1889 (25 Stat., 854), and the act of June 2, 1858 (11 Stat., 294) are irrelevant to this case; and that they do not affect the special act of January 10, 1849; which remains in full force, and must be obeyed; unless it shall appear that there remain no unappropriated lands belonging to the United States within the limits of the district of territory described in the act.

The act of March 2, 1889 (25 Statutes 854), Section 1, reads:

That 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.

This relates to the private sale or entry of 'offered' lands under sections 2354 and 2357 United States Revised Statutes. . . . These provisions of said acts of 1889 and

1891, while forbidding the disposal at public auction or *private sale* of the mass of public lands under the general statutes that formerly provided therefor, do not necessarily prevent the disposal of lands under any act of Congress of a special nature having local application, in such manner as therein provided for. (General Circular of 1892, page 4.)

In the case of *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S., 638, Miller, J., after quoting the words "*pre-emption*," "*private entry*," and "*sale*," said:

In the terminology of the laws concerning the disposition of the public lands of the United States, each of these words has a distinct and well known meaning in regard to the mode of acquiring rights to these lands. . . . A sale for money in hand, by an entry made by the party buying (i. e., a private cash entry), is throughout the whole body of laws for disposing of the public lands understood to mean a different thing from the establishment of a pre-emption or homestead right.

"Private entry" and "private cash entry" are synonymous in the nomenclature of the Land Department.

Formerly the policy of the government, in administering the Land Department, was, after due notice, to offer at public sale to the highest bidder the surveyed public lands. Such of them thus offered as were not then sold, were thereafter subject to private sale, and could be purchased by what is known as "private cash entry." The lands thus subject to private purchase became known, in land office terminology as "offered" lands; those that could not be thus purchased were known as "unoffered" lands. (Secretary Noble's Instructions to the Commissioner of the General Land Office, 16 L. D., 327.)

Under said former policy, any person who was, or who had declared his intention to become a citizen, could buy as much land as he could raise money to pay for, and secure title by "private entry" or "private cash entry." In this way non-resident speculators were absorbing numberless tracts of land, and holding them from cultivation, hoping to realize the "unearned increment" which would accrue from the labor of others in developing the country. This practice was against the policy of Congress which encouraged actual settlers in good faith and residents. Therefore Congress put a stop to it. The act of March 2, 1889, had no other purpose. It repealed no other law. It disturbed no *bona fide* rights whether vested or inchoate. It simply said that from and after its date, the practice of selling "offered" land to private persons for cash should be discontinued.

The Commissioner rightly held that said act had nothing to do with the special act for the relief of Bessee. He had no scrip, no certificate, no land warrant, no money to pay. He owned the special act of Congress; a statutory grant in the nature of a float within the limits of the Greensburg land district. He was not required to apply to the Commissioner or to the Secretary; but only to the United States surveyor-general in Louisiana; whose mandatory duty it was to locate six hundred and forty acres, and return to the General Land Office a certificate of the location, as a basis for a patent.

Your office decision is hereby affirmed. You will cancel the eight certificates of location prepared by the surveyor general and transmit

ted to your office in 1872. You will instruct the surveyor general to obey the act of January 10, 1849; and to locate for the heirs of Anthony Bessee six hundred and forty acres of land, according to the lines of the public surveys, upon any unappropriated lands belonging to the United States in the Greensburg land district, Louisiana, as its limits were established and recognized on January 10, 1849, and to return to your office a certificate of such location, in order that a patent shall issue to the heirs of said Bessee. The selections made by the heirs aforesaid in their application to the surveyor-general dated August 20, 1891, and presented on August 21, should be respected in making said location unless sufficient legal reasons to the contrary shall appear, as to some one or more of the tracts selected.

OKLAHOMA TOWN LOTS—OCCUPANCY—AGENT.

BOWIE *v.* GRAFF.

The right to acquire title to town lots in Oklahoma under the act of May 14, 1890, is dependent upon occupancy, not residence, and such occupancy may be begun by an agent, and maintained thereafter through a tenant.

The presence of such agent in the Territory at the hour of opening will not operate as a disqualification if he did not thereby acquire an advantage for his principal over other applicants.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (E. E. W.)

STATEMENT. The above named parties, Henry T. Bowie and Louis Graff, are contesting applicants for deed to lots 1 and 2, of block 53, in Lexington, Oklahoma. That portion of Oklahoma was opened to settlement on the 22d of April, 1889, and on the 15th of May following the townsite surveyor issued a certificate setting forth that the lots were that day "surveyed for, taken and occupied by Louis Graff." The people residing on the townsite recognized the authority of this surveyor to issue such certificates, and also recognized the certificates as evidences of claim and occupancy. During the next month one T. A. Baldwin, as agent for Graff, caused a house to be built on the lots, at the cost of \$225, purchasing the material, making payments for labor, and doing everything pertaining to the improvement in the name of the principal. As Graff's agent, Baldwin then authorized one P. H. Smith to rent the premises, and Smith rented them to Bowie, who immediately moved into the house, and has occupied it ever since. He paid rent from June, 1889, till some time in the year 1892, when he ceased to pay, and, without surrendering possession to his landlord, set up independent, adverse claim of right to title himself, alleging that Graff had never established occupancy in person, and that his agent, Baldwin, was disqualified by reason of being in the country at the hour of opening. The rent at first was collected by

Smith, and afterwards by one Abernathy, and accounted for to Graff by Baldwin. During Bowie's occupancy he has made some repairs and slight improvements. It is not shown that Graff established occupancy in person, and it is admitted that Baldwin is an officer in the U. S. Army, and was with his command near the townsite at the time of the opening.

The land was entered as a townsite on the 22d of July, 1893, at which time Bowie was occupying the premises as aforesaid, and had paid no rent, or otherwise acknowledged Graff's right, since the year before. Graff had not abandoned his claim, but through his agent, Baldwin, he had made demand on Bowie for rent, and upon payment being refused, he had demanded possession of the premises.

The trustees heard the case on the 14th of October, 1893, and awarded the lots to Graff, holding that he was the legal occupant. On the 20th of the same month Bowie filed an appeal and specification of errors, but failed to serve copies on Graff. The record was sent up to the General Land Office, and on the 17th of January, 1895, the Assistant Commissioner rendered the following decision:

Rule 46 of the Rules of Practice requires that "notice of appeal and copy of the specification of errors shall be served on appellee within the time allowed for appeal," which in this case was ten days from October 16, 1893. The papers in the case contain no evidence that Bowie's appeal was ever served on Graff or his attorney, and in your letter of transmittal, dated November 27, 1893, you state that "no proof of service of appeal filed in this case."

Under this state of facts it is held that there has been a failure to appeal in this case and said decision, therefore, will be considered final as to the facts. See Rule 48 of the Rules of Practice.

The said board, however, committed an error in law in holding that Louis Graff is a legal occupant of said lots. There is no evidence in the case even tending to show that he has ever been in the town of Lexington. On the contrary, it is satisfactorily shown, in the absence of rebutting evidence, that he has never been in said town. All the improvements which he caused to be placed on said lots were placed there by an agent, and it is a well settled principle that no possessory right to public land can be acquired through acts performed thereon by an agent. Such acts do not make the principal a legal occupant of said lots, and that his application for a deed thereto must be rejected. See 19 L. D., 363, on page 368.

The proposition that a tenant in possession will not be permitted to deny the title of his landlord is unquestionably correct as a general rule, but where a party goes upon public land as the tenant of one having no right to the possession, such tenant may acquire title in his own name. (*Downing v. Chapman*, 18 L. D., 361 and cases cited).

Board No. 4 found that Bowie was an occupant of said lot from June, 1889, to the date of hearing, and that he ceased to pay rent for the premises from sometime in 1892, but it failed to make any finding as to his general qualifications as a lot occupant. If he is a duly qualified lot occupant, I can discover no reason for denying him a deed for said lot. Should this decision become final, and Bowie show to your satisfaction that he is a qualified lot occupant, you will issue a deed to him on the usual terms.

OPINION. The decision of the Assistant Commissioner that there had been no appeal, and that the decision of the trustees was final as

to the facts, is correct. And his review of the case on the questions of law was also proper, notwithstanding the failure to appeal, and the consequent finality of the decision of the trustees as to the facts. Rule 48, of the Rules of Practice; *Witt v. Henley*, 12 L. D., 198; *Hazard v. Swain*, 14 L. D., 230.

But the decision of the Assistant Commissioner on the main point in the case is erroneous. The doctrine that no possessory right to public land can be acquired through an agent is sound as to homestead entries, but it does not apply in the case of town lots. In the case of a homestead the principal consideration for which the grant is made is that the entryman shall actually reside on the land—make it his home. That is a requirement of the law, a condition of the entry, a consideration for the grant, that cannot be performed through an agent. But in the case of town lots the consideration is occupancy, and occupancy may be by residence, by tenant, or by improvement. The act of Congress of May 14, 1890, 26 Stat., 109, provides that land in Oklahoma—

may be entered as town-sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of Sec. 2387 of the Revised Statutes.

Section 2387 of the Revised Statutes provides that the entry shall be “in trust for the several use and benefit of the occupants” of the land, and that the execution of the trust, as to the disposal of the lots, and the proceeds of the sales thereof, shall be conducted “under such regulations as may be prescribed by the legislative authority of the State or Territory in which the town is situated.” The Legislature of Oklahoma Territory has, by the act of December 25, 1890, Stats., Okla., 1145, prescribed the following regulations:

Sec. 1. Whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a townsite, it shall be lawful and the duty, whenever requested by a majority of the occupants or owners of the lots within the limits of the town, (for the proper officers) to enter at the proper land office the land so settled upon and occupied, and hold the same in trust for the several use and benefit of the occupants thereof and those holding by deed or otherwise, according to their respective interests.

Sec. 4. (The trustees) shall, subject to the provisions of this act, by a good and sufficient deed of conveyance grant and convey the title to each and every block, lot, share or parcel of the same to the person, persons, associations or corporations who shall occupy or possess or be entitled to the right of possession or occupancy thereof, according to the several rights and interests of the respective claimants in or to the same as they existed in law or equity at the time of the entry.

Sec. 9. Should any one or more persons, associations, or corporations claim adversely the title to any lot or lots, parcel or parcels of land within the boundaries of such city or town, the party in possession, or if neither party be in actual possession, then the party first filing his application, shall be *prima facie* entitled to deed.

Sec. 10. The amount of ground which any one claimant shall be entitled to receive a deed for in a single tract, under the provisions of this act, unless said claimant, or

his grantors, were in the actual peaceable possession of the same prior to its entry as herein provided for, and had improved the same, and is still in the occupancy thereof, may equal, but not exceed, two acres in extent: Provided, That such ground be exclusively occupied by, or in the possession of, such claimant, and have permanent and valuable improvements thereon. Such claimant shall also be entitled to a deed for such additional lot, not exceeding in area thirty-five hundred square feet, on which he may have substantial improvements. When any claimant shall make application for a deed to more than one tract, or parcel, he shall file, in addition to his own affidavit as required by this act, the affidavits of at least two disinterested witnesses, showing the nature, character and actual cash value of the improvements upon such additional lot or lots so claimed.

Thus it is seen that the occupant, the one in possession, or who has the right to possession, is entitled to deed. And to be an occupant, or in possession, in the meaning of these statutes, it is not necessary to reside on the premises. Under these statutes one may occupy, be in possession, or invested with the right to possession, by residence, by tenant, or by improvements. Actual possession as much consists of present power and right of dominion as an actual corporeal presence. *Minturn v. Burr*, 1 Cal., 107. Actual possession of (public) land is the purpose to enjoy united with or manifested by such visible acts, improvements, or inclosures as will give the locator the absolute and exclusive enjoyment of it. *Staininger v. Andrews*, 4 Nev., 59. There can be no such thing as constructive occupancy under the townsite laws, but there must be an actual bodily presence of the claimant or some one for him on the premises; or a purpose to enjoy united with or manifested by such visible acts, improvements, or enclosures as will give the claimant the absolute and exclusive enjoyment of it. *Bender v. Shimer*, 19 L. D., 363. A claimant is not required to actually live on a lot as on a homestead. It is sufficient if he makes a settlement and improvements, though the improvements be occupied by another. Such tenant occupies for him, the owner. *Berry v. Corette*, 15 L. D., 210. The object of the law was to give the owners of lots a good title to their property. Opinion of Attorney General, 1 Lester, 431.

The Assistant Commissioner's decision seems to be based on the theory that while occupancy may be maintained by tenant, it cannot be begun by agent, but must be initiated by the claimant himself. That is a mistaken view. The supreme court of Utah has held that it cannot be begun by agent, and also that the claimant must be a resident of the town. *Hussey v. Smith*, *Pratt v. Young*, and *Cain Heirs v. Young*. 1 Utah 129, 347, 361. But on appeal of the case of *Hussey v. Smith* the supreme court of the United States reversed the Utah court, and held that deed should have been made to Hussey, who was a resident citizen of the State of Ohio, and had never been an inhabitant of Salt Lake City, the town in which the lot in controversy was situated, who had never occupied the lot, and whose claim was based only on a purchase of the improvements and right to possession under a decree of foreclosure of a mortgage. *Hussey v. Smith*, 99 U. S., 20.

It is the uniform holding of the Department that occupancy may be maintained by tenant, and no rule or reason is known to exist why occupancy may not be initiated by agent, provided the agent acts in the name of the principal, and the element of good faith is evident.

In this case everything was done in the name of the principal, and good faith is evident in every act. The allegation that Baldwin was disqualified to act as agent because he was in the country at the hour of opening is not well taken. It is not necessary that the agent shall possess the same qualifications as the principal, and Baldwin's presence in the country at the hour of opening did not disqualify him, unless he thereby acquired some advantage for his principal over his competitors for the lots, and that is not even charged.

The decision of the Assistant Commissioner of the General Land Office is reversed, and the trustees will be instructed to make deed to Graff.

ACCOUNTS—SURVEY—MILEAGE RATE—ADJUSTMENT.

W. C. MILLER ET AL.

The mileage rate of compensation for surveys is regulated by statute, and cannot be determined by the average mileage per day made during the period covering a survey.

The term "dense undergrowth," as used in the statutes wherein provision for augmented rates is made, means such a growth as obstructs the use of the transit, and seriously impedes the work of chaining the line.

A deputy surveyor should not be heard to complain as to the adjustment of his account, where in the contract he agrees that no payment for work not personally done by him shall be made, and it appears that in fact he did no part of the work in person, and that the government thereafter, to avoid the disturbance of private vested rights, approves such survey, and fixes a just compensation therefor which is accepted by the surveyor.

Under the provisions of section 8, act of July 31, 1894, the Department has no jurisdiction to revise an account that has been finally adjusted by the Auditor, and due payment thereof tendered and accepted.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (W. M. B.)

This is an appeal taken by the attorney of United States Deputy Surveyors W. Clayton Miller and David M. White from your office decision of July 29, 1895, wherein was refused the re-opening of two certain accounts for surveys and resurveys executed under contract No. 137, dated January 21, 1892 (entered into jointly by said deputies), for the purpose of readjustment and payment of the further sum of \$2,128.45 thereon, upon grounds hereinafter stated.

Miller qualified to both accounts, although it is claimed that he did but a small portion of the work under the contract, while White, whom it is alleged did a much larger share of the work, strange to say, qualified to the correctness of neither. Such action is unusual and not in

keeping with the usage on the part of contracting deputies in presenting—and the government in accepting and paying—claims for survey of the public lands.

