DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JANUARY, 1898, TO MAY, 1898.

VOLUME XXVI.

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OFFICE OF THE ASSISTANT ATTORNEY-GENERAL.

The decisions of the Secretary of the Interior relating to public lands are prepared in the office of the Assistant Attorney-General for the Interior Department, under the supervision of that officer, and submitted to the Secretary for his adoption:

ATTORNEYS IN THE OFFICE OF THE ASSISTANT ATTORNEY-GENERAL DURING THE TIME COVERED BY THIS REPORT.

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[1] On detail from the Board of Pension Appeals.
[2] On detail from the General Land Office.

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* For the word "Territories," in the second line from the bottom of page 537, read *corporations.*

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

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

HOMESTEAD APPLICATION—SUCCESSFUL CONTESTANT.

WRIGHT *v.* GOODE.

When a homestead applicant contests an entry successfully, on the ground of prior settlement, he is entitled to the statutory period of three months from date of settlement in which to make entry; and in the computation of this period, the time between his original application to enter, and the date of legal notice of cancellation, should be excluded.

Notice of cancellation to the successful contestant in such case, by registered letter, is not effective if it fails to reach said contestant, and such failure is not due to any negligence on his part.

Secretary Bliss to the Commissioner of the General Land Office, January 6, 1898.

(W. V. D.) (C. J. G.)

The record in this case is as follows: On November 3, 1893, Thomas Jabezanka made homestead entry No. 3257 for the SW. ¼ of Sec. 1, T. 27 N., R. 1 W., Perry land district, Oklahoma.

On October 31, 1893, the local office received by mail an application for said land from Samuel Wright, alleging that he had been a *bona fide* settler thereon since October 7, 1893.

On November 22, 1893, the local office rejected Wright's application for conflict with homestead entry No. 3257 aforesaid. In accordance with instructions received from your office for the disposition of applications received by mail and those presented in person, homestead entry No. 3257 had been made of record by the local office before Wright's application was reached in regular order.

On January 5, 1894, Wright filed affidavit of contest against said entry wherein he alleged his prior settlement and abandonment on the part of Jabezanka, and on January 25, 1894, he filed an appeal from the rejection of his application.

In passing upon said appeal your office, on September 25, 1894, concluded as follows:

> The order for action on Mr. Wright's application was in accordance with the instructions laid down in letter C of October 14, 1893, case of George W. Randall, and your decision rejecting his application for conflict with homestead entry 3257, would have been proper, had there been no evidence of settlement. In an affidavit, however, accompanying his application and which was executed October 28, 1893, before the probate judge of county K, Oklahoma Territory, Mr. Wright alleges "That he is at this time a bona fide settler on the tract."

As said alleged settlement antedates the entry of Jabezanka, who does not allege settlement, you should have ordered a hearing under the rule laid down in the decision in the case of Todd *v.* Tait, 15 L. D., 379. The same end will be gained, however, by proceeding with the contest as would be reached by a hearing ordered by this office, and you will therefore proceed with the contest in accordance with the Rules of Practice.

A hearing was duly had at which Jabezanka made default, and upon the evidence submitted by Wright the local office recommended the cancellation of the entry and that Wright be allowed to make entry.

On July 1, 1896, your office canceled Jabezanka's entry, and on September 16, 1896, the local office notified Wright by registered mail addressed to Blackwell, Oklahoma, of the cancellation of said entry and that he could apply to enter within thirty days. The letter containing the notification was returned uncalled for.

On February 2, 1897, the local office gave to the attorneys of Wright personal notice in writing of the cancellation of the entry and his right to enter. On the same day Caleb Goode filed homestead application for the land in question, which was suspended to await the action of Wright.

On March 8, 1897, the local office received by mail the homestead application of Wright, dated March 6, 1897. Accompanying the said application was an affidavit to the effect that on or about February 1, 1897, Wright was taken sick with asthma and was confined to his bed nearly all the time up to the date of his affidavit.

The local office rejected Wright's application to enter because the time granted him within which to act had expired, and because of the intervening adverse claim of Goode.

On March 10, 1897, the local office placed Goode's application of record as No. 9028.

On April 7, 1897, Wright appealed from the rejection of his application, and on June 17, 1897, your office affirmed the decision of the local office.

A further appeal by Wright brings the case to this Department, the appellant basing his allegations upon the provisions of section two of the act of May 14, 1880 (21 Stat., 140). There seems to have been a misconception of Wright's true status. In view of the showing herein made his case is properly adjudicated under the provisions of section three of said act. The only question involved is as to whether he applied to enter within three months from the date of his settlement. In computing this time the period between the date of his settlement and his application of October 31, 1893, and the period between the date of legal notice of cancellation of the contested entry and his application of March 8, 1897, must be charged against him; or, what is the same thing, the time between his application of October 31, 1893, and the date of legal notice of cancellation, should be excluded. This necessarily involves the question as to whether the notice of September 16, 1896, mailed to him at Blackwell, constituted legal notice.

Your office holds that the notice mailed to Wright on September 16,

1896, by registered letter, the same being properly addressed to him at his post-office of record, was in itself a complete notice. According to this holding more than three months had elapsed before Wright applied to enter. But in the case of John P. Drake (11 L. D., 574), cited in your office decision, it was held (syllabus):

Notice of a decision by mail, whether by registered or unregistered letter, will not bind the party to be served if such notice fails to reach him; but the failure to thus receive notice can not be set up by one whose own laches has prevented service in the manner prescribed.

Wright states in a corroborated affidavit that during the months of September, October, November and December, 1896, and January and February, 1897, he or some member of his family asked about three times a week for mail at the Blackwell post-office, and that they were never informed or received notice of the registered letter in question. The postmaster at Blackwell states that Wright gets his mail through the general delivery and that said Wright never refused to take same from him. The assistant postmaster is unable to say whether he ever delivered to Wright the notice as to said registered letter.

Following in the line of the above cited decision this Department is of opinion that it does not appear in the case at bar that the failure to receive the notice of September 16, 1896, which was sent by registered letter, was due to the negligence or laches of Wright or his attorneys. Hence time did not run against him until he was duly notified. The first legal notice, therefore, received by Wright, of the cancellation of the entry, was that given to his attorneys on February 2, 1897. He applied to enter on March 8, 1897, which was within three months from the date of his settlement, computing the time as hereinbefore set out. By his contest Wright was shown to have been the first settler, and he has continuously kept up his residence and improvements to the present time. The homestead entry of Goode, therefore, made in the presence of such prior adverse settlement right, must be canceled.

Your office decision is hereby reversed, Goode's entry will be canceled, and unless there are other reasons than those appearing in the record, Wright will be allowed to perfect his application to enter.

REPAYMENT—PRE-EMPTION ENTRY.

EDWARD H. SANFORD.

The right to repayment does not exist where the entry is properly allowed on the proofs presented, but is subsequently canceled on the ascertainment that it was procured on the false and misleading representations of the entryman.

Secretary Bliss to the Commissioner of the General Land Office, January 6, 1898.

(W. V. D.) (C. J. G.)

It appears from the record in this case that on January 9, 1894, Edward H. Sanford made pre-emption cash entry for the NE. ¼ of Sec. 33, T. 123 N., R. 66 W., Aberdeen land district, South Dakota.

In the final proof, upon which the entry was allowed, the witnesses testified that the entryman settled on the above described tract May 14, 1883, and that his residence was thereafter continuous. The entryman's affidavit was to the same effect, except he states that his residence was continuous "so far as possible."

Upon the report of a special agent a hearing was subsequently ordered in said case, and upon the evidence adduced at said hearing the local office found that the entryman had never established and maintained his residence in compliance with law.

The entryman appealed to your office where the decision of the local office was affirmed, it being held "that the entryman's final proof was false and fraudulent, and that he attempted to secure title to the tract in question by an evasion of the pre-emption laws." Upon further appeal the Department affirmed the judgment of your office, and the entry was finally canceled.

The entryman has now appealed from your office decision of December 19, 1895, which denies his application for repayment of the purchase money paid by him on his pre-emption cash entry on the ground that "the law governing the return of purchase money does not apply to cases of this character."

It is argued in said appeal, substantially, that the entryman's final proof was not false and fraudulent, he having stated the facts as they really existed; that he should not be held responsible for failure to submit a detailed statement of the nature and extent of his residence, he having stated that it was continuous "so far as possible;" that under the circumstances the local office should have asked for a detailed statement of the character of the residence claimed. That the conclusion of the Department, as to want of residence, having been based almost exclusively on his testimony at the hearing, is evidence of his honesty and good faith; that having concededly acted in good faith his is a case where repayment may properly be made.

The second section of the act of June 16, 1880 (21 Stat., 287) authorizes repayment only where the entry has been "canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed." It is plain that the entry in question was not "canceled for conflict." The definition of the phrase "erroneously allowed," as given in the general circular issued by the Land Office is as follows:

> If the records of the Land Office or the proofs furnished should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." But if the tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was "erroneously allowed;" and in such case repayment would not be authorized.

The land in question was subject to entry, and it cannot be gainsaid that the entryman's proofs showed a compliance with law. Under these circumstances it was proper for the local officers to allow the

entry; in fact they would have erred if they had not allowed it. As was said in the case of George A. Stone (25 L. D., 111, on review):

> It was not error for the local officers to devolve upon the entrymen the risk incident to any material falsity in his proofs. It does not lie in his mouth to reproach them for accepting his representations as true and acting thereon.

The subsequent proceedings had on the special agent's report, and which resulted in the cancellation of the entry, showed conclusively that said entry was procured upon the false and misleading representations of the entryman, and not that the entry had been erroneously allowed. These proceedings demonstrated that the entryman had not established and maintained continuous residence, while it was to be inferred from his proof that he had. The entry might have been confirmed but for the laches of the entryman, which were not made to appear in his proofs. The fact that there was no error in the allowance of the entry, which is the exclusive act of the government, is the true test in determining whether repayment should be made. It being apparent that the entry was not thus erroneously allowed the statute does not authorize repayment.

Your office decision is accordingly affirmed.

PACIFIC COAST MARBLE CO. *v.* NORTHERN PACIFIC R. R. CO. ET AL.

Motion for review of departmental decision of September 9, 1897, 25 L. D., 233, denied by Secretary Bliss, January 4, 1897.

SWAMP LAND—ACTS OF MARCH 2, 1849, AND SEPTEMBER 28, 1850.

STATE OF LOUISIANA (ON REVIEW).

The act of September 28, 1850, removed the restrictions and exceptions in the grant of swamp lands made to the State of Louisiana by the act of March 2, 1849, and vested the title in said State to all the swamp and overflowed lands which remained unsold at the passage of said act of 1850, and it therefore follows that said State is entitled to the benefit of the indemnity provisions of the acts of 1855, and 1857.

The field notes of survey having been accepted by the State as the basis of the adjustment of the swamp grant, the character of land for which the State asks indemnity may be determined thereby, except where a direct issue is made, in which case an investigation may be ordered and the character of the land determined on the evidence so submitted.

The decision of March 15, 1897, 24 L. D., 231, recalled and vacated.

Secretary Bliss to the Commissioner of the General Land Office, January 6, 1898.

(W. V. D.) (F. L. C.)

The State of Louisiana has filed a motion for review of the decision of the Department of March 15, 1897, (24 L. D., 231) holding that the act of September 28, 1850, granting swamp lands to the several States

has no application to said State and that therefore it is not entitled to the indemnity provisions made by the act of March 2, 1855.

The decision complained of was rendered upon the appeal of the State from the action of your office rejecting the application for indemnity under the acts of March 2, 1855, (10 Stat., 634) and March 3, 1857, (11 Stat., 251) for swamp lands sold by the government after the grants made by the acts of March 2, 1849, (9 Stat., 352), and September 28, 1850, (9 Stat., 519) and prior, to said acts of March 2, 1855, and March 3, 1857.

Your office rejected these applications solely upon the ground that the only evidence submitted by the State as to the swampy character of the land for which indemnity was asked, was the certificate of the State agent stating that on examination of the field notes of survey, the lands appear to have been swamp land. You refused to make an examination of said lists to ascertain whether the field notes of survey showed said lands to be swamp and overflowed at the date of the grants for the reason that the sale of said lands by the government raised a presumption against the swampy character of the land at the date of the grant, and that indemnity would not be allowed except upon clearest proof that the lands were swamp and overflowed at the date of the grant which you required to be shown by the testimony of two disinterested witnesses.

While the Department in passing upon this appeal held that there was no sufficient proof offered by the agent of the State in support of the swampy character of the lands it also held that the swampy character or condition of the land forming the basis for indemnity should be shown in the same way and by evidence of the same character as was required to entitle the State to lands under its grant. But in considering all the legislation relative to the grants of swamp lands to this State, and of the several acts granting swamp land indemnity, it was determined that as the United States had granted, in contemplation of law, all the swamp lands in Louisiana by the act of 1849, there was no swamp land in the State subject to the act of 1850, when that act was passed, and as the latter act did not apply to the State of Louisiana, it was therefore not entitled to the indemnity granted by the acts of 1855 and 1857.

Upon this ground the action of your office rejecting the application of the State was affirmed.

It is urged by counsel for the State in the argument of this motion that the right of the State of Louisiana to the benefit of the act of September 28, 1850, has received judicial and legislative recognition by the supreme court in the cases of Martin *v.* Marks, 97 U. S., 345; Louisiana *v.* United States 123 U. S., 32; Louisiana *v.* United States 127, U. S., 182, and by the act of Congress of March 2, 1889, (25 Stat. 877), known as the "Gay act," which was not called to the attention of the Department when the decision of March 15, 1897, was rendered.

The case of Martin *v.* Marks was an action in the nature of ejectment brought by Marks who claimed title under the State of Louisiana, of lands that had been listed to said State as inuring to it under the act of September 28, 1850, against Martin who relied on a patent from from the United States, dated May 20, 1873. The question at issue was whether the land so listed was confirmed by the act of March 3, 1857. The court in stating the case said:

This was an action in the nature of ejectment, brought by Marks, the plaintiff below, who asserted title under the swamp land act of Sept. 28, 1850, and the earlier act of March 2, 1849, in regard to the same class of lands in the State of Louisiana. The defendant relied on a patent from the United States, dated May 20, 1873. The evidence of plaintiff's title under the act of 1850, which is all we shall now consider, is as follows:

"NORTH-WESTERN DISTRICT, LA.

"A.—List of swamp land unfit for cultivation, selected as inuring to the State of Louisiana under the provisions of an act of Congress approved 28th September, 1850, excepting such as are rightfully claimed or owned by individuals."

It is evident that the question as to whether the State of Louisiana was entitled in common with all the other States to the benefits of the act of September 28, 1850, was considered by the court, because it assigns as the reason for the passage of the act approved March 3, 1857, the failure of the Secretary to perform the duties enjoined upon him by the act of 1850, which had become a grievance and hence the confirmatory, act of 1857, was passed. Upon this point the Court says:

It seems that, seven years after the passage of the swamp land grant, this failure of the Secretary to act had become a grievance, for which Congress deemed it necessary to provide a remedy, by the act of March 3, 1857 (11 Stat., 251), which declares that the selection of swamp and overflowed lands granted to the States by the act of 1850, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the States in conformity to the provisions of said act.

The case of United States *v.* Louisiana, 123 U. S., 32, was an action brought by the State against the United States in the Court of Claims to recover on two demands, one arising under the act of Congress of February 20, 1811, and the other under the acts of September 28, 1850, and March 2, 1855. Referring to this claim the court says:

The second of these demands arises upon the act of Congress of September 28, 1850, 9 Stat., 519, c. 84, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of March 2, 1855, 10 Stat., 634, c. 147, "for the relief of purchasers and locators of swamp and overflowed lands." The act of September 28, 1850, granted to the States then in the Union all the swamp and overflowed lands, made unfit thereby for cultivation, within their limits which at the time remained unsold. The second section made it the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to prepare a list of the lands described and transmit the same to the governor of the State, and at his request to cause a patent to be issued therefor. It would seem that this duty was not discharged and, notwithstanding the grant was one in *praesenti*, many of the

lands falling within the designation of swamp and overflowed lands were sold to other parties by the United States. The act of March 2, 1855, was designed to correct, among other things, the wrong thus done to the State; it provided that, upon due proof of such sales, by the authorized agent of the State, before the Commissioner of the General Land Office, the purchase money of the lands should be paid over to the State. Such proof was not made, but equivalent proof was submitted to the Commissioner as to the character of the lands from the field notes of the surveyor general of the State. This mode of proof was accepted by the Commissioner in other cases as early as 1850. The amount found in this way by the Commissioner on the 30th of June, 1885, to be due to the State from the United States, on account of sales of swamp lands to individuals, made prior to March 3, 1857, was $23,855.04.

It does not appear that there was any serious contest in the Court of Claims, either as to the validity or the amount of these demands; but it was objected that the demand arising upon the acts of September 28, 1850, and of March 2, 1855, was barred by the statute of limitations, and that both demands were set off by the unpaid balance of the direct tax levied under the act of August 5, 1861, 12 Stat., 292, which was apportioned to the State of Louisiana. The First Comptroller of the Treasury had, at different times previous to the commencement of this action, admitted and certified that the sums claimed were due to the State on account of the five per cent net proceeds of sales of the public lands, and on account of sales of swamp lands within the State purchased by individuals; but had directed the amounts to be credited to the State on account upon the claim of the United States against her for the unpaid portion of the direct tax mentioned.

See also United States *v.* Louisiana, 127 U. S., 182.

The act of March 2, 1889, *supra*, (the Gay act) restored to the public domain lands that had been reserved from disposition because claimed to be embraced within the lands of the Spanish private land claim, known as the Houmas grant. This act restored said lands to settlement and entry under the homestead laws, but provided:

That the provisions of this act shall be limited to the lands claimed by actual settlers for purposes of cultivation whose titles are now incomplete, within the limits of the Donaldson and Scott, Daniel Clark, and Conway grants, and that after setting apart to each of said settlers not to exceed one hundred and sixty acres, the residue of the public lands within said grants shall continue to be, as they are now, a part of the public domain: *And provided further*, That nothing in this act shall preclude the State of Louisiana from enforcing its claim to said residue of public lands under the acts of Congress granting swamp lands to the several States of the Union.

The language of the court in the decision cited, which I have quoted at length, and the last proviso to the act of March 2, 1889, is a clear recognition of the right of the State to the benefit of the act of September 28, 1850, and sustains the former decisions of the Department holding that

the act of September 28, 1850, removed the restrictions and exceptions in the grant of swamp lands made to the State of Louisiana by the act of March 2, 1849, and vested the title in said State to all the swamp and overflowed lands which remained unsold at the passage of said act of 1850. 17 L. D., 440.

This is in harmony with the almost unbroken line of decisions by the Department, and it is, in my judgment, the true interpretation of the act; for whatever may have been the motives that induced the

passage of the act of March 2, 1849, or whatever may have been the physical conditions existing in said State at the passage of said act, it is apparent, from what has been said, that the act of September 28, 1850, enlarged the swamp land grant so as to bring within its operation all lands "the greater part of which is wet and unfit for cultivation" and made it applicable to all the States then in the Union, and, as said by Attorney-General Garland in his opinion (5 L. D., 464), it

was substantially a re-enactment of the act of March 2, 1849, so far as Louisiana was concerned, with an extension of the grant in that act so as to include the lands which had been excluded by the exception in the former enactment, as to which it was a new and substantive grant on the 28th of September, 1850. 1 Lester, 543; Ib., 554; 2 L. D., 652; 3 L. D., 396; 5 L. D., 464; 17 L. D., 440.

Upon a careful examination of these several acts of Congress in the light of the decisions cited, the Department is satisfied that the decision of March 15, 1897, does not correctly construe the act of September 28, 1850, and that the State is entitled to the benefit of said act, and hence to the indemnity provision of the acts of 1855 and 1857. Said decision is therefore recalled and revoked and the decision of the Department of January 19, 1887, 5 L. D., 464, is reaffirmed.

As to what proof should be required to show the swampy character of the land for which indemnity is claimed, it was said in the decision of March 15, 1897, that it should be shown in the same way and by evidence of the same character as was required to entitle the State to lands under its grant. The State of Louisiana having elected to abide by the field notes in the adjustment of its swamp land grant, and that grant having been heretofore adjusted in said State under this rule, I can see no reason why any further proof should be deemed necessary, except where a direct issue is made when investigation may be ordered and the character of the land determined upon the evidence so submitted.

Inasmuch as the application of the State was rejected by your office, without examination, and solely upon the ground that no proof would be considered by you, except the testimony of two disinterested witnesses as to the swampy character of the land, you are directed to examine said lists, in accordance with the instructions herein given, but in the examination of the field notes you are to be governed by the decision of the Department of March 25, 1887, 5 L. D., 514.

TIMBER LAND ENTRY—MINERAL LAND.

CHORMICLE *v.* HILLER ET AL.

A contest against a timber land entry, on the ground that it embraces land of known mineral character, must be determined on the conditions existing at the date of the purchase, and not on developments subsequent thereto.

The requirement in the act of June 3, 1878, that a timber land applicant shall show that the land applied for contains no mining improvements, contemplates improvements on existing mining claims. Abandoned mineral workings on land not included in any existing location or entry are no bar to a purchase under said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *January 7, 1898.* (P. J. C.)

The record shows that on June 15, 1887, S. W. Hiller applied to purchase, under the act of June 3, 1878, (20 Stats., 89) land described as the NE. ¼ of Sec. 4, Tp. 11 N., R. 15 W., S. B. Mer., Los Angeles, California, land district, and after due notice, offered final proof and purchased the same September 5, 1887. There was excluded from the purchase mineral lot No. 37, known as the Pine Tree Lode. The correct description of the land purchased is lots 1 and 2 and S. ½ of NE. ¼ of said section—the total acreage being 141.50/100 acres.

It appears that there was a contest filed against this entry January 15, 1890, and a hearing ordered. The hearing was not had, however, and on June 8, 1895, the contest was formally dismissed by the contestants.

On June 22, 1895, W. C. Chormicle filed a petition alleging that the land had been known to be mineral in character since 1856; that there was a group of gold quartz mines thereon known as the Pine Tree mines for twenty years last past; that in 1892 the petitioner purchased the same from the former owners; that ever since his purchase he has been in the actual possession of and working the same; that the improvements and developments thereon cost at least $100,000; that he does not know Hiller; that when he purchased the said mines he had no notice or knowledge of Hiller's claim thereto or of any other claim; that the claim of "Hiller is a fraud upon the government" for the reason that if he ever went upon the land, he must have seen that it was mining ground and that mining had been carried on there for a great many years. It was prayed that a patent be not issued to Hiller and that a hearing be granted.

By letter of July 25, 1895, your office ordered that the petitioner be given sixty days within which to apply for a hearing on the charges.

The local officers ordered a hearing

with a view to the cancellation of said entry, contestant alleging that said land is mineral land and that he is the owner of valuable mines situated thereon, and has made valuable improvements and extensive explorations thereon.

The Summit Lime Company, the California Lime Company and Joseph Moffatt on showing that they were the transferees of Hiller were allowed to enter their appearance and defend.

On consideration of the evidence the local officers, referring to the mineral locations under which the protestant claims, held:

These several mines are spoken of by the various witnesses as the "Pine Tree Group," and the ones on the land in question are . . . . all owned by contestant, and were bought or located by him about three years after Hiller had made his

entry. These claims were merely relocations of former ones, located prior to Hiller's entry; and it is contended by counsel for contestant that Hiller must have known of the existence of mineral thereon, that the land had been worked as mineral land, and therefore was put upon inquiry.

We think it fair however to conclude from all the testimony that these claims were not used, if not actually abandoned at that time; and thus, even if the then existing conditions were decisive of the matter, it is not proved that Hiller's entry was fraudulent. We understand, however, that as to the character of the land it is a question of present fact and we find, after carefully reading all the testimony that the whole area claimed by contestant on said NE. ¼ of Sec. 4, is mineral land and chiefly valuable as such. . . .

We, therefore, recommend that the land included within the lines of the claim as above recommended be segregated as mineral land and that the entry of Hiller remain intact as to the balance.

On appeal, your office found that the land included within the mining locations named was known mineral land in character at the date of the timber entry, and affirmed the decision of the local officers with the statement that the known character of the land at the date of the timber entry and not its known character at the date of the hearing, was the controlling question in issue. In discussing the question involved, your office said:

It appears from the evidence that one of the locations on said quarter section made prior to 1887, was abandoned on account of a disagreement or falling out of the owners, another because of the difficulty and expense of obtaining motive power for a mill at that time, and others for lack of means to prosecute the work, so that it is not at all fair to conclude that land was not known to be mineral in character simply because it was not then being worked for mineral.