These accounts as originally presented, on the one hand, and as adjusted by your office and paid by the disbursing officer of the Treasury, on the other, can be more readily understood by the tabulated statements, and the explanations thereof, given below.

Account for surveys, as made out and presented by the deputies.

STATEMENT NO. 1.

Mls.	Chs.	Lks.				
26	19	82	Standard lines, \$13 (high rates) per mile	.....		\$341.28
2	53	72	“ “ 9 (low rates) “ “	.....		24.04
124	53	53	Township “ 11 (high rates) “ “	.....	1,371.36	
8	38	80	“ “ 7 (low rates) “ “	.....		59.40
508	48	10	Section “ 7 (high rates) “ “	.....	3,560.21	
72	37	11	“ “ 5 (low rates) “ “	.....		362.32
44	65	93	Meander “ 13 (high rates) “ “	.....		582.71
11	71	14	“ “ 9 (low rates) “ “	.....		107.00
2	55	09	Connecting “ 5 (low rates) “ “	.....		13.44
Total						\$6,421.70

(Idem) as corrected and adjusted by the General Land Office.

STATEMENT NO. 2.

Mls.	Chs.	Lks.				
62	67	84	Township lines, \$11 (high rates) per mile	.....		\$691.33
98	52	18	“ “ 7 (low rates) “ “	.....		690.57
58	08	67	Section “ 7 (high rates) “ “	.....		406.76
519	77	54	“ “ 5 (low rates) “ “	.....	2,599.85	
44	65	93	Meander “ 13 (high rates) “ “	.....		582.71
11	71	14	“ “ 9 (low rates) “ “	.....		107.00
2	55	09	Connecting “ 5 (low rates) “ “	.....		13.44
Total						\$5,091.66

Account for re-surveys as made out and presented by the deputies.

STATEMENT NO. 3.

Mls.	Chs.	Lks.				
48	51	18	Standard lines, \$13.00 (high rates) per mile	.....		\$632.32
3	12	80	“ “ 9.00 (low rates) “ “	.....		28.44
101	31	04	Township “ 11.00 (high rates) “ “	.....	1,115.27	
18	21	45	“ “ 7.00 (low rates) “ “	.....		127.88
171	01	19	Section “ 7.00 (high rates) “ “	.....	1,197.10	
4	35	43	“ “ 5.00 (low rates) “ “	.....		22.21
Total						\$3,123.22

(Idem) as corrected and adjusted by the General Land Office.

STATEMENT NO. 4.

Mls.	Chs.	Lks.				
16	09	43	Standard lines, \$13.00 (high rates) per mile	.....		\$209.53
13	65	81	“ “ 9.00 (low rates) “ “	.....		124.40
26	21	22	Township “ 11.00 (high rates) “ “	.....	288.92	
115	20	01	“ “ 7.00 (low rates) “ “	.....		806.75
8	76	24	Section “ 7.00 (high rates) “ “	.....		62.70
166	40	08	“ “ 5.00 (low rates) “ “	.....		852.51
Total						\$2,324.81

It will be observed that the total amount of the account, for original surveys, claimed by the deputies, is \$6,421.70, and that allowed by your office after corrections and adjustment made in accordance therewith, is \$5091.66—showing a reduction of \$1330.04; and total of account for re-surveys is \$3123.22, which after like correction and adjustment amounts to \$2324.81, being a reduction of \$798.41; aggregate reduction \$2128.45, the amount, as stated, now claimed by appellants.

The corrections made by your office in the accounts for surveys and re-surveys consisted (1) in transferring to the column of township lines, at the mileage rate for such lines—as will appear by a comparison of statements 1 and 2—28 miles, 73 chains, and 54 links, of the Fort Hall correction line (which is also a standard parallel), and 21 miles, 68 chains, and 74 links of the west boundary line of the reservation—as will be seen by a comparison of statements 3 and 4—for which appellant charged in said accounts, and now claim the rate of mileage allowed by law for standard lines; and (2) in cutting down the number of miles of standard, township, and section lines charged for (to the extent as shown by above statements) at the respective augmented rates of \$11 and \$7; increasing, however, the linear mileage at the respective minimum rates of \$7 and \$5 per mile.

The standard line mileage rate appears to have been disallowed by your office, though not so stated, for the running of said correction and boundary lines for the reason that it was not satisfactorily shown that two sets of chainmen were employed and used in extending those lines, as is prescribed by the Manual of Surveying Instructions for the purpose of securing that high degree of accuracy so necessary in the survey and establishment of standard lines.

In making up these accounts the augmented rates of \$13, \$11 and \$7 per mile were charged for all standard, township exterior and section lines, or portions thereof, where the same passed over lands which appeared from the field notes to have been covered, at time of survey, with "dense sage," "dense sage brush," or a "dense undergrowth of sage brush."

The record shows that your office, by letter "M" of December 6, 1894, notified the contracting deputies, through the surveyor-general, that their accounts had been adjusted, and that the stated disallowance had been occasioned for the reason—substantially stated—that the lands which were covered with such growth of sage brush, as above described, should not be classed, or put in the same category, with those lands specified in the act of Congress as "covered with a dense undergrowth," for which payment of the augmented rates of mileage were authorized for the survey thereof.

No appeal was taken from your office decision of the last above named date, the contracting deputies electing at that time, as it would appear, to receive the amount awarded them under their contract upon the closing of their said accounts in the General Land Office and the

Department of the Treasury, instead of calling in question the equitable-ness of the award made by the decision of your office by an appeal therefrom at the time, which allowance was just and liberal, regardless of the frauds charged against them (and not denied) in the execution of surveys under their contract.

As a matter of fact, this appeal is from your office decision, as already stated, of July 29, 1895, wherein was refused application of appellants made more than four months subsequent to adjustment and payment of allowance upon their said accounts) to have the same reopened for the purpose of further action thereon.

Whether an appeal could properly be taken from the action of your office of the last named date, under the circumstances surrounding this case, will be considered hereinafter.

With regard to complaint of appellants that only the township rate had been allowed for standard lines, let it be admitted for argument's sake, that an error was made in allowing said township rate for the Fort Hall correction and west boundary lines of the reservation, with a total length of 50 miles, 62 chains, and 28 links; since there is only a difference of \$2 in the rates prescribed for the two lines—township and standard—an allowance of the same would give them only \$101.55 additional.

If it is proper to consider said allegation of error, then it would be equally so to consider another question which is presented by the record in that connection, which is as follows:

Of the total mileage of the two lines above named, 21 miles, 68 links, and 74 chains, constitute the said west boundary line, for the entire length of which the township rate was allowed and paid, while the re-survey of that line was not authorized by the contract or any special or general instructions.

If it is insisted that it became necessary (which is not admitted) to re-survey that line in order to have a line upon which to close township, exterior, and section lines so as to complete the surveys authorized by contract, it cannot in justice be claimed that it was necessary to retrace any portion of said line south of the ten-mile post thereon, for the reason that there were no subdivisional surveys made in townships adjacent to that line and south of said point, and no township exterior line south of same point, run to said west boundary line, save the south township boundary line of T. 9 S., R. 32 W., which was coincidentally surveyed with the correction or south boundary line of the reservation, which was extended from the guide meridian, and already paid for, as such correction or boundary line. Thus it is shown that beyond any question 11 miles, 68 chains, and 74 links of the west boundary line were unnecessarily retraced, and that in said accounts \$13 per mile were charged for 9 miles, 58 chains and 74 links, and \$9 per mile for 2 miles, 10 chains thereof, amounting in the aggregate to \$145.63. Deducting, therefore, said sum of \$145.63 from the amount charged for the survey and resurvey of said lines, and giving appellants credit for

the \$101.55 claimed by them, in the manner stated above, leaves a balance of \$44.08 against the contracting deputies for the survey and resurvey of said correction and west boundary lines.

This disposes of the contention of the appellants, upon the merits of the case, with respect to their charges for the survey and resurvey of the last two above mentioned lines, for which standard rates are claimed.

Relative to the disallowance resulting from cutting down the mileage of standard, township and section lines, for which augmented rates were charged, upon the ground hereinbefore stated, it appears that a greater part of the reduction—in fact something over \$2,000.00 thereof—was made for the said reason.

In the Manual of Surveying Instructions (p. 224), for 1894, such "dense undergrowth" as is found upon lands which warrant the payment of augmented rates for the survey thereof, and the sense in which that term is used in the appropriation for survey of the public lands, contained in the act of March 3, 1891 (26 Stat., 971), under authority of which this contract was made, is defined in the following language:

By dense undergrowth is meant thick bushes, boughs, or other vegetable growth of such height as to obstruct the use of the transit, and require cutting away to obtain sights along line; also bushes, brush, vines or other vegetation which is of such tangled and difficult character as to seriously impede the work of chaining the line.

Appellants contend, however, that the foregoing definition is much stricter than the one contained in the Manual of 1890, which was in force at the time the contract was made and during the period the work thereunder was undergoing completion. This is error. The fact is, the Manual of 1890 contains no definition whatever of the term "dense undergrowth."

The one above quoted is accepted as correct in all particulars; it comes fully and clearly within the meaning or sense, doubtless, in which the term is employed in the statute, and has in such substantial or material sense been so recognized for a period of time antedating the execution of this contract in fixing the rate of mileage authorized by law for the survey of lands covered with a dense vegetable growth.

To bring the phraseology "dense sage brush," or "dense undergrowth of sage brush," within the purview of the stated definition of the statutory term "dense undergrowth," as found in the Manual, appellants contend that the growth of sage brush, herein described, encountered along the lines of survey, was of such height "as to obstruct the use of the transit, and of such size and density as to materially impede the work of chaining the line," and for the purpose of establishing the truthfulness of such allegations they file with the appeal the affidavits of Deputy Miller; George Winter, engineer in charge of the construction of the Pocatello Water Company's ditch and flume; J. J. Cusick, superintendent of Pocatello Water Works at

Pocatello, Idaho; H. R. Harrison, a chainman employed on the survey; and A. B. Hower, surveyor of Bannock county, Idaho.

The language employed in each one of the affidavits is about the same, and the material portion of each affidavit is in the following words:

That the sage brush prevailing there (Fort Hall Indian Reservation), and covering a large majority of its surface, is of such height and density, and its circumference is so great and bushes so large that it materially interfered with the survey as a whole and more particularly and more largely and seriously with the chainman and chaining thereof, and almost equally so with the deputy and his flagman and axemen and teamster.

The height of this sage brush is nowhere shown in said affidavits, nor is it proven therein or elsewhere that such sage brush as is represented by the field notes as covering the land over which the lines of survey passed had to be, or was in reality, cut away, in order to facilitate the progress of the survey.

Evidence is submitted upon the point of height and size of sage brush upon lands in close proximity to but outside of the reservation, which is not deemed competent to show the precise character of that growing upon lands within the same in the face of the best and only direct evidence upon that point as furnished by the field notes of the supplemental test surveys made by Special Examiner Henry L. Collier, consisting of a partial retracement of the lines of survey purporting to have been run by the contracting deputies, his examination thereof, and report thereon (p. 12, book of field notes) in words following:

Dense sage brush about eighteen inches high. Not very troublesome and should not be classed as "dense undergrowth," as "obstructing the survey."

The field notes of every mile of the inspection surveys made by Deputy Collier have been carefully examined, and they show that the sage brush upon the greater portion of the land over which the lines of his said surveys passed was from eighteen to twenty inches high; twenty-four inches in many places, and as much as twenty-eight inches in a few spots.

For the purpose of establishing the fact that the work of chaining the lines was seriously impeded wherever such growth was encountered along the same, attorney for appellants submits a tabulated statement of the mileage of subdivisional surveys, whereby it appears that 816 miles (out of a total of a little over 1,145 miles of all lines) were run in 132 days, showing an average made of 6.18 miles per day. The field notes for almost every mile of the entire survey and resurvey have been most carefully examined and they do not show the number of hours each day devoted to work during the said period, nor is it otherwise in evidence that a full day's work, for any number of days was put in during that time. The average mileage made during the period covering the survey cannot properly be made a criterion or standard by which to determine the mileage rate of compensation that should

be paid for such work; that matter is regulated by statute, and is made to depend upon the particular character of the land surveyed; no other rule would be a safe or proper one.

While upon this particular branch of the subject, however, it might be well to state that the field notes show that frequently 10 to 11 miles of section lines were run in a day over land represented as covered with "dense sage brush," and it is recalled here that on September 10, 1892, in T. 9 S., R. 34 E., (the extreme southern portion of the reservation), 958.20 chains (12 miles, less 1.80 chains) of true lines were run, every inch of ground over which said lines passed being covered with "dense sage brush;" that on December 17, 1892, in T. 3 S., R. 34 E. (the extreme northern portion of the reservation), 932.75 chains (12 miles, less 27.25 chains) of true lines were run over same character of land; and that on May 16 and 17 in T. 4 S., R. 35 E., 1,758.03 chains (22 miles, less 1.97 chains) of true lines were run during these two days; land over which lines passed also of like character with that above described.

After representing that an average of only 6.18 miles per day had been made during the 132 days spent in subdivisinal surveys, appellants contend that an equal daily average could not be made in the survey of standard lines owing to the fact that the latter class of lines required much more careful marking and accurate running in their extension. Upon examination, however, of the field notes of survey of the Fort Hall Correction line—which is also a standard parallel—it is ascertained that on May 20, 1892, commencing at the standard corner of T. 9 S., Rs. 33 and 34 E., 960 chains (12 miles) were run on that day, every foot of ground over which said portion of that line passed being covered with this same "dense sage brush," if the field notes are to be relied upon as giving a true description of the character of land over which the lines of survey passed.

German to the correctness or reliability of said field notes, W. T. Trowbridge, who was specially detailed to inspect and retrace the lines of surveys and resurveys, as far as might be deemed necessary, executed under the contract, and make report thereof, on page 48 of the same states: "I find also a number of lines, where dense sage brush was reported, to be absolutely bare of brush and nothing but bare ground with a little grass."

No denial by appellants of the truthfulness of the above statement is found in the record submitted for examination.

To accurately run and carefully mark the lines of a tier of sections—the extent of the true lines thereof being 11 miles or thereabouts—is considered by experienced surveyors to be a good day's work in the field in open country.

Great stress is placed by the attorney in this case upon the small daily average mileage made in the larger portion of these surveys, with a view of justifying the claim of his clients to a higher mileage rate of compensation for all work charged for in their accounts.

The daily progress made in these surveys does not seem to have been affected by the existence along the lines of this "dense sage brush," for while the field notes show that 11 miles and upwards of lines were run some days over ground covered with such growth of vegetation, still they also show that only 5, 6 or 7 miles were made on other days over precisely the same character of land.

This fact alone demonstrates the fallacy of a rule which would allow the daily average speed made in a survey to have any weight in determining mileage rates of compensation. If it were proper to recognize such a test, the correct principle would seem to be to regulate the rate by the mileage that could be, rather than by that which was actually made in the course of a day.

Sage brush running up from eighteen to twenty-eight inches—and even to thirty inches—in height can not be considered as "obstructing the use of the transit" in "obtaining sights along line," since such sights are easily obtained by means of transits most commonly in use across lands covered with bushes or other objects which range from four and one-half to five feet in altitude, and over objects of even greater elevation where the flag is sufficiently elevated along the line; and the linear mileage of 10, 11 and 12 miles of true lines—leaving out random lines—made in a day, in the instance cited, afford sufficient evidence that the chaining was not "seriously impeded" along the lines by the presence of described growth of sage brush or bushes, hence it necessarily follows and must be held that the phraseology "dense sage brush" or "dense undergrowth of sage brush," where the sage brush is of the same height, size and density as that found upon these lands, does not place the lands covered with such growth in the class of lands designated in the contract and the statute as "covered with dense undergrowth," the character of which warrants the payment of the augmented rates, \$13, \$11, and \$7, of mileage for the survey thereof.