On the contrary I am of the opinion that in every instance where it appears from the evidence that a location was made, and that such an amount of development work was performed prior to the entry of Hiller as disclosed a vein of quartz of such character as would justify a reasonably prudent person in the expenditure of his time and means in the effort to work the same as a mining property, the ground covered by such location must have been and was known to be mineral in character at date of the sale to Hiller.

From your office decision the entryman has appealed, assigning error as follows:

First. The Commissioner erred in deciding that the testimony showed that the land covered by the Oregon, Utah, Bunkerhill, Nevada, and California, mineral claims, or either of them, was known to be mineral land, at the time Hiller made his timber land entry, September 5th, 1887.

Secondly. The Commissioner erred in holding that the mere fact that the land was being prospected for minerals at the time Hiller made his entry, was conclusive evidence that the land was in fact known to be mineral at that time, in the absence of proof that any valuable deposits of mineral had then been discovered in the prospect holes.

Thirdly. The Commissioner erred in reversing the decision of the register and receiver, wherein they found that Hiller did not know when he made his entry, that the land had any value for minerals, and that his entry was not fraudulent.

Fourthly. The Commissioner erred in not deciding from the evidence, that no mineral of value had been discovered on the land at the time Hiller entered it, and that the prospect holes previously dug, had then been abandoned by the prospectors and locators.

Fifthly. The Commissioner erred in not deciding that the land is more valuable for the timber growing upon it, than it is for minerals.

Sixthly. The Commissioner erred in not dismissing the contest of Chormicle for want of proof that Hiller knew the land was mineral at the time he made his entry.

The testimony in this case is quite voluminous and is surcharged with an extraordinary amount of irrelevant and redundant matter. It would seem as if the attorneys had exhausted their ingenuity in getting in testimony that has no relevancy whatever to the issue. It is made extraordinarily perplexing to winnow the grain from the chaff because there have been almost numberless mining locations and relocations made on the land, each under a different name, and in giving their testimony each witness has used the name by which he knew it at the time, and in many instances there is nothing to associate the former locations with the later ones.

It is doubtful if out of the four hundred and twenty seven pages of testimony, there are fifty pages of relevant evidence.

It will be observed that Chormicle in his protest does not allege any interest in himself in any part of the land in controversy prior to the purchase of Hiller. The averment that he did not know of Hiller's entry at the time he purchased the so-called Pine Tree group is without force. The entry being of surveyed land was shown upon the public records of the local office and he was charged with notice thereof.

The "Pine Tree Group" and "Pine Tree Mines" as referred to both in the protest and in the testimony, are used as a sort of a general description for a great number of locations made on and in the vicinity of the land in controversy. The Pine Tree claim itself was originally located in 1878, and was quite extensively worked by various parties. As before stated, it was excluded from Hiller's purchase, so there is no controversy as to the ground included therein. When Chormicle bought the Pine Tree claim in 1892, five years after Hiller's purchase, it was known as the Compromise, and was located as such December 24, 1888, more than a year after Hiller's purchase. The other claims which lie wholly or in part on the land in dispute are the Oregon, California, Nevada, Utah and Bunker Hill. These claims were all located January 1, 1891, and were transferred to Chormicle, after his purchase of the Compromise. Some of the land included in these last-named locations had been located as mining claims as early as 1878, but these early locations had been abandoned or forfeited, and, apparently, repeatedly relocated. The land seems to have been regarded as of little value, and, outside of that done upon the Compromise, but little systematic work was ever done that tended to develop it. It is shown by the district records, that in 1889 thirty-two different locations were made in that vicinity, none of which have the names now used. It is stated by one witness that one man made seventeen locations at one time that he did not intend to work, but made them for the purpose of selling them. This statement would seem to be verified by the facts as disclosed by the testimony; at least it is not shown that any work was

done on them with the view of mineral development, and they were evidently abandoned when the present locations were made.

It is true there had been some work done on some of the old locations—outside of the Compromise or Pine Tree—prior to the entry of Hiller, but the testimony does not show that at the time of the entry there were upon the land any evidences of work then being done, or of work recently done.

The burden of proof was upon the protestant and this he has failed to sustain.

There is no evidence that any of the locations other than the Pine Tree, ever paid for the working thereof, and the Pine Tree is the one on which the improvements are located. As said by one of the witnesses for the protestant, the other locations "in a very great measure," are "prospecting holes." This same witness says the Pine Tree was located two or three times.

It is claimed that Hiller's entry was fraudulent, for the reason that if he had investigated the land he would have found the mineral improvements, and this would have been sufficient notice to him that it was held and claimed as mineral land. Hiller complied with the requirements of the law in making his entry; he filed his affidavit stating that the "land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited, that it contains no mining or other improvements, nor, as I verily believe, any valuable deposits of gold," etc. This statement is consistent with what is shown by the testimony, or, to put it conversely, there is no evidence which shows that there were any mining operations then being carried on or that there had been any mining operations of recent date such as to indicate that the land entered contained any valuable mineral. The fact that there had been work done some time prior to that, and that evidence of it may have remained, did not of itself necessarily convey notice that the land contained valuable mineral. In fact, the presence of old and apparently abandoned workings would equally indicate that exploration has shown that the land was without valuable minerals.

In Colorado Coal Company *v.* United States (123 U. S., 307), patents had been issued under the pre-emption law to large tracts of land upon which were subsequently discovered large bodies of coal, and the government sought to set aside the patents on the ground that they had been procured by fraud, and among other charges was one that the land was not agricultural, but valuable for coal, which was known to exist by the parties who procured the entries to be made.

In discussing this feature of the case, the court said:

> We hold, therefore, that to constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even

prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, can not affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines" capable of being profitably worked for their product so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preemption act can not be successfully assailed.

The doctrine announced by the court would apply with equal force to land of the character involved here. This land has timber on it that is valuable for wood. It is not shown that it has any considerable timber valuable for sawing, but there is a great quantity that may be used in burning lime, for which purpose, it appears, the transferees have secured it, and so far as demonstrated at the time the entry was made, it was more valuable for that purpose than for mining.

Discoveries made subsequent to Hiller's purchase, can not be used to defeat his right to the land. The conditions that pertained at the date of entry control, and not what may have been developed since. (Arthur *v.* Earle, 21 L. D., 92.)

At some time, prior to Hiller's entry, there had been some work done, outside of the Compromise, such as sinking prospect holes, running drifts and short tunnels, and these were visible at the time of the entry. While the statute says that applicant must show that the land "contains no mining or other improvements," it is not believed that Congress contemplated by this that everything in the way of old excavations made with a view to mining should be construed as mining improvements. It is fair to assume that Congress only meant to protect land upon which there were mining improvements upon existing mining claims—claims that were alive and subsisting at the time. There might be evidence of "other improvements," for agricultural purposes, for instance, but in such a state of decay as to induce reasonable belief that the tract had been abandoned. Again, there might be present on land evidences of former inhabitancy, such as an old cabin, but if it were not occupied and appeared to have been deserted, this would not constitute an improvement within the meaning of the law. In these instances it can hardly be claimed that the land would not be subject to entry if the records of the local office were clear as to the given tract. The same reasoning, it is thought, would apply to abandoned mining claims, notwithstanding the presence of abandoned mining improvements. If the land on which they are situated is not segregated by an existing location or entry, the applicant would be justified in assuming that it is subject to entry.

It is quite difficult to lay down any general proposition as to what will give notice of mineral character, to parties seeking to enter under non-mineral laws, land which at one time may have been regarded as mineral, and may have been worked for mineral deposits, but the mere

naked fact that land may have been at some former time worked for mineral, is not, in itself, sufficient to defeat an entry otherwise legal.

Section 3 of the act of June 3, 1878, *supra*, under which Hiller's entry and purchase were made, provided:—

> The register of the land office shall post a notice of such application embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant with a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time.

The purpose of this posting and publishing is to give notice of the application to purchase, in order that any adverse claimants to the land may have opportunity to assert their claims and prevent the land from wrongfully going to the applicant. In this case the record shows that a notice of the application was regularly posted by the register in the local land office, for the period required, and that a like notice was regularly given by publication in a newspaper, as required.

After setting forth the fact of the application and describing the land, both the posted notice and the published notice contained the following warning and citation to adverse claimants:

> All persons holding any adverse claim thereto are required to present the same at this office within sixty days from the first publication of this notice.

No response was made to these notices and no adverse claim of any kind was asserted within the time fixed or at any time before January 15, 1890, which was more than two years after Hiller's purchase and entry. A contest was instituted January 15, 1890, but, without being prosecuted to a hearing, was dismissed by the contestants. The present contest was instituted more than seven years after the entry was made.

These facts tend strongly to corroborate and sustain the conclusion that at the date of Hiller's entry the lands in question were not claimed by any one under the mining laws and that the previous mineral locations and workings thereon had been abandoned.

The protestant has failed to show, by a preponderance of the evidence, that at the date of Hiller's entry the land entered was known to contain any valuable mineral deposit or was claimed under the mining laws or had mining improvements thereon which would defeat the entry.

Your office judgment is therefore reversed and the protest dismissed.

RAILROAD GRANT—PRE-EMPTION FILING—OCCUPANCY.

MADSEN *v.* CENTRAL PACIFIC R. R. CO.

A pre-emption filing made after the map of definite location is filed, alleging settlement prior to notice of withdrawal, will not in itself defeat the operation of the grant.

A claim of occupancy, set up to defeat a railroad grant, will not serve such purpose, if the qualifications of the alleged settler, and the character of the occupancy, are not made to appear.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *January 7, 1898.* (F. W. C.)

An appeal has been filed on behalf of James Madsen from your office decision of January 16, 1896, in which it is held that the W. ½ of the NW. ¼ of Sec. 29, T. 11 N., R. 2 W., Salt Lake City, Utah, inured to the Central Pacific Railroad Company under its grant made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356).

Said tract is within the limits of the grant for said company as adjusted to the map of definite location filed October 20, 1868, at which date the rights under said grant attached. The order of withdrawal upon said map of location was made by your office letter of May 15, 1869, in which the local officers were instructed,

should it appear that parties have made *bona fide* settlements under the preemption laws on any of the land prior to the date of receipt of this order of withdrawal, such settlers will be permitted to prove up and enter their claims either on odd or even sections.

At the time of said withdrawal it thus appears that the rule of construction was that the right under this grant did not attach until the receipt of notice of withdrawal at the local office, so that on May 26, 1869, Rais Cahoon was permitted to file pre-emption declaratory statement for this land, in which statement settlement was alleged April 12, 1869. This filing remained of record until in 1888 the company, being desirous of listing the land on account of its grant, served notice upon Cahoon to come forward and show cause why his filing should not be canceled, and also presented affidavits by James and Jens Madsen, executed May 16, 1885, in which they swear that at the time of definite location there was no settlement, cultivation or improvement whatever upon said land belonging to or claimed by said Rais Cahoon or anyone else, but that the land was vacant, unoccupied, unappropriated and unsettled.

Cahoon made no response to the notice, and the showing made by the company was forwarded by the local officers with the recommendation that Cahoon's filing be canceled; and by your office letter of August 1, 1888, an order was issued to the local officers directing the cancellation of said filing. Thereafter, to wit, on November 18, 1888, the company was permitted to list the tract on account of its grant.

By letter of May 5, 1894, the register transmitted an affidavit by James Madsen, corroborated by Jens Madsen, to the following effect:

That at the time the line of the Central Pacific Railroad was definitely fixed a *bona fide* settler was in the open, peaceable, exclusive and notorious, and adverse to all the world except the United States, possession of the same; that at said time the said tract of land was occupied, appropriated, interdicted and reserved land and was not of the character contemplated by the grant to the said railroad.

Upon this allegation hearing was ordered by your office letter of September 13, 1894; which was duly held.

The testimony offered is very meagre and unsatisfactory. No attempt is made to show a settlement by Cahoon antedating the filing of the company's map of definite location. In fact, his connection with the land either before or after the definite location of the road is not shown. The testimony relied upon to defeat the grant is to the effect that one Sorensen was in the occupation and cultivation of this land from the spring of 1868 until after the filing of the map of definite location.

No testimony was offered to establish the qualification of said Sorensen further than that of one Baird, a witness for Madsen, who swears that at the date of the definite location, October 20, 1868, Sorensen was seventeen or eighteen years old. As to whether he was native or foreign born is not clearly shown. It would appear that he is of foreign birth.

Sorensen never asserted a claim to the land, so far as shown by the record, by the tender of an application to enter the same, and from the testimony it is doubtful if he ever intended so doing.

The record filing by Cahoon can not be held to have defeated the grant, as it was made subsequently to the filing of the map of definite location, and no such showing has been made in support of the alleged claim of Sorensen as would support a holding that the tract was excepted from the operation of the grant. I therefore affirm your office decision.

DEVORE *v.* RIEHL.

Motions for review and rehearing denied by Secretary Bliss, January 11, 1898. See departmental decision of November 12, 1897, 25 L. D., 380.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT.

NORTHERN PACIFIC R. R. CO. *v.* KEMP.

The order of May 28, 1883, relieving the Northern Pacific company from specifying losses in support of indemnity selections, is only applicable to lands withdrawn for the benefit of the grant.

An application to select a tract as indemnity, unaccompanied by a specification of loss, is no bar to the acquisition of a settlement right to the land covered thereby.

Secretary Bliss to the Commissioner of the General Land Office, January 11, 1898.

(W. V. D.) (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of February 17, 1896, holding for cancellation its indemnity selection covering the W. ½ of the NW. ¼ of Sec. 23, T. 129 N., R. 35 W., St. Cloud land district, Minnesota, with a view to allowing the homestead application of Charles Kemp covering said tract.

Kemp's application was tendered October 18, 1892, and covered the W. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of said Sec. 23, and was rejected for conflict with the selection made on account of the grant for the St. Paul, Minneapolis and Manitoba Railway Company.

This tract is within the indemnity limits common to the grants for the last mentioned company on account of the St. Vincent Extension of its road and the Northern Pacific Railroad Company.

At the dates of the withdrawals ordered on account of said grants, the W. ½ of the NW. ¼ of said section 23 was embraced in the homestead entry of William J. Tomkins, made April 16, 1868, and canceled November 29, 1875. Said tract was therefore excepted from the operation of said withdrawals.

The entire tract covered by Kemp's application was embraced in list No. 25, tendered by the Northern Pacific Railroad Company on November 7, 1883; which application to select was rejected for conflict with the grant for the St. Paul, Minneapolis and Manitoba Railway Company; the ruling at that time being that the last named company had the superior right within the conflicting limits.

The Manitoba Company also made selection of the tracts covered by Kemp's application; but its selection was duly canceled October 21, 1895, and said company is not before this Department urging any claim as to any of the land covered by said application.

The application to select filed by the Northern Pacific Railroad Company, before referred to, was not accompanied by a designation of losses as bases for the selections covered by said list, and the same was not supplied until April 26, 1892, when it filed its re-arranged list No. 25–A.

As before stated, Kemp's application to make homestead entry was tendered on October 18, 1892, and in his appeal from the rejection of said application he alleged settlement upon the land and continuous residence thereon since 1884. Upon this allegation of settlement hearing was duly ordered, and upon the testimony adduced it was shown that he settled, as alleged, in July, 1884, and with his family has continuously resided on the land, that he has cleared, broke and fenced about thirty-three acres, built a house and barn, dug a well, and otherwise improved the land to the value of about $900.

It will be noted that Kemp's settlement made in 1884 was the year following the presentation of the application to select by the company; but said application to select was not accompanied by a designation of losses, as required by the regulations in force at the date of the presentation of said list. It is claimed by the company, however, that the same was protected by the order of May 28, 1883, in which order the Northern Pacific Railroad Company was relieved from specifying a basis for its indemnity selections; but, as held in the case of Northern Pacific Railroad Company *v.* Miller (11 L. D., 428), the order did not apply to lands not protected by withdrawal.

As to the tract, namely, the W. ½ of the NW. ¼, which was covered by the entry of Tomkins at the date of the withdrawal on account of the Northern Pacific grant, it must be held, under the authority of the last mentioned decision, that said tract was not protected by said order of May 28, 1883, and as to said tract the company's incomplete selection, tendered in 1883, was no bar to the settlement by Kemp. Your office decision so held and awarded Kemp the right to enter the said W. ½ of the NW. ¼, but rejected his application as to the W. ½ of the SW. ¼ of said Sec. 23; from which action he failed to appeal.

Upon a review of the matter no reason appears for disturbing the action taken in your said office decision, and the same is accordingly affirmed; and upon completion of entry by Kemp within a reasonable time to be allowed by your office, the company's selection will be canceled.

HILLIARD *v.* LUTZ.

Petition for the reversal of departmental decision of March 16, 1896, 22 L. D., 324, under the supervisory authority of the Department, denied by Secretary Bliss, January 11, 1898. See also 23 L. D., 400.

MILLE LAC INDIAN LANDS—PRE-EMPTION.

MAHEW ET AL. *v.* MCLELLAN.

Under a pre-emption filing for Mille Lac lands protected by the second proviso to section 6, act of January 14, 1889, wherein the right to make final proof has been suspended by the act of July 4, 1884, it is incumbent upon the pre-emptor, during such period of suspension, to maintain his possessory right by such acts as will negative an inference of abandonment, if the rights of an intervening adverse claimant are involved.

Secretary Bliss to the Commissioner of the General Land Office, January 11, 1898.

(W. V. D.) (E. B., Jr.)

The land involved in this case is the W½ NW¼ and NW¼ SW¼ of Sec. 12, T. 42 N., R. 25 W., St. Cloud, Minnesota land district.

On March 13, 1884, James F. McLellan filed pre-emption declaratory statement No. 1978 for the land above described, alleging settlement thereon March 4, 1884. On February 3, 1891, Moses Mahew filed pre-emption declaratory statement No. 2061 for the SW¼ NW¼ and W½ SW¼ of said section, and the SE¼ NE¼ of section 11, same township and range, alleging settlement thereon March 5, 1890. On February 3, 1891, David Johnston filed pre-emption declaratory statement No. 2022 for the W½ NW¼ and W½ SW¼ of said section 12, alleging settlement thereon December 29, 1890. It thus appears that Johnston's filing conflicts with McLellan's as to all the land claimed by the latter, and that Mahew's filing conflicts with McLellan's as to all the land claimed by the latter except the NW¼ NW¼ of said section 12.

McLellan on March 12, 1891, gave notice of intention to submit final proof on April 29, 1891, before the local office then at Taylor's Falls. That office reports that "on the day set for hearing (April 29, 1891) the case was called at 10 o'clock a. m., and placed on the calendar" and "trial taken up May 7, 1891," with all the parties above named present and represented also by counsel. Instead of filing a written protest against McLellan's filing, Mahew and Johnston appear to have protested in person. On the date last named McLellan submitted final proof as in the ordinary course and, in addition, on that day and the next, considerable other testimony; and the other parties each submitted testimony. The privilege of cross-examination was freely allowed and exercised by the respective parties. Upon the evidence adduced the local office decided, December 28, 1893, that "there was no compliance" by McLellan "with the spirit of the law and hardly any attempt to comply with the letter" and rejected his offered final proof. McLellan appealed. Pending the appeal Mahew on August 11, 1894, and Johnston on August 30, 1895, submitted final proof.

Your office on July 1, 1896, affirmed the decision of the local office, holding that the evidence showed that McLellan had maintained "but a desultory connection with the land" and that "his proof offered as it was in the face of adverse claims, does not show due compliance with law and is therefore insufficient." His proof was accordingly rejected and his filing held for cancellation. It was further said in this connection that "the respective rights and priorities" of Mahew and Johnston "are not involved in this case and will receive attention in another decision." An appeal by McLellan which assigns several grounds of error brings the case here for consideration.

The land in controversy is within what was formerly known as the Mille Lac Indian reservation. The history of legislative and departmental action affecting the lands in said reservation, commencing with the treaty of February 22, 1855 (10 Stat. 1165) may be readily gathered from the cases of David H. Robbins (10 L. D. 3), Amanda J. Walters *et al.* (12 L. D. 52), and Haggberg *et al. v.* Mahew (24 L. D. 489). The treaties of March 11, 1863 (12 Stat. 1249) and May 7, 1864 (13 Stat. 695), under which these lands were ceded to the United States each contained this provision:

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

Notwithstanding the right of occupancy thus conferred upon the Mille Lac Indians numerous pre-emption filings and homestead entries for these lands were allowed at the Taylor Falls land office, as would seem under Departmental authority, between the year 1877 and July 1884, of which McLellan's was one.

On July 4, 1884 (23 Stat., 89), an act was passed prohibiting any disposal of said lands "until further legislation by Congress." McLellan's

filing was allowed therefore prior to the prohibition of July 4, 1884, and while other filings and entries for Mille Lac lands were being allowed, as above stated. The "further legislation" necessary to the disposal of said lands was enacted January 14, 1889 (25 Stat., 642), and the second proviso to the sixth section thereof declared:

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

In the case of Smith *v.* Lochren (22 L. D., 578), the latter having filed a pre-emption declaratory statement, January 9, 1884, for a certain tract of said lands, it was held (syllabus):

A pre-emption filing for Mille Lac lands, authorized by the rules in force at the time of its allowance, is within the spirit and intent of the second proviso to section 6, act of January 14, 1889, and is accordingly protected thereby, if subsisting at the date of said act.

Under a filing of such character, however, wherein the right to make final proof is suspended by provisions of the act of July 4, 1894, it is incumbent upon the pre-emptor, during such period of suspension, to maintain his possessory right by such acts as will negative an inference of abandonment, where the rights of an intervening adverse claimant are involved.

The doctrines of that case both as to the validity of Lochren's filing and the acts necessary to maintain the right to the land covered thereby apply directly and broadly to the case at bar. While the adverse claim in the Lochren case was a homestead entry made under the act of February 14, 1889, *supra*, which not only did not provide for but, in effect, prohibited the initiation thereafter of pre-emption claims to Mille Lac lands, subsequent legislation (joint resolution of December 19, 1893, 28 Stat., 576) expressly confirmed all pre-emption filings made within the period specified in the resolution, that is—

between the ninth day of January, eighteen hundred and ninety-one, the date of the decision of the Secretary of the Interior holding that the lands within said reservation were subject to disposal as other public lands under the general land laws, and the date of the receipt at the district land office at Taylor's Falls, in that State, of the letter from the Commissioner of the General Land Office, communicating to them the decision of the Secretary of the Interior of April twenty-second, eighteen hundred and ninety-two, in which it was definitely determined that said lands were not so subject to disposal, but could only be disposed of according to the provisions of the special act of January fourteenth, eighteen hundred and eighty-nine—

and furthermore, as construed in Haggberg *et al. v.* Mahew, *supra*, said joint resolution operated, also, to validate settlements on these lands when supported by pre emption filings made during the said period. The said joint resolution included in its confirmatory provisions homestead entries as well as pre-emption filings or entries and thus beyond question placed both classes of claims upon the same footing. It only remains then to decide whether McLellan duly maintained his rights under his filing so as to prevent the attaching of a superior adverse claim in Mahew or Johnston.

McLellan made settlement on the land on March 4, 1884. During the rest of that year he was on the land, all told, according to his own statements, not to exceed forty-six days, in periods ranging from one day to fifteen days at the respective visits. During 1885 he was on the claim, he states, not to exceed sixty-nine days, and during 1886 not to exceed forty-eight days. During 1887 he was there on but one occasion, in May of that year, a few hours at most, and did not return to the land at all, thence, until about the middle of March, 1891, a period of nearly four years. In the seven years succeeding his settlement he was thus on the land only one hundred and sixty-three days. For more than a year subsequent to the visit in 1887 he was living in the same county in which the land is situated. In June, 1888, he left for the Pacific Coast, and was absent in Washington, Oregon, and British Columbia until his return in March, 1891. The only improvements placed on the land or cultivation thereof by him consisted in the erection of a small log shanty, the digging of a shallow unwalled well, clearing and enclosing with a rude fence of brush, rails, and fallen timber about an acre of ground, and the planting of a few garden vegetables in 1884 or 1885. He made no improvements, nor did any work on the land between 1885 and March, 1891.