Referring again to the question of sufficiency of evidence furnished respecting the use of two sets of chainmen on standard lines claimed by appellants to have been run as such in conformity to Manual of Instructions, Special Examiner Trowbridge, in his report (p. 47), in pointing out and commenting on an error of a serious nature made in the survey of the First Standard parallel south, states that:

It is not difficult to understand why this error should not have been discovered by the second set of chainmen required in running standard lines, for the reason that two sets of chainmen were not used on this line, a fact admitted by the deputy to me.

In this connection Special Examiner Collier, in his report (p. 53), of March 4, 1894, makes the following observations:

The deputy, D. M. White, who signed the oaths as the deputy who did the work in his own proper person *did not* do the work, and was himself seldom in the field. He employed a man by the name of McComb, who signs the oath of special chainman. This the deputy *does not deny*. Mr. Kimport, who was flagman on all the work north of the First Standard parallel south, says that Mr. White was not with the party at any time during his connection therewith.

Mr. White furnished him several blank oaths to sign and although he was not engaged on the standard or any line south thereof, yet his name appeared to the oaths of all the work that is included in contract No. 137. The other assistants could not be found.

In the face of such uncontradicted evidence the conclusion is that the proper showing has not been made that two sets of chainmen were used, as hereinbefore assumed, upon the Fort Hall correction and west boundary lines, for which reason the rate prescribed for township lines, as stated, was only allowed for the survey thereof.

With respect to the work done by deputies Miller and White in person under their contract, the report of Trowbridge upon that point is substantially corroborated and sustained by that of Collier, wherein on page 56 the latter states:

Before closing this report I would most respectfully again call your attention to the fact that neither Deputy White nor Deputy Miller did the work on contract No. 137. Deputy White was engaged as engineer of the Pocatello water works company to which he gave his undivided attention, while Deputy Miller was engaged at the same time on a government contract in north-west Idaho.

The service would be very much improved by having the deputies under contract No. 137 punished as provided by the act of Congress approved August 8, 1846, in reference to making false affidavits.

No effort is made on the part of appellants to disprove the allegations contained in the foregoing statement; not even a formal denial thereof is entered, and not being satisfied with money received for work which was not personally performed by either of them and to which they were not entitled under the terms of their contract, they now seek to recover additional compensation upon the grounds stated.

One of the material conditions of that contract, to which reference is made, is in the words following:

And it is further understood and agreed by and between the parties to this agreement that . . . no payment shall be made for any surveys not executed by the said deputy surveyors W. Clayton Miller and David M. White in their proper person.

These surveys and resurveys which were shown by the inspection and reports of the special examiners to contain serious inaccuracies were, however, accepted upon recommendation of Deputy Collier—based upon the ground of public policy and non-disturbance of private vested rights—that they be approved upon correction by appellants of said defects. The correction of the inaccuracies, so far as the limited tests disclosed, were made by one of the contracting deputies, Miller, who had failed up to that time to perform any work under his contract, or to exercise any personal supervision over the same, and upon adjustment of the accounts, presented by him, by your office and the Auditor just and lawful compensation was tendered and accepted by said Miller and White for all work done under contract No. 137, and charged for in said accounts, regardless of the fact whether the work was performed by them or those in their employ.

The decision of your office, based upon the foregoing state of facts, refusing to reopen these accounts for the purpose of recommending an additional payment thereon is therefore affirmed.

Aside from the fact that there is no merit in the claim of appellants they are stopped from obtaining any further auditing or readjustment of said accounts, with a view of additional payment thereon by the Auditor for the Interior Department by virtue of provision of act of July 31, 1894 (28 Stat., 208, section 8, par. 3), in words following:

Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.

The items constituting these accounts are composed of two parts, the first thereof representing the work done, and the second the rate charged and amount allowed therefor, and it has been clearly shown that the work indicated by each of the items embraced in these accounts for surveys and resurveys, as summarized in statements Nos. 1 and 3, a proper rate and amount were allowed for the same by your office as is evidenced by statements Nos. 2 and 4, and explanations which follow.

The Auditor for this Department examined and approved said accounts for payment at the rate of mileage allowed by your said office for the work described in each item of these accounts without suspending a single item therein contained for "further evidence or explanation" relating to the compensation prescribed therefor by law.

Subsequent thereto payment was made and accepted by appellants of the allowance so made for each and every item of work for which compensation was claimed in the settlement of their accounts, whereupon the same were finally closed by the disbursing officer of the Treasury, and it is now beyond the jurisdiction of an executive department of the government, under provision of the above cited act, to further revise the same.

OKLAHOMA LANDS—QUALIFICATIONS OF CLAIMANT.

DEWEY *v.* JACKSON (ON REVIEW).

The prohibition against entering the Territory of Oklahoma, contained in the act of March 2, 1889, is general, and includes therein honorably discharged Union soldiers and sailors.

The fact that a soldier's declaratory statement is filed by an agent, after the lands are duly opened, will not make such claim valid if the principal was in said Territory at the hour of opening.

Secretary Smith to the Commissioner of the General Land Office, December (J. I. H.) 28, 1895. (C. J. W.)

I have before me the petition of Ambrose F. Jackson for re-review of departmental decision of September 12, 1895, 21 L. D., 160, involving homestead entry No. 3631, and final certificate No. 84, for NW. $\frac{1}{4}$ of Sec. 28, T. 12, R. 3 W., I. M.

The chief ground of error alleged to have been committed was in holding that Jackson was disqualified by reason of his presence inside the Territory of Oklahoma at 12 o'clock, noon, on the day of opening. The insistence is that he being an honorably discharged Union soldier is excepted from the operation of the second proviso to section 13, of the act of March 2, 1889 (25 Stat., 1005).

Said proviso is as follows:

That each entry shall be in square form as nearly as practicable and no person be permitted to enter more than one quarter-section thereof, but until said lands are open for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The proviso immediately preceding the one above quoted is as follows:

That the rights of honorably discharged Union soldiers and sailors in the late civil war, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged.

These sections are parts of the act of June 8, 1872. There is in my opinion no conflict between the two provisos to the act of March 2, 1889. Sections 2304 and 2305, Revised Statutes, confer no right upon the persons named to enter upon public lands not open to settlement and especially upon lands thereafter acquired, and it would seem that to put them upon an equality with others as to the time when they might lawfully go into the Territory of Oklahoma, does not abridge any right conferred upon them by said sections. The right to enter in advance of others, is not amongst the rights defined and described in said sections. The purpose of said proviso first named seems to have been to make it clear that soldiers and sailors might exercise the rights conferred by sections 2304 and 2305 in Oklahoma, as soon as opened to settlement which might otherwise have been in doubt, while the purpose of the last proviso seems to have been to put all persons on the same footing as to the time when they might enter and go into said Territory. If it had been the intention of Congress to provide that Union soldiers and sailors might go into said Territory in advance of others, and make their selections of land first, they would doubtless have said so in plain terms, and would, at least, have made provision for securing equality amongst those who belong to these two classes.

I must therefore hold that honorably discharged Union soldiers and sailors, like others, were bound to obey the law and the proclamation of the President as to the time of entering said Territory, and failing to do so they must suffer the same penalty as others.

It is insisted, however, that Jackson's filing was made through an agent, as authorized by sections 2304 and 2305, and not made until the 23d of April, 1889, the day after the opening, and that therefore Jackson's presence inside the Territory at the hour of opening could have no relation to or effect upon his agent's act. This is in effect saying

that Jackson could lawfully do through an agent that which he had disqualified himself to lawfully do for himself. I cannot so hold.

I deem it unnecessary to make any comment upon Jackson's motives in coming into the Territory prematurely. He was inside at the hour of opening. His coming in was not induced by either fraud or force. His presence inside at the hour of opening, according to Smith v. Townsend (148 U. S., 490), puts him where he will be deemed to have broken both the letter and the spirit of the law. The Department, as the law stands, has no power to relieve one in this situation. The motion is accordingly denied.

SWAMP LANDS—ADJUSTMENT—FIELD NOTES.

BISHOP v. STATE OF MINNESOTA.

In the adjustment of the swamp grant the question at issue is whether the lands involved were of the character granted at the date of the grant.

Where the State accepts the field notes of survey as the basis of adjustment, and from such evidence a selection is duly made, the Department will not cancel the same in the absence of convincing proof of fraud or mistake in the survey.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (J. L.)

The land involved in this case is the E. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 35, T. 144 N., R. 26 W., Saint Cloud land district, Minnesota. The exterior lines of the township were surveyed in the years 1871, 1872 and 1873. The subdivisions were surveyed in 1875. The township map on file in your office was approved August 12, 1876. And on November 25, 1876, the United States surveyor general for Minnesota, certified to the local land office, "A list of the swamp and overflowed lands in the Saint Cloud district, selected from the field notes of the surveys as inuring to the State of Minnesota," under the swamp land grant of March 12, 1860; and included in said list "all of fractional section 35, T. 144 N., R. 26 W., containing 639.45 acres, as swamp and lake. Tamarac swamp and Mud lake."

On October 19, 1893, Albert Bishop (who was not a settler), filed an application to make homestead entry of the tracts aforesaid in accordance with circular "K" of December 13, 1886 (5 L. D., 279). The governor of the State of Minnesota was notified, and a hearing was ordered, at which, in accordance with paragraph 6 of said circular, the burden of proof was upon Bishop to show that said tracts of land were "not in fact swamp and overflowed and rendered thereby unfit for cultivation, at the date of the swamp land grant."

After the hearing the local officers found only,

That a majority of each government subdivision embraced in said application was not swamp or overflowed land at the time of the government survey; and from the growth and kind of timber now standing thereon, as testified to by the witnesses, a

fair preponderance of the testimony shows that a majority of each of said subdivisions is not swamp land.

Thereupon they recommended that the claim of the State to said land as swamp, should be cancelled, and that Bishop's application to make entry of the same, should be allowed.

On June 4, 1894, your office affirmed said decision, and the State of Minnesota has appealed to this Department.

Your office decision is erroneous. Bishop has utterly failed to prove that the tracts of land in controversy "were not in fact on March 12, 1860 swamp and overflowed lands made unfit thereby for cultivation." The evidence proves the contrary, not only by a clear and palpable preponderance, but, as I think, beyond reasonable doubt.

Bishop called three witnesses besides himself to prove the condition of the land as swamp or not swamp in November and December, 1893. The State also introduced four witnesses for the same purpose. Two of the latter, Richard Cronk and David Connors, very intelligent persons, made a careful survey of the whole of the east half of section 35, on the 6th, 7th, 8th, 9th and 10th days of December, 1893. Bishop was with them part of the time. Mr. Cronk, who is an experienced and skillful surveyor, furnished an accurate topographical plat of said half section made from actual measurements on the ground. Cronk and Connors when examined and cross-examined as witnesses proved its correctness. That plat is in evidence; and it shows that in each of the three 40-acre subdivisions of the NW. $\frac{1}{4}$, more than five-eighths of the land is swamp, and that in the 40-acre subdivision of the SW. $\frac{1}{4}$ less than one-fourth of the land is swamp. Against such positive testimony, the conjectural estimates of Mr. Bishop and his friends and witnesses, made without measurements, can not have weight.

But that is not the matter at issue in this case. The question to be determined is: Whether the four subdivisions in contest were swamp or non-swamp within the meaning of the grant, on the day of its date, March 12, 1860?

Inspection of the official map and field notes of the township on file in your office, shows conclusively that between the years 1871 and 1875, everyone of said subdivisions was "swamp." A comparison of the official map with the map prepared by Mr. Cronk, shows the topographical changes which have taken place during twenty years. Mr. J. E. Hayward, one of the United States deputy surveyors who helped to make the official surveys, appeared as a witness, and testified that the official map is right. That Mud Lake just west of the land in contest was one compact body of water with its surface at least three or four feet higher than the surface of the water there now. That in consequence of the recession of the waters there are now two lakes, Goose lake and Mud lake, where Mud lake was alone in 1872. It was also proved by another witness that there is up on Leech river, about ten or eleven miles above the land in contest, a government dam, which when closed diverts water

from Mud lake and leaves the adjacent meadows dry, and when opened leaves the water to overflow the meadows to the depth of several inches.

There is not a particle of evidence in the case tending to show that the character and condition of the land in 1860 was otherwise than as the United States surveyors found it in the years between 1871 and 1875.

For the adjustment of the swamp land grants the Land Department proposed to the several States two methods to be adopted, viz:

1. The field notes of the government survey could be taken as the basis for selections, and all lands shown by them to be swamp or overflowed within the meaning of the act, which were otherwise vacant and unappropriated September 28, 1850 (or in this case March 12, 1860), would pass to the States.

2. The States could select the lands by their own agents, and report the same to the U. S. surveyor general with proof as to the character of the same.

The State of Minnesota by its legislature accepted and adopted the first of said methods. There is nothing in this case to justify this Department in repudiating said arrangement. Proof of fraud, or a mistake so gross as to be tantamount to fraud on the part of the surveyors, would be required to induce this Department to set aside a swamp-land selection made by the surveyor-general in obedience to its orders in pursuance of the aforesaid agreement. In order to contradict the field notes, which have stood unimpeached for twenty years, testimony should not be merely contradictory, it must clearly preponderate.

The only facts found by the local officers are quoted on the second page of this decision. Their finding contains no reference to the condition or character of the land on March 12, 1860. It was dated February 8, 1894, and contains only two propositions:

1. That a majority of each subdivision was not swamp or overflowed land at the time of the government survey (i. e. between 1871 and 1875).

2. And from the growth and kind of timber now, (i. e. in 1893 and 1894) standing thereon *as testified to by the witnesses*, a fair preponderance of the testimony shows that a majority of each of said subdivisions is (at the date of their decision), not swamp land.

Neither the local officers nor your office seem to have considered the fact that it appears of record—by the official maps and plats and field notes, and by the surveyor general's certificate—that the whole of the land in contest was in 1875, "tamarac swamp and Mud lake." The natural inference, that the land was more swampy in 1860 than it was in 1875, or in 1893, seems to have been disregarded.

For the foregoing reasons your office decision of June 4, 1894, is hereby reversed. Bishop's application to make homestead entry will be rejected; and the State selection of the lands in contest will be held intact.

CONTEST—PRE-EMPTION FILING—SPECIAL ORDER.

SLOCUM *v.* LANG.

A contest against an expired and abandoned pre-emption filing could not in any event inure to the benefit of the contestant, and will not be allowed.

Hereafter all appeals allowed from orders of the General Land Office granting or rejecting applications to contest, or applications for hearings, shall be promptly forwarded to the Department as current business.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (J. L. McC.)

I have considered the case of Everett E. Slocum *v.* William Hogan, involving the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 23, T. 10 N., R. 4 W., Helena land district, Montana.

This case is a sequel to that of the Northern Pacific R. R. Co. *v.* Kranich *et al.*, in which two decisions have been rendered by the Department, to wit, on April 22, 1891 (12 L. D., 384), and July 7, 1893 (17 L. D., 40), to which reference is made for a full account of the events which led to the present contest. For the present it is sufficient to say that in those decisions the Department found and held that the land involved was within the primary limits of the grant to the railroad company; that the line of road opposite the grant was definitely located on July 6, 1882; that on that date the land described was embraced in the claim of Ernest Kranich, which therefore excepted the same from the operation of the grant; that Kranich had removed from land of his own to reside upon the land in controversy, which disqualified him from acquiring any right of pre-emption; that—

The land therefore became subject to settlement and entry by the first legal applicant therefor. Inasmuch as William Hogan made pre-emption filing on April 14, 1886, he may be permitted, if duly qualified, upon showing compliance with the law, to perfect his claim therefor.