His voluntary absence from the land for more than four years is inexcusable in the face of the adverse claims initiated toward the close of that period when the condition of his improvements indicated abandonment. The plea of his counsel that this absence was justified by the threatening attitude of the Indians finds no support in the testimony, which makes no allusion whatever to any interference by the Indians nor any apprehension on McLellan's part of danger from that source. Mahew and Johnston had both made settlement on the land some time prior to McLellan's return, the former in the spring of 1890 and the latter early in January, 1891—and their improvements were easily to be seen, and Mahew's were seen by McLellan at that time. He must be held to have abandoned the land. The foregoing disposes of all the questions presented in the case.

The decision of your office is affirmed. McLellan's filing will be canceled. The rights of Mahew and Johnston, respectively, in the premises have already been determined in the case of Haggberg *et al. v.* Mahew, *supra*.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

ALIX HEIPFNER.

The right to make a second entry under the act of December 29, 1894, can not be recognized, where the first entry was abandoned without any attempt to raise a crop on the lands embraced therein.

A second entry will not be allowed on account of the worthless character of the land covered by the first, if such entry was made without examination of the land.

Secretary Bliss to the Commissioner of the General Land Office, January 13, 1898.

(W. V. D.) (C. W. P.)

The record shows that on October 22, 1894, Alix Heipfner made homestead entry, No. 9728, of lots 1, 2 and 3, and the SE. ¼ of the NW. ¼ of Sec. 5, T. 124 N., R. 72 W., Aberdeen land district, South Dakota.

On May 6, 1896, the said entryman filed a relinquishment of said entry, together with an application to make a second homestead entry, embracing, in lieu of the aforesaid land, the SW. ¼ of Sec. 11, T. 123 N., R. 75 W.

In the application it is alleged, substantially, that affiant was misled when he made said entry; that he had never examined the tract, but took the word of another as to its quality; that his informant was one whom affiant supposed to be well acquainted with the land, and who would not deceive him as to its character, but his informant was either not aware of the kind of land he entered, or else deceived him; that the tract is very stony and gravelly, and not at all suitable for raising crops thereon; that affiant erected a small sod house on said tract immediately after making entry, but has not lived there to amount to much, as he found he could not farm the land.

The local officers rejected this application, because the grounds set out in the petition do not bring the case within the provisions of the act of December 29, 1894 (28 Stat., 599).

On appeal, your office held that it not appearing "that Heipfner ever attempted to raise any crops upon the tract in question," "his abandonment of the same cannot be said to be due to a failure of crops, which would be necessary in order to bring his case within the provisions of the act of December 29, 1894 (*supra*), and since he made his entry without first examining the land he must suffer the consequences of his own neglect," and cited the case of Nikolai Martenson (19 L. D., 483).

The decision of your office is approved and affirmed.

APPLICATION FOR SURVEY—ISLAND.

ARCHIE G. PALMER.

A hearing should be ordered on an application for the survey of an island in a non-navigable stream, alleged to be above high water mark, and to contain more than three legal subdivisions, and to have been in existence at the date of the adjacent surveys, for if an island of such character was omitted from the public survey through fraud or mistake an order for its survey may properly issue.

Secretary Bliss to the Commissioner of the General Land Office, January 13, 1898.
(W. V. D.) (C. W. P.)

On November 22, 1897, you submitted the application of Archie G. Palmer, of Central City, Nebraska, for the survey of an island in the Platte river, in sections 4, 5, 8 and 9, township 13 north, range 5 W., Nebraska, and you recommend that the application be approved and a survey ordered.

From the application it appears that the island the applicant desires to have surveyed contains about one hundred and twenty-five acres of land; that the width of the channel between the island and the main shore of Long Island on the south is from two hundred and sixty to three hundred feet, and between the island and the main shore of Prairie Island on the north is from twenty-five to fifty feet, the depth of the river at ordinary stages of the water being from about one and a half to two feet; and that the island is about two feet above high water mark, not subject to overflow, and is fit for agricultural purposes, and that there are no improvements upon the island, and that it existed at and prior to the survey of the township embracing said island.

The application appears to have been served upon the riparian owners.

The township was surveyed and the river meandered in September, 1862, and the photolithographic copy of the plat, submitted by you, shows no island in the locality described in the application and represented on the accompanying diagram.

The affidavits attached to the application state that the island was in existence when the township was surveyed. But William A. Wilder, Christian Miller, and Mrs. John Payne have filed a protest against the approval of the application, claiming the island as a part of their lands under the law of riparian rights. The protest is accompanied with affidavits by the protestants and two others, showing that between Prairie Island and Long Island there are numerous small tow-heads, no one of which contains to exceed one acre of land, and three small brush islands, one of said brush islands containing not to exceed fifteen acres of land and each of the others not to exceed twenty-five acres; that said islands are of no value to any other person than the owners of adjoining lands for pasturing stock at low water time, and that they are covered with a dense brush of willow, plum and a few cottonwood trees.

If these statements are correct, the application for survey should not

be granted. John C. Christenson's case, 25 L. D., 413, and the case of the Grand Rapids and Indiana Railroad Company *v.* Butler, 159 U. S., 87. But if it is a fact that there was in existence, at the date of the survey, an island in the locality described, above high water mark and not subject to overflow and fit for agricultural purposes, containing about one hundred and twenty-five acres of land—more than three legal subdivisions—which was omitted from the survey of 1862, it may be that the island was omitted from the original survey through fraud or mistake, so that a survey should now be granted. To determine whether the facts alleged in the application and affidavits accompanying it are true, a hearing will be necessary. A hearing is therefore ordered, and you will cause notice thereof to be given to the applicant for survey and the owners of the adjacent lands.

INDIAN LAND—APPROVAL OF CONVEYANCE.

NANCY WHITEFEATHER.

It is no objection to the approval of an Indian deed that a certified copy thereof is presented for action, if the loss of the original is shown, or the custodian thereof refuses to part with its immediate possession.

The approval of an Indian deed, in the absence of an intervening adverse right, relates back to the date of said deed, and gives effect thereto from the time of its execution.

Where, prior to the approval of an Indian deed, a conveyance adverse thereto is made, and approval thereof secured on the ground that such action would serve to protect parties holding under the first deed, the Secretary of the Interior may approve said instrument, leaving the parties claiming thereunder to assert their rights in the courts.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 13, 1898.

I have the honor to acknowledge the reference by the Acting Secretary of a communication from the Commissioner of Indian Affairs, dated January 10, 1898.

That communication states that certain lands in Kansas were allotted and patented December 28, 1859, to Nancy Whitefeather, a Shawnee Indian; that February 25, 1864, Nancy Whitefeather conveyed separate portions of those lands to Brooking Jefferies (or Jeffries) and John O'Connor, but these conveyances have never been approved by the Secretary of the Interior; that January 28, and 29, 1870, Nancy Whitefeather having died in about 1868, Elizabeth Longtail and George Washington claiming to be sole heirs of Nancy Whitefeather, conveyed to Harry McBride and Thomas Jeffries, respectively, three separate portions of the land so as aforesaid conveyed by Nancy Whitefeather; that the deeds to Harry McBride and Thomas Jeffries were approved by the Secretary of the Interior April 18, 1870, and June 11, 1870; that subsequently it was discovered that Elizabeth Longtail and George

Washington were not the sole heirs of Nancy Whitefeather but were heirs inheriting only an undivided one-half interest in her real estate; that February 16, 1895, the heirs inheriting the other undivided one-half interest conveyed the same to Wm. J. Isaac; that the deed to Isaac was approved by the Secretary of the Interior March 19, 1897; that long previous to the conveyance to Isaac the title obtained by Brooking Jeffries and John O'Connor from Nancy Whitefeather and the title obtained by Harry McBride and Thomas Jeffries from Elizabeth Longtail and George Washington had united in the same persons; that the approval of the deed to Isaac was obtained upon the representation "that the purpose and intent of said conveyances was to quiet title in the several vendees and holders of said lands through mesne conveyance from the vendees (Harry McBride and Thomas Jeffries) in the deeds approved in 1870;" that this representation has proved to be false and it has been shown that the Isaac deed and its approval were obtained adversely and in hostility to the title held under the original conveyances of Nancy Whitefeather and the approved conveyances of Elizabeth Longtail and George Washington. It is shown that at the date of the deed to Isaac and at the date of its approval the existing state of the title under the Nancy Whitefeather deeds and those of Elizabeth Longtail and George Washington was fully shown by the records of the county, and that those then holding that title and their grantors had been in the actual and undisturbed occupancy and possession of these lands for over twenty-six years.

The communication of the Commissioner of Indian Affairs then submits for your consideration and approval certified copies of the original deeds from Nancy Whitefeather to Brooking Jeffries and John O'Connor, respectively, saying that this is done

> in order to accomplish now what it considered and held that it was doing when this office recommended the approval of the Isaac deed, viz., to quiet the title of innocent purchasers and present holders of said lands.

Proof is submitted showing the loss of the original deed to Brooking Jeffries and showing that John O'Connor now has possession of the original deed to him and refuses to part with the possession thereof or permit an examination thereof, saying that he is satisfied it conveyed a good title. In concluding his letter the Commissioner of Indian Affairs says:

> From a retrospection of the former correspondence and a close examination of the latter I have no hesitancy in recommending the approval of these certified copies of said deeds as an act of justice to the many innocent holders of town lots whose title to such land was not complete by the approval of the deeds executed by only two of the heirs of said Nancy, and do now so recommend.
>
> Prompt action on these deeds is respectfully requested for the reason that actions in ejectment are now pending in the courts, and the innocent holders and occupants are necessarily anxious that their titles should be adjusted as promptly as possible.

The reference to me is for "opinion as to whether there are any legal objections to the approval of the two certified copies of deeds." It

seems to me that there is no objection to the fact that in requesting your approval certified copies are presented instead of the original deeds. The loss of the Jeffries deed and the refusal of the custodian of the O'Connor deed to part with the immediate possession thereof is sufficient reason for the non-production of the originals. In the absence of the intervening approved deed to Isaac, there is no doubt that a present approval of the Whitefeather deeds would relate back to the date thereof and give effect and validity thereto, from the time of their execution. (Pickens *v.* Lomax, 145 U. S., 310; See also George Big Knife, 13 L. D., 511.) No statutory provision will in any event be violated by their present approval, but whether an approval at this time can relate back to the date of the Nancy Whitefeather deeds as against any title which may have been obtained under the intervening approved Isaac deed, is subject to question. If the date of a present approval is clearly shown therein so that upon contrasting it with the approval of the Isaac deed the precedence of the former in the order of time will be apparent, no injury or injustice will be done to Isaac or anyone claiming under him. If, by reason of the approval of the deed to Isaac, you are without jurisdiction and authority to approve the Whitefeather conveyances, that want of authority and the consequent invalidity of a present approval will be apparent and no one can be misled. In this connection it is to be observed that the approval of the Isaac deed is shown not alone by the public records of the Indian Office, but also by the public record of conveyances in the county in which the lands are situate.

Without your approval it may be that the holders of the title under the Nancy Whitefeather deeds will not be able to present to the courts in the pending, or other suits, any equities of their own claim or any infirmity in the Isaac deed growing out of the record state of the title at that time and the existing and long-continued possession thereunder, or growing out of any false representations which may have been made on behalf of Isaac in procuring the approval of his deed.

If the conveyances by Nancy Whitefeather to Brooking Jeffries and John O'Connor are deemed by you to have been of such a character as to merit your approval, in the absence of any intervening approved conveyance, I believe that, in the light of the statement and recommendation of the Indian Office, you will be justified in approving the conveyances shown by the two certified copies, casting upon the applicants the duty of establishing, if they can, that under the facts surrounding this transaction as they may be developed by judicial inquiry, a present approval will relate back to the date of the conveyance approved so as to give it full effect as of that time.

Approved, January 13, 1898.

C. N. BLISS, *Secretary.*

RAILROAD GRANT—SETTLEMENT RIGHTS—ESTOPPEL.

WIGHT *v.* CENTRAL PACIFIC R. R. CO.

A pre-emptor who has made an affidavit in support of a railroad selection, to the effect that he was not residing upon the tract embraced within said selection, at the date when the company's right attached, is estopped from setting up a contrary state of facts, as against the heirs of one who subsequently purchased said tract from the company.

A pre-emption claim, based on alleged settlement prior to definite location, and filing made prior to notice of withdrawal, can not be held to defeat the operation of a railroad grant, where the fact of settlement is not clearly established, and the pre-emptor has failed to show due maintenance of his claim after his filing, and it further appears that the land involved has been, for a long term of years, in the adverse possession of one against whom the pre-emptor is estopped from setting up his alleged settlement right.

Secretary Bliss to the Commissioner of the General Land Office, January 13, 1898.

(W. V. D.) (F. W. C.)

Lyman Wight has appealed from your office decision of June 13, 1895, in which it is held that lots 1 and 2 and the NE. ¼ of the SW. ¼ (should be NE. ¼ of NW. ¼) of Sec. 29, T. 10 N., R. 2 W., Salt Lake City land district, Utah, inured to the Central Pacific Railroad Company under its grant made by the act of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356).

The map showing the line of definite location of the company's road opposite the tract in question was filed on October 20, 1868, at which date the rights under its grant attached.

A land-office in the Territory of Utah was not opened until March 9, 1869, and the order of withdrawal on account of the grant to the Central Pacific Railroad Company was not made until May 15, 1869; so that on April 3, 1869, Lyman Wight was permitted to file pre-emption declaratory statement for this land, in which statement settlement was alleged March 13, 1869.

The company included this tract in its list No. 3, filed November 4, 1884, which list was accompanied by an affidavit made by Wight on the 6th of October, 1883, in which he swears

> that he was not residing upon said land at the time the rights of the Central Pacific Railroad Company attached to the same and that he has never resided thereon or any part thereof.

This list stood unchallenged until on December 19, 1893, Lyman Wight filed a corroborated affidavit, in which he alleged that at the time the line of the Central Pacific Railroad was definitely fixed "one Wight was in the open, peaceable, exclusive and notorious, and adverse possession" of the tract involved, as to all the world except the United States, the land at that time being "occupied, appropriated, interdicted and reserved land and was not of the character contemplated by the grant to the aforesaid company."

This affidavit was forwarded to your office, and by letter "F" of January 10, 1894, a hearing was ordered to afford Wight an opportunity to prove the allegations of his affidavit. Hearing was called for March 20, 1894.

On February 7, 1894, Mrs. Mary L. House, widow of Hiram House, filed a petition asking to be allowed to intervene—basing her application upon an affidavit alleging ownership and possession of the tract involved since March 29, 1888, through a deed of conveyance from the Central Pacific Railroad Company.

Hearing was duly held, after several continuances, and upon the testimony adduced the register and receiver were of the opinion that no such claim was shown to exist, to the tract in controversy, at the date of the definite location of the Central Pacific Railroad, as would withdraw the same from the operation of the grant to said company, and therefore held that the land passed to the railroad company; in which opinion your office concurred; and Wight has appealed to this Department.

From a review of the testimony it appears that the present claimant, together with his father, Louis Wight, now deceased, made a joint settlement prior to the filing of the map of definite location and to the extension of the operation of the homestead and pre-emption laws to the lands in this Territory. Under the Territorial law the present claimant in 1868 applied to the county surveyor, who made a survey of the land included in this joint occupation. The claimant was at this time a duly qualified pre-emptor and undoubtedly intended to claim land in his own right in addition to that to be claimed by his father. He and his father occupied the same house and used the same stable and other buildings jointly, and cultivated the greater part of the tract, which, according to the survey made at that time embraced about 158 acres. After the government survey of the land in 1869 it was found that the buidlings were all upon section 20 and that the cultivated field extended across the tract here in dispute. At this time the father and son made a division of the land claimed, the father entering under the homestead law the land in section 20, and the present claimant filing his pre-emption declaratory statement, as before stated, for the tract in question.

Several nice questions would be thus presented for consideration by the record made in this case were it not for the fact that Wight made the affidavit before referred to, in 1883, in which he swears, as before stated, that he was not residing upon the land at the time the rights of the company attached under its grant, and that he never resided upon any part thereof; and the only explanation offered as to the making of said affidavit is that the agent for the company who secured said affidavit informed him that that was the only way he might secure the tract, and that the inference gathered from the representations made by the agent for the company led him to believe that he would have the preferred right of purchase from the company in the event of its securing patent for this land.

Following the filing of said affidavit, together with the company's list, in 1884, to wit, on the 29th of March, 1888, Hiram House purchased this land, together with other tracts in the same section, from the Central Pacific Railroad Company, and he immediately thereafter enclosed the entire tract within a common fence and has maintained undisputed possession since said purchase.

As against the claimed rights and equities of the heirs of House, who has since died, Wight alleges that he had an agreement with House to the effect that upon purchasing this land, together with other tracts in the same section, from the railroad company, he (House) would convey to claimant the tracts here involved, Wight to pay House the amount paid the company.

The showing upon this question, resting as it does upon the claimant's own testimony, can not be considered.

Upon the record as made it must be held, whatever be the effect of Wight's filing and settlement as regards the company's grant, that he would be estopped from claiming the tract as against those claiming under the purchase made by Hiram House. Even should it be held, therefore, that the tract was excepted from the operation of the company's grant by reason of the alleged claim of Wight existing at the date of definite location, the equities of the purchaser, which are duly protected by the act of March 3, 1887 (24 Stat., 556), would be clearly superior to the claim now sought to be asserted by Wight under his filing made, as before stated, in 1869.

After a careful review of the entire record, in view of the doubtful character of the settlement shown at the date of the attachment of rights under the grant; of the fact that Wight had failed to show that his pre-emption claim had been duly maintained since his filing made in 1869; that House or his heirs have been in undisputed possession of the land since 1888, under purchase from the railroad company, and that Wight is estopped by his own action from now claiming as against the heirs of such purchaser, it is directed that Wight's filing be canceled and the tract included in a list and submitted for approval as the basis for patent to be issued on account of the grant.

For the reasons given your office decision must be and is accordingly affirmed.

DURESS—SENTENCE OF IMPRISONMENT—SETTLEMENT RIGHTS.

SKAGGS ET AL. *v.* MURRAY.

It can not be held, under a local statute that suspends civil rights during the term of a sentence of imprisonment, that a decision of the General Land Office is ineffective for the reason that the party adversely affected thereby had been convicted and was imprisoned at the time the judgment of the local office was rendered.

The preferred right of a successful contestant can not be defeated by an adverse settlement claim acquired subsequently to the initiation of the contest.
A minor can not acquire settlement rights under the homestead law.

Secretary Bliss to the Commissioner of the General Land Office, January 17, 1898.
(W. V. D.) (C. W. P.)

The appeal of Sarah E. Skaggs, James Skaggs, William Skaggs, Jr., Cora Skaggs, and Edith Skaggs, from your office decisions of February 19, 1897, and June 4, 1897, rejecting their application to contest the homestead entry, No. 12,743, of William Murray, of lots 5 and 6, and the S. ½ of the SW. ¼ of Sec. 32, T. 17 N., R. 2 W., Guthrie land district, Oklahoma Territory, made December 26, 1895, is before the Department.

On March 17, 1897, the said Sarah E. Skaggs and others filed their application to contest said entry, alleging, in substance, (1) that the said Sarah is the wife of William Skaggs; that the other contestants are the minor children of the said William Skaggs; that on the 22d of April, 1889, at about thirty minutes past two o'clock P. M., the said Sarah and said minor children, in company with their father, the said William, settled upon said land; that said settlement was made prior to the settlement of said entryman; that on the 30th of April, 1889, Robert M. McKenzie made homestead entry of said land; and on the 30th of April, 1889, the said William Skaggs filed a contest against said last mentioned entry, alleging prior settlement; that subsequently the said Murray filed a contest, alleging that both Skaggs and McKenzie were disqualified as "sooners"; that on the 3d of October, 1890, prior to the trial of said contests, the said William Skaggs was arrested on a charge of felony and convicted thereof on the 12th of February, 1891, and sentenced to the penitentiary at Columbus, Ohio, for six years, and thereby prevented from prosecuting his own contest, and defending against the contest of the said Murray; that by means of said conviction and imprisonment, the said William Skaggs "became civilly dead, and that the life of his said contest died or expired with the said conviction and sentence and confinement for the commission of said felony," and that the contest of said Murray also "became *functus officio*, and that all the rights of property of said William Skaggs vested in his wife and minor children, and that upon the conviction and expiration of the contest aforesaid, the U. S. Land Office was divested of jurisdiction, by operation of law, of both the person and the subject matter of the aforesaid contests; that by reason of the conviction of the said William Skaggs, the said Sarah "became the head of the family," "but was prevented from asserting her rights by reason of the status of the litigation at the time;" that the acts of settlement made by the contestants, and those acquired through the said William Skaggs are as follows: "By William Skaggs, assisted by these plaintiffs," one dugout, two wells, twenty-four apple trees, one sod house,

and ten acres of land broken, total cost $50, and by the contestants, "without the assistance of William Skaggs," one box house, thirty-five acres broken, fencing and garden, total cost $118.50;

(2) That the testimony upon which the forfeiture of the right of the said William Skaggs to said land was obtained was "fraudulent, false, and untrue."

(3) That said Murray was allowed to make his homestead entry before the contest proceeding of the said Murray and Skaggs was formally disposed of, and without notice to the contestants, or any other person, and that the contest and intervention of said Murray were illegal.

This affidavit of contest was rejected by the local officers, (1) because William Skaggs is not civilly dead, (2) because Mrs. Skaggs had not secured a divorce, but, on the contrary, is now living with said William as his wife, and (3) because minor heirs can make no valid settlement.

Upon appeal your office held that:

> If Mrs. Skaggs ever had any right to this land she has delayed too long in asserting it. She does not aver any ignorance of her husband's protracted efforts to assert his claim thereto. She will not be allowed to stand by and await the result of the protracted efforts of her husband to assert his claim thereto, until said efforts have proven fruitless, and then, several years later, commence to assert her own claim. She has waited out the statutory life of the entry before making any claim whatever in her own right to the premises. She now comes too late,

and sustained the action of the local officers.

The records of your office show that on April 30, 1889, Robert M. McKenzie made homestead entry of said land. On May 30, 1889, William Skaggs filed a contest affidavit against said entry, alleging prior settlement. On August 20, 1889, William Murray filed affidavit of contest charging that both McKenzie and Skaggs were disqualified as "sooners."

A hearing was had, at which Skaggs, being in the penitentiary at Columbus, Ohio, appeared by attorney. Testimony was submitted, and the local officers decided in favor of Murray. Upon appeal your office, by letter of March 12, 1894, affirmed said judgment. Skaggs and McKenzie appealed. While the appeals were pending before the Department, Skaggs moved for a rehearing. On September 7, 1895, the Department denied Skaggs's motion for rehearing, without prejudice, and affirmed the decision of your office. On November 22, 1895, the Department denied a motion for review, filed by McKenzie, and McKenzie's entry was canceled by your office letter of December 19, 1895. On December 29, 1895, Murray made homestead entry of said land. Skaggs filed a motion for rehearing, and on January 31, 1896, appealed from the action of your office canceling McKenzie's entry. Said motion for rehearing was denied on February 10, 1896, and appeal dismissed on December 3, 1896.

But it is insisted that the decision against William Skaggs was void, because, while the contest was pending, and prior to the hearing before the local officers, Skaggs had been convicted of a penitentiary offence, and was imprisoned under his sentence, when the judgment of the

local officers was rendered. And a provision in the laws of the Territory of Oklahoma is relied on in support of the contention that the Land Office was divested of jurisdiction by reason of such conviction and imprisonment, which reads: Sec. 21, Ch. 25, Statutes of Oklahoma, 1890:

> A sentence of imprisonment in the territorial prison for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority or power, during the term of such imprisonment.

2 New York Revised Statutes, 101, Sec. 19, declares that

> a sentence of imprisonment in the State prison for any term less than for life, suspends all the civil rights of the person so sentenced . . . during the term of such imprisonment;

and the Court of Appeals of New York, in the case of Davis *v.* Duffie, 3 Keyes, 606, held that, under this provision, the service of legal process upon a convict in the State prison is regular and valid to confer jurisdiction; that the statute which "suspends all the civil rights of the person" sentenced to the State prison, does not suspend the rights of others against him; that he may be sued, and the suit against him may be prosecuted to judgment.

The provision in the New York statute is similar to the Oklahoma law, and the interpretation of the provision by the Court of Appeals of New York accords with sound reasoning. It would be strange indeed, if a convict in a State prison should be exempt from ordinary proceedings by action during his imprisonment.