On October 10, 1889, Frank S. Lang applied to make homestead entry of the tracts alleging settlement a few days previously. This application was rejected because of the pending contest.

On July 23, 1893, Lang again applied to enter—but his application was again rejected, for the same reason as before.

On August 16, 1892, one Everett E. Slocum applied to make homestead entry of the tract; but his application was rejected because a contest involving the same was then pending before the Department. He appealed to your office.

On August 23, 1892, he filed affidavit of contest against the pre-emption filing of said Hogan, alleging that the latter was not qualified, and that he had abandoned the land without having resided thereon for the six months required by law. This application was rejected by the local officers; and Slocum again appealed to your office.

On January 23, 1894, Lang filed in the local office certified copies of

documents showing abstract of title and accompanying affidavits showing that Hogan, on March 22, 1887, sold his improvements to Mrs. Nettie Fyatt, who on May 15, 1889, sold to one Nate Sifton, who on October 10, 1889, sold to Frank S. Lang; that Lang paid \$2500, for said improvements, and has made further improvements worth as much more; and that since said purchase in October, 1889, he has continuously resided on the land.

Upon this showing, your office on May 7, 1895, directed that Lang be allowed to make entry of the land.

Slocum filed a motion for review, which your office letter of August 8, 1895, denied.

From said decisions of your office, Slocum has appealed to the Department. He alleges nineteen errors—which need not be recited in full. The large majority of them consist of denunciation of Lang, charging him with “fraud and imposition;” with “maintaining a fictitious contest;” with “concealing the true party in interest;” with attempting to “profit by his own wrong and fraud;” etc.

The departmental decision of July 7, 1893, explicitly declared the tract “subject to settlement by the first legal applicant.” When Lang purchased the improvements, in October, 1889, he at once—within a few days—filed application to enter. The application was refused because of the then pending contest. Said decision of July 7, 1893, was promulgated by the local officers on July 23; on that same day Lang again applied to enter, filing affidavits showing that he was a qualified entryman, and had complied with the requirements of the law as to settlement, residence and improvement. At no stage of the proceedings does any “fraud,” “imposition,” “concealment,” or “wrong” appear to have been practiced by Lang.

The application is not, however, to contest Lang’s entry. There is no charge that Lang did not settle, reside upon, and improve the land as he alleges. The application is to contest Hogan’s (expired) filing. Why Slocum should desire to do this it is difficult to understand. Lang claims nothing by virtue of Hogan’s filing. His claim is based upon his own settlement, residence and improvements, wholly irrespective of any claim that Hogan ever had. It is only in very rare and exceptional cases that a contest against a pre-emption filing is allowed. In the case at bar the filing has expired by statutory limitation; the claim for which it might have served as a foundation has been wholly abandoned; even conceding that such contest might be successful, it could not by the remotest possibility inure to the advantage of the contestant, inasmuch as the right of another party has attached to the land in accordance with law and in pursuance of a specific decree of this Department. The allowance of a contest against such an expired, inefficacious, purely historic filing would be improper and absurd.

The decision of your office refusing to allow a contest is therefore affirmed.

The papers transmitted by your office letter of November 6, 1895, are herewith returned.

In this connection I have to direct that hereafter all appeals allowed from orders of your office granting or rejecting applications to contest, or applications for hearings, shall be promptly forwarded to the Department as current business.

~~PRACTICE—NOTICE—APPEAL—SETTLEMENT RIGHT.~~

GARISS v. BORIN.

Notice of cancellation to the attorney of a successful contestant is notice to such party, and his failure thereafter to exercise his preferred right within the statutory period defeats his claim thereunder.

An appeal will not be held out of time where the delay therein is due to the negligence of the local office.

A homestead entry made in the presence of a prior adverse settlement right must be cancelled on due showing of the settler's claim.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (C. J. G.)

The land involved in this contest is the SE. $\frac{1}{4}$ of Section 5, T. 6 N., R. 31 W., Colby land district, Kansas.

The plaintiff, Albert Gariss, was a successful contestant against timber culture entry for the land in question. Said entry was canceled by your office decision of May 26, 1893, and plaintiff was given preference right. Notice of said decision was duly sent to his attorney.

July 17, 1893, the defendant, C. J. Borin, made homestead entry for this land, and plaintiff having failed to exercise his preference right, Borin's entry was allowed and placed on record in the local office. The next day, July 18, 1893, Gariss filed his application to enter. Said application was rejected, and plaintiff appealed to your office. By office letter of August 19, 1893, you held that Gariss's preference right of entry had expired at the time he made his application, but ordered a hearing to determine whether he was residing on the land when Borin made entry. After said hearing was had the local office decided, November 27, 1893, that Gariss had failed to show that he was an actual settler prior to Borin's entry, and dismissed the contest. Notice of this decision was sent to plaintiff's attorney on the same day, and by him accepted.

January 8, 1894, Gariss appealed, and by your office letter of June 21, 1894, the decision of the local office was reversed and Borin's homestead entry was held subject to the right of plaintiff to complete his application by tendering payment for the land.

The defendant filed a motion to dismiss plaintiff's appeal, for the reason that it was not filed within thirty days after date of notice to Gariss's attorney. This motion was overruled by your office.

The defendant appeals from the decision of June 21, 1894, to this

Department, claiming that it was error for your office to hold (1) that notice served upon plaintiff's attorney was not notice to the plaintiff himself, and (2) that plaintiff was an actual settler on the land at date of defendant's entry.

In explanation of his failure to perfect his application within thirty days after preference right of entry had been awarded him, Gariss files an affidavit in which he states that he did not receive notice from his attorney of the cancellation until July 17, 1893. His attorney makes affidavit to the effect that he had notified plaintiff once before, and the second letter is submitted in evidence.

In view of these facts it may seem a manifest injustice to hold the plaintiff to a strict compliance with the letter of the law. There is no evidence that the delay in receiving notice of the cancellation was due to the neglect or laches of either the attorney or his client. As an evidence of his apparent good faith the plaintiff was in the Oberlin land office by 10 o'clock on the morning of July 18, having traveled a distance of thirty-five miles, for the purpose of completing his homestead application. This is doubtless a case where, on account of a few days' delay in perfecting his entry, the delay being chargeable neither to the attorney or his client, the law is unnecessarily strict towards an otherwise meritorious and properly qualified contestant. But the law requiring a successful contestant to complete his entry within thirty days from date of notice of cancellation, and that notice to an authorized attorney of record is notice to the party he represents, is too well established to call for discussion. There is no question that Gariss failed to perfect his homestead entry within thirty days from date of notice of cancellation. Hence, any rights that he may have must depend on his ability to show that he was an actual settler in good faith at the date of Borin's entry.

Notwithstanding that the local office dismissed Gariss's contest on November 27, 1893, he did not appeal until January 8, 1894. This delay was caused by an oversight in the local office. Gariss's attorney alleges that at the close of the trial, he, in the presence of the plaintiff, requested his dismissal as attorney, and that the plaintiff be notified in person; that the contest clerk made such notation upon the contest docket including the postoffice address of the plaintiff; that he believed the notice to him a matter of form on the part of the office, and having been discharged and having requested that the plaintiff be notified in person, he paid no further attention to the matter. This statement is verified by the contest docket, which bears the notation in pencil: "Notify plaintiff at Rexford, Kans." In the absence of his own neglect or laches the plaintiff cannot be held responsible for the delay in receiving notice of the decision.

As a general rule it is true that the party cannot be expected to appeal until he has had notice of an adverse ruling, and therefore his right of appeal is made to date from the service of the same (*Dreesen v. Porter*, 19 L. D., 195).

The plaintiff can in no sense be held liable for any negligence on the part of the local office. Therefore you properly overruled the motion of defendant to dismiss plaintiff's appeal.

As to Gariss's good faith, settlement upon and improvement of this land prior to Borin's entry, the testimony is to the effect that in April, 1893, he plowed ten acres and sowed it to spring wheat. In the latter part of June he broke five acres additional, and dug a cellar ten by twelve feet, and three feet deep. He built a dug-out with a roof of lumber and tarpaper. This evidence is corroborated by two witnesses living within one and two miles, respectively, of the place.

Borin and his witnesses directly contradict Gariss's testimony, denying that the improvements as testified to were on the place July 16, the day before the initiation of the contest. They were not sure whether the ten acres had been plowed this year or last. Borin and his witnesses, the latter being his father-in-law and brother-in-law, never saw this land prior to July 16, 1893. Borin visited the land again on August 17; the breaking was then done, and the dug-out built. He was aware of the fact that Gariss was successful contestant in this case. Borin and his witnesses claim to have driven over or near the point where Gariss's dug-out is now located. Borin in his testimony admits, however, that the point where the dug-out is located was higher than the point where they were driving. This would indicate that Gariss's cellar may have been dug and they did not notice it.

Taking into consideration the fact that Gariss's witnesses live within one and two miles of this land, and therefore had frequent opportunities of observing any improvements that may have been made thereon, and that Borin and his witnesses live some thirty-five miles from the land and never saw it until the day before the contest was initiated, and furthermore did not have a single witness from the immediate neighborhood of said land, I am disposed to agree with you that Gariss had established his right before Borin made his entry.

The decision of your office is hereby affirmed.

MINING CLAIM—ABSTRACT OF TITLE—SHERIFF'S DEED.

BRADSTREET ET AL. v. REHM (ON REVIEW).

An abstract of title filed by a mineral applicant is insufficient, where a sheriff's deed is relied upon and the decree under which the sheriff's sale is made does not direct the sale of the property in question.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (C. J. W.)

The above stated case was the subject-matter of departmental decision of July 6, 1895, on appeal from your office (21 L. D., 30).

A motion for review of said decision was filed here on July 6, 1895, and on September 25, 1895, movant's counsel were advised that the motion would be entertained and that counsel on both sides would be allowed to file briefs. Such briefs have been filed and counsel on both sides have been heard orally and I have said decision now before me on review.

The mineral entry in question, No. 921, for the Niagara Lode claim, San Francisco mining district, Beaver county, Utah Territory, Salt Lake City land district, was made by Andrew Rehm on July 19, 1883, and has been the subject of a number of decisions from your office, which need not be specially referred to here, for the purposes of the present inquiry, since said entry is yet pending on the application of the entryman for patent.

By letter "N" of March 21, 1894, your office transmitted here the appeal of Andrew Rehm from its decision of December 21, 1893, holding his mineral entry No. 921 for cancellation, and it was on said appeal that the decision now under review was rendered. Its effect is to reverse your office decision of December 21, 1893, and dismiss the protest. It is now to be decided whether said decision is to be reversed, or affirmed and become final.

The following are pertinent facts in the case:

June 25, 1874, the Niagara Lode claim was located by one Thomas Adams. The location notice states that said lode is situated about two hundred feet south of a location known as the "Cerro Gordo," and subject to the laws of the United States and San Francisco district.

August 10, 1875, Adams conveyed a one-half interest in said property to William Stokes.

January 3, 1880, Adams and Stokes conveyed the entire claim to the "Cerro Gordo" and Minnesota Consolidated Silver Mining Company, a corporation organized under the laws of Utah Territory.

July 30, 1881, the Cerro Gordo and Minnesota Consolidated Silver mining company, conveyed to a corporation of the same name organized under the laws of the State of New York, the whole of said Niagara claim. For brevity the above named corporation organized under the laws of Utah will be called herein the Utah Company, and the corporation of the same name organized under the laws of New York will be called the New York company.

The Utah company was organized January 30, 1880, but the record does not show the date of the organization of the New York company.

The property of the Utah company consisted of the Cerro Gordo, Minnesota and Niagara mines consolidated.

On March 4, 1881, one T. M. Collins, in accordance with the statutes of Utah in such cases made and provided, filed with the recorder of Beaver county in said Territory, notice of a miners' lien for work and labor performed as a miner in a certain mine, alleged to be the property of the Cerro Gordo and Minnesota Consolidated Silver Mining company,

the particular property on which the work was done being called the Minnesota mine. It is alleged that the work was done under and by virtue of a contract made with E. E. Woods, the president of the Utah company, and a lien was claimed upon all the property of said company.

Said notice specifically sets forth the character of the work done and the amount due thereon.

January 20, 1882, a suit was brought by Collins in the second judicial district of Utah to foreclose his lien, to which action the Utah company was alone made party-defendant.

On March 6, 1882, he obtained a judgment against the Utah company and *in rem* against the property therein described, and a decree ordering said property to be sold or so much thereof as might satisfy said judgment and costs.

The sheriff of Beaver county in said Territory, thereafter on April 29, 1882, sold all the mines of said company to the said Collins for the sum of \$950, he being the highest and best bidder therefor. The certificate of sale executed by said sheriff to Collins was by him assigned to one P. L. Orth, and on January 25, 1883, said sheriff executed to Orth a sheriff's deed purporting to convey the property mentioned in the decree and in the deed described as the Cerro Gordo, Minnesota, and Niagara mines.

January 27, 1883, Orth by deed conveyed said property to one Andrew Rehm. On April 20, 1883, Rehm made application for patent for the Niagara Lode claim; notice by publication was given thereof for sixty days, as required by law, and no adverse claim was filed against said claim.

June 6, 1883, Rehm conveyed said claim to the Chicago, Calumet and Frisco Silver Mining company and on July 19, 1883, he was allowed to make final entry No. 921, as stated.

Protests have been filed against the issuing of the patent. The status and rights of the protestants were fully considered and discussed in the decision under review and as to this part of the decision, it is so far modified as to recognize the right of protestants to be heard.

The chief contention of protestants is that the applicant had failed to make a case which entitles him to a patent under Sec. 2325 of the Revised Statutes and regulations of the Department (Mining Circular of December 10, 1891, page 24). This leaves protestants in the attitude of nominal parties while the main question is between the applicant for patent and the government. Is Rehm's abstract of title sufficient?

The recorded lien of Collins in so far as it is descriptive of the property to be subject thereto is as follows:

Take notice that I, T. M. Collins, of Frisco, Beaver county, have performed labor as a miner in a certain mine, commonly called the Cerro Gordo and Minnesota mines, situated at about five miles south-west of the town of Frisco and Beaver county and hereinafter particularly described, and that it is my intention to claim a lien upon said mines, or the Cerro Gordo and Minnesota Consolidated Silver Mining company, and its appurtenances as hereinafter described, and sufficient space around the same

or so much thereof as may be required for the convenient working, use and occupation of said mine.

That the following is a true statement of my demand for such labor under which I claim such lien, viz: A contract with E. E. Woods, president of the Cerro Gordo and Minnesota Consolidated Silver Mining Co., for 87 feet on the Minnesota mine a (at) \$14.00 per foot, making Twelve Hundred and Eighteen Dollars. This is the amount agreed to be paid per foot. That said labor commenced to be performed by me on the 22nd day of June, 1880, and ended on the 25th day of February, 1881. That the names of said mines is the Cerro Gordo and Minnesota Consolidated Silver Mining Company, a mining corporation created under the laws of the Territory of Utah. . . . Said Cerro Gordo mine is situated on the west side of the San Francisco Mountains and adjoins the Mormon Maid Mine and also the Minnesota is situated and adjoining the Cerro Gordo mine. The Niagara mine is situated and adjoining the Cerro Gordo and Minnesota mine being and recorded in the San Francisco Mining district, Beaver county, Utah Territory.