The claim of Mrs. Skaggs to the land, independent of that of her husband, can not be recognized, for the reason (if for no other reason) that the preferred right of Murray as a successful contestant could not be defeated by Mrs. Skaggs's settlement acquired subsequent to the initiation of his contest against McKenzie's entry. Hodges *et al. v.* Colcord, 24 L. D., 221; Hine *v.* Cliff, Id., 432.

That the minor children of William Skaggs are not qualified to acquire title to public lands under the homestead laws is apparent. A homestead entryman must be the head of a family, or a person who has arrived at the age of twenty-one years. Sec. 2289 of the Revised Statutes.

Your office decisions denying the application for a hearing are affirmed.

On October 1, 1897, an application to intervene was filed by Robert M. McKenzie, wherein it is alleged, among other things,

> that the petitioner employed an attorney of Washington, D. C., to appeal said case to the Honorable Secretary of the Interior for the consideration of $50.00, $48.00 of which was duly paid, and your petitioner rested in the assurance that said case was duly appealed to your Honor, for your consideration, and he only learned that such was not the case by the letter mentioned in his affidavit, hereunto attached, dated August 4, 1897, and it was then for the first time that your petitioner learned that his entry was canceled, on the 19th day of December, 1895, by direction of the Honorable Commissioner of the General Land Office.

The record in the case of Skaggs and Murray *v.* McKenzie shows that an appeal was taken in behalf of McKenzie from the decision of your office, and that on September 7, 1895, the Department affirmed said decision; that a motion for review was then filed in behalf of McKenzie, which was denied by the Department on November 22, 1895, and McKenzie's entry canceled by your office letter of December 19, 1895.

This motion being founded on a misstatement of the record, affords no proper grounds for intervention. But Mrs. Skaggs's affidavit of contest being dismissed, the motion, for that reason, is without support.

The motion to intervene is dismissed.

RES JUDICATA—SUPERVISORY AUTHORITY—PREFERENCE RIGHT.

PARCHER *v.* GILLEN.

The rule of *res judicata* as applied by the Department in determining whether a contest is barred by prior proceedings, does not, as against the government and third parties, place matters which might have been tried and determined upon the same footing with those which have thus been disposed of.

While the legal title to land remains in the government the Secretary of the Interior is charged with the supervisory authority and duty of determining its proper disposition; and a change in the person holding the office of Secretary, does not defeat or prevent a review or reversal in any instance where the Secretary making the ruling, or rendering the decision, if still holding the office, would be in duty bound to review and reverse his own act.

The preferred right of entry given to the successful contestant by the act of May 14, 1880, can not be held to extend to one, who, under another statutory enactment, is disqualified and prohibited from entering the land involved.

Secretary Bliss to the Commissioner of the General Land Office, January 17, 1898.

This case involves the N ½ of the NW ¼ and lot 1 of Sec. 12, T. 39 N., R. 6 E., Wausau land district, Wisconsin.

March 10, 1894, John Gillen made homestead entry No. 7121 of the tract, and March 24, 1894, D. W. Parcher filed an affidavit of contest against this entry alleging, among other things, that Gillen, in advance of their being opened for settlement, entered and occupied the lands, of which this tract is a part. A hearing was had, at which both parties were present and introduced testimony, the receiver alone presiding. A special agent was detailed to act in place of the register, who was disqualified. While not present at the hearing, the special agent duly considered the written transcription of the testimony and thereafter separate decisions were rendered, the receiver holding that the charge of premature and unlawful entry was sustained by the evidence and the special agent holding that the charge was not sustained.

April 3, 1895, your office approving the decision of the receiver, sustained Parcher's contest and held Gillen's entry for cancellation.

Gillen appealed, and April 22, 1896, this Department affirmed your office decision. (330 L. and R., 463, not reported.)

Motion for a review of the departmental decision was filed by Gillen, the chief error assigned being stated therein as follows:

(1). In not holding that the case of Gillen *v.* Beebe (16 L. D., 306), upon a motion for rehearing, was *res adjudicata* as to the question of whether or not Gillen was on the land in dispute prior to December 20, 1890, as the application for rehearing in that case was based upon this very point.

December 15, 1896 (23 L. D., 485), this Department revoked the departmental decision of April 28, 1896, dismissed Parcher's contest, and held Gillen's entry intact, solely upon the ground that the decisions in the case of Gillen *v.* Beebe (16 L. D., 306 and 279 L. and R., 319) finally and conclusively adjudged that Gillen did not prematurely or unlawfully enter upon the land in contest.

January 12, 1897, Parcher filed a petition asking a reconsideration of this last decision of the Department and Gillen was duly notified. Briefs by both parties were filed; and February 24, 1897, counsel on both sides argued orally before the Department the questions involved in the case. My predecessor then concluded to defer action on said petition and to permit his successor to decide it.

The whole case has been recently re-argued, both orally and in writing, and it is now before me for disposition.

The record shows the following facts:

The tract in contest is part of the lands, commonly known as "water reserve lands," which were withdrawn from settlement and entry by the President's proclamation of April 5, 1881, and which were restored to settlement and entry under the homestead law, by the act of Congress approved June 20, 1890 (28 Stat., 169).

The third section of said act reads as follows:

Sec. 3. That no rights of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

The act took effect December 20, 1890. The receiver, who saw the witnesses and heard them testify, your office, and the Department in its first decision, all concurred in finding from the evidence that Gillen unlawfully entered upon and occupied water reserve lands on December 19, 1890, and that he did this for the purpose of obtaining an advantage in the settlement and entry thereof. The record has again been carefully examined and I am of opinion that this finding is fully sustained by the evidence. Applied to these facts the statute commands that Gillen shall "never be permitted to enter any of said lands or acquire any title thereto." Smith *v.* Townsend (148 U. S., 490).

Gillen insists that by reason of the proceedings and the decisions in

Gillen *v.* Beebe, first decided March 22, 1893, (16 L. D., 306), and reaffirmed February 12, 1894 (279 L. and R. Letter-press 319), it was finally and conclusively adjudged that he did not enter upon and occupy said lands in violation of the act aforesaid; and that Parcher and the United States are bound by that adjudication. This claim of *res judicata* was not made before the local office in the present contest but was urged by Gillen upon his appeal to your office and again upon his further appeal to the Department. Your office in its decision of April 3, 1895, held that the matter was not *res judicata* and this holding was affirmed by the departmental decision of April 22, 1896, and was afterward withdrawn and reversed by the departmental decision of December 15, 1896. Upon the same record and upon the same question these two departmental decisions reached and announced opposite conclusions.

The facts in the case of Gillen *v.* Beebe will be briefly stated in order that the application of the contention made by Gillen and recognized in the decision now under review, may be understood. Beebe had made homestead entry of a part of the lands now in question shortly after 9 a. m., the hour of opening the local office, December 20, 1890, being the day upon which the lands were opened to settlement. Gillen subsequently made application to enter all the lands now in controversy, alleging settlement between the hours of 12 and 1 a. m., December 20, 1890, and a hearing was had to determine the respective rights of Gillen and Beebe to the lands claimed by both. The evidence was brief and without conflict. The point of difference was one of law only. Beebe contended before the local office that the portion of the statute providing

> that no rights of any kind shall attach by reason of settlement squatting upon any of the lands hereinbefore described, before the *day* on which said lands shall be subject to homestead entry at the several land offices,

referred to the business day recognized in the practice of the local office and not to the calendar day. It was insisted by him that since the local office opened at 9 a. m., and since a homestead entry could not be made until the local office did open, Congress intended to inhibit settlement up to the moment when the lands could be entered at the local office according to its recognized hours for transacting business, and that therefore Gillen's settlement was premature and unlawful and could not avail against Beebe's entry. The local officers held that the statute referred to the calendar day and not to the business day; that Gillen's settlement between the close of the calendar day of December 19, and 9 a. m., December 20, was not premature or unlawful, and that Gillen had the prior and better claim. On appeal, your office affirmed the decision of the local office in this respect and, on further appeal, the Department reached a like decision.

Up to this time there had been no claim, and no intimation of any claim, that Gillen had entered upon water reserve lands prior to the calendar day of December 20. Thus far, the claim of his disqualification

was based exclusively upon his admitted entry upon said lands between the beginning of that calendar day and 9 o'clock in the forenoon thereof. This statement of the very narrow issue tried and determined respecting the qualifications of Gillen is given additional significance when we consider the issue which was tried and determined in the same case, respecting the qualifications of Samuel H. Norton, another party thereto, who claimed settlement on the morning of December 20, upon a part of the lands included in Beebe's homestead entry. At the hearing special inquiry was made to show that Norton had in fact entered upon water reserve lands on December 19, for the purpose of examining the land and selecting that which he desired. This fact was distinctly pointed out in the briefs filed and it was earnestly insisted that by reason thereof Norton was wholly disqualified to make entry of any of said lands. While the contention was not recognized in the decision of the local office or in that of your office, it was reasserted in the briefs and the departmental decision discussed the matter at length and expressly held Norton was disqualified by such premature and unlawful entry. The fact that Norton's disqualification resulting from what he did before the calendar day of December 20, was made the subject of inquiry at the hearing, was insisted upon in briefs of counsel, and was determined in the departmental decision, when contrasted with the fact that there was no such inquiry, insistence or decision relating to Gillen, demonstrates that the question of the latter's entering upon such lands before the calendar day of December 20, and his consequent disqualification, was not tried or determined in that case.

Beebe thereafter filed a motion for rehearing, alleging that he had recently been informed that Gillen had entered upon and occupied water reserve lands upon December 19, in violation of the statute and that he had also recently discovered several witnesses who would so testify. The names of the witnesses were given and their affidavits filed. Counter-affidavits were filed upon the part of Gillen and in passing upon the motion the department held (279 L. and R., 319):

> a new trial will not be granted on the ground of newly discovered evidence unless such evidence is of that character to necessarily cause the trial court to arrive at a different conclusion. It is not shown to my satisfaction that the newly discovered evidence of Beebe would necessarily have that effect in the case at bar, especially in view of the fact that such evidence would all be contradicted by witnesses called by Gillen, judging from the affidavits now before me.

Hilliard *v.* Lutz (22 L. D., 324; on review, 23 L. D., 400) is a case quite similar to the one now under discussion. There, Lutz, on the ground of settlement in the early morning of December 20, had successfully contested a homestead entry made by another upon water reserve lands immediately following the opening of the local office, and as the result of such contest was himself permitted to make homestead entry thereof. Later Lutz's entry was contested by a third party on the ground of premature entry on December 19, as in this case, and when this second case reached the Department it was contended that the question of

Lutz's qualifications was determined in the first contest and could not be made the subject of further inquiry. The Department held:

It is obvious that strictly speaking, any question involved in the present contest is not *res judicata* by reason of having been decided in a former contest to which the contestant herein was not a party, as one of the essential elements of *res judicata, viz.*, identity of parties, is wanting. However, the Department in order to prevent useless litigation has adopted the rule that an issue once tried and determined can not be made the basis of a second contest. If then the question as to whether or not Lutz is disqualified by reason of having entered upon water reserve lands prior to the legal hour of opening has been passed upon in a former contest, that question can not again be raised; but if it has not heretofore been adjudicated, then it is still a proper subject of investigation.

The history of the first contest is then recited whereby it appears that Lutz's qualifications were not in any manner questioned in the first contest except by a motion for a rehearing, which was denied. The decision proceeds:

It must be clear from what has been said above that the question as to whether or not Lutz is disqualified by reason of having entered upon water reserve lands prior to the legal hour of opening is not an "issue once tried and determined." There has never been a trial upon that point prior to the present contest, nor did the Department in the former contest decide that Lutz was not disqualified. The qualifications of Lutz were not in issue in the former contest, and the fact that the Department declined upon good and sufficient grounds to remand the case in order that testimony might be taken upon that point is no bar to a subsequent contest in which that issue is properly raised.

The motion for rehearing alleging disqualification of the contestant on account of his going upon the land on December 19, was common to both cases. The qualifications of Lutz were not questioned at all at the hearing in the first contest. Gillen's qualifications, however, were made the subject of inquiry at the hearing in the Beebe contest, but that inquiry was confined to the legal effect of his entering upon the land on December 20, and prior to 9 a. m. thereof. The difference in the two cases is not such as to prevent the application to this case of the ruling in Hilliard *v.* Lutz. The most that can be said of either case is that in the first contest the disqualification of the contestant if known and proved by the contestee, would have defeated the contest. Since settlement by one prohibited or disqualified from acquiring any right or title to the land is unavailing and confers no right of entry upon such settler, it follows that where the sole ground of a contest is the prior settlement of the contestant his disqualification may be successfully interposed as a defense to the contest; but if the contestee admits the qualifications of the contestant or fails to take issue thereon, the government and third parties are not thereby precluded from asserting such disqualification. The rule of *res judicata*, as applied in the Department, does not, as against the government and third parties, place matters which might have been tried and determined upon the same footing with those which have been tried and determined. It results that the question of Gillen's disqualification by reason of having

entered upon water reserve lands on December 19, was not tried and determined in the case of Beebe *v.* Gillen, and the decision therein did not preclude at rial and determination of that question in this case.

It is urged by both parties that one Secretary of the Interior is without jurisdiction or authority to review and reverse, upon the same record, a decision of a preceding Secretary, the contestant insisting that the decision of April 2, 1896, by Secretary Smith, was not subject to review and reversal by Secretary Francis, and the contestee maintaining that the decision of December 15, 1896, by Secretary Francis is not subject to review and reversal by the present Secretary. If it is literally true that a ruling by one Secretary can not be reviewed and reversed, upon the same record, by a succeeding Secretary, then the decision of Secretary Smith is now the decision of the Department in this case, and the decision by Secretary Francis is void because without jurisdiction or authority. The record at the time of the decision by Secretary Smith is the record now; there have been no changes. To avoid the application of this contention to the decision by Secretary Smith, contestee calls attention to the fact that a motion for review thereof was seasonably filed by him, and refers to the Rules of Practice, wherein provision is made for the filing of such motions. The authority of the Secretary of the Interior is fixed by law and not by rules of practice of his own or his predecessor's making. This authority is conferred for the public good and its exercise is a duty pertaining to his official station. Any act of his would be impotent to either divest him of that power or to relieve him of that duty. The rules adopted and promulgated from time to time are intended to regulate and provide for the orderly transaction and dispatch of the public business by law placed under his direction and supervision, and do not attempt to surrender any lawful authority or to avoid any official duty. This is plainly recognized by the rules now in force, which, as a matter of precaution rather than of necessity, contain the following express reservation in the order for their promulgation, viz.:

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

The Revised Statutes of the United States contain the following provisions:

> Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
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> * * * * * * *
>
> Second, The public lands, including mines.
>
> * * * * * * *
>
> Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all agents [grants] of land under the authority of the government.
>
> * * * * * * *

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [public lands] not otherwise specially provided for.

In Knight *v.* United States Land Association (142 U. S., 161, 177, 178, 181), in construing these sections and discussing the jurisdiction and power of the Secretary of the Interior over proceedings for the disposition of public lands, the court said:

The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

The rules prescribed are designed to facilitate the department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul.

* * * * * * *

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. He represents the government which is a party in interest in every case involving the survey and disposal of the public lands.

In United States *v.* Schurz (102 U. S., 378, 402), the court, in referring to the authority of the officers of the land department, held:

From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away.

In New Orleans *v.* Paine (147 U. S., 261, 266), in discussing the same subject, the court says:

Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.

In Michigan Land and Lumber Co. *v.* Rust (168 U. S., —), the supreme court in again passing upon the jurisdiction of the Department, said:

> It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. (Cornelius *v.* Kessel, 128 U. S., 456; Orchard *v.* Alexander, 157 U. S., 372, 383; Parsons *v.* Venzke, 164 U. S., 89.) In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

A consideration of these decisions interpreting the statutes defining the authority and duties of the officers of the land department, clearly demonstrates that so long as the legal title remains in the government the lands are public within the meaning of those statutes and the laws under which such lands are claimed, or are being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior.

The legal title to the land embraced in Gillen's homestead entry remains in the United States, and Gillen, upon due notice and after a full hearing, is shown to be prohibited from acquiring title thereto. If this entry remains intact and a patent is issued thereon, a direct violation of a plain provision of the land laws will receive official sanction and approval, the rights of the people of the United States will not be preserved, and a proceeding fatally defective will be consummated by the passing of the government title to one expressly prohibited from acquiring it. Jurisdiction and authority to apply the law to these facts and prevent this unlawful acquisition of public lands certainly exists somewhere, and if so it is possessed by the courts or the land department. That the courts are without such jurisdiction while the legal title is in the United States is fully shown in United States *v.* Schurz, *supra*, where at page 395 the court says:

> The constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land-Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.
>
> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

The holding thus announced has been frequently repeated by the supreme court and is too well established to admit of any question.

A suit by the United States against this entryman to recover the

legal title to this land can not now be maintained because the government can not recover a title which it has not lost, and because the entryman can not be compelled to restore a title which he does not possess. A suit by the United States to determine whether the entryman has acquired an equitable title would be equally unsuccessful for the reason that the authority of the land department over proceedings to acquire title to public lands is exclusive and that authority extends to determining whether or not an equitable title has passed and continues until the government has parted with the legal title. (United States *v.* Schurz, *supra*, and Michigan Land & Lumber Co. *v.* Rust, *supra.*)

If the contention under consideration is sound, it follows that during the period intervening between the decision of Secretary Smith or Secretary Francis and the issuance of patent, there is a hiatus during which jurisdiction does not exist anywhere; and that the land department must knowingly issue a patent to a disqualified entryman as a condition precedent to any proceeding to declare him disqualified and not entitled to such patent. It is not believed that a contention which leads to such an anomalous and unreasonable result finds support in either statutes or judicial decisions. There is no claim that the contention finds support in any statutory provision, and the only judicial decisions cited in support thereof (United States *v.* Stone, 2 Wall., 525; Mullen *v.* United States, 118 U. S., 271; Noble *v.* Union River Logging Co., 147 U. S., 165) are cases in which, after the legal title had passed from the government the Secretary of the Interior, erroneously assuming that the land was still within the jurisdiction of the land department, attempted to revoke the patent or other instrument of conveyance. It was held that this was a judicial act and required the judgment of a court. This would have equally followed if there had been no change of secretary, (Moore *v.* Robbins, 96 U. S., 530) and it is not in conflict with the ruling in the other cases to which reference has been made. The true rule drawn from an examination of all of the authorities is that the jurisdiction of the land department ceases where the jurisdiction of the courts commence, viz: when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights.

The office of the Secretary of the Interior is a continuing one. Its incumbents come and go but the office remains. The powers and duties of the office are impersonal, and operate uniformly at all times and upon all controversies without reference to who may be exercising those powers or performing those duties. A change in the person holding the office does not authorize, and should not invite, a review or reversal of prior rulings or decisions; and neither does such change prevent or defeat a review or reversal in any instance where the Secretary making the ruling or rendering the decision, if still in office, would be in duty

bound to review and reverse his own act. Administrative reasons as well as the principles of common justice require that a secretary should not disturb or reverse prior rulings or decisions, except where it is affirmatively shown that manifest injustice has been done or the law clearly misapplied; but this is equally true of his own rulings and decisions, and is not limited to those of his predecessor.

So long as the legal title remains in the government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law. The issuance of a patent is the final act and decision in that disposition and with it and not before does the supervisory power and duty of the Secretary cease.

The departmental decision of December 15, 1896, herein is recalled and vacated, and the former departmental decision of April 22, 1896, affirming your office decision of April 3, 1895, is adhered to, subject to the following modification:

By the act of May 14, 1880 (21 Stat., 140), a contestant procuring the cancellation of a homestead entry is given a preference right of entry of the land thereby relieved from entry, but this statute is to be construed and administered in harmony with others relating to the disposal of the public lands and can not be held to confer such preference right upon one who is by another act prohibited and disqualified from making entry of such land. Here it appears by the testimony of the contestant, Parcher, that he, like Gillen, entered upon these water reserve lands December 19th, during the prohibited period for the purpose of selecting a tract for entry and gaining an advantage over others in the settlement and entry thereof. Using the language of the statute, it follows that he "shall never be permitted to enter any of said lands or acquire any title thereto." Being prohibited from making entry he is equally excluded from the preference right of entry, otherwise given to successful contestants.

Gillen's entry is hereby canceled, Parcher is denied any preference right, and the land will be held subject to entry by the first qualified applicant.

Prepared and approved by

WILLIS VAN DEVANTER,
Assistant Attorney General.

RAILROAD GRANT—RESERVATION—INDIAN LANDS.

NORTHERN PACIFIC R. R. CO. *v.* MACLAY.

Lands in the Bitter Root valley above the Loo-Lo Fork, included in the reservation made by the treaty of 1855, and surveyed under section 2, act of June 5, 1872, are excepted from the grant to the Northern Pacific.

Secretary Bliss to the Commissioner of the General Land Office, January 17, 1898.

(W. V. D.) (J. L. M'C.)

Your office, on August 30, 1893, rendered a decision in the case of the Northern Pacific Railroad Company *v.* Samuel Maclay, involving

the N. ½ of the NE. ¼ and the N. ½ of NW. ¼ of Sec. 11, T. 11 N., R. 20 W., Missoula land district, Montana.

The land described is situated in the valley of the Bitter Root river, above the Loo-lo Fork. Said decision held Maclay's pre-emption entry for approval, and rejected the claim of the railroad company.

On June 17, 1895, the Department affirmed said decision of your office.

On June 29, 1895, counsel for the railroad company filed a motion for review, which your office transmitted by letter of July 3, 1895.

The principal ground of said motion for review was that "the question of the right of the company to lands thus situated being" then "before the United States supreme court for determination in the case of the company *v.* Maclay, No. 762, it was error to decide the same before the court rendered its decision."

The case was brought before the United States supreme court from the circuit court of appeals, ninth circuit. The latter court held that the tract in controversy, and others similarly situated (in the Bitter Root valley, above the Loo-lo Fork), were not granted to the Northern Pacific Railroad Company. (See 61 Federal Reporter, 554).

Action upon said motion for review has been suspended by the Department pending a decision by the supreme court in said case.

The Department is now in receipt of a communication from counsel for the company, in which they state that said company have determined to withdraw their appeal to the United States supreme court in the Maclay case; and they suggest that it will not be necessary longer to continue the suspension of said Bitter Root valley cases. In fact, it is within the knowledge of the Department that said appeal has actually been withdrawn.

The land here in controversy is within the lands surveyed under the second section of the act of June 5, 1872 (17 Stat., 226–7), and is a part of the reservation made by the treaty of 1855—being in "the Bitter-Root valley above the Loo-lo fork"—and is therefore excepted from the grant to the railroad company. (61 Fed. Rep., 554.) The railroad company has now abandoned all claim to lands embraced within the survey under the act of 1872, *supra*, and any suspension heretofore existing of lands within that survey is withdrawn.

No reason appears why the departmental decision (of June 17, 1895,) heretofore rendered should be disturbed.

The motion for review is therefore denied.

INDIAN LANDS—LEASE—ACT OF JUNE 7, 1897.

RED CLIFF RESERVATION.

Under a patent for Indian lands that contains a provision, authorized by treaty, that the lands so conveyed shall not be alienated or leased without the consent of the President, a lease is ineffective until approved by the President.

The provisions of the act of June 7, 1897, relative to leases of Indian lands, are applicable only to allotments made under the act of February 8, 1887, or other acts of Congress, where the title in fee has not passed to the allottee, and do not include a lease executed by the heirs of an Indian patentee to whom title has passed in accordance with treaty provisions.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 17, 1898. (H. G.)

Your reference of January 6, 1898, of the letter of the Commissioner of Indian Affairs, bearing date January 4, 1898 (Land 52463–1897, 52693–1897), for an opinion upon the questions therein submitted, has been under consideration, and I have the honor to present herewith my views thereon.

It appears from this communication that, under departmental authority, sealed proposals were invited for the purchase of all the merchantable timber upon the Red Cliff Indian reservation, in Bayfield county, Wisconsin, to the extent, approximately, of one hundred million feet. The successful bidder was required to erect a mill within the limits of such reservation, of suitable capacity for the manufacture of not less than ten million feet of lumber annually, of timber to be purchased from the allottees or patentees thereon, and it seems, therefore, that the duration of the contract might extend to the period of ten years.