The only other paper in the record necessary to quote in order to throw light on the sheriff's deed is the decree under and by virtue of which the property was sold and the deed executed.

The decree is as follows:

In the District Court, Second Judicial District, Territory of Utah, County of Beaver. March 6th of March Term A. D. 1882. Present: Hon. Stephen P. Twiss, Judge.

T. M. COLLINS
vs.
CERRO GORDO AND MINNESOTA CONSOLIDATED } Decree.
SILVER MINING CO.

This cause having this day been brought on to be heard upon the complaint filed therein and taken as confessed by the defendant Cerro Gordo and Minnesota Consolidated Silver Mining Company, whose default for not answering thereto has been duly entered, and upon due proof of service of the summons and certified copy of the complaint upon the defendant; and that notice of *lis pendens* has been duly filed in the county recorder's office of the county where the property described in the complaint and notice of lien attached to said complaint and made a part thereof; and it appearing to the court from the sworn complaint herein that there is now due the plaintiff from defendant for principal and interest upon the debt and lien set out in the complaint the sum of Six Hundred and Fifty Dollars, which sum is to draw and bear interest at the rate of ten per cent per annum, and that all the allegations contained in said complaint are true: And it further appearing that Two Hundred Dollars is a reasonable attorney's and counsel fee for prosecuting this action, and that plaintiff have judgment therefor.—Now on motion of plaintiff's attorney, It is ordered and adjudged, That all and singular the mortgaged premises mentioned in said complaint and lien, and hereinafter described or so much thereof as may be sufficient to raise the amount due plaintiff for principal, interest and costs and expenses of sale to be sold by or under the direction of the sheriff of Beaver county, after due and public notice thereof is given according to law, and the practice of this court—relative to sales of real estate upon execution. That the plaintiff or any parties to the suit may become purchasers at such sale. That the sheriff after the time for redemption expires execute a deed to the purchaser. That the sheriff retain out of the proceeds of said sale his fees and commissions, and pay to the plaintiff his costs taxed at Thirty-One 85/100 dollars, and the sum of two hundred dollars allowed by the court as counsel fee for foreclosure.

That the defendant and all persons claiming from or under it, and all persons having subsequent liens upon the property and land described in the complaint and lien of plaintiff, and all persons claiming to have acquired any interest or estate in said

premises or property subsequent to the date of the filing the complaint herein, be forever barred and foreclosed of and from all equity of redemption and claim, in, of and to said premises mentioned and described in said complaint and lien from and after the delivery of said sheriff's deed.

That the purchasers at such sale be let into possession and that any of the parties in this action in possession of said premises, or any person at or since the commencement of this action who have come into possession under them, deliver possession to such purchaser or purchasers, on the production of a sheriff's deed.

That if the money arising from such sale be not sufficient to pay the amount found due plaintiff with interest and costs and expenses of sale, that the sheriff so specify in his return of sale, and that a judgment of this court shall be docketed for such balance against defendant with interest thereon at the rate of ten per cent per annum from the date of such return, and that the plaintiff have execution therefor.

That the description and boundaries of the property authorized to be sold hereby, so far as they can be ascertained, are as follows:

The properties and appurtenances of the Cerro Gordo and Minnesota Mines, situate in Beaver county, Utah Territory, about five miles south-west of the town of Frisco, said Cerro Gordo Mine being on the west side of what is known as the San Francisco Mountains in said county, and adjoins the Mormon Maid Mine, and the Minnesota Mine adjoins said Cerro Gordo Mine, all in San Francisco Mining District, Beaver county, Utah Territory.

In reference to the sheriff's deed, which is an essential part of applicant's abstract, and a necessary link in his chain of title, I feel constrained to recede from my former view. In reaching the conclusion in said opinion announced, the description of the property set out in the notice of lien was resorted to to aid and complete that set out in the decree. It is now insisted that the description of the property upon which a lien is claimed, as set out in said notice, in which the Niagara mine is mentioned, is intended to throw light on the exact location and surroundings of the particular mine upon which the work was done, rather than to make public a claim of lien upon the Niagara mine, for work done on the Minnesota.

The language of the notice is somewhat confusing, but whatever may be its true interpretation, it can in no event determine what property was authorized to be sold by the decree subsequently rendered. The decree is the sole authority of the sheriff to sell, and the decree must speak for itself. In determining whether or not the Niagara mine covered by the decree, resort must be had to that part of it, which is a judgment *in rem* and designates the particular property to be sold.

The authority for the sheriff to sell is the decree, and that describes the property to be sold. This part of the decree expressly directs the sale of the Cerro Gordo and Minnesota mines, but does not mention the Niagara. It therefore appears that the sheriff had no authority under this decree to sell the Niagara mine.

All parts of the decision under review inconsistent herewith are revoked, including that part which reversed your office decision of December 21, 1893, holding said mineral entry No. 921, for cancellation, which last decision is hereby approved and affirmed.

JURISDICTION—EQUITABLE ACTION—RES JUDICATA.

GAGE *v.* ATWATER ET AL. (ON REVIEW.)

The recommendation of the Commissioner of the General Land Office that an entry should be submitted for equitable action is an administrative act, and a decision of the Secretary that such submission is not proper is a decision on an administrative question that has the effect of arresting proceedings thereunder but leaves the decision subject to review by his successor in office.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (C. J. W.)

On the first day of March, 1862, Matthew Gage made desert land entry of Sec. 30, T. 2 S., R. 4 W., Los Angeles, California.

On January 23, 1886, Atwater, Gunther and Newman each filed affidavits of contest against said entry and filed applications to make homestead entries. Said contests resulted in the cancellation of Gage's desert land entry in accordance with departmental decision of August 1, 1892 (15 L. D., 130), and the allowance of their homestead entries.

November 28, 1893, Atwater, Newman and Gunther gave notice of their intention to make commutation proof before the county clerk of Riverside county. At the hearing Gage appeared by attorney and filed affidavits of contest, one for each entry, and deposited money to pay the expenses of taking testimony. On the closing of the testimony for the entrymen Gage's attorney moved for continuance of hearing to enable protestant to introduce testimony in rebuttal.

On February 16, 1894, the officers of the local land office dismissed said protests and awarded the land to the homestead entrymen without hearing rebutting testimony. Gage appealed to your office and your office decided adversely to Gage. Gage appealed from your office decision and filed with his appeal, petition for re-review of departmental decision of August 1, 1892 (15 L. D., 130), between the same parties and involving the same land, and prayed that said cases be considered together. The defendants were duly served with copies of petitions and affidavits filed in support of same, and filed briefs and arguments in response.

On September 26, 1895, said cases were here considered together, and your office decision in reference to the protest cases was reversed; said homestead entries suspended, and the decision of August 1, 1892 (15 L. D., 130), reviewed and reversed.

I have now before me a motion for review of said decision by defendants upon various grounds, most of which were urged and received consideration before said decision was rendered. The specific grounds of error alleged are:

First—The Secretary of the Interior erred in holding that the affidavit filed by Mr. Gage was sufficient to state a cause of action and that the corroborating affidavit of Alexander Campbell was sufficient.

Second—That it was error to review the decision of the Commissioner of the General Land Office, and to hold that no further hearing will be necessary in view of the disposition hereinafter made of the entries in question.

Third—The Secretary erred in considering in any manner the so-called petition for re-review of the decision of First Assistant Secretary Chandler (15 L. D., 130), for the reason that a Secretary of the Interior cannot review the final decision of his predecessor in office, except in cases of mistakes of fact arising from errors of calculation and in cases in which material testimony is afterwards discovered and produced.

In support of these grounds many authorities are cited.

In reference to the first and second grounds, counsel were fully heard before the decision complained of was rendered and nothing new is now suggested. As to the third ground, while it necessarily received consideration before said decision was rendered, and was insisted upon by defendant's counsel in their briefs and arguments, the brief now filed is more full and complete than any heretofore presented. It involves, too, the legality of the whole decision complained of, and can but command careful consideration.

The authorities cited in support of defendant's insistence are recognized as sound, and if they were applicable in a case like this, would certainly control it. In reaching the conclusion that this case should be re-opened I was influenced to some extent by the newly discovered evidence produced, and by the belief that material facts had been mistaken in rendering the decision reviewed, but I reached the conclusion that for another reason, this case was not *res judicata*. Said decision was not final, for the same reason that the decision which I am now asked to review is not final. It undertook to dispose of a question which it seems to me can only be finally disposed of by the board of equitable adjudication. That board (sec. 2450, R. S.), has exclusive jurisdiction in settling equities. An existing equity cannot be extinguished simply by a refusal to consider it upon the part of one officer. When the Commissioner recommended the reference of Gage's final proof to the board of equitable adjudication, he performed an administrative act, and when First Assistant Secretary Chandler decided that said recommendation was not proper, and declined to approve it, he decided on an administrative question, which had the effect of arresting proceedings but left the decision subject to review by a successor.

Former action of the Department on administrative matters not conclusive. Gervacio Nolan Claim (4 L. D., 311); W. A. Simmons *et al* (7 L. D., 283).

Criticisms of various portions of the decision complained of are made, but the errors alleged are substantially covered by the grounds already referred to. Affidavits and argument is presented to deny the correctness of the finding that section 30 has been rendered valuable for homesteads, chiefly, by Gage's ditch, by showing that the land is productive without water. This is not an open question as the land has been adjudged to be desert land and all controversy on that subject closed.

It is also insisted that the evidence of final payment for the land is wanting. This is required as a condition precedent to submission of final proof to board of equitable adjudication and the same will not be submitted until the record is completed by filing of final certificate as evidence of final payment.

I deem it unnecessary to notice objections urged before the decision was rendered and then considered. I am still of the opinion that the rule of *res judicata* does not apply to the decision of August 1, 1892, and the motion for review is denied.

OKLAHOMA LANDS—SOLDIERS' DECLARATORY STATEMENT.

PHILLIP CASEY.

The prohibition in the proclamation of the President, and departmental regulations, against using the mails for the purpose of filing soldiers' homestead declaratory statements in Oklahoma, is authorized by the law opening the lands in said Territory to settlement.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 18, T. 26 N., R. 1 E., Perry land district, Oklahoma Territory.

The record shows that on February 24, 1894, the local officers transmitted to your office the rejected application of Phillip Casey to file soldiers' declaratory statement, through his agent John Rogers, for the above described tract. The application was received at the local office on September 18, 1893, and rejected because sent by mail.

September 27, 1893, Edward M. Kemp made homestead entry for the tract involved subject to Casey's declaratory statement.

It appears from your letter of transmittal of April 17, 1895, that a relinquishment was made to this tract by Edw. M. Kemp which is not now in the record.

By appeal, your office decision of April 9, 1894, affirmed the action of the local officers.

On April 13, 1892, the Department issued a circular addressed to the register and receiver at Oklahoma City, Oklahoma Territory, contained in 20 L. D., page 7, wherein is found on page 10 thereof the following:

It is also represented that persons have it in contemplation to avail themselves of the mails to present filings in any number at once, to the exclusion of persons proposing to present their applications in person. You are advised in reference to this point that filings of homestead declaratory statements under sections 2304 and 2309 R. S., can only be made by the parties entitled, or by their agents in person, and should not be received by mail. This is a ruling of long standing and should be enforced by you in all cases. (See Copp's Land Owner 1, page 20.)

This circular of the Department was also based on the President's proclamation (17 L. D., 244), wherein it was said:

Soldiers' declaratory statements can only be made by the parties entitled, or their agents, in person, and will not be received if sent by mail.

The act opening these lands to settlement is found in 27 Stat., page 612, the act of March 3, 1893. On page 643 thereof the following occurs:

No person shall be permitted to occupy or enter upon any of the lands herein referred to except in the manner prescribed by the proclamation of the President opening the same to settlement and any person otherwise occupying or entering upon any of said lands shall forfeit all rights to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act for the occupation and settlement of said lands to be incorporated in the proclamation of the President, which shall be issued within twenty days from the time fixed for the opening of said lands.

On page 642 of the same act it is said:

The President of the United States is hereby authorized at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided by the proclamation opening to settlement any or all of the lands not allotted or reserved in the manner provided in section 13 of the act of Congress approved March 2, 1889, etc.

Section 13 of the act is found in 25 Stat., 1005, and contains among other things the following:

Provided further, that the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in section 2304 and 2305 of the R. S. should not be abridged.

Section 2304 of the R. S. provides that soldiers of the United States honorably discharged shall be entitled to enter and receive patent for one quarter section

but such homestead settlers shall be allowed six months after locating his homestead and filing his declaratory statement, within which to make his entry and commence settlement and improvements.

Section 2305 provides that

The time which the homestead settler has served in the army, navy or marine corps shall be deducted from the time hereinbefore required to perfect title, or if discharged on account of wounds received or disabilities incurred within the line of duty then the term of enlistment shall be deducted from the time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

Section 2309 provides that such soldier

may as well by an agent as in person enter upon said homestead by filing a declaratory statement.

It will be noted that section 13 of the act March 2, 1889, *supra*, confines the right of the soldiers in so far as it is not to be abridged to the rights granted under section 2304 and 2305 of the Revised Statutes.

The circular of this Department and the proclamation of the President in nowise affect the rights granted in those two sections. It is only possibly in conflict with section 2309 of the Revised Statutes, if that section be construed as authorizing the use of the mail as an agent, which is not mentioned in the act opening these lands to settlement, or in section 13 of the act of March 2, 1889.

In the case of *Wickstrom v. Calkins* (20 L. D., 459), it was held, *inter alia*—

'The law authorizing the filing of a soldiers' homestead declaratory statement does not warrant the rejection of a filing on the ground that it was received through the mails.

But that case refers to lands in Wisconsin and not to lands in Oklahoma Territory, and from what has already been set out, it appears that the prohibition of using the mails for the purpose of filing soldiers' additional entries in Oklahoma, was not without authority of law.

The discussion in that case upon the late circular of the Department hereinbefore referred to was erroneous, inasmuch as that circular had no application to the lands involved in that case. It is sufficient therefore to say that inasmuch as the President's proclamation was in nowise in conflict with the letter of the law opening these lands to settlement but appears to be in strict accordance with it, the abridgment contained in it is of effect and should be enforced.

The decision appealed from is therefore affirmed.

PRACTICE—APPEAL—ORDER OF DISMISSAL.

WILKINSON v. CURTIN.

An appeal is properly dismissed where it fails to specify any points of exception to the ruling appealed from.

Where an appeal from the local office is properly dismissed for want of compliance with the rules of practice, the case must be regarded as though no appeal had been filed, and therefore none can be considered from the action of the General Land Office affirming the decision below.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (E. M. R.)

This case involves the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 47 N., R. 5 W., Ashland land district, Wisconsin.

The record shows that one Delos Selly, or Sully, made homestead entry for the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said section September 30, 1876, and on May 5, 1883, made additional homestead entry for the tract in controversy under the act of March 3, 1879.

May 7, 1883, he made cash entry for the land under the act of June 15, 1880, and cash certificate was thereupon issued to him. But on July 16, 1883, your office held that the cash entry had been erroneously allowed as to the land involved, and held the same for cancellation.

On October 19, 1883, your office held in reply to a request for information upon the part of the entryman, that in order to secure patent to such additional entry it was necessary to furnish, after the expiration of one year from May 5, 1883, final proof, after giving the required notice showing that he had cultivated and improved the land at least one year.