In the bid of Mr. Frederick L. Gilbert, which was accepted by the Department on September 23, 1897, there was a condition that the government shall furnish him with a mill site on the reservation, free of cost, and in the official report of that date, submitting such bid for the consideration of the Department, it was indicated that this condition could not be complied with, as the reservation land, with the exception of a very small tract, had been allotted in severalty or patented to the Indians, but the acting agent at the La Pointe Agency had advised the office of Indian Affairs that the Indians of the reservation would willingly furnish a mill site thereon, and that there would be no difficulty in that respect. Thereafter, and on October 25, 1897, a lease was executed by and between Mr. Gilbert and the heirs of Henry Buffalo, a Chippewa Indian, deceased, for lot 2 of section 31, in township 51 north, of range 3 west, on the Red Cliff reservation, Wisconsin, containing 61.58 acres, for the term of ten years from the date thereof, at an annual rental of two hundred dollars, payable annually in advance. It has since been determined by the Red Cliff Indian business committee that the lessors are the only heirs of the decedent patentee for said lands.

The lease provides that it shall be valid and binding only after the approval of the Secretary of the Interior.

The Commissioner of Indian Affairs states that in view of the situation and the necessities of the case, he is of the opinion that the interests of the Chippewa Indians of the Red Cliff reservation would be subserved by the approval of the lease, and that the rental of the

demised premises, at two hundred dollars per annum, which is something over three dollars per acre, appears to be adequate and beneficial to the lessors.

He also suggests that the lease should be approved by the Secretary of the Interior, as it so provides in terms, and also by the President, as required by the treaty and prescribed by the patent.

The allotments or assignments to the Red Cliff Indians were patented under the third article of the treaty with the Chippewa Indians, concluded on September 30, 1854 (10 Stat., 1109), which authorizes the President, from time to time, at his discretion, to cause the whole or any part of the reservation, set apart by the treaty, to be surveyed, and to assign to each head of a family, or single person over twenty-one years, eighty acres of land for his "or their" separate use, and in his discretion, as fast as the occupants of the reservations become capable of transacting their own affairs, to issue patents therefor to such occupants "with such restrictions of the power of alienation as he may see fit to impose."

The patents issued in conformity with this stipulation of the treaty, the form of which is submitted in the letter of the Commissioner of Indian Affairs, convey the title in fee simple of the allotted portions of the reservation to the several allottees and patentees, subject to the stipulation that the patentees and their heirs shall not sell, *lease* or in any manner alienate the tracts allotted and patented to them without the consent of the President of the United States.

The lease is ineffective without the consent of the President, as his approval is a condition precedent to its validity, under the reservation in the patent, which is expressly authorized by the terms of the treaty. It should be submitted to him, with your approval thereon endorsed, if you should determine that such recommendation should be made.

The lessee desires an authoritative ruling of this Department upon the validity of the term of the lease, which is ten years, in view of recent legislation of Congress as embodied in the Indian appropriation act, approved June 7, 1897 (30 Stat., 85), wherein it is provided that

> whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any allottee of Indian lands under this or former acts of Congress can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased, in the discretion of the Secretary, upon such terms, regulations and conditions as shall be prescribed by him, for a term not exceeding three years for farming and grazing purposes, or five years for mining or business purposes.

The Commissioner intimates that this provision does not apply to the lease submitted in his communication, as the allotments were made to the Indians on the Red Cliff reservation, and patents issued therefor in fee, under the terms of the third article of the treaty with the Indians of such reservation, prior to the legislation on the subject of leasing lands allotted in severalty to reservation or tribal Indians and that the sole proviso or condition in such patents is that none of the land shall

be sold, leased or in any manner alienated without the consent of the President.

It is clear that the lease does not fall within the provisions of this act. The legislation has reference to allotments, made under the act of February 8, 1887 (24 Stat., 388), or other acts of Congress, where the title in fee has not passed to the allottees and does not embrace cases like the one at bar, where the title in fee has passed from the United States to the allottee.

The term of a lease permitted under the act of June 7, 1897, for business purposes, can not exceed five years, and this limitation as to the term of the lease is not the only limitation, as the Indian lessor must be one who by reason of age or disability can not personally and with benefit to himself occupy or improve his allotment or any part thereof. If this statute operates in a case like the one now under consideration, the lease would be subject to attack, not only because the term of the lease extends beyond the statutory limitation of five years, but for the further reason that there is no showing that the lessors are, on account of age or disability, unable to successfully occupy or improve the allotment of their ancestor.

But the statute does not apply to the case at bar. The Indian lessors are not allottees or heirs of an allottee. They are not occupying the position of heirs of an "allottee of Indian lands" under any act of Congress, but are heirs of a patentee, whose patent was issued not by authority of an act of Congress, but pursuant to the terms of a treaty. The provisions of such treaty have not been abrogated by the act of Congress referred to, nor by any act of Congress. The statute mentioned—that of June 7, 1897 (30 Stat., 85)—is a reiteration of the policy of Congress relating to leases of Indian allotments in severalty, and its language is similar to antecedent legislation enacted as supplementary to the act of February 8, 1887, allotting lands in severalty to certain reservation Indians (24 Stat., 388; 28 Stat., 304, 900; 29 Stat., 340). It had reference to allotments where the title remains in the United States in trust for the Indians, for the statutory period, or for such additional period as the President may, by virtue of an allotment statute, impose; it has no application to a lease like the one submitted, executed by the heirs of an Indian patentee to whom the title has passed from the United States by a patent issued under the solemn provisions of a treaty.

The prohibition of alienation, under the terms of the treaty, is one which the President has seen "fit to impose," using the language of the treaty, and is expressed in the patents which convey the title in fee, issued to the Chippewa Indians residing on the Red Cliff Indian reservation, and who are those with whom the treaty was made and whose rights are secured thereby. It inhibits the Indian patentee from selling, leasing, or in any manner alienating his lands without the consent of the President. While this is a provision in restraint of aliena-

tion it necessarily implies that the patentee has the power to sell, lease, and convey the lands patented *with* the consent of the President.

I have, therefore, to advise that, in my opinion, the lease submitted will be valid upon the approval of the President. The lease is also by its own terms conditioned upon your approval.

If it receives the joint approval of the President and of the Secretary of the Interior, it will, in my opinion, be valid.

Approved January 17, 1898,

C. N. BLISS, *Secretary.*

JACKSON ET AL. *v.* GARRETT.

Motion for rehearing denied by Secretary Bliss, January 17, 1898. See 25 L. D., 273.

RAILROAD GRANT—INDEMNITY—FORFEITED LANDS.

UNION OIL COMPANY.

The order of November 22, 1897, suspending action relative to the right of the Southern Pacific Company to make indemnity selections within the forfeited primary limits of the Atlantic and Pacific grant, revoked, and directions given with respect to the disposition of lands in said limits.

Secretary Bliss to the Commissioner of the General Land Office, January 18, 1898.

(W. V. D.) (F. W. C.)

November 22, 1897, the Department, on the application of the Southern Pacific Railroad Company, issued an order (25 L. D., 393), directing your office to suspend action upon that part of departmental decision of November 6, 1897, on review (25 L. D., 351), relating to the question of the right of the Southern Pacific Railroad Company to make indemnity selections within the forfeited primary limits of the Atlantic and Pacific grant. The purpose of this order of suspension was to withhold action upon that particular portion of said departmental decision of November 6, 1897, during the pendency, in the supreme court, of proceedings to obtain a rehearing and reconsideration of a prior decision therein, upon which the departmental decision now in question was based.

Since the issuance of said order of suspension the Southern Pacific Railroad Company has presented to the supreme court its petition for rehearing in the case named and that petition has been considered and denied, so that the decision of the court cited in the departmental decision has now become final. The said order of suspension of November 22, 1897, is hereby revoked and the application of the Southern Pacific Railroad Company, which was therein treated as a motion for re-review, is hereby denied.

In so far as departmental letter of November 8, 1893, in answer to

your office letter of October 25, 1893, operated to defer the opening to entry of the lands embraced in what was then known as suit No. 184 (which is the one recently decided in the supreme court, as hereinbefore stated) it is hereby recalled, and you will proceed as theretofore directed in departmental letter of July 15, 1893, relating to these lands.

SECOND CONTEST—RES JUDICATA—JURISDICTION.

SEIXAS *v.* GLAZIER.

A second contest, or second hearing on the same charge is rarely permitted, but the mere fact that a charge against an entry has formed the basis of a contest, which failed for want of sufficient proof, will not, in itself, preclude the Land Department from further consideration of the same matter, if the legal title to the land still remains in the government, and it is made to clearly appear that adherence to the former finding, or decision, will lead to the patenting of public land in violation of express provisions of law.

Secretary Bliss to the Commissioner of the General Land Office, January 17, 1898.

(W. V. D.) (W. A. E.)

The Department is in receipt of your office letter of May 11, 1897, returning, with evidence of service, the motion for review, entertained April 24, 1897, of departmental decision of January 30, 1897, in the case of Florian Seixas *v.* Henry E. Glazier, involving the NW. ¼ of Sec. 11, T. 19 N., R. 2 W., Guthrie, Oklahoma, land district.

The history of the case, briefly stated, is as follows:

On May 3, 1889, Glazier filed soldier's declaratory statement for the above described tract, upon which he made homestead entry on October 2, 1889.

On August 3, 1891, Seixas filed affidavit of contest alleging that Glazier had made said entry for and in behalf of the Cherokee Land and Investment Company, and for its use and benefit; and that the entryman has never established his residence upon said tract.

A hearing was duly had and resulted in a decision by the local officers in favor of the defendant.

On appeal, your office affirmed the action of the register and receiver, and on further appeal the Department on July 2, 1894, affirmed the decision of your office and dismissed the contest.

On May 27, 1895, Glazier, after due publication, submitted final proof in support of his entry; and on the same day Seixas filed a protest against the acceptance of said proof, alleging that

the said Henry E. Glazier entered said land as a homestead for the use and benefit of the Cherokee Land and Investment Company, of which said Glazier was the President, and that the improvements made by said Henry E. Glazier, or caused to be made by him, or pretended to be made by him, were in fact made or caused to be made by the said Cherokee Land and Investment Company for their use and benefit.

With this protest Seixas filed certain papers as follows:

First, an alleged copy of a contract, entered into on the first day of August, 1889, between twelve persons therein named, of whom Henry E. Glazier was one, associating themselves together into a company for the purpose of locating and building a town or city in Oklahoma, to be known as Cherokee City. Three tracts are named as part of the capital of said company, the tract in controversy being one. Henry E. Glazier is named as president of the company for the first six months after its organization.

Second, an alleged copy of a report made to the members of the company by Glazier, on January 24, 1890, in which he details the work done and expenditures made on behalf of the company, upon the tract in controversy, as well as upon the other tracts.

Seixas further alleged in an affidavit attached to his protest that during the trial of his contest against Glazier's entry he used every effort to prove the existence of the contract above referred to, but through perjury and misrepresentation, the said Henry E. Glazier succeeded in producing a preponderance of the evidence to the contrary; that affiant is informed and has good reason to believe that during the month of January, 1894, his attorneys succeeded in procuring a copy of said contract, and of a report, which copies are attached to his protest and made a part thereof; that he believes he can produce the original report.

The local officers refused to reopen the question as to whether Glazier had made this entry for his own use and benefit, or for the use and benefit of the Cherokee Land and Investment Company, on the ground that that matter had been adjudicated and determined by final decision of the Department. Seixas was, however, permitted to cross-examine the entryman and his witnesses on the questions of residence, improvements, etc.

On June 26, 1895, the local officers dismissed the protest and approved the final proof, whereupon Seixas appealed to your office, which, by letter of April 18, 1896, affirmed the action of the register and receiver.

On further appeal, the Department, on January 30, 1897, affirmed the action of your office, on the ground that the question attempted to be raised by the protestant is *res judicata*.

Motion for review of said departmental decision was filed and entertained, as above stated, and is now here for consideration.

On June 25, 1897, subsequent to the filing of the motion for review, the attorneys for Seixas forwarded to the Department what purports to be the original report made by Glazier to the members of the company on January 24, 1890. The identity of this report is sworn to.

That part of the report material to the present inquiry reads as follows:

> I have the honor to submit this my report as president of your syndicate showing briefly the action and disposition of your matters entrusted to my care.
>
> * * * * * * * * *
>
> I have further to report that I have expended the following sums in improving the north west quarter Sect. 19-12-2 W., filed on by the writer.

Filing fee	$16.00
To quiet title	25.00
To breaking out 46 acres	95.00
Breaking out fire guards. Protecting timber	5.00
Paid for fence posts	13.00
Foundation for house	12.00
Paid for fence wire and staples	74.25
Lumber, windows, doors for house	79.50
Labor on house	29.70
Hardware for house	3.75
Setting posts and stretching wire	8.00
Flue for house	6.50
Paid for surveying, board, &c	95.00
Cost me 20.00 for transportation for my daughter in supporting homestead claim	22.50
	$485.20

These figures does not include anything for my own time and services. I have spent eight months time performing all kinds of labor necessary for the interests of the company and by so doing neglected my own business, sacrificing and losing not less than $2000, but as this is not a matter of charge, I will only add that in all ages and countries the laborer is worthy of his hire. My services were reasonably worth for the nine months $900.00.

* * * * * * *

To this I have also lost my further right to use my homestead entry and advantage of service in the army, which is worth several hundred dollars. You will readily see that I have met all expenditures, including board bills, surveying, and in protecting interests of company. The North West Quarter 11–19–2 W., on which I have filed, ought to be reasonably worth $3000.00 or will be worth that without much more additional expense, and will increase in value yearly.

The record in the original contest between Seixas and Glazier has been called for and examined for the purpose of throwing light on the present protest and enabling the Department to arrive at a satisfactory conclusion.

It appears that at the original hearing the attorneys for Seixas introduced the contract above referred to, and that the same was identified by Glazier as well as by other members of the company. The attorneys then asked that the contract be copied into the record, which was done. The original, that is, the paper identified by Glazier and others, is not found with the record, and was apparently not filed, the attorneys for Seixas seemingly relying solely on the copy introduced into the record. In this contract three tracts are named as part of the capital of the company, the tract in controversy being one. The secretary of the company, testifies that he wrote in the description of this tract as Glazier had agreed to put it in, and it was generally understood among the members of the company that said tract was to be included. Glazier admits having signed the contract, and says it was the understanding that the Reed brothers should furnish two quarter sections, and Black (the vice president) and himself should furnish one quarter section. He denies, however, that it was ever his intention to put in the tract for which he had made homestead entry, or that he authorized the secretary or any one else to write the description of said tract in

the contract. Asked what tract he and Black intended to put in, he replied: "We were not decided on which ¼ section we would put in." Afterwards he testified that he had an idea of putting in the SW. ¼ of Sec. 2, T. 19 N., R. 2 W., if he could have found some one to file on it.

The report alleged to have been made by Glazier to the members of the company on January 24, 1890, was not introduced in evidence at the original hearing, but was referred to incidentally by several of the witnesses. On cross-examination Glazier was asked: "Will ask you, Mr. Glazier, whether in any report to the St. Joe members of this company you referred to this land in dispute as company land?" His reply was: "I did not."

In the case of Moores *v.* Sommer (on review, 23 L. D., 514), it was held that (syllabus):

> The doctrine of *res judicata*, as between the parties to a controversy, will not prevent the government from canceling an entry where it is apparent that it can not be perfected without perjury on the part of the entryman.

As before stated, Glazier's declaratory statement was filed May 3, 1889, and his homestead entry made October 2, 1889. The contract between him and others associating themselves into the Cherokee Land and Investment Company was executed in August, 1889. The written report by Glazier to that company which apparently acknowledges that the land here in question is being acquired by him for that company, and which apparently charges the company with all the expenses incident to the entry and improvement of the land, is dated January 24, 1890, and Glazier's final proof was submitted May 27, 1895.

Section 2290, Rev. Stat., as in force when his homestead entry was made, provides that on an application to make homestead entry the applicant shall make affidavit:

> That such application is made for his exclusive use and benefit and that his entry is made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use or benefit of any other person;

and section 2291, Rev. Stat., provides that the entryman, as a part of his final proof, shall make affidavit—"That no part of such land has been alienated except as provided in Section 2288." The section to which reference is made has application only to alienation for church, cemetery, school, and right-of-way purposes and is without application here. If Glazier made this entry not "for his exclusive use and benefit . . . . for the purpose of actual settlement and cultivation" but "either directly or indirectly for the use or benefit of any other person," or if at the time of submitting his final proof he had alienated the land for purposes other than those specified in section 2288, his entry was thereby rendered unlawful and was one respecting which "it is apparent that it could not be perfected without perjury on the part of the entryman."

While the necessity for promptly and finally determining controversies arising in the disposal of the public lands is keenly recognized,

and while a second contest, or second hearing, upon the same charge is rarely permitted, the mere fact that a charge against an entry has formed the basis of a contest which failed for want of sufficient proof will not of its itself preclude the land department from further consideration of the same matter, if, while the legal title remains in the United States, it is made to clearly appear that adherence to the former finding or decision will lead to the patenting of public land in violation of express provisions of law. While the government retains the legal title the land laws are in process of administration and the jurisdiction and authority of the land department continues. In Michigan Land & Lumber Co. *v.* Rust (168 U. S., —), the supreme court in discussing the jurisdiction of the Department, said:

> It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. (Cornelius *v.* Kessel, 128 U. S., 456; Orchard *v.* Alexander, 157 U. S., 372-383; Parsons *v.* Venzke, 164 U. S., 89.) In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

In Knight *v.* United States Land Association (142 U. S., 161, 178), in discussing the jurisdiction and power of the Secretary of the Interior over proceedings for the disposition of public lands, the court said:

> For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul,

and on page 181, the court further says:

> The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office obliges 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. He represents the government which is a party in interest in every case involving the survey and disposal of the public lands.

The departmental decision of January 30, 1897, is therefore set aside and you are directed to instruct the local officers to appoint a day for a further hearing upon the question presented by the protest. Due notice should be given to both Glazier and the protestant and you will cause a special agent to be present to represent the government. The case will then be adjudicated in the light of the evidence heretofore taken and of that submitted at this new hearing.

PRACTICE—APPEAL—APPLICATION TO ENTER—OKLAHOMA.

WALK *v.* BEATY.

Under a rule to show cause why an entry should not be canceled the entryman may either comply with the order, or stand on the record and appeal to the Department.

The failure to file a "non-sooner" affidavit, with a soldier's declaratory statement, may be subsequently remedied, even though an intervening adverse claim to the land may be asserted.

The case of Lawson H. Lemmons, 19 L. D., 37, cited and distinguished.

Secretary Bliss to the Commissioner of the General Land Office, January 18, 1898.

(W. V. D.) (G. B. G.)

The defendant, William W. Beaty, in the case of Leffie Walk *v.* said Beaty, has appealed from your office decisions of March 6th and July 23, 1896, "awarding preference right in the SW. ¼ Sec. 14, T. 13 N., R. 3 E., to Walk."

The above described land is within the Oklahoma land district and in what was the Kickapoo Indian reservation, which lands were thrown open to settlement and entry on May 23, 1895.

On that day the soldier's declaratory statement of William W. Beaty was filed for said land.

On August 8, 1895, Leffie Walk filed a homestead application for the land, which was rejected by the local officers on that day for the reason that Walk had entered the Kickapoo Indian reservation subsequent to the passage of the act of March 3, 1893 (27 Stat., 557), and for conflict with the soldier's declaratory statement of the said Beaty.

On August 14, 1895, Walk appealed to your office, and with his said appeal filed a protest against the completion of Beaty's soldier's declaratory statement. On September 11, 1895, however, Beaty completed his soldier's declaratory statement by making homestead entry for the tract.

On March 16, 1896, your office held, in view of the showing made by Walk, that he was not disqualified because of his presence in the Kickapoo country prior to the date of the opening, but stated that this ruling would not be understood as relieving Walk from contest by any party who could show the facts to be otherwise than alleged by him, and in view of his allegation of prior settlement the local officers were directed to order a hearing to determine the respective rights of Walk and Beaty to the tract in question.

Beaty filed a motion for review of this decision, pending which the local office was called on for a report on the allegation of Walk that Beaty's application to file his soldier's declaratory statement was not accompanied by a "non-sooner affidavit." This report showed that said soldier's declaratory statement was filed in the local office by John H. Beaty, as agent for William W. Beaty, and was not accompanied by

such affidavit, either by the agent or his principal,—it being stated that the filing "was allowed without non-sooner affidavit by oversight."

Thereupon your office held, on the authority of the case of Lawson H. Lemmons (19 L. D., 37), that—

> Since Beaty's application to file his soldier's declaratory statement was thus defective when presented, it should have been rejected, and the intervening adverse claim of Walk would have prevented the perfection thereof.

It was then held that the hearing theretofore ordered was unnecessary, and Beaty was advised that he would be allowed thirty days from notice within which to show cause why his entry should not be canceled and Walk allowed to enter the tract, and that in the event of his failure to take action within the time specified, his entry would be held for cancellation.

From this decision Beaty has appealed to the Department.

Counsel for Walk has filed a motion to dismiss this appeal as being an appeal from an interlocutory order of the Commissioner. It is contended that Beaty should have complied with the order to show cause, or have waited for the order holding his entry for cancellation and then appealed from such order. This contention is not sound. Beaty had the right either to show cause, in compliance with the order of the Commissioner, or stand on the record and appeal to the Department. He has chosen the latter course.

The main question presented by the record is, whether Beaty's failure to file a "non-sooner" affidavit with his soldier's declaratory statement was fatal to his application in the presence of the intervening claim of Walk.

The third section of the act of March 3, 1893, *supra*, entitled, "An act to ratify and confirm an agreement with the Kickapoo Indians in Oklahoma Territory, etc.," provides, among other things, that—

> Until said lands are opened to settlement by proclamation of the President of the United States, no person shall be permitted to enter upon or occupy any of said lands; and any person violating this provision shall never be permitted to make entry of any of said lands or acquire any title thereto.

The President's proclamation opening the Kickapoo lands was made on May 18, 1895 (20 L. D., 470), and on that day departmental instructions in reference thereto were issued, which directed, among other things, that—

> Any person applying to enter or file for a homestead under the provisions of section three of the act of March 3, 1893, *supra*, will be required first to make affidavit, in addition to other requirements, that he did not violate the law by entering upon or occupying any portion of said lands prior to the time fixed in the President's proclamation for legal entrance thereon, the affidavit to accompany your returns for the entry allowed.

It thus appears that the act opening these lands imposed a disqualification, for prematurely going thereon, and that the prescribed regulations provided for a declaration, under oath, that the law had not been

violated. It is clear that such an affidavit should have been filed by Beaty with his soldier's declaratory statement. It is suggested that those regulations have no application to a soldier; but this is not believed to be so. The language of the regulations is, "any person applying to enter or *file* for a homestead" shall file such an affidavit. The word "*file*" could not relate to anyone except a soldier. No filing except the declaratory statement filing of a soldier was authorized at that time for Oklahoma lands.

It is also clear that it was the duty of the local officers to reject the filing for want of the affidavit required. But inasmuch as the application was not rejected, but allowed and placed of record by these officers, it is thought that no good reason exists why the defect may not be supplied, even in the presence of an adverse claim. This affidavit was not a statutory requirement, but a regulation of the Department. The statute does not disqualify a man because he has failed to make oath to his qualifications.

The requirement *supra* of the regulations was a precautionary measure adopted by the Department under general administrative authority and for the guidance of the local officers in administering the law, and did not, in itself, impose a disqualification.

So far as appears from the record, Beaty was not disqualified to make an entry of the land. On September 11, 1895, when he completed his soldiers' declaratory statement by making homestead entry for the tract, he filed a "non-sooner" affidavit; and it is thought that the ends of justice will best be met by treating it as supplying the defect in his application. It does not follow, nor is it now held, that he was a qualified entryman, but only that the conditions authorizing the filing have been complied with.

This view is not believed to be in conflict with the decision of the Department in the Lemmons case, *supra*, relied on by your office. In that case, one Daniel D. Williams filed a soldier's declaratory statement for a tract of land in Oklahoma, which was suspended to allow him to furnish "proof of his service in the United States Army during the war." On May 31, 1892, while such suspension still existed, Lemmons was permitted to make homestead entry for the same land. On June 6, 1892, the suspension of the declaratory statement of Williams was removed by his filing the additional papers, and placed of record, and on June 24, 1892, he was allowed to complete his filing by making a homestead entry. On this state of facts the Department, in directing the cancellation of Williams's entry, said:

> The application of Williams being defective when filed, should have been rejected by the local office, and the entry of Lemmons intervening defeated any right which Williams might otherwise have acquired by perfecting his defective application.

Section 2304 of the Revised Statutes provides that:

> Every private soldier and officer who has served in the Army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, ... shall be entitled to enter, etc.

"Service in the United States army during the war," is therefore a condition on which depends the right of a soldier to make an entry of public lands under this section, and until proof of that fact has been offered the soldier can have no legal standing as a claimant before the Department. There is, as has been seen, no statutory provision which makes the right of entry of Kickapoo lands dependent on any particular proof that the law has not been violated by the premature entry thereon. In the Lemmons case the declaratory statement was suspended for proof requirements, while in the case at bar the declaratory statement was received by the local officers and placed of record without requiring the "non-sooner" affidavit, and the applicant may have rested on the assumption that all of the requirements of the law had been met.

It is believed that Beaty's rights attached as of the date of the filing of his declaratory statement. In this view there remains several questions which can not be decided on the present record.

Your office decision is reversed, and you will order a hearing between the parties to determine whether the alleged settlement of Walk was prior to Beaty's filing, and as to the qualifications of both Walk and Beaty, at which hearing Walk will be permitted to show, if he can, that Beaty is disqualified by reason of his agent's presence in the territory during the prohibited period.

PRACTICE—COSTS—RAILROAD GRANT—FILING—SETTLEMENT.

SAVAGE *v.* CENTRAL PACIFIC R. R. CO.

In a hearing ordered between a railroad company, and one alleging the land in question to have been excepted from the grant, the costs are properly taxable under rule 55 of practice.

A declaratory statement filed after the attachment of rights under definite location is ineffective as against the operation of a railroad grant.

While a railroad company can not attack a declaratory statement of record on the ground of the non-citizenship of the claimant, it will be heard on such charge where acts of settlement are relied upon to defeat the grant.

The Central Pacific Railroad is entitled to the lands opposite the line between Ogden and Promontory Summit, and the line of said road, between said points, was definitely located October 20, 1868.

Secretary Bliss to the Commissioner of the General Land Office, January 18, 1898.

(W. V. D.) (C. J. W.)

On December 18, 1893, Herbert Savage filed in the local land office at Salt Lake City, Utah, his corroborated affidavit, alleging his qualification as a homestead settler:

That on the 20th day of October, 1868, one Savage and other parties, who were qualified to enter the same, were in the open, peaceable, exclusive, notorious, and adverse possession of the same, to all the world except the United States. That at

said time the said tract was occupied, appropriated, interdicted, and reserved lands, and were not of the character contemplated by the grant to the Central Pacific Railroad Company.

He asked that said company's list No. 3 be canceled, and that he be permitted to obtain title to the land described.

Your office reports:

That Mr. Savage filed D. S. 1786, for the tract, June 14, 1869, alleging settlement March 4, 1869.

Savage was an alien and did not declare his intention to become a citizen until March 3, 1869.

On the showing made your office directed that a hearing be had, at which Mr. Savage should be allowed an opportunity to establish his claim by proof, and it was directed that the status of the land on October 20, 1868, be ascertained, this being the date of the definite location of the line of the Central Pacific Railroad. A hearing was ordered for March 20, 1894. On February 7, 1894, Cora House, a daughter and one of the heirs of Hiram House, deceased, filed a corroborated affidavit, alleging her qualification, and that she was in possession of the land involved, and that she claimed through a chain of mesne conveyances from the Central Pacific Railroad company to her father,—the deed to her father bearing date March 29, 1888, since which date they have had actual possession of the land, and have grazed and improved the same, and asked that she be allowed to intervene in the case, and to enter the land should the title of the government be found to be paramount to that of the railroad company. The hearing was postponed for various causes until April 27, 1894. The testimony is chiefly in the form of depositions taken in accordance with stipulations entered into between the attorneys of the respective parties.

On May 25, 1894, the local officers, after a summary of the facts presented and appearing of record, made the following finding:

We must hold that the contestant has failed to make such a showing of right, claim or settlement, to the land in question, as would withdraw it from the operation of the grant to the Central Pacific Railroad Company, and therefore that the tract did pass to the company under its grant on October 20, 1868.

From this decision Savage appealed. On June 12, 1895, your office passed upon the case, under said appeal, and affirmed the decision of the local officers. From said decision Savage again appealed, alleging the following grounds of error:

1st. Error in denying Savage's motion to tax against the Central Pacific Railroad company the costs of taking testimony.

2d. Error in holding that the declaratory statement of Herbert Savage, as shown by the records of the land office, did not except the land in dispute from the grant to the Central Pacific Railroad Company.

3d. Error in holding that said tract was not excepted from said grant by virtue of the claim settlement and improvements of Herbert Savage, made prior to the definite location of said railroad.

4th. In holding that there must be a lawful and valid claim to the land in dispute in order to except it from said grant.

5th. Error in holding that the said grant to the Central Pacific Railroad company took effect on the 20th day of October, 1868, and in awarding the land to said company.

The company's rights are based on the acts of July 1st, 1862 (12 Stat., 492), and July 2d, 1864 (13 Stat., 358).

The aforesaid act of July 1, 1862, making the grant of lands to the company, excepted from the grant lands reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may have attached, at the time the line of said road is definitely fixed.

The exception or proviso contained in section 2 of the act of July 2, 1864, amendatory of the act of July 1, 1862, is as follows—

> And any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands or the improvements of any *bona fide* settler.

The alleged errors will be considered in the order in which they are stated. The first one contains, negatively expressed, the affirmative proposition that the railroad company should have been taxed with all the costs of taking testimony. Under what rule, by what authority, or for what reason, this should have been done, is not stated. The local officers state that the costs were taxed under and in accordance with Rule 55 of Practice. Your office seems to have made no specific ruling in reference to the costs, but the costs appear to have been properly taxed. The second ground of complaint is, substantially, that your office held that the declaratory statement of Savage, of record, was not sufficient to except the land from the grant. Upon examination of that part of the decision complained of, which relates to the declaratory statement and to the qualifications of Savage, it is found to be so expressed as to convey the impression that your office held the filing of Savage to be nugatory and of no effect, since it is now made to appear that he is an alien, and was disqualified at the time of said filing, and that the company could take advantage of his disqualification now disclosed. If such is a proper interpretation of the language used, it does not state the law correctly. It was, in substance, held by the supreme court in the case of Kansas Pacific R. R. Co. *v.* Dunmeyer (113 U. S., 629), that a pre-emption filing made before the filing of the map of definite location, excepted the land filed on from the operation of the grant, and this rule has been followed here. In the case of Fish *v.* Northern Pacific R. R. Co. (on review), 23 L. D., 15, it was held that an uncanceled pre-emption filing of record at the date when a railroad grant becomes effective, excepts the land from the operation of the grant, even though, at such time, the statutory life of the filing has expired. Thus, while the homestead right is denied to an alien, yet if an alien applies, and is permitted to file, this is such an adjudication of his right, as estops the railroad company from disputing its validity, although

the right to do so remains in the government, and this doubtless for the reason that, as between the government and such person, this default might be cured before final proof.

Your office found that the filing of Savage passed to record June 14, 1869, and that the company's map of definite location was filed October 20, 1868, and then proceeded to find that Savage acquired no right under his filing, because he was at that time an alien, when the finding should have been that the filing did not except the land from the operation of the grant, for the reason that it was made subsequent to the filing of the company's map, but this error was harmless to the company.

The next proposition insisted upon is that the settlement and improvements of Savage, made before the definite location of the company's line had the effect of excepting the land from the grant. Your office found in reference to the matter of settlement, that the evidence of such settlement was not sufficient, to authorize the conclusion that such settlement prevented the company's right from attaching under the grant, but if the evidence was more satisfactory on this point, the evidence that Savage was at that time an alien would destroy the effect of the settlement; for while the company cannot attack a filing of record, by proof of non-citizenship, it will be heard on such charge where acts of settlement are relied on to defeat the grant.

No separate consideration of the fourth assignment is necessary. The fifth and last assignment of error attacks the basis on which your office decision rests, by denying the fact found by your office, as to the date of the definite location of the company's line. The argument under this specification asserts that the land in question was covered by the grant to the Union Pacific Railroad Company, which did not take effect until April 10, 1869. The question thus presented is not an open one, it having been considered in the case of Central Pacific R. R. Co., *ex parte* (5 L. D., 661), in which it was specifically held that the Central Pacific railroad was entitled to the lands opposite the line between Ogden and Promontory Summit and that the company's line between these points was definitely located October 20, 1868. This ruling is adverse to the present contention, and must stand. The claim of Miss Cora House is insisted upon only in the event it is found that the land was excepted from the company's grant, she being, as she alleges, a bona fide purchaser from the company, and holding its deed. As it is now held that the rights of the company attached on the filing of its map of definite location October 20, 1868, it is not necessary to make further reference to her claim.

With the modifications indicated herein your office decision is affirmed.

HOMESTEAD ENTRY--QUALIFICATIONS OF ENTRYMAN.

BONNETT *v.* JONES.

The privilege of making a homestead entry, without regard to the ownership of other land, was not one of the rights of soldiers and sailors defined and described in sections 2304 and 2305 R. S., hence the subsequent legislation making the ownership of other lands a general disqualification does not abridge any right conferred by said sections.

The disqualification resulting from the ownership of other lands is general, with no exception as to the ownership of arid lands, and operative without respect to the manner in which title to the land is obtained.

Secretary Bliss to the Commissioner of the General Land Office, January 18, 1897.
(W. V. D.)

This case involves the SE. ¼ of Sec. 5, T. 16 N., R. 7 W., Kingfisher land district, Oklahoma Territory, and is before the Department upon petition by James Jones for re-review of departmental decision of December 23, 1896 (23 L. D., 547), which was on March 15, 1896 (24 L. D., 242), on motion for review, re-affirmed.

In the decision first cited, it was held that Jones was the owner of one hundred and sixty acres of land in the State of Kansas, and that such ownership disqualified him, under the law pertaining to Oklahoma, from making homestead entry in that Territory, and it was, therefore, directed that his entry made May 14, 1892, be canceled, and that a preference right of entry be accorded to William J. Bonnett, who had filed affidavit of contest May 20, 1892, alleging prior settlement.

On motion for review it was urged by Jones that the act of March 3, 1891, (26 Stat., 989–1026) served to except the lands in the Cheyenne and Arapahoe reservation from the abridgment of the right of entry contained in the act of May 2, 1890, (25 Stat., 81). It was determined, however, that no conflict necessarily existed between these statutes and that the language of the act of May 2, 1890, was not affected by anything contained in said act of March 3, 1891.

The act of May 2, 1890, section 20, provides:

> and no person who shall at the time be seized in fee simple of one hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma.

The act of March 3, 1891, (26 Stat., 989–1026) providing among other things, for the disposition of the lands acquired from the Cheyenne and Arapahoe Indians, declares:

> That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement, they shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply).

By section five of another act of March 3, 1891, (26 Stat., 1095–1097) amending and re-enacting the first section of the homestead law, (Rev. Stat., Sec. 2289) it is provided:

> But no person who is the proprietor of *more* than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law.

Construing these acts, it was held in the first departmental decision in this case (23 L. D., 547, syllabus,):

> The special provision in section 20, act of May 2, 1890, limiting the right of homestead entry to persons not "seized in fee simple of one hundred and sixty acres, etc.," is not repealed by the general provisions in section 5, act of March 3, 1891, amending section 2289, R. S.

In denying the motion for review of that decision, it was held (24 L. D., 242, syllabus,):

> The provision in section 16, act of March 3, 1891, (26 Stat., 989) that the lands specified therein shall be opened to settlement "under the provisions of the homestead and townsite laws," should be construed to mean that said lands are to be opened to settlement under the homestead and townsite laws governing the disposition of lands in Oklahoma, and not operating to repeal the provision contained in section 20, act of May 2, 1890, disqualifying as homesteaders all persons owning one hundred and sixty acres in any State or Territory, and applicable to all lands in Oklahoma.

These rulings are believed to be right and are now adhered to.

It is further urged that the Department was in error in not holding that as Jones was an honorably discharged soldier in the late civil war, and as in the act of May 2, 1890, and that of March 3, 1891, authorizing the disposal of the Cheyenne and Arapahoe lands, it was provided that the rights of such soldiers under sections 2304 and 2305 of the Revised Statutes should in no wise be abridged, the defendant had the right to make this homestead entry, notwithstanding his ownership of one hundred and sixty acres in the State of Kansas.

The provision in the act of May 2, 1890, *supra*, upon which this contention is made, is as follows:

> The rights of honorably discharged 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 of the United States, shall not be abridged.

Section 16 of the act of March 3, 1891 (26 Stat., 898–1026) contains the same provision.

Prior to this legislation the ownership of one hundred and sixty acres did not disqualify any one from entering public land under the homestead law. An inquiry into the history of the homestead laws shows that the right to make homestead entry was conferred by section 2289 of the Revised Statutes, and that persons who are honorably discharged Union soldiers and sailors were equally entitled to its benefits. Their right to make homestead entry of public lands did not have its origin or existence in sections 2304 and 2305 but in section 2289. If sections 2304 and 2305 were repealed they would still

have that right equally with others. The special rights conferred upon such soldiers and sailors by sections 2304 and 2305, were: 1st. Section 2304 permitted them to delay entry, settlement and improvement for six months after locating a homestead and filing declaratory statement, and permitted them to take one hundred and sixty, instead of eighty, acres of alternate reserved lands; and 2nd, section 2305 permitted them to deduct from the required time of residence upon an entry, the period of service in the army and navy, or in some instances the period of enlistment, excepting that residence, improvement and cultivation for at least one year should be shown in all cases. These are the rights conferred upon such soldiers and sailors by these two sections, and are therefore the rights preserved by the provision quoted from the acts of 1890 and 1891. While a repeal of sections 2304 and 2305 would take away these rights, the general right to make homestead entry would still continue under section 2289 and would equally apply to honorably discharged Union soldiers and sailors.

The making of a homestead entry without regard to the ownership of other land was not one of the rights of such soldiers and sailors "as defined and described in" sections 2304 and 2305; hence, the subsequent legislation making the ownership of other lands a general disqualification does not abridge any right conferred by sections 2304 or 2305.

It is further urged by counsel that as the land owned by Jones in Kansas was arid, it could not have been intended that the ownership of such land would amount to a disqualification. Congress had full authority to make the disqualification resulting from the ownership of other land general and absolute. It exercised that authority. There are no exceptions in the act, and I am not authorized to revise the action of Congress by inserting exceptions where none were made by that body. The words of the act are:

> . . . . and no person who shall at the time be seized in fee simple of one hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma.

The language is explicit and the meaning clear.

It is urged that as this defendant acquired his Kansas land under the commutation provision of the homestead law, the ownership thereof does not disqualify him from making entry in Oklahoma Territory. The fact that he had made an entry under the commutation provisions of the homestead law may not have disqualified him from making this entry in Oklahoma, but the *ownership* of one hundred and sixty acres at the time of the Oklahoma entry does so operate, without regard to how the land was obtained.

The petition is denied.

FINAL PROOF—RULE 53 OF PRACTICE.

McCALLA *v.* ACKER (ON REVIEW).

One who submits final proof under rule 53 of practice, during the pendency of a contest involving an adverse settlement claim, must stand or fall on the showing thus made as to compliance with law during the period covered thereby.

Secretary Bliss to the Commissioner of the General Land Office, January 19, 1898.
(W. V. D.) (E. F. B.)

This is a motion filed by John S. McCalla for review of the decision of the Department of September 22, 1897 (25 L. D., 285), accompanied by a petition for rehearing which he asks may be considered with said motion for review.

This motion was considered and denied by the decision of the Department of December 13, 1879, which was recalled because of the failure of the Department to give any consideration to the petition for rehearing.

In this case John S. McCalla filed a contest against the homestead entry of Calvin S. Acker for the SE.¼ of Sec. 19, T. 27 N., R. 2 E., I. M., Perry, Oklahoma, alleging priority of settlement and that Acker is disqualified from making entry of said tract. Upon the hearing of this contest, the local officers on April 17, 1895, rendered a decision in favor of Acker, from which McCalla appealed. Prior to the rendering of this decision Acker filed his application to make final proof before a probate judge at Newkirk, Oklahoma, and on the day fixed for the taking of such proof McCalla appeared and filed a protest against its allowance because of the pending contest. The testimony was taken and was forwarded with the protest to the local officers, who, on May 25, 1895, dismissed the protest because McCalla refused to pay the fees the local officers are entitled to for examining and approving such testimony.

On July 26, thereafter, Acker filed in the local office a written request to have his final proof withdrawn, which was forwarded to your office without taking action thereon, with other papers in the case, and it was considered by your office in passing upon the appeal of McCalla from the decision of the local officers of April 19, 1895.

Your office by decision of February 13, 1896, affirmed the action of the local officers and dismissed the final proof of Acker and the protest of McCalla, from which decision McCalla appealed.

In passing upon this appeal the Department in the decision now asked to be reviewed held that your office erred (1) in dismissing McCalla's protest, because of the failure to pay the fees of the local office in advance and (2) in dismissing the protest of McCalla and allowing the withdrawal of the final proof of Acker which should be held to await the final disposition of the contest, but affirmed your decision so far as

it held that the contest of McCalla should be dismissed, the evidence showing conclusively that Acker was the prior settler and that he was not disqualified.

A re-examination of the testimony shows no reason for disturbing the decision of the Department, holding that Acker was the prior settler and that he was not disqualified.

The gravamen of this motion is the alleged error in not finding and holding that Acker had abandoned the land and this necessarily involves the question whether he had the right to withdraw his final proof in the face of McCalla's protest.

A mere protest against the allowance of final proof which would not secure the protestant a preference right in the event of the cancellation of the entry, would not prevent your office from allowing the withdrawal of the final proof, or the making supplemental proof, because in such case it would be a matter solely between the government and the entryman. Hoffman *v.* Hindman (9 L. D., 81). But if in the presence of a valid adverse claim, final proof is offered which fails to show compliance with the law, the claimant must submit to an order of cancellation. Wade *v.* Meier (6 L. D., 308); Coffin *v.* Inderstrodt and authorities therein cited (16 L. D., 382); Murphy *v.* Logan (19 L. D., 478).

In this case McCalla was a settler upon the land, claiming the right to enter it by virtue of priority of settlement which issue was pending undetermined before the local office upon his contest when Acker filed his application to make final proof. From the adverse decision of the local officers upon that contest he filed his appeal in due time. His rights were fully protected by his protest against the allowance of the final proof and after the submission of such proof it could not be withdrawn to his prejudice, and so the Department held in the decision now asked to be reviewed, wherein it was said that

> neither the sufficiency of the final proof nor the right of defendant to withdraw it, should be passed upon pending the contest, and your office erred in allowing the withdrawal of said proof and the dismissal of the protest, and so much of your office decision as refers thereto, is reversed, and said proof and protest will be held to await the final disposition of the contest, when they will be returned to the local office for appropriate action.

There was no error in the decision complained of. It was therein directed that the final proof should be returned to the local office for appropriate action. If that proof shows that the entryman has complied with the law as to the residence and cultivation for the time covered by such proof, his entry should be allowed. If it shows that he has not complied with the law as to residence and cultivation during that period, his entry should be canceled.

The question of priority having been decided in favor of Acker, no other course could be pursued under the rules. See Rule 53, Rules of Practice.

Nor has sufficient reason been shown for the granting of a rehearing

in this case. The petition rests upon the ground that if petitioner is given an opportunity, he can submit further and additional proof that Acker has abandoned the land and failed to reside thereon, which is supported by fifteen affidavits to that effect.

Motions for rehearing upon the ground of newly discovered testimony must show that the party did not know of the testimony at the time of the trial, and that it could not have been discovered by due diligence. The only affidavit verifying this petition is the one attached to the motion for review and this merely states that the motion is made in good faith and not for the purpose of delay.

Besides, the affidavits simply tend to corrobrate the testimony offered by protestant at the final proof, which has not been passed upon by the Department, but has been remanded to the local officers for action thereon.

The motion and petition are both denied and the papers are herewith returned.

You will instruct the local officers to pass upon the final proof, together with the testimony offered by protestant both on direct and cross-examination and to forward the result of their action to your office, without delay.

The decision of December 13, 1897, is hereby recalled and vacated, and this decision is submitted therefor.

PRACTICE—HEARING—MILL SITE ENTRY—NOTICE.

REED *v.* BOURON.

The Department will not interfere with the exercise of the Commissioner's discretion, in the matter of ordering a hearing, if an abuse of such discretion is not shown.

A mill site entry, allowed without publication of notice of application, may be properly regarded as a nullity, in the disposition of a protest subsequently filed alleging the mineral character of the land covered by said entry.

Secretary Bliss to the Commissioner of the General Land Office, January 19, 1898.

(W. V. D.) (P. J. C.)

Counsel for George J. Bouron have filed an application for a writ of *certiorari*, for the purpose of having the record in the above entitled case forwarded to the Department.

It appears that mineral entry No. 535, was made March 31, 1877, at the Sacramento, California, land district, for the Peachy Consolidated Quartz Mine and Millsite, but among other irregularities in said entry the mill-site claim was omitted in the publication made. No notice of the application for entry thereof has ever been published. Other irregularities having been cured in the meantime, your office letter of October 28, 1896, directed publication of the mill-site application.

By letter of June 25, 1897, the local officers transmitted a verified protest by Charles A. Reed, against the issuance of patent for the mine and mill-site, alleging that he claimed the property by relocation in 1895 and 1896; that the mill-site was, at the time of its survey and location, public mineral land of the United States, having quartz ledges running through it bearing gold in paying quantities, and that the applicant for patent and those claiming through him are, and have been, well aware of the mineral character of the same; that there are five or six lodes bearing gold running through the mill-site, and that the same had been prospected and worked for more than twenty-five years.

By letter of September 25, 1897, your office dismissed the protest as to the quartz mine and held respecting the mill-site that—

> the allegations of its mineral character are specific and if, as a matter of fact, it is true that the land embraced in the mill-site is mineral in character, it cannot be patented as a mill-site.

A hearing was therefore ordered to determine the character of the land and the order for republication of the mill-site application for patent was suspended to await the result of the hearing.

From this order the mineral claimant filed an appeal in your office, assigning numerous grounds of error, which your office, by letter of November 24, 1897, declined to forward for the reason that the order complained of is interlocutory and the ordering of a hearing is a matter resting in the discretion of the Commissioner.

The mineral claimant now presents his application for a writ of certiorari.

The ordering of a hearing, in any case relating to the public lands upon application presented to your office, is lodged in the sound discretion of the Commissioner, and the rule has uniformly been that unless there is an abuse of that discretion the Department will not interfere. There is no showing of such an abuse in the case at bar.

But aside from that it is not apparent from anything before the Department that your office would have been justified in doing otherwise than ordering this hearing. There seems to be a direct charge here that this land is not only now known to be mineral in character, but was so known by the applicant for patent at the time the application was filed. Under the express provisions of the statute (Sec. 2337) only non-mineral lands can be entered as a mill-site. There having been no publication of the application to enter this mill-site it is the same as if there had been no entry and application therefor was now being made for the first time. It is not necessary to inquire what the result would be if after an entry regularly allowed and before patent the land was discovered to be mineral in character.

The petition for *certiorari* is therefore denied.

Counsel in closing their brief request that—"If you (the Secretary of the Interior) determine the hearing was properly ordered, then we ask that patent issue for the mining claims, leaving the mill-site for further

action." This is a matter for the determination of your office, in the first instance at least, and the papers are herewith returned for such action in this connection as may be deemed appropriate.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

FLORIDA CENTRAL PENINSULAR R. R. CO. *v.* SUMMERALL.

The designation of a tract as the basis of a selection under the act of June 22, 1874, estops the company from subsequently alleging that its relinquishment, in favor of settlers, did not include the entry embracing said tract.

Secretary Bliss to the Commissioner of the General Land Office, January 22, 1898.

(W. V. D.) (F. W. C.)

The Florida Central Peninsular Railroad Company has appealed from your office decision of April 13, 1896, recognizing as against the grant for said company the homestead entry of Robert Summerall, made January 8, 1877, covering the S. ½ of the NW. ¼ of Sec. 27, T. 29 S., R. 20 E., Gainesville land district, Florida, upon which he made cash entry November 6, 1882, under the provisions of section 2 of the act of June 15, 1880 (21 Stat., 237).

This tract covered by Summerall's entry is within the six miles primary limits of the grant under which said company claims, which was made by the act of May 17, 1856 (11 Stat., 15). The rights under said grant attached long prior to the entry by Summerall but your decision recognizing said entry is based upon the relinquishments executed by the claimant under said grant on April 1, 1876, and June 25, 1891, by which the company waived its claim to all lands between Waldo and Tampa occupied by settlers whose improvements were made prior to the 16th day of March, 1881.