January 14, 1885, the cash entry was canceled as to the land in controversy leaving the homestead entry intact.

August 13, 1892, Delos Sully applied to make final proof, which was rejected by the local officers because the land was covered by the homestead entry of Larry Curtin, but upon appeal, your office held December 15, 1892, that the entry of Sully was still intact and that the entry of Curtin was erroneously allowed, and consequently held said entry for cancellation.

December 19, 1892, Curtin relinquished his entry and on January 7, 1893, he filed a contest against the entry of Sully, alleging the land to be more valuable for timber and unfit for agricultural purposes. This proceeding ended in the cancellation of the entry of Sully on July 16, 1895.

April 24, 1895, Curtin made application for the reinstatement of his homestead entry.

May 11, 1895, George D. Wilkinson made application to enter the land, which was rejected by the local officers

because the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of Sec. 22, T. 47 N., R. 5 W., is covered by T. & S. entry No. 34, by Larry Curtin, and application filed by him April 24, 1895, for re-instatement of his homestead entry No. 3008, dated July 5, 1892.

Wilkinson appealed, and Curtin filed a motion to dismiss on the ground that the appeal was too vague and indefinite. The affidavit filed by Wilkinson at the time of making his application to enter was as follows:

George D. Wilkinson, being first duly sworn, on oath says: That he is the identical person who made application on May 11, 1895, to file homestead entry on the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 47 N., R. 5 W., in the U. S. Land Office at Ashland, Wisconsin, which was rejected on said date on the ground that a timber and stone entry of one Larry Curtin is still of record in said office, and that said Larry Curtin made application on April 24, 1895, to have his homestead entry No. 3008 re-instated; that said Larry Curtin filed a homestead entry No. 3008 on said described land on July 5, 1892, and on Dec. 19, 1892, he relinquished such homestead entry, and filed a timber claim on the same date on said land; that during the period between July 5, 1892, and Dec. 19, 1892, or any time since, said Larry Curtin has not resided upon nor made any improvements whatsoever on said land; that this affiant is informed and verily believes that said Larry Curtin is acting in bad faith; and does not intend to take said land for his own use and benefit, but that one John Blake is interested in said land, and has so informed this affiant; that said John Blake, as agent for said Larry Curtin, came to this affiant during March and April, 1895, and offered to sell this land to this affiant; that during the fall of 1894 said Curtin made affidavit that the timber on said land was badly injured by fire, and that unless permission to cut the same was granted, it would be destroyed; that such affidavit was untrue, no timber on said land having been injured to any extent, and that said Curtin made such affidavit in bad faith, and for the purpose of fraudulently appropriating such timber; that this affidavit is made for the purpose of opposing the allowance of said Curtin's application to have his homestead entry re-instated, and this affiant asks that the rejection of his application to file homestead on May 11, 1895, be overruled, and this affiant be allowed to enter said land.

GEORGE D. WILKINSON.

August 15, 1895, your office decision was rendered wherein you re-instated the entry of Curtin and dismissed the appeal of Wilkinson. Wilkinson again appealed and on October 1, 1895, your office decision was rendered holding that no appeal lay; whereupon the petitioner applied for the issuance of the writ of certiorari directed to you to forward the record in the case to the Department for such action as may be deemed just after its examination.

Rule 81 of practice, as amended, is, in part, as follows:

No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers.

The writ of certiorari was never intended to take the place of appeal. In dismissing the appeal for want of definiteness, your office held in effect that there was no appeal.

The appeal was in the following manner:

In the matter of the homestead entry involving E. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 22, T. P. 47 N., R. 5 W.

UNITED STATES LAND OFFICE,
Ashland, Wisconsin.

To the Hon. REGISTER AND RECEIVER,
United States Land Office, Ashland, Wis.:

Please take notice that I appeal from your rejection of my application to file homestead entry May 11, 1895, on E. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 22, Tp. 47 N., R. 5 W., to the Hon. Commissioner of the General Land Office at Washington, D. C.

Dated May 11, 1895.

GEORGE D. WILKINSON.
E. J. DOCKERY,
Attorney for George D. Wilkinson.

Your office was not in error in dismissing the appeal as it did not comply with the terms of Rule 45 of practice, which is as follows:

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

The petitioner cannot secure through the application for writ of certiorari what he has lost in failing to comply with the Rules of Practice. The appeal being defective, in contemplation of law none was filed, and no appeal having been filed from the action of the local officers, none can be considered from your office decision. Furthermore, it does not appear that any error has been committed by your office in rejecting Wilkinson's application to enter, inasmuch as the land at that time was covered by the entry of Sully, and the application would fall for that reason. Jhilson P. Cummins (20 L. D., 130).

If the petitioner has reason to believe that Curtin's entry is not in good faith, he can proceed as provided in all contest cases. The application is denied.

HOMESTEAD ENTRY—RIGHT OF AMENDMENT.

FRED G. WAGNER.

The right to amend an entry, so as to include a tract that was omitted therefrom in the belief that it was not public land, will not be recognized, where no effort is made to ascertain the true status of the land on the records of the local office.

Secretary Smith to the Commissioner of the General Land Office, December 28, 1895. (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 1, T. 13 N., R. 9 W., Oklahoma City land district, Oklahoma Territory.

The record shows that on June 11, 1892, the local office transmitted to your office the application of Fred G. Wagner, who had made homestead entry on April 30, 1892, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 1, T. 13 N., R. 9 W., to amend so as to include the tract in controversy.

The facts set forth as a reason for the amendment are that he had originally intended to make entry for that tract of land, but upon making inquiry of people in the neighborhood he was told that it had been taken. That owing to the great distance to the land office he was unable to go there in person, and relying upon this information he made application for the land entered by him. That he has since discovered that said tract is vacant public land and that there is no adverse claim to it. That he has begun to make improvement thereon and asks that he be allowed to amend the entry to include this tract.

This affidavit is corroborated by three witnesses who depose that the general impression in the neighborhood was that the SW. $\frac{1}{4}$ of Sec. 1, T. 13 N., R. 9 W., was appropriated land and that they so informed the applicant. It appears from the record that the tract is unappropriated land.

On December 23, 1892, your office decision rejected the application. Further appeal brings the case before the Department.

The appellant rests his case in great measure upon *ex parte* Samuel Meek (18 L. D., 213), where it was held (syllabus):

A homestead entry may be so amended as to include a tract covered by the applicant's settlement and originally intended to be entered, but not so taken on account of misinformation as to its true status.

An examination of that case shows—

In his affidavit he says that when he made his original entry he did not know that there was any vacant land adjoining said tract and he could not ascertain this at the time because of the crowded condition of the land office.

This application was rejected and—

On February 11, 1892, he filed another, by which it is shown that on September 23, 1891, he went upon the land that he is asking to have added to his original entry, and put a foundation for a house and built a box house that cost \$50; that he placed a stake with notice on that he claimed the land; that he was informed that this land was an Indian allotment, and did not know any better until after he made the entry;

that he could not get into the local office to examine the plats for several days after his entry; that he can neither read nor write, and had to rely on such information as he could obtain.

In the case of Sherman A. Chivens (20 L. D., 186), it was held (syllabus):

The right of amendment can not be recognized on behalf of one who makes an entry and takes less than he might have taken had he informed himself of the status of the records of the local office.

In view of these conflicting decisions, and in view of the fact that it is set out in the decision relied upon by the appellant that owing to the crowded condition of the local office he could not secure the information as to the true status of the land, I am led to believe that that was the controlling reason in allowing the amendment to be made.

I think that amendment will not be allowed in such a case as this where no effort was made to ascertain the true status of the land upon the records of the local office. To so hold would be to harmonize the two decisions, which, under any other construction would be conflicting. An examination of the additional affidavits filed in the case show them to be inconsistent with those originally filed as a basis for the relief sought.

Your office decision is therefore affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

STEPHAN ET AL. v. MORRIS.

The right of a qualified transferee to purchase under section 5, act of March 3, 1887, is not affected by the fact that his purchase was made after the passage of the act, if the land was originally purchased in good faith from the company.

An application to make homestead entry pending at the passage of said act does not defeat the right of purchase under said section.

A covenant in the deed under which the transferee holds to the effect that "any and all additional title . . . which may inure to the said first party, by reason of any acts of Congress, or decisions of the Interior Department of the United States Government, shall inure to the said second party," will not be held to defeat his right to perfect title under said section as a *bona fide* purchaser.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
December 4, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 1, T. 2 S., R. 67 W., Denver land district, Colorado.

The record shows that on June 24, 1890, the Department rejected the claim of the Union Pacific Railway Company, and that your office on July 14, 1890, in promulgating that decision ordered a hearing to determine the rights of the respective applicants to this tract, it appearing that George Stephan, on June 20, 1885, applied to make a timber culture entry of the SW. $\frac{1}{4}$, and on June 24, of the same year, applied to file a pre-emption claim for the SE. $\frac{1}{4}$.

June 22, 1885, Nathan Mansfield applied to make homestead entry for the SE. $\frac{1}{4}$.

January 5, 1889, Frank E. Dodge applied to file a pre-emption declaratory statement for the SW. $\frac{1}{4}$.

August 10, 1888, Robert Morris applied to purchase the land in controversy under the act of March 3, 1887.

At the hearing ordered the various parties in interest, by their attorneys, submitted an agreement to the local officers for their determination of the question as to whether Robert Morris was entitled to purchase the land described under the provisions of the fifth section of the act of March 3, 1887 (24 Stat., 556). In the event that it should be finally determined by the Department that he had no right of purchase, then the hearing was to proceed to determine the rights of Stephan, Mansfield and Dodge.

August 25, 1891, the local officers rendered their decision that Morris could not purchase under said act.

Upon appeal, your office decision of February 14, 1894, was rendered, wherein you reversed the action of the local officers and held that Morris was a competent purchaser under the fifth section of the act, *supra*.

The record shows certified copies of deeds showing the various transfers of the tract as follows: Union Pacific Railroad Co. to the Platte Land Co., February 6, 1882; The Platte Land Company to S. J. Gilmore, August 1, 1886; The Platte Land Co. and S. J. Gilmore to T. S. Hayden and Chas. E. Dickinson, April 29, 1887; T. S. Hayden and Chas. E. Dickinson to S. J. Gilmore, April 30, 1887; and S. J. Gilmore to Robert Morris, July 26, 1888.

In the deed from Gilmore to Morris the following is set out:

The first party hereby covenants and agrees with the said second party that any and all additional title to the land herein described which may inure to the said first party, by reason of any acts of Congress or decisions of the Interior Department of the United States Government, or otherwise, shall inure to the second party to this agreement, and in case a full title in fee simple shall inure to said first party, he shall convey the same in proper form to the second party.

It is maintained that Robert Morris is not entitled to purchase for three reasons:

First, because he purchased subsequently to the passage of the act.

In *Sethman v. Clise* (17 L. D., 307), it was held, *inter alia*:

The right of a qualified transferee to purchase under said section is not affected by the fact that his purchase was made after the passage of the act, if the land was originally purchased in good faith from the company.

Second, that applications of Stephan and Mansfield were made prior to the passage of the act.

The case, *supra*, held also that a claim resting upon an application to enter is not protected under either of the provisos of said section, as the terms thereof provided only for the protection of settlement rights.

And in *Union Pacific Railway Co. v. Norton, idem*, 314, it was held:

The right of purchase under section five, act of March 3, 1887, is not defeated under the first proviso of said section, if at the date of sale of the railroad company the land was not in the *bona fide* occupancy of the adverse claimants under the pre-emption or homestead laws; nor under the second proviso by an application to enter under the homestead law on behalf of one who does not allege a settlement right.

Again, in *Jenkins et al. v. Dreyfus* (19 L. D., 272), it was held (*sylabus*):

The right of purchase under section five, act of March 3, 1887, is not defeated by an adverse application to enter made after the passage of said act, nor by an application to enter pending at the passage of said act under which no settlement right is alleged.

Third, because he is not a *bona fide* purchaser within the meaning of section five of the act of March 3, 1887, because he purchased with notice of defect, as has been set out.

In the case of *Jenkins et al. v. Dreyfus, supra*, a similar recital appeared in the deed, it being there set forth:

This deed is made with the understanding that should the title to the SE. $\frac{1}{4}$, Sec. 33, T. 4 S., R. 67 W., prove defective, the first party will refund second party one-fourth of the price herein paid, and second party agrees to accept the same to relieve the first party from all obligations in the premises.

Nevertheless, Tynon was held to be a *bona fide* purchaser within the meaning of the section.

It would thus appear that the decision appealed from was correct, and the same is affirmed.

PRIVATE LAND CLAIM—APPLICATION FOR RESURVEY.

NIXON HEIRS ET AL.

A resurvey of a private land claim, for the alleged reason that the existing survey does not show the true boundaries of said claim, is not warranted, where it appears that on a showing made by the grantee for legislative confirmation of the "remainder" of the grant, the petition was granted, and the subsequent surveys recognize approximately the full area of the grant contemplated by Congress.

Secretary Smith to the Commissioner of the General Land Office, December
(J. I. H.) 28, 1895. (G. C. R.)

On March 12, 1895, the Department held that a resurvey of the *Millieux* or *Malines* private land claim in the Southeastern District of Louisiana was unnecessary, and that said grant is now satisfied in its entirety by present established boundaries, thus affirming the judgment of your office, dated May 18, 1893.

The *Hixon* heirs, through their attorney Mr. Duane E. Fox, of this city, filed a motion for review of said departmental decision. Proper grounds for entertaining the same having been shown, Mr. Fox was, on June 18, 1895, so advised, and under amended practice rule 114 was allowed to file briefs.

It appears that on July 16, 1764, Jean Jacques Blaise d'Abbadie, Director General Commandant for the King in Louisiana, upon the request of Miss Marie Rillieux, "conceded" to her, "for herself, her heirs or assigns, and to enjoy and dispose of in full ownership and usufruct as of anything to her belonging," a tract of land

bordering on Lake Pontchartrain, from the Ravine du Sueur to Manchac or the Ibberville river, not including the land on which lies the new village of the Zacteaux Indians, lying north and south; bounded on the south by the aforesaid Ravine du Sueur, on the north by Manchac, on the east by the lake Pontchartrain and on the west by the cypress swamp bordering on Lake Maurepas.

The colony of Louisiana having been ceded to Spain, on September 14, 1785, one Don Carlos Trudeau, surveyor under Spanish authority, surveyed the land for Marie Rillieux in presence of her brother (Vicente), and described it as

a tract of land of one hundred and eighty arpents front on the whole depth reaching the cypress swamps, which border on Lake Maurepas, which tract of land forms a peninsula of something like ten thousand one hundred and twenty superficial arpents by admeasurement of the city of Paris, according to the usage of this colony, said peninsula being situated about nine leagues distant from the entrance of the mouth of the Bayou St. John, in the western part, bounded on its front by Lake Pontchartrain, in the southern direction by De Sueur's ravine and the line C. E. and on the northern and northwestern direction by the margin of Lake Maurepas, and by Pass Manchac.

It is unnecessary to give a history of the different conveyances of this land; it sufficiently appears from the documents in evidence that the heirs of John Nixon are now entitled to the same. It was also held by Secretary Delano, March 1, 1875 (2d Copp's Land Owner, p. 23), that "the claim is valid in its entirety, and is entitled to recognition by this Department according to its established boundaries."

Your office had held, June 20, 1874 (2d Copp's Land Owner, p. 23), that "the only portion of this claim that this office can recognize as a private claim is that portion (3,200 arpents) confirmed by said act of 24th of May, 1858," and the Department in the decision quoted modified that decision, holding, as before seen, that "it is valid in its entirety." And just here is where counsel seem to differ as to what Secretary Delano meant by "established boundaries."