In making these relinquishments the company reserved the right to select lands in lieu of those thus settled upon under the provisions of the act of June 22, 1874 (18 Stat., 194), and it appears from your office records that on May 2, 1887, per list No. 4, the company duly made selection of the N. ½ of NW. ¼ of Sec. 30, T. 29 S., R. 23 E., in lieu of the tract covered by Summerall's entry; thus, in effect, recognizing the application of the general relinquishments executed by the company in favor of settlers, as applying to the tract covered by Summerall's entry.

The company's appeal would seem to be based upon the ground that Summerall did not complete his entry by making the regular homestead proof, but rather chose to perfect it by making cash entry as provided in the act of June 15, 1880, *supra*.

In view of the company's action in selecting another tract in lieu of that embraced in Summerall's entry, it would seem to be estopped from asserting that Summerall's entry was not included in the general

relinquishment before referred to, and its appeal is therefore dismissed and Summerall's entry, if otherwise regular and proper, will pass to patent.

For the reasons stated, your office decision is accordingly affirmed.

HOMESTEAD ENTRY—AMENDMENT.

JOSEPH HEISEL.

An entry may be amended to embrace an additional adjacent tract that was at the date of the original entry included in the existing entry of another, where such amendment corresponds with the original settlement claim, and no adverse claim exists.

Secretary Bliss to the Commissioner of the General Land Office, January 22, 1898.

(W. V. D.) (C. W. P.)

The record shows that on October 14, 1893, William Smith made homestead entry, No. 1900, of the SW. ¼ of Sec. 17, T. 24 N., R. 3 W., Enid land district, Oklahoma Territory; that on December 15, 1893, Joseph Heisel filed an affidavit of contest against said entry, alleging abandonment; that on March 22, 1894, Heisel dismissed his contest, filed Smith's relinquishment, as to the S. ½ of said SW. ¼ and made homestead entry No. 7422 of the land so relinquished. It also appears that on July 18, 1896, Heisel initiated a contest against Smith's entry on the charge of abandonment, and that as the result of said contest, Smith's entry was canceled by your office on April 3, 1897.

On April 24, 1897, Heisel filed an application to enter the N. ½ of said SW. ¼.

The local officers rejected said application, and Heisel appealed to your office, and with his appeal filed an application to be allowed to amend his homestead entry No. 7422, by including therein the N. ½ of said SW. ¼.

In his affidavit, which is corroborated by only one witness, he says that on May 16, 1893, he settled upon the SW. ¼ of said section 17, prior, as he believes, to any other person, and has resided thereon and "particularly the S. ½ thereof ever since;" that he could not read English and was ignorant of the homestead laws, and had to rely upon others and was wholly without money to carry on his contest against Smith's entry, and was induced by Smith and the advice of others, who lived near him, to dismiss his contest against Smith's entry and make homestead entry of the S. ½ of said section 17. Your office held that—

Heisel is not entitled to the right of amendment. He can not plead mistake. He entered the land which he originally intended to enter. His action was voluntarily taken, with full knowledge of all the facts.

His application is denied, subject to the right of appeal.

It is not deemed necessary to consider his appeal from your rejection of his application to enter, as his application to amend was, of itself, an abandonment of such application to enter.

Heisel appeals to the Department.

There does not appear to be any adverse claim to the land applied for, and therefore the question is one entirely between Heisel and the government. Under the circumstances, as set out by Heisel in his affidavit, the showing made appears to be sufficient upon which to allow the amendment. Your office decision is accordingly reversed, and the papers are returned herewith that Heisel may make an amendment of his entry as applied for.

CONTEST—JURISDICTION—SERVICE OF NOTICE.

KNOTTS *v.* MOSGROVE.

Issuance of notice on a second contest, during the period allowed for filing a motion for the review of a departmental decision in a prior case, will not defeat the jurisdiction of the local office, where said notice is not served until after the expiration of said period, and no motion for review is filed.

Secretary Bliss to the Commissioner of the General Land Office, January 22, 1898.

(W. V. D.) (C. J. G.)

On September 8, 1893, William Mosgrove made homestead entry for the N. ½ NW. ¼, SE. ¼ NW. ¼ and NE. ¼ SW. ¼ of Sec. 10, T. 2 S., R. 32 E., La Grande land district, Oregon

On October 4, 1893, Perry Knotts filed a contest against said entry, alleging priority of settlement. Upon this contest the local office rendered decision in favor of Knotts, but upon appeal your office reversed said decision.

On November 5, 1895, the Department rendered decision affirming the action of your office, Mosgrove's entry was held intact and the case finally closed June 25, 1896. This decision was promulgated November 21, 1895, and the parties notified thereof January 25, 1896.

In the mean time, on September 24, 1895, and during the pendency of Perry Knotts' appeal, Alonzo Knotts filed affidavit of contest against Mosgrove's entry, alleging that the defendant had never resided upon or cultivated this land as required by law. Notice was issued on this contest February 20, 1896, and personal service was made March 7, 1896. Upon the testimony submitted at the hearing, at which both parties were present, the local office rendered decision recommending the cancellation of the entry.

From this decision Mosgrove appealed to your office, where, on July 22, 1897, the said decision was affirmed. A further appeal has been made to this Department, it being alleged that it was error to find that the defendant had never established a bona fide residence on this land, and furthermore that the local office was without jurisdiction to try the case and that the order for trial was premature.

From an examination of the record it becomes evident that Mosgrove never established residence on this land in compliance with law.

Jurisdiction was acquired by the local office in this case by the service of notice. Such service, as heretofore shown, was made on March 7, 1896, which was after the expiration of thirty days from the date when the parties to the former contest were notified of the departmental decision. No motion for review was filed, hence the local office had acquired full jurisdiction to try the case.

Your office decision of July 22, 1897, is accordingly affirmed.

INDIAN LANDS—ALLOTMENT—TRIBAL RIGHTS.

WILLIAM BANKS.

The usage of an Indian tribe may be accepted to establish a claim of membership therein, on the part of one who under the general rule would be held a citizen of the United States.

Under the provisions of the act of March 3, 1875, and the general allotment act, the right of an Indian to an allotment of tribal lands is not lost by abandonment of the tribal relation.

By the act of June 7, 1897, children of an Indian woman by blood, who, at the time of her death, was recognized as a member of an Indian tribe, are placed on the same footing as to rights in the property of such tribe as the other members thereof; but the children of one who is thus protected are not entitled to allotments if the parent, prior to their birth, abandons the tribal relation.

Assistant Attorney General Van Devanter, to the Secretary of the Interior, January 22, 1898. (W. C. P.)

On September 1, 1897, I submitted an opinion upon certain questions arising in connection with the application of William Banks for allotments for himself and seven children as members of the Sac and Fox of Missouri tribe of Indians. It was held therein that any person who can show that he is a member of said tribe and has not received an allotment should be given one just as if his name had been upon the original roll.

It was then said that the information furnished by the papers then before this office was not sufficient to warrant an expression of opinion as to the rights of Banks and his children. Other affidavits have been filed and the matter has been again submitted to me for further consideration.

From affidavits presented before the former opinion was rendered it appears that William Banks, sr., a white man, was married to an Indian woman, a member of the Sac and Fox of Missouri tribe; that the applicant William Banks was born of this marriage about the year 1849; that his parents lived in Missouri just across the river from the reservation in Kansas, then occupied by this tribe; that his mother was recognized as a member of the tribe up to the time of her death, which occurred about 1852; that she visited the tribe to receive the annuities due her as such member, and that she took this child with her on some, if not all, of these visits, and received annuities for him as well as for

herself; that after her death he was for a time in a school called the Highland Mission, established for the benefit of these Indians; that during the time he was there annuities were drawn by those in charge of said school on his account; that at some time during his childhood, just when not being shown, his father removed him from the school and after that he continued to live among the whites until about the year 1895 when he went to the reservation for this tribe in Nebraska to secure allotments for himself and children. It is further stated in some of these affidavits that it was the custom of these Indians to consider all children born to any member of the tribe as members and to place their names upon the rolls for annuity payments without any action of the council or chiefs.

As a part of the additional proof the affidavit of Banks is filed, stating that he has always claimed the rights of membership in said tribe; that he has never received any land by way of allotment or as a homestead and that he has for several years considered himself a citizen of the United States and has exercised his rights as such to some extent. He is corroborated by three others.

It seems from this proof that Banks, whatever may have been his status as to citizenship by reason of his parentage, was at one time considered and treated s a member of this tribe of Indians. It was said in Black Tomahawk *v.* Waldron (19 L. D., 311) that the laws and usages of an Indian tribe may determine the membership therein of one who would under the general rule be a citizen of the United States. The proof in this case while not so full as could be desired, goes to establish the usage of this tribe as being that children born as this one was, were considered as members of the tribe.

It is plain, however, that he never recognized his tribal relations after he reached years of discretion until he sought to reap the advantages incident thereto. His tribal relations were completely severed so far as his own acts could accomplish that end.

All tribal property among the Indians is held as communal property. Under the general rule governing in the matter of community property one who withdraws from the community or association, thereby forfeits all his interest in the common property. In this case it must be held that Banks gave up all right to share in the tribal property of the Sac and Fox of Missouri Indians, unless the legislation of Congress shows an intent to relieve from the effect of the general rule, Indians severing their tribal relations.

It has been the declared policy to encourage the breaking up of tribal relations among the Indians and different laws have been enacted with that end in view. The act of March 3, 1875 (18 Stat., 402–420), conferred the benefits of the homestead law upon Indians who had abandoned their tribal relations but with a proviso as follows:

> Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands and other property the same as though he had maintained his tribal relations.

The allotment act of February 8, 1887 (24 Stat., 388), declares every Indian who has taken up his residence separate and apart from his tribe and has adopted the habits of civilized life, a citizen of the United States "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." In view of these provisions of law it must be held that Banks did not by severing his tribal relations give up his distributive share in the tribal property and that consequently he is entitled to an allotment in the lands of said tribe.

This conclusion that Banks is entitled to an allotment in these tribal lands is confirmed by a provision of the act of June 7, 1897 (30 Stat., 62–90), which reads as follows:

> That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right.

Banks' mother was a member by blood of the Sac and Fox of Missouri tribe and recognized as such at the time of her death, and he therefore is entitled to the protection of the provisions of this act.

The case of the children of Banks presents a different question. Their father had severed his tribal relations before their births and hence they can not claim to have been born members of this tribe. Neither is it claimed that any one of them was ever considered or recognized as having membership therein. The act of 1897 does not seem to confer any benefits upon persons in their position. Neither did that act nor any of the others cited, make Banks a member of the tribe from which he had separated himself. The object of that act was not to make the persons coming within its provisions members of any tribe of Indians nor to reinstate them where they had withdrawn from such membership but to confer upon them simply one of the incidents of membership, that is, a right to share in the distribution of the property of the tribe. The mother of these children was not, so far as the record shows, recognized as a member of this tribe nor was the father so recognized at the date of said act and hence they have not been brought within its provisions. They are not in my opinion entitled to allotments in the land of these Indians.

Reference is made to the case of Ariadne Bohart as furnishing a precedent for holding both Banks and his children entitled to allotments. That case was decided upon an opinion of this office of June 8, 1895 (11 Op. A. A. G., 333), holding that Ariadne Bohart was entitled to an allotment on the Nez Perce reservation, because her mother was a full blood Nez Perce Indian and the regulations under which allotments were made prescribed that an applicant to be entitled to an allotment must be a recognized member of the tribe or his father or mother must

be such. The same opinion, however, held that Ariadne Bohart's children were not entitled. So far as that case is authority here it sustains the conclusions hereinbefore announced.

Approved, January 22, 1898,

C. N. BLISS, *Secretary.*

DESERT LAND—STATE SELECTIONS—PATENT.

STATE OF WASHINGTON.

The provision in the act of June 11, 1896, that patents for desert lands may issue to the States when an ample supply of water is actually secured, without regard to settlement and cultivation, is not limited to lands on which liens have been placed under said act, but is applicable to all lands donated by the act of August 18, 1894.

Secretary Bliss to the Commissioner of the General Land Office, January 22, 1898.

(W. V. D.) (F. W. C.)

In your office letter "F" of June 19, 1897, submitting list No. 2 and accompanying papers, filed by the State of Washington, for the segregation of certain lands under section 4 of the act of August 18, 1894 (28 Stat., 372–422), you made the following reference to the act of June 11, 1896 (29 Stat., 434):

I desire to call attention to the provisions of the act of June 11, 1896 (29 Stat., 413-434), in relation to liens on the lands segregated under the above act of 1894, and would recommend that the forms and the contract in the circular of November 22, 1894, be amended by adding, wherever the act of August 18, 1894, is referred to, the words 'and acts amendatory thereof.'

In answer thereto the departmental letter of July 12, 1897 (25 L. D., 33), said:

The recommendation made by you in the last paragraph of your letter of the 19th ultimo, relative to the amendment of the forms and the contract in the circular of November 22, 1894, will be made the subject of a separate communication.

The matter has again been called to my attention by your office letter of October 12, 1897, submitting, for my approval, a draft of regulations concerning the making of final proof for desert lands segregated under section 4 of said act of August 18, 1894.

The act of 1894, as therein declared, was enacted "to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof, in small tracts to actual settlers," and provided for donating and granting to such States, free of cost, such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied and cultivated by actual settlers. The provision for the patenting of these lands is couched in the following language:

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State, or its assigns, for said lands so reclaimed and settled.

The act of June 11, 1896, *supra*, provides:

That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An Act making appropriations for the sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of such lien or liability in whole or in part.

Under the act of 1894, lands coming within this million-acre grant could not be patented until they were shown to be "irrigated, reclaimed, and occupied by actual settlers." The act of 1896, referring specifically to arid lands granted to States by the act of 1894, authorized the creation of a lien thereon, by the State to which "such lands are granted" to cover "the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers." This act then further provided—

and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of *such lands*, then patents shall issue for the same to such State, without regard to settlement or cultivation.

The act of 1896, as is shown by this language, expressly dispenses with proof of settlement and cultivation and authorizes the issuance of patents when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim the land.

The question which arises under this legislation is whether the provision in the act of 1896 prescribing the conditions on which patents shall be issued, applies to all lands donated and granted under the act of 1894, or is limited to those lands on which a lien is created under the act of 1896. As before shown, the specific reference, in the beginning of the act, to arid lands so granted under the act of 1894, necessarily meaning all lands so granted, is followed by a provision for the creation of a lien upon "such land" and by a further provision for the patenting of "such lands." It is believed that the words "such lands" thus twice employed, have the same meaning in each instance and refer to the only lands specially mentioned in the act, which are those granted under the act of 1894. Had it been the intention of Congress to limit the provision in the act of 1896 relating to patents, to lands upon which a lien had been created by the State under that act, such intention could have been easily manifested and instead of repeating the words

"such lands" other words, having a more limited meaning, would have been used, such as "the lands covered by any such lien." There does not seem to be any reason for the patenting of lands, made susceptible of irrigation by means secured through a lien placed thereon, without requiring proof of settlement or cultivation, which does not apply with equal force to lands made susceptible of irrigation by means taken from the State treasury or secured in any manner other than through such lien.

A construction should not be put upon the act which discriminates in favor of lands irrigated by the expenditure of money obtained through a lien, as against lands irrigated by the use of money derived from other sources. The purpose and object of the law is to enable the State to reclaim the lands as an inducement to their settlement and cultivation by actual settlers in small tracts, and it is immaterial whether the money expended in such reclamation is obtained through the instrumentality of a lien or otherwise. The act of 1896 is remedial in its purpose and should receive such construction, consistent with the language there employed, as will best tend to accomplish the ultimate and great purpose of this legislation. The act of 1896 should be treated as amending the act of 1894 by authorizing a lien to be placed upon the lands as an aid in the accomplishment of their reclamation, and as also amending the original act in the matter of patenting the lands to the States, by dispensing with proof of settlement and cultivation and thus confiding to the States the settlement and cultivation of the reclaimed lands according to the expressed purpose of the first act. This seems to have been the view taken of the amendment in the House of Representatives at the time of its passage. Mr. Lacey, chairman of the committee of public lands, in explanation of the amendment said (Cong. Rec. 54th Cong., 1st Sess., p. 6222):

> It is proposed now by this amendment to authorize those States to provide means by which liens can be created upon the land to be irrigated, and that those liens shall be enforced up to the time that the land is patented to the settler; and also to modify the Carey act to the extent of providing that when the water and the irrigating ditches have been arranged so as to irrigate the land properly, then patents to the land may issue at once.

Mr. Mondell, also, stated (p. 6224):

> I believe it is entirely safe to provide that the legislatures of the arid-land States shall pass such laws as may tend to the irrigation, cultivation, reclamation and settlement of the lands within their borders.

There is no expression in the act of 1896 from which it can be gathered that it was the intention of Congress to limit the provision therein, for issuing patents, to such lands as are covered by liens, and even if the language used be considered doubtful in its meaning no good reason suggests itself for so restricting the provision. The amendment is therefore held applicable to all lands coming within the act of 1894.

You will cause to be prepared a form of contract and other forms

along the lines of this ruling and forward the same for my consideration and approval.

The rules and regulations accompanying your letter of October 12, 1897, are also herewith returned for modification according to the views herein expressed.

INDIAN LANDS—PATENT—RIGHT OF WAY.

SOUTHERN UTE ALLOTMENTS.

In the issuance of patents to the Indian allottees of lands in the Southern Ute reservation, over which the Denver and Rio Grande railroad has been constructed, a clause should be inserted setting forth that the conveyance is made subject to the right of way granted to said road by the special act of June 8, 1872, which does not in terms protect the company's right.

Assistant Attorney General Van Devanter to the Secretary of the Interior, January 24, 1898. (W. C. P.)

In response to your request of November 16, 1897 "for an opinion as to whether patents to the Indian allottees of lands in the Southern Ute reservation must be subject to the right of way of the Denver and Rio Grande Railroad Company," I would submit the following:

By the treaty of March 2, 1868 (15 Stat., 619), between the United States and the several bands of Ute Indians, a district of country described as beginning at a point on the southern boundary line of the Territory of Colorado where the meridian of longitude 107° west crosses the same, running thence north to a point fifteen miles north of the fortieth parallel of latitude, thence west to the western boundary of said Territory, thence south to the southern boundary of said Territory, and thence east to the place of beginning, was set apart for the absolute and undisturbed use and occupation of the Indians, and they, on their part, relinquished all claims to any other lands. It is not necessary to notice the other provisions of said treaty, except that appearing in Article XIV, which reads as follows:

> The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interests may require it, that all roads, highways, and railroads, authorized by law, shall have the right of way through the reservation herein designated.

By the act of April 23, 1872 (17 Stat., 55), the Secretary of the Interior was authorized to negotiate with the Ute Indians of Colorado Territory for the extinguishment of their right to the south part of the reservation, made in pursuance of said treaty of 1866. An agreement was made with said Indians on September 13, 1873, and ratified by the act of Congress approved April 29, 1874 (18 Stat., 36), by which the Indians ceded their interest to a portion of their former reservation described as beginning at a point on the eastern boundary thereof, fifteen miles north of the southern boundary line of the Terri-

tory of Colorado, running thence west to a point twenty miles east of the western line of said Territory; thence north to a point ten miles north of the thirty-eighth parallel of latitude; thence east to the eastern boundary of the Ute reservation, and thence south to the place of beginning.

It was further provided that all the provisions of the treaty of 1868 not altered by said agreement should continue in force. It was also agreed that an agency should be established on the southern part of this reservation for the Weeminuchi, Muache and Capote bands. These bands seem to have been subsequently designated as the Southern Utes and they occupied the strip of land fifteen miles wide in the southern part of Colorado.

Another agreement was entered into with the confederated bands of Ute Indians in Colorado, on March 6, 1880, which was ratified by act of Congress approved June 15, 1880 (21 Stat., 199). It was then contemplated that the Indians should take their lands in severalty and agreed that they should cede to the United States all the territory of the then Ute reservation in Colorado, except as therein provided for their settlement. The settlement of the Southern Utes was provided for as follows:

> The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands, as may be found on the La Plata River or in its vicinity in New Mexico.

It was further provided as follows:

> All provisions of the treaty of March second, eighteen hundred and sixty-eight and the act of Congress approved April twenty-ninth, eighteen hundred and seventy-four, not altered by this agreement shall continue in force.

Said act of Congress provided for a commission to make a census of these Indians, to select and make allotments of land in severalty to them, and to superintend their removal, location and settlement on such allotments. This part of the plan was not carried into execution and the Southern Ute Indians continued to occupy the strip of land in the south part of Colorado, as a reservation.

Another agreement was entered into with the Southern Ute Indians in 1888, which provided for their removal to Utah, but this was never ratified by Congress, being rejected by the act of February 20, 1895 (28 Stat., 677). At the same time it was directed that the agreement of 1880 be carried out as in said act provided. It was then directed that the Secretary of the Interior cause allotments to be made, to such of the Southern Utes as should elect, and be considered by him qualified, to take the same, out of the agricultural lands in their reservation in Colorado. For the use of those who should not elect to take allotments, there was reserved the western portion of their reservation and certain townships in New Mexico,

subject, however, to the right of the government to erect and maintain agency buildings thereon and to grant rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes.

It is in connection with the allotments made under this act that the question now presented arises.

Among the papers submitted are letters of the Commissioner of the General Land Office and the Commissioner of Indian Affairs, written in 1882 and 1883, in relation to certain maps of parts of this company's road, filed under the right of way act of March 3, 1875 (18 Stat., 482). These maps affected lands in the original reservation, but entirely outside of the limits within which the allotments now in question were made, and those letters do not afford any assistance in solving the question now before the Department.

By the act of June 8, 1872 (17 Stat., 339), the Denver and Rio Grande Railway Company was granted a right of way over the public domain, with the proviso that said company should complete its railway to a point on the Rio Grande as far south as Santa Fé, within five years, on penalty of forfeiture of all rights under said act as to the uncompleted portions of the road. By the act of March 3, 1877 (19 Stat., 405), the time for building the road was extended for five years.

Upon application of said company, the President of the United States, on May 12, 1880, made a formal statement as to the necessity for the proposed road, in which, after mentioning the proposition of the company to extend its line of road through and over the reservation provided for the Ute Indians by the treaty of 1868 and the provision of article XIV, thereof, said:

> Now, therefore, being satisfied that the interests of the public at large do require that such branches and extensions of said railroad should be constructed as proposed by said company, I make this declaration of my opinion that the public interests require the construction of such branches and extensions of said railroad through and upon the said tract of land, so set apart for said bands of the Ute tribes of Indians under the said treaty, the right to the construction of railroads through said reservation being stipulated for in said article of said treaty in certain cases.

In 1883 the company filed two maps; one showing the line of road from the town of Antonito to the mouth of the Rio Piedra, and the other to the town of Durango, which maps covered the entire line of said road within the reservation where the allotments in question were afterwards made. These maps were approved under said act of 1872. In the letter returning the approved maps to the General Land Office, dated January 15, 1884, the Secretary, after stating that the Commissioner of Indian Affairs had recommended the approval, reserving the question of compensation to the Indians for future consideration, said:

> I concur in the views above expressed, and with the qualification mentioned as to compensation, accordingly approve, under the granting act of June 8, 1872, the maps referred to and return them herewith.

He, also, in that connection, referred to the provisions of article XIV, of the treaty of 1868, *supra*, and the executive order of May 12, 1880,

supra. I have not been able to learn that anything has been done in regard to compensation.

This question as to right of the Indians to compensation for the right of way does not affect the question now under consideration. The right to compensation, if any, attached at the time the road was built and can not be affected by the insertion in, or omission from, the patents for allotments, made long subsequent to that time, of words denoting that the land is subject to said right of way. Neither can the insertion or omission of such words affect the rights of the railroad company or of the allottee. The question submitted is, therefore, one of policy rather than of law.