Your office in the decision herein appealed from held that the "established boundaries" referred to "were evidently the boundaries of the lands embraced in the two congressional confirmations, as shown by the surveys thereof approved by Surveyor-General Foster," and that this construction "is in harmony with the action of Mr. Secretary Teller in approving the swamp lands to the State on June 4, 1884, *supra*."

The Nixon heirs contend that the grant was a complete one, and that the same is described by natural boundaries as established by the royal surveyor Trudeau in 1785, and by subsequent private surveys; that the Trudeau survey represents the land bounded "in the southern direction by the ravine De Sueur."

W. H. Robinson, under his contract No. 3, dated August 6, 1872, surveyed T. 10 S., R. 8 E., Southeastern District of Louisiana, from November 30, to December 11, 1872, and also T. 9 S., R. 8 and 9 E., same district, from December 27, 1872, to January 14, 1873, stating that he had

Resurveyed the traverse of Lake Maurepas, Pass Manchac, and Lake Pontchartrain, and originally surveyed the lines of township boundaries, *private claims*, and sectional lines in the townships above represented. Swamp lands accruing to the State of Louisiana under the provisions of the act of Congress approved March 2, 1849, have been selected in the townships; see lists herewith transmitted.

The surveyor-general of Louisiana (E. W. Foster), on January 20 1873, approved the map as conformable to the field notes of the survey.

The survey as thus approved recognized the existence of 3,259.04 acres of land in T. 9 S., R. 9 E., and of 5,306.53 acres in T. 9 S., R. 8 E., in all 8,565.57, as inuring to Manon, Emelie, and Rosalia Malines under the concession of 1764 to Marie Rillieux.

The map thus approved represents the Ravine de Sueur as bounding fractional Sec. 26 (in T. 9 S., R. 8 E.) on the east and the southwestern portion of the claim on the southwest side. The Nixon heirs as successors in interest protest against this survey, claiming that it restricts the grant to the extent of nearly one-half, and that the Ravine de Sueur of the Trudeau survey is not and can not be the stream given that name in the Robinson survey; but that the true de Sueur ravine is in fact about five miles to the southwest of the one so falsely named and represented where it opens out into Lake Pontchartrain, and erroneously misnamed Bayou de Sert in the Robinson survey.

It is insisted that the grant is a complete one, capable of being defined by the natural boundaries, described both in the concession of 1764 and by the Trudeau survey of 1785, and that the existing public surveys greatly restrict the grant. A survey is therefore asked, etc.

It is claimed on the part of the Nixon heirs that the Robinson survey is a "false and fraudulent" one; that while Robinson represented that he had "originally surveyed" the lines of the township boundaries, in fact he did not do so, as evidenced by the limited time in which he represented himself as engaged in the work; that as a matter of fact he adopted the field notes of a survey made by one Theodore Gillespie in July, 1861, and returned them as his own; that the Gillespie survey was fraudulent, because of his unsuccessful attempt to get the heirs to pay a sum of money not authorized by law for the survey of the land.

If the validity or correctness of the existing survey were based alone upon the Gillespie survey, there might be some grounds for setting it aside, for after such a proposition had been made, as is alleged, little or no confidence could be placed in his work.

Robinson's field notes are in many respects similar to those made by Gillespie, but that fact does not necessarily impeach their accuracy,

especially since his report shows that he surveyed the lines. If altogether like the field notes of the Gillespie survey, it would only tend to establish the accuracy of Gillespie's work, which would otherwise have remained open to suspicion.

It may be conceded that, if the Rillieux concession of 1764 and the Trudeau survey thereof in 1785 described lands from natural objects, capable of identification, and if the grant were a comp'ete one, the heirs should have the full benefit of the concession, and would not suffer a loss from a miscalculation of the supposed area conceded. But neither the grant itself, nor the description thereof given in the Trudeau survey, is sufficiently definite in giving the exterior boundaries of the land granted to enable the surveyor to accurately describe and measure the land. The grant itself is of a tract bounded on the west "by a cypress swamp bordering on lake Maurepas." The boundary on the north and east is sufficiently definite, but that on the south, "Ravine du Sueur," is still disputed.

The tract of land as described on the map of the Robinson survey corresponds with the description given in the Trudeau survey as to the north, northwestern and eastern boundaries, because here are the great natural boundaries, viz: Pass Manchac, Lake Maurepas, and Lake Pontchartrain. The Robinson survey may or may not correspond with the Trudeau survey in the southern direction, the question being the true situation of "De Sueur's ravine."

In making the survey of 1785 Trudeau describes the tract as forming a peninsula "of something like ten thousand one hundred and twenty superficial arpents by admeasurement of the city of Paris." That area reduced makes 8,609.08 acres. The Robinson survey recognizes the existence of 8,565.57 acres in the grant, the survey being closed on the southwest side of the claim, leaving the greater portion of the land in the northeastern portion of the fractional township between Pass Manchac and Lake Pontchartrain. The grant itself undoubtedly embraces such locus, whatever may be the doubt as to the limit of its extension towards the southwest.

It is thus seen that the Robinson survey and the Trudeau survey practically agree as to the area of the grant. Trudeau says its area is "something like" 10,120 arpents, and Robinson, by a more accurate measurement, places it at only 43.51 acres less than that area. If the appellants are right in their contention as to the true boundaries on the southwestern limits of the grant, the area would be more than 16,000 acres, or nearly double the estimate made by Trudeau himself. It is hardly likely that the royal surveyor would make such a blunder; to charge him with it would be to discredit the correctness of all his work.

The case of Martha B. Nixon *et al. v. Emile Huillon* (20 Louisiana An., 515,) throws much light upon this case, and serves to illustrate the difficulties which would be met by the surveyor who, if appellants'

contention were sustained, should undertake to run the lines to correspond with the claimed limits of the Trudeau survey.

The Nixon heirs in the case cited averred themselves to be the legal owners of the full amount of land as herein contended for, and complained that the defendant had entered thereon and committed waste by cutting and removing timber. Upon this averment they took out an injunction to restrain the defendant from further alleged depredations, and prayed judgment decreeing them to be the true owners of the land embraced in the boundaries then, as herein described, also for damages, etc.

The defendant answered by general denial, and also averred ownership by purchase from the State, etc.

The particular tracts upon which the alleged depredations were charged to have been committed were in Sec. 34, T. 9, R. 8 E., and Sec. 4, T. 10, same range. These tracts, while within the claimed limits of the grant, are without those limits according to the Robinson survey.

The controversy grew out of the uncertainty which seemed to exist as to the locality of the Bayou Sueur, named in the grant, and marked on Trudeau's plat. Upon the issue thus presented the court below dissolved the injunction and dismissed the suit, on the grounds of the uncertain and contradictory character of the testimony. The supreme court affirmed that judgment, saying: "Their testimony (i. e., that of a surveyor-general and two deputy surveyors,) as to the locality of the Bayou Sueur conflicts as much as that of other witnesses." The court further says that the junction of the Manchac Pass with Lake Pontchartrain is "the only certain point in Trudeau's survey."

If upon a trial in the local courts, having all the light that could be thrown upon the question by witnesses skilled as surveyors, with their maps and plats, and others having much knowledge of the general topography of the country, it could not be shown where the Ravine du Sueur of the Trudeau survey exists, it could hardly be expected that a new survey could establish it.

It appears that in the early part of 1856 Adeline C. Nixon presented a memorial to Congress, reciting the terms and extent of the grant, and the different conveyances by which she had become possessed of the same; after describing the boundaries as set forth in the grant, she made a further statement of its area, saying it contained (not about) but "ten thousand two hundred Paris arpents." She recited the acts of the commissioners appointed under the act of March 3, 1807 (2 Stat., 441), wherein by Report No. 383 (American State Papers, Duff Green's Edition, Vol. 2, Public Lands, p. 279), they attempted to confirm the grant to the extent of ten thousand one hundred and twenty Paris arpents, "which was duly surveyed." She further represented that, although the said grant was confirmed, nevertheless it inured to their benefit *only to the extent of one league square*, as the law under which the

commissioners acted restricted them from confirming to any private claimant more than one league square. (Sec. 4, act March 3, 1807, *supra*.)

Your petitioner humbly conceives that the same principle which enabled the commissioners aforesaid to confirm the validity of the original grant to Marie Malines to the extent of a league square of the land included within its limits would, but for the impediment aforesaid, have carried with it a confirmation of the whole of the ten thousand two hundred Paris arpents of which it was composed.

She averred that she was entitled to the remainder of the said tract of land, and prayed for relief confirming her right to the same, etc.

Mrs. Nixon evidently believed that the old board of commissioners by their report (No. 383) did confirm the grant to the extent of a league square, and it is admitted by her counsel that Congress took the same view: for in the report of the committee on private land claims, presented March 5, 1858, it is said:

It is true, as alleged by the memorialist, that owing to the restricted clauses and conditions of the law under which the commissioners acted, their confirmation of claims would only inure to the benefit of the claimants to the extent of a league square, which in the present instance is greatly less than the land embraced by the original grant.

The report of the committee further states:

There can be no doubt that had the law not contained the conditions and restrictions above alluded to, those parties could have exercised all rights of property, as against the United States over the entire extent of the ten thousand one hundred and twenty Paris arpents as specified in the grant made in the year 1764.

The committee regarded the prayer of the memorialist "well founded," and a bill for her relief was reported, and its passage recommended.

This resulted in the passage of the act approved May 24, 1858 (11 Stat., 533), which reads as follows:

That the legal representatives of Marie Malines, born Rillieux, be, and they are hereby, confirmed in all the right, title, and interest now held or possessed by the United States in and to a certain tract of land in the State of Louisiana, containing about thirty-two hundred arpents, being a part of a grant made by the French government, in the year one thousand seven hundred and sixty-four, to Marie Rillieux, according to a survey and plat made by the royal surveyor, Don Carlos Trudeau, and of record in the land-office at New Orleans; and upon a proper survey, duly approved, being returned to the General Land-Office, a patent shall issue: *Provided*, That this act shall only be construed to vest in the said legal representatives of Marie Malines, born Rillieux, the rights, title, and interest in said land now held and possessed by the United States, and shall not be construed in any way to impair the *bona fide* rights, interests, or claims acquired by any other person under adverse grants, concessions, or purchase made prior to the passage of this act.

It is evident that Congress understood that the grant to the extent of the league square was confirmed by the old board, and the act quoted simply confirmed the residue of the grant, namely, "about 3,200 arpents," which added to the league square made up the full amount asked for by Mrs. Nixon in her memorial.

It is unnecessary to discuss the powers of the old board under the act of 1807, or whether the grant was a complete or incomplete one.

It is sufficient to say that, when Mrs. Nixon, then the owner of the land, made her representations to Congress, and upon those representations secured legislation, giving to her the "remainder" of the amount claimed, neither she nor those claiming under her are in a position to ask the land department to make a new survey, with a view to enlarging the claim. She applied to Congress for relief, presumably upon the grounds that the then existing laws afforded her no complete remedy; Congress recognized her claim as a valid one, and gave to her all she asked. It matters not that the legislation asked for and obtained may have been enacted by Congress under a misapprehension of the law and the facts of the case, the fact still remains that Congress acted and in doing so enacted the law petitioned for.

The subsequent surveys recognize (approximately) the full area contemplated by Congress in granting the special relief, and a further survey, for the purposes desired, is not warranted.

The motion is denied.

CHIPPEWA HALF BREED SCRIP—TRANSFEREE.

AYLEN v. YOUNG ET AL.

Chippewa half breed scrip issued under the provisions of article 7, of the treaty of April 12, 1864, in the possession of a half breed not qualified to receive the same under the terms of said treaty, confers no title upon the possessor, or his transferee. The scrip authorized by said article was intended to take the form of property, subject to sale and transfer, and confers upon the holder thereof title and the right of location.

Secretary Smith to the Commissioner of the General Land Office, December (J. I. H.) 28, 1895. (W. F. M.)

On August 4, 1880, S. B. Pinney, attorney in fact for Baptiste Turpin, located the latter's Red Lake and Pembina half-breed scrip, No. 279, upon the SW. $\frac{1}{4}$ of section 26, township 141 N., Range 50 W., within the land district of Fargo, North Dakota.

On September 8, 1892, Russell Aylen filed an affidavit alleging that said location was illegally made by one S. B. Pinney as attorney in fact for a person fraudulently claiming and pretending to be the same Baptiste Turpin to whom a certain scrip or certificate numbered 279 was issued under the treaties of October 2, 1863, and April 12, 1864, with the Red Lake and Pembina bands of Chippewa Indians, when in fact, he was not the same Baptiste Turpin and was not a beneficiary under said treaties. If the powers of attorney under which said Pinney made said location and on the same day transferred the land to Harriet Young were executed by the rightful scribee and in the manner alleged, said location and transfer were illegal and fraudulent, for the reason that the right to make said location is a personal right and not transferable.

Baptiste Turpin, the alleged scribee, under whose powers of attorney Pinney made the location and conveyed the land, never saw the land embraced in said entry and said location was not made for his use and benefit but for the sole use and benefit of other persons unknown to him.

The power of attorney authorizing said S. B. Pinney to locate said scrip and the power of attorney authorizing him to sell and convey the land were both fraudulently obtained without proper compensation to either the pretended or real scribee, and it has been so held by the Honorable Secretary of the Interior, who ordered said scrip to be taken from the files of the General Land Office and returned to the scribee and said scrip is not now in the custody of any Department of the government, and the United States has never received value for said land and is still the owner thereof.

The location of said scrip was an attempted fraud both upon the scribee and the government of the United States, and the removal of the scrip from the files of the General Land Office and its return to the scribee by order of the Secretary of the Interior on account of fraud, was in effect a cancellation of the entry.

A hearing was ordered and held upon these charges and the case has now reached this Department on appeal from the decision of your office the conclusions of which will be stated hereafter.

There are two Chippewa Indians, father and son, bearing the name of Baptiste Turpin, who claim to belong to the Pembina band.

On December 29, 1868, the son made application for scrip for one hundred and sixty acres of land under Article 7 of the treaty of April 12, 1864, between the United States and the Red Lake and Pembina bands of Chippewa Indians (13 Stat., 689), supplemental to the treaty of October 2, 1863 (13 Stat., 667).

No scrip has been issued upon this application.

On April 30, 1873, a similar application was made by the father, and on December 29, 1873, scrip numbered 279 was issued on his application and placed for delivery in the hands of Ebenezer Douglass, United States Indian agent, White Earth Agency, by whom it was turned over to the proprietors of a store of some sort in Minneapolis, Minnesota, who, it appears, had assisted him in the preparation of his application and transmitted it for him to the Indian Bureau.

Fletcher and Loring, manifestly by mistake, delivered the scrip to Turpin, the son, and this blunder has been the prolific parent of the bewildering brood of difficulties that now almost hopelessly involve the efforts of this Department in adjusting the conflicting claims of the father and son and their several transferees.

The younger Turpin having become possessed of the scrip through error, sold it to W. H. Grant, a lawyer in St. Paul, on April 16, 1874, for the sum of fifty dollars, who in turn, through the banking firm of Dawson and Company, transferred it to Albert W. Stiles, on October 7, 1875, the consideration being sixty dollars.

On December 18, 1875, Stiles located the scrip on the SE. $\frac{1}{4}$ of section 25, township 164 N., range 51 W., of the land district of Detroit, Minnesota, but this location was canceled on April 7, 1879, for conflict with the grant, St. Vincent extension, of the St. Paul and Pacific Railroad Company.

The scrip remained in the files of your office until June 5, 1879, when it was transmitted by letter "C" of that date to the land office at Crookston, Minnesota, with directions to deliver it to the party entitled to

the possession of it. The register of that office, on September 20, 1879, gave it into the hands of Charles W. McIntyre, at that time a special agent of the General Land Office, for delivery, obviously, to the rightful scribee. On October 16, 1879, McIntyre, acting for the elder Turpin, sold it to Morton, Moore and Company, bankers at St. Paul, for four hundred and eighty dollars, by whom it was sold, on July 3, 1880, to S. B. Pinney, for the sum of seven hundred dollars. Thereupon, Pinney made the location which is attacked in the proceeding that again brings the matter before this Department.

By the location last referred to the scrip again reached the files of your office, and about that time, Stiles, deriving title from the younger Turpin, made a demand for its delivery to him and has persistently pressed his claim to this day. Through his instrumentality the Department came to know that McIntyre, the special agent who sold the scrip for the elder Turpin, had turned over to the latter only one hundred dollars of the total proceeds amounting to four hundred and eighty dollars. It is pertinent to remark here that McIntyre justifies his withholding of the balance, three hundred and eighty dollars, on the alleged ground that he had sold the scrip under the guarantee that any location thereof should be held valid, and should finally go to patent. So far as anything appears to the contrary this balance is still in his hands, though his connection with the General Land Office as a special agent has long since terminated.

These irregularities, and the conflicts arising out of the claims derived from the two Turpins, father and son, were, by direction of the Indian Bureau, made the subject of an investigation in October, 1882, by John A. Wright, a special Indian agent.

The report submitted by Wright was made the basis of a letter from this Department to your office, dated November 10, 1882 (Ind. Div. Misc. Vol. 30½, p. 50), which, after directing "that the necessary steps be taken by your office to secure Baptiste Turpin, senior, in his full and undivided rights in the scrip in question," proceeds as follows:

This should be done by proceedings under new authority from Baptiste Turpin, sr., for the location, etc., of the scrip. Whether that authority takes the form of ratification of the previous authority given by him to McIntyre in the matter, or be in the nature of proceedings *de novo* for the location, etc., of the scrip, is not material. He should receive the full amount of the consideration for which the scrip was sold under the original authority or he should be re-possessed of the scrip.

Mr. Stiles' remedy, if he has any, is against those from whom he received the scrip to which they had no right or title.

Of the alternative courses prescribed by this letter, your office elected to pursue the latter, and accordingly, the scrip was transmitted to Wright, who, on April 4, 1883, delivered it into the hands of Baptiste Turpin, sr. There is nothing in the record to show that it has gone out of his possession.

At the hearing provoked by Ayley's contest the parties appearing and showing interest were Pinney, who located the scrip, his trans-

ferees, Mrs. Harriet Young *et al.*, and Stiles, who claimed it as his property through the junior Turpin.

The findings of the register and receiver, after an exhaustive discussion of the evidence, are stated by them in the form of four several conclusions of fact and law, the substance of which is here given, as follows:

1. That the scrip in controversy was issued upon the application of the junior Turpin; that it passed by purchase and possession into the legal ownership of Stiles, who was wrongfully deprived of its possession when it was surrendered into the custody of McIntyre, and that it should be restored to him.

2. That the location of the scrip by Pinney, the title thereof not being legally in him, nor the scrip rightfully in his possession was without authority in law, and should therefore be canceled.

3. That Harriet Young is an innocent purchaser, in good faith, for value, and should be protected.

4. That Russell Aylen, the contestant, having established the allegations of his affidavit, is entitled, upon the cancellation of the location, to a preference right of entry.

The decision of your office, in modifying that of the register and receiver, may be formulated in the following terms:

1. That the claim of Stiles is *res judicata*, having been disposed of by the departmental letter of November 10, 1882, *supra*, and that he should not have been permitted to appear as a party to the proceeding.

2. That the location of the scrip by Pinney was regular and valid, and should not be canceled, and that Mrs. Young was an innocent purchaser.

With respect to the claim of Stiles, I cannot concur in the conclusion reached by your office that it was finally adjudged by the letter of November 10, 1882, *supra*, since he had been theretofore afforded no opportunity to present it contradictorily with the interests opposed to him; and insomuch as he has made himself a party here, the Department will take jurisdiction to set his pretensions at rest.

Of the eleven specifications of error assigned by Stiles, several require consideration, as follows:

1. In not holding that the application of Baptiste Turpin, jr., was duly approved by the Chippewa Indian Commission of 1870-71, and by the Commissioner of Indian Affairs, who, prior to April 30, 1873, directed the Indian Agent at White Earth, Minnesota, to notify the applicant that his said application had been approved.

2. In holding that scrip No. 279 was issued upon the application of Baptiste Turpin, sr., of April 30, 1873, and not upon that of his son, dated December 29, 1868.

3. In not holding that Baptiste Turpin, sr., was a member of the Lake Superior tribe of Chippewa Indians, and that having received scrip under the treaty of 1854, he could not have been a beneficiary under the treaties of 1863 and 1864.

4. In not holding that Stiles was an innocent purchaser and holder of said scrip, and that he was illegally, and without due process of law, deprived of the possession of it.

These specifications will be disposed of in the order of their statement, and

1. The Commission to which reference is made was appointed by the Secretary of the Interior on April 21, 1871, and its report is embraced in House Executive Document 193, 42nd Congress, 2nd Session, printed at the government printing office in 1874. It was

a special commission to investigate the matter of scrip issued under the treaty of the United States with the Chippewas of Lake Superior and the Mississippi, made at La Pointe, Wisconsin, September 30, 1854, and also to ascertain what persons are still beneficiaries under the seventh clause of the second article of said treaty; as also who are beneficiaries under article eight of the treaty made with the Red Lake and Pembina bands of Chippewas at the old crossing of Red Lake river on the 2d day of April, 1863, and article seven of the supplementary treaty of the 12th of April, 1864.

Schedule B, beginning at page 171 of the volume, purports to be "a list of the applications filed with the special commission, with the dates, names of attorneys, findings of the commission, and the evidence taken concerning each case." Number 677 of this list, on page 224, is Baptiste Turpin, date of application, December 29, 1868; residence, Gray Cloud; attorney, William H. Grant; the application is approved by the commission on the following finding of facts: "Saw his father and find this person to be a mixed-blood of the Pembina Chippewas, and a beneficiary under the treaty." It is indisputable that this is the younger Turpin, from whom Stiles derives title to the scrip, but it is equally obvious that this finding of the commission is not conclusive of his right to receive it. On the contrary, the evidence satisfies my mind that he was under twenty-one years old at the date of the treaty, and was, therefore, excepted from the provision made therein in favor of the mixed-bloods. This was shown by the affidavits of his father, his uncle, Joseph Turpin, and himself, made on October 26, 1882, that he was at that date about thirty-five years of age. This testimony as to his disability is corroborated by the affidavit of W. H. Grant, his original attorney, made on April 7, 1886, that he was at that date, about thirty-five years old, and by the recital contained in his discharge from the army, dated Fort Snelling, Minnesota, April 23, 1866, that he was then twenty years old. The fact of his disability being thus placed beyond controversy, it results that, however the scrip may have reached his hands, he was wrongfully in possession of it, and was without title and could convey none therein.

As to the charge that the Commissioner of Indian Affairs, prior to April 30, 1873, the date of the elder Turpin's application, directed the Indian Agent at White Earth, Minnesota, to notify the younger Turpin that his application had been approved, there is nothing in the record to support it, and its truth is doubted. But if admitted as a fact, it could not avail to cure his original incapacity, and vest in him a right, which, by the very terms of the instrument under which he claims, he is disqualified to exercise.

If Stiles should take exception to the ex parte character of the evidence upon which these conclusions are based, it would seem to be

sufficient to answer that the investigation by virtue of which the evidence has been brought into the record was made at his request and upon his instigation, and that he might have been present and participated therein if he had chosen to do so.

2. In the decision appealed from it is said:

December 29, 1873, scrip No. 279 was issued on the latter application (that of the senior Turpin) and sent to the proper Indian Agent for delivery to the person entitled to it. No action seems to have been taken on the former application (that of the younger Turpin), certainly no scrip was issued on it so far as is shown by the records of the office of the Commissioner of Indian Affairs, and I have had the stub of each piece of scrip issued under the treaties before referred to carefully examined.

So far as this statement involves matters of fact, this Department is justified in taking it for true. There is nothing in the record to show upon which of the applications the scrip was issued, except the certificate of Frank C. Armstrong, Acting Commissioner of Indian Affairs, that on the back of the younger Turpin's application appears the memorandum, in pencil: "Scrip issued, Dec. 29-73. No. 279." But a similar memorandum is also found, in pencil, on the back of the other application, as follows: "Scrip sent to Agent Douglas Dec. 29, 1873." The fact appears to be, and doubtless is, that the Indian Bureau did not realize that there were two Turpins identical in name applying for the issuance of scrip under the same treaty, and that their applications did not receive conscious separate and distinct treatment. They were confused, and acted on as a single application.

3. It seems to be true that Baptiste Turpin, sr., made application for scrip under the treaty of 1854, and it is probably true that the scrip was issued, though it is not certain that it ever reached his hands. In his application under the treaty of 1863-64, he admits having made application under the former treaty, but says in relation thereto:

I have never heard the result of said application nor have I received the scrip for which said application was made, and since then I have been informed that said scrip has been canceled on the ground that I was not a mixed blood belonging to the Chippewas of Lake Superior, and that I made the said application at the instigation of the attorney.

That the scrip was issued is shown by a letter of December 3, 1864, from William P. Dole, Commissioner of Indian Affairs to the Commissioner of the General Land Office, printed on page 234 of the volume cited, *supra*, and Turpin is represented to have sold it to Isaac Van Ettan for twenty-five dollars. *Id.* p. 135. As to his tribal relations the commission found that "he is from Red river, Pembina Chippewas; never belonged to the Chippewas of Lake Superior; is fifty-eight years old." *Id.* p. 133. The question as to whether, though a member of the Pembina band, he would be entitled to the benefits of the treaties of 1863 and 1864, after having represented himself as belonging to the Lake Superior band and received the benefits provided by the treaty of 1854, if fairly presented, would not be a difficult one to determine. But the question is not fairly presented here. If it be admitted that

the elder Turpin received twenty-five dollars for the scrip issued in his name under the treaty of 1854, it can scarcely be said that he was in any true sense a beneficiary of that treaty. The circumstances, however, point to the truth of his own statement, made under oath, that he was instigated to make the application by some other person, and that he never received any scrip. Fraud ran riot in those days in connection with this class of scrip, as disclosed by the investigations of the special commission appointed for that purpose, and this transaction has the appearance of being typical of the dishonest practices thus exposed.

4. The conclusions already reached dispose of Stiles' contention that he was an innocent purchaser and holder of the scrip, for the person through whom he claims had no title that he could transmit; and the error of which he complains, "that he was illegally, and without due process of law, deprived of the possession of the scrip," if its existence be admitted for the sake of argument, is now cured by the present proceeding, to which he has made himself a party.

The contestant, Russell Aylen, has not appealed here, so that, if this proceeding be viewed and treated as strictly judicial in character, the main question raised by him, that is, the validity of Pinney's location and the attitude in law of Mrs. Harriet Young, as his transferee, is not properly before the Department. The question, however, is one of administration, as well as of private right, and the interest of the government therein renders it desirable that jurisdiction be assumed.

An inquiry into the nature and incidents of the scrip issued under the authority of the Chippewa treaties of 1863 and 1864, *supra*, is necessary to determine the rights of parties who hold the scrip itself, or lands by virtue of its location.

The original provision for the benefit of the half-breeds and mixed-bloods is contained in Article 8 of the treaty of 1863, and is as follows:

In further consideration of the foregoing cession, it is hereby agreed that the United States shall grant to each male adult half-breed or mixed-blood who is related by blood to the said Chippewas of the said Red Lake or Pembina bands, who has adopted the habits and customs of civilized life, and who is a citizen of the United States, a homestead of one hundred and sixty acres of land, to be selected at his option, within the limits of the tract of country hereby ceded to the United States, on any land not previously occupied by actual settlers or covered by prior grants, the boundaries thereof to be adjusted in conformity with the lines of the official survey when the same shall be made, and with the laws and regulations of the United States affecting the location and entry of the same.

It is obvious that this provision confers a right at once personal and inalienable. It was entirely adequate in its terms to effect the purpose of the government, which, manifestly, was to secure a home to such of the mixed-bloods as had "adopted the habits and customs of civilized life," and to further encourage them in the ways of civilization. We find a change of policy, however, in the supplementary articles consented to a year later, and it is inferrible that it was

adopted at the instance of the beneficiaries themselves, who, it may be assumed, found it inconvenient and undesirable to take lands within the ceded territory, or else had no wish to acquire lands at all. This change is embodied in article 7 of the treaty of 1864, which is as follows:

It is further agreed by the parties hereto, that, in lieu of lands provided for the mixed-bloods by article eight of said treaty concluded at the Old Crossing of Red Lake river, scrip shall be issued to such of said mixed-bloods as shall so elect, which shall entitle the holder to a like amount of land, and may be located upon any of the lands ceded by said treaty, but not elsewhere, and shall be accepted by said mixed-bloods in lieu of all future claims for annuities.

It is to be observed that the scrip to be issued is locatable by the holder, and that an additional consideration for its issuance is named, to wit, the relinquishment by the scribee "of all future claims for annuities." Instead of lands, the beneficiaries may, upon their election to do so, receive scrip. It is to be presumed that if they should prefer lands, they would not take scrip; and if they should prefer lands it would appear idle to take scrip possessing a value that could be realized only by locating it upon lands. It is clear, therefore, that the scrip was designed to take the form of property, subject to sale or transfer, and that the terms of article 7 were advisedly used in order to give it that quality. If it had been intended by the parties to serve as the evidence of a merely personal right, it seems reasonable to suppose that some restrictive phrase would have been used; on the contrary, title and right of location are vested in the "holder" in express terms. It is not deemed necessary, in stating this conclusion, to decide that the term "holder" is there used in the technical signification in which it is employed when applied to bills and notes.

There is no evidence in the record to impeach the various and successive transactions through which the scrip finally reached the hands of S. B. Pinney. They are valid on their face, and no facts are shown to overthrow the presumption in favor of their validity.

It is ascertained from the record, as elsewhere stated, that Baptiste Turpin, sr., sold his scrip for four hundred and eighty dollars, of which sum he has already received one hundred dollars, and that the balance is in the hands of Charles W. McIntyre, who avers himself ready to pay it when the location goes to patent. The consideration was no doubt a fair one at the time, and when the balance due by McIntyre has been paid Turpin will have received all the benefit contemplated by the treaty. It results, therefore, that the scrip should now be in the files of your office, with its function discharged, and that it is improperly in the possession of Turpin, or any one to whom he may have transferred it.

It is ordered, therefore, that the contest of Russell Aylen be dismissed; that the claim of Albert W. Stiles be denied; that the location by S. B. Pinney of Chippewa scrip No. 279 upon the SW. $\frac{1}{4}$ of section 26, township 141 N., range 50 W., Fargo, North Dakota, be passed to patent, and that appropriate steps be taken by your office to recover from Baptiste Turpin, sr., scrip No. 279, improperly held by him.

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† In line 7, page 271, for "imperative," read "inoperative."

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