It was formerly the policy to insert in final certificate and patents for tracts of land traversed by railroads which had been granted rights of way, a reservation of such right of way and this whether the right was claimed under the general right of way act of 1875 or under a special act. This rule has, however, been changed as to roads claiming the right of way under the general act. In the case of Mary G. Arnett (20 L. D., 131), it was held that said statute itself amply protected all rights and it was, therefore, unnecessary to insert an excepting clause in a patent for a tract of land crossed by such right of way. In the case of Dunlap *v.* Shingle Springs and Placerville R. R. Co. (23 L. D., 67), this ruling was adhered to and the distinction between cases arising under the act of 1875 and under special acts which do not in terms protect the company's right of way, was pointed out, the case of Florida Central and Peninsular R. R. Co. *v.* Heirs of Lewis Bell (22 L. D., 451), being referred to for the rule in such cases. On November 27, 1896 (23 L. D., 458), a circular was issued informing the local officers that it is not necessary to note on final certificates a reservation of the right of way where such right is claimed under the act of March 3, 1875, or the act of March 3, 1891 (26 Stat., 1095), granting the right of way for canals and reservoirs. In the concluding paragraph of that circular it is said:

> It will be observed that the decisions above noted do not refer to cases where right of way has been granted under special acts.

In this case the grant of the right of way was by a special act; there is no question of forfeiture and the granting act does not in terms protect the company's right. Under the ruling in Florida Central and Peninsular R. R. Co. *v.* Bell *et al.* (22 L. D., 451), where similar conditions obtained, the patents for tracts across or over which this portion of the Denver and Rio Grande Railroad Company's line runs should contain a clause setting forth that the conveyance is made subject to the right of way for said road.

The fact that in the preliminary or trust patent issued for Indian allotments, the United States promise to convey a title in fee simple free of all incumbrance whatsoever, at the end of the trust period, is an additional reason for inserting the excepting clause in such patents.

In this case the road was built many years ago, so that the specific tracts subject to the right of way are, or should be known, and, therefore, the excepting clause should be inserted in only those patents which embrace those specific tracts.

Approved, January 24, 1898,

C. N. BLISS,
Secretary.

STOKES *v.* PENSACOLA AND GEORGIA R. R. CO.

Motion for review of departmental decision of May 3, 1897, 24 L. D., 396, dismissed by Secretary Bliss, January 24, 1898.

MINING CLAIM—APPLICATION FOR PATENT.

ASPEN MOUNTAIN TUNNEL LODE NO 1.

An application for mineral patent should not be allowed for land embraced within the prior pending application of another.

Secretary Bliss to the Commissioner of the General Land Office, January 24, 1898.

(W. V. D.) (P. J. C.)

It appears that The Aspen Mountain Tunnel and Drainage Company, on February 11, 1896, made application, No. 522, for patent for the Aspen Mountain Tunnel Lode No. 1 mining claim, survey No. 10,035, Glenwood Springs, Colorado, land district. This application was received and publication of notice commenced in a newspaper.

In March, 1896, and during the period of publication, the owners of the Graystone and the Alabama lode claims each filed a protest against the acceptance by the local office of the application for patent by the Aspen Company. (It is stated the owners of the Menlough mining claim also filed a similar protest, but it is not found in the record.) These protests allege, in substance, that the protestants are the owners of the several claims; that in August, 1895, the owner of the Sibley lode mining claim applied for a patent for the same; that there was a conflict between the claims owned by the protestants and the Sibley; that all of the conflict between protestants' claims and the Sibley is also a part of the said Aspen Tunnel lode No. 1; that the protestants each adversed the Sibley application, brought suits thereon, and said suits are now pending and undetermined—

that unless said M. A. No. 522 is canceled and held for naught contestee will be granted its receiver's receipt upon said premises so soon as said publication expires, unless protestants go to the needless expense of again "adversing" and bringing suit for the identical premises sued for in their adverse against said Sibley application.

The protestants pray that the application be canceled and publication notice ordered stopped.

At the request of counsel the local officers immediately forwarded

the protests to your office, whereupon, by letter of March 25, 1896, your office informed the register and receiver that their action was irregular, required an immediate report from them on the matter, and directed them not to allow entry upon the application.

Without going into all the correspondence in detail, it is sufficient to say that, by direction of your office, the protestants were advised to appeal from the action of the local office in allowing the application. This they did, and the entire record was forwarded to your office, and by letter of August 14, 1896, your office reversed the action below and held the application for patent for the Aspen Mountain Tunnel Lode No. 1 for cancellation.

From this decision the applicant has appealed, alleging that it is contrary to the rules of the land office and the law; that the application is simply pending and not perfected and awaiting decision in the adverse suits; that "there is no rule or law preventing the application for patent for ground covered by previous entry pending adverses;" that the survey having been allowed and approved by the surveyor-general, the application filed and notices posted and published, it would be subjecting applicant to additional expense and delay to require him to go through the same proceedings after the adverses are disposed of.

There is no brief filed by counsel for appellant, and it is not pointed out wherein the decision of your office "is contrary to the rules of the land office and the law." The question will not, therefore, be discussed further than to say that it has uniformly been held by the Department, where the question was raised, that an application for patent for a mining claim will not be allowed to embrace therein ground covered by the prior location and application of another (Rocky Lode, 15 L. D., 571), and, also, that—

An entry allowed prior to the final disposition of adverse proceedings must be canceled and the parties placed *in statu quo*, where it appears that such adverse claim is still asserted and remains undetermined. (Meyer et al. *v.* Hyman, 7 L. D., 83; see also Great Eastern Mining Co. *v.* Esmeralda Mining Co., 2 Id., 704.)

It is true that in these cases the facts were not exactly the same as those in the case at bar, but the principle announced applies with equal force.

The question as to the right of possession of the ground in controversy having been transferred to a court of competent jurisdiction, there was no justification for the local officers in receiving an application for the same land even from one not a party to the proceeding then pending.

There was no specific rule in the mining circular approved December 10, 1891, covering such a case as this, but paragraph 49 of the new Mining Regulations, approved December 15, 1897 (25 L. D., 561), was prepared to meet just such emergencies as are here presented. It reads as follows:

Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or any lands embraced in a railroad selection, or for

which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

Your office judgment is affirmed.

RIGHT OF WAY—STATION GROUNDS—UNSURVEYED LAND.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The actual use of unsurveyed public land as station grounds precludes the subsequent acquisition of adverse rights to the land so occupied.

Secretary Bliss to the Commissioner of the General Land Office, January 24, 1898.

(W. V. D.) (C. J. G.)

The St. Paul, Minneapolis and Manitoba Railway Company, under the provisions of the act of March 3, 1875 (18 Stat., 482), filed a plat, showing its selection of station grounds at Laclede, Idaho, covering an area of twenty acres in lots 1, 2, 3, the SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼, Sec. 20, T. 56 N., R. 3 W., in the Cœur d'Alene land district.

On July 23, 1892, your office refused to recommend the said plat for approval, on the ground that the lands covered thereby, being unsurveyed, were not subject to approval under the above mentioned act.

After a survey had been made the railway company filed another plat, which was also rejected by your office on May 19, 1897, but this time for the reason that said plat, with the exception of about one acre in the SW. ¼ of the NE. ¼, covers land upon which entries have been made, as follows:

lots 1 and 2, by John Kepky, August 7, 1896; and

lot 3, NW. ¼ of SE. ¼, by Lyman F. Markham, March 26, 1897.

In support of this last decision of your office the case of Dakota Central Railway Company (12 L. D., 264) was cited.

The railway company has filed an appeal to this Department, it being contended therein that, following the case of this company *v.* Maloney *et al.* (24 L. D., 460), its plat should be approved, or a hearing ordered to determine the priority of right between said company and the adverse claimants named.

The syllabus of the case cited by the company is as follows:

The actual use of lands as station grounds, prior to survey, by a company that has filed its articles of incorporation, proofs of organization, and constructed a railroad over unsurveyed land, entitles said company to an approval of a plat of said grounds, as against an intervening homestead entry, if such use antedates the settlement of the homesteader.

Based on this ruling and the facts of the case under consideration, the Department is warranted in instructing your office to order a

hearing, after due notice to all parties concerned, for the purpose of affording the railway company an opportunity to show that the lands in question were actually used by said company as station grounds prior to the initiation of the adverse claims referred to. It is so directed.

INDIAN LANDS—TIMBER CUTTING.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *September 28, 1897.*

Logging Regulations to govern logging by Indians on the ceded Chippewa Reservations, Minnesota, under the provisions of the act of Congress approved June 7, 1897 (Public No. 3).

1st. The Indians on the ceded Chippewa reservations, Minnesota, shall be authorized to enter into a contract or contracts with any responsible person or persons to cut and bank any specified quantity of dead timber standing or fallen on said reservations, at a given price per thousand feet, such responsible person or persons being required to give bond in a sufficient penalty, stipulating for the faithful performance of the obligations of such contract, the careful observance of the intercourse laws, etc.

2nd. There shall be detailed from the corps of Chippewa examiners, appointed under the act of January 14, 1889 (25 Stat., 642), for the effectual carrying out of these regulations, a superintendent and as many assistant superintendents as the Commissioner of the General Land Office may select. The superintendent detailed for the purpose of directing logging operations, shall, with the assistance of the Indian agent at White Earth agency, require each Indian desiring to cut and bank saw-logs, to make a selection of the dead timber standing or fallen, and thereafter make application to be allowed to contract for the cutting and banking of such timber, describing by section, township and range the land on which the dead timber is standing or fallen.

3rd. Before any timber shall be cut under the foregoing authority, a contract shall be entered into between the Indian applicant or applicants and some responsible person or persons as provided in paragraph one, and in such form as shall be prescribed by the Commissioner of the General Land Office, which contract, however, shall not be of force until the same is approved by the Indian agent and superintendent, and confirmed by the Commissioner of the General Land Office, which approval and confirmation shall operate as a permit for the cutting and banking of the timber applied for by the Indian or Indians.

4th. It shall be the duty of the superintendent and assistant superintendents to go into the woods with the loggers, and direct their labors, to the end that no green or growing timber may be cut, and

* Not reported in Vol. 25.

that no live trees may be damaged in any manner, so as to cause them to die, and also to inspect the scaling of the logs.

5th. The superintendent shall receive, in addition to his compensation as examiner of Chippewa lands, two dollars per day for such time as his services may be actually necessary in logging operations hereunder, and both the superintendent and assistant superintendents shall receive their necessary traveling expenses; and such additional compensation and traveling expenses shall be paid from the proceeds of the sale of logs. The assistant superintendents shall oversee and direct such portions of the work as the superintendent may direct.

6th. With the exception of the superintendent, assistant superintendents and scaler, and in cases where persons of sufficient knowledge and skill for foremen, blacksmiths, filers, teamsters, clerks and cooks cannot be found among the Indians, no white labor shall be employed in performing this work.

7th. One-half of the cost of scaling shall be paid by the Indian loggers, and one-half by the purchaser of the logs. After the scaling is completed, the sale of the logs shall not be valid until the same is approved by the Indian agent and superintendent and confirmed by the Commissioner of the General Land Office.

8th. The Indian agent will assume control of the proceeds of the sale, fifteen per cent of which shall be deducted by him for the benefit of the Indians, and to pay all expenses of the sale, such as advertising, telegraphing, additional compensation of superintendent and traveling expenses of superintendent and assistant superintendents, provided that, in any case where the logs are sold for an amount exceeding $5 per thousand feet, the per cent or amount to be deducted for the benefit of the Indians, as above stated, shall be proportionately increased in the discretion of the Commissioner of the General Land Office.

The net proceeds remaining shall be divided and paid as follows:

1st. He shall pay, from the sales of the logs under each contract, the party or parties furnishing the advances under the contract, authorized in section 9, to the logger who delivered said logs.

2nd. He shall pay the scaler or scalers of such logs, the amount due on the part of the Indian logger.

3rd. He shall pay the foremen, blacksmiths, teamsters, filers, clerks and cooks of the logger any balance that may be due them under their contracts with the logger.

4th. He shall pay the laborers of the logger any unpaid balance which may be due them under their contract for labor performed in the cutting or delivery or banking of such logs.

5th. He shall pay the logger or contractor who banked such logs, any part remaining of the amount to be paid under his contract.

9th. Any logging Indian, on a proper showing of his inability to furnish his logging outfit, or to sustain himself, or his family, during the logging operations, may receive advances of goods or cash from any

party with whom he may contract, which contract shall first be approved by the Indian agent to such a limit as the Indian agent may fix, and such advances shall be paid by the Indian agent to the party making the same from the amount to which such Indian is entitled for his logging work.

10th. The Commissioner of the General Land Office shall have power to prescribe such rules and regulations not inconsistent with these regulations as he may deem proper from time to time, for the more efficient prosecution of the logging operations, and to thoroughly protect the interests of the Indians and the Government in the premises.

BINGER HERMANN,
Commissioner.

Approved,
C. N. BLISS,
Secretary.

INDIAN LANDS—TIMBER CUTTING—ACT OF JUNE 7, 1897.

THEODORE H. BEAULIEU.*

Permission to place portable saw mills in the vicinity of dead and down timber, cut under the provisions of the act of June 7, 1897, for the purpose of manufacturing such timber into lumber, may be granted, where the applicant enters into a contract in the form prescribed by the regulations of September 28, 1897, and submits proof as to the present impracticability of marketing the timber.

Secretary Bliss to the Commissioner of the General Land Office, December 4, 1897. (J. I. P.)

I have before me your letter of the 22nd ultimo enclosing one from Mr. R. H. Rosa, superintendent of dead and down timber, Chippewa ceded lands, White Earth, Minnesota, covering the application of Theodore H. Beaulieu for permission to cut dead timber, standing and fallen, on certain sections in township 162 north, range 36 west, and to establish portable saw-mills near such timber for its manufacture into lumber.

Mr. Rosa states that the timber referred to has been dead many years, that it is rapidly decaying and that it is represented that if the desired permission is accorded to Mr. Beaulieu the farming community in that vicinity will be greatly benefited.

You express the belief that if proper opportunity is not given to dispose of the timber loss will result to the Indians. You have accordingly recommended that you be authorized to grant permission to Mr. Beaulieu to place a portable saw mill in the locality mentioned, on his submitting satisfactory proof that the allegations as to the present impracticability of marketing the timber are true and when he has entered into a contract in the form prescribed in the instructions of September

* Not reported in Vol. 25.

28, 1897, relating to dead and down timber on the ceded Chippewa reservations, Minnesota, heretofore approved by the Department.

Under the authority of the act of June 7, 1897—Public No. 3, page 32—in pursuance of which the above instructions were issued, and in accordance with your verbal request for such authority, I hereby authorize you to grant the permission asked for in this and all other cases, where the applicant will enter into a contract in the form prescribed in the instructions of September 28, 1897, and where such permission will, in your judgment, be for the benefit of the Indians and in accordance with the act of June 7, 1897 (*supra*).

You are also hereby directed to instruct Mr. Rosa, superintendent of dead and down timber, to see that no other advantages inure to the contractor in this or any other case, for the erection of a mill as proposed, and require him to report to your office should any of said contractors attempt to cut any other than dead and down timber on said ceded lands; and on proof that any contractor has cut any other than dead and down timber on said ceded lands, his contract or permission will be at once revoked.

ABANDONED MILITARY RESERVATION—SCHOOL GRANT.

INSTRUCTIONS.

The provision in the act of August 23, 1894, that lands within abandoned military reservations restored for disposal under said act, shall be subject to entry by actual settlers, is a congressional disposition of said lands that takes them out of the operation of the school grant, if it had not attached prior to the establishment of the reservation.

The proviso to section 6, act of July 16, 1894, admitting Utah to the Union, does not take the grant of school lands to said State out of the operation of the general rule as to the time when said grant attaches to the specific sections, or limit the authority of Congress to so provide for the disposal of reserved lands, that on their restoration the right of the State to the specific sections may be defeated.

Secretary Bliss to the Commissioner of the General Land Office, January 28, 1898.

(W. V. D.) (E. F. B.)

I am in receipt of your letter of November 18, 1897, resubmitting for my consideration the circular of instructions to the register and receiver at Salt Lake City, Utah, as to disposal of the lands in the abandoned Fort Cameron military reservation which received the approval of the Department March 22, 1897, 24 L. D., 269.

It does not appear that any change is desired in these instructions so far as they indicate the manner of disposal of the lands subject to settlement and entry under the act of August 23, 1894 (28 Stat., 491), which was the aim and purpose of the instructions, but the resubmission seems to be made merely with reference to the expression of the Acting Commissioner as to what lands are excepted from settle-

ment and entry under the act and to which the instructions did not therefore apply.

The expression referred to is that "Sections 2, 16, 32 and 36 of this reservation are reserved for school purposes."

The date when this reservation was established, and when it was turned over to the custody of this Department, and when it was surveyed, were not given in the letter of instructions of March 22, 1897, and hence it received the approval of the Department upon the assumption that the facts in that case warranted the statement made therein as to the reservation for school purposes, but from the facts stated in the communication now under consideration it is evident that it was intended by your office to apply generally to military reservations turned over to this Department under the act of August 23, 1894, following the decision of your office of July 25, 1896, to which you refer, holding that as to the lands within such reservations,

after providing for the preference rights of actual bona fide settlers, the balance should be treated as public lands subject to all the land laws of the United States, including grants for school purposes and all other public laws.

The question therefore submitted with your letter involves a construction of the act of August 23, 1894, especially with reference to the rights of the several States under the grant for school purposes to take lands within the limits of abandoned military reservations containing more than five thousand acres.

The grant to the several States of certain designated sections for school purposes has been so clearly interpreted by the decisions of the courts and of this Department as to leave little room for doubt as to what lands come within its operation. It attaches to the specific sections in every township within the political boundaries of the State which are disencumbered and free from reservation, at the date when the sections are designated by survey,

but where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may if it so desires, elect to take equivalent lands in fulfillment of the compact or it may await until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted. State of Colorado, 6 L. D., 412. See also Cooper *v.* Roberts, 18 How., 173; Ham *v.* Missouri, Ib. 126; Beecher *v.* Weatherby, 95 U. S., 517; Heydenfeldt *v.* Daney Gold Mining Company, 93 U. S., 634.

Until the status of the land is actually fixed by survey, as shown by the township plat, so that the grant may attach to the specific section, the government has the absolute power to dispose of it as a part of the public domain, or to provide for its disposal in any manner that may promote the public interest. Gregg *v.* State of Colorado, 15 L. D., 151.

This principle was clearly announced in the case of Heydenfeldt *v.* Daney Gold Mining Company, *supra*, in which the court said:

A grant, operating at once and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada until they were segregated from those granted.

Again the court in holding that the words of the present grants are restrained by words of qualification intended to protect the State against loss that might happen through the action of Congress in settling or disposing of the public domain says:

> Besides no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the sixteenth and thirty-sixth sections in each township. Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the State was to be compensated by other land equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.

See also Mining Company *v.* Consolidated Mining Co. 102 U. S., 167.

Until survey, Congress reserved the right either to sell them or dispose of them in any other way that commends itself to its judgment. Hence if a reservation is created within the boundaries of any State prior to survey, Congress may in providing for the survey of such reservation and its restoration to the public domain so dispose of it as to deprive the State of the right to the specific sections, in which event it would be compensated by the selection of other lands in lieu thereof. Heydenfeldt *v.* Daney Gold Mining Company, *supra*, and Mining Company *v.* Mining Company, *supra*. Gregg *v.* Colorado, *supra*.

Keeping in view this interpretation, has Congress by the act of August 23, 1894, so restored lands within abandoned military reservations containing more than 5,000 acres, to the public domain as to subject them "to all the land laws of the United States including grants for school purposes and other public laws."

The act of July 5, 1884, (23 Stat., 103), providing for the disposal of abandoned military reservations required that they shall be surveyed and approved and disposed of at public sale to the highest bidder for cash at not less than the approved value and not less than one dollar and twenty-five cents per acre.

Under said act the Secretary is authorized to cause the lands in said reservation to be subdivided into tracts of less than forty acres each and into town lots, or either, or both if in his opinion the public interests so require. By a proviso to this act settlers who were in occupation of any part of said reservation prior to its location or had settled thereon prior to January 1, 1884, in good faith for the purpose of securing a home and entering it under the general laws and had continued in such occupation to the date of the act and were qualified to make homestead entry shall be entitled to enter the land so occupied not exceeding one hundred and sixty acres, according to the legal subdivisions.

As these lands had been enhanced in value by the uses for which they had been reserved, it was the general policy of the government at

that time, that it should receive the benefit of such enhanced value by offering them for sale to the highest bidder for cash in tracts or lots of such area as would best subserve the public interest.

Many of these reservations, however, in the western States were of such extended area that the act of July 5, 1884, could not be made to apply to the entire area of such reservations without conflicting with what afterwards became the established policy of the government to wit, the disposal of the public lands to actual settlers as homesteads rather than at public sale to the highest bidder, and hence the act of August 23, 1894, was passed, which did not limit the right of homestead settlers to such lands as they were in actual occupancy of at the date of location of the reservation or upon which they had settled prior to January 1, 1884, but provided:

That all lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and eighty-four, the disposal of which has not been provided for by a subsequent act of Congress, where the area exceeds five thousand acres, except such legal subdivisions as have government improvements thereon, and except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public land laws of the United States, and a preference right of entry for a period of six months from the date of this act shall be given all bona fide settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment, at the option of the purchaser, be made in five equal installments at times, and at rates of interest to be fixed by the Secretary of the Interior.

The established policy of the government to dispose of the public lands to homestead settlers only, was thus preserved without discarding the policy that formerly obtained of disposing of such lands for revenue. The purpose of the act is made manifest by the report of the House Committee on Public Lands, which was concurred in by the report of the Committee on Public Lands of the Senate, so far as it set forth the object of the bill, the circumstances which called for such legislation and the policy which had prevailed in previous years with reference to the disposal of lands in abandoned military reservations. See Senate Report 650—53d Congress 2d Session.

The House Committee in reporting the bill after referring to existing legislation and that no provision had been made in the act of July 5, 1884, for opening the lands to *agricultural settlement*, says:

The pending bill is intended to apply only to reservations of which the area exceeds 5,000 acres, and only to such portions of the reservations to which it shall apply as have no improvements thereon and as are not reserved for any public use. That beyond these reservations and parts of reservations the provisions of the said act of July 5, 1884, are to remain unchanged and in full operation, while those lands as to which this bill shall operate shall be open to homestead settlement, with the

condition that survey and appraisement thereof shall be made according to the provisions of the act of July 5, 1884, and that parties claiming the same as settlers shall be allowed ninety days in which to make entry thereof, with the requirements superadded to the ordinary requirements of the homestead law that they shall pay for the lands so entered by them at not less than the appraised value and not less than the minimum price of such lands under the general statutes, in five equal installments, at times to be fixed by the Secretary of the Interior by general regulations.

It is the established policy of the government to dispose of the public lands as homes to actual settlers rather than to sell them for a money price for the benefits of the Treasury, as was formerly done.

This is the policy applied to any public lands remaining undisposed of in the vicinity of the lands once embraced in military reservations now abandoned, and the settlers naturally doubt the expediency of applying a different rule to the latter class of lands if agricultural in character, unimproved, and not required for any public use. The reason ordinarily given therefor is that if the lands have enhanced in value, the government rather than the individual settlers should have the benefit of it, notwithstanding that with respect to lands generally the government has discarded the policy of managing them and disposing of them for revenue.

In this the object is kept in view of securing the benefit of any enhancement of value of the lands to the Treasury while giving settlers the preference in purchase at such enhanced value, to be ascertained by appraisement. This would appear to be in harmony with the general policy now prevailing which looks to the disposal of the lands to the settlers, and as calculated to do away with the seeming anomaly in the existing methods of disposing of abandoned military reservations on a different and contradictory principle. It may be added that the proposed legislation would be in the line of the legislation under which relinquished Indian reservations in the Dakotas, Montana, and Oklahoma are now being disposed of to settlers under the homestead laws, but with payment of a prescribed price per acre, in addition to the usual homestead requirements.

If this report is to be accepted as a guide to the true interpretation of the act, it is apparent that it was not intended to repeal any of the provisions of the act of July 5, 1884, but that its purpose was to keep said act in full force as to the power of the Secretary to subdivide the reservation or any part of it into town lots or either or both, and to sell them at public auction to the highest bidder while it further extended the privilege granted to the homestead settler by subjecting all the land in such reservation, with certain exceptions therein named, to settlement and entry, under the homestead law upon the conditions stated in the proviso to said act.

The words "those lands as to which this bill shall operate, shall be opened to *homestead settlement*, with the condition that survey and appraisement thereof shall be made according to the provisions of the act of July 5, 1884," can have but one meaning, and clearly indicate that the words of the act, "opened to settlement under the *public land laws* of the United States," have reference to agricultural settlement laws, and as the homestead law was the only law then in force under which agricultural entries depending upon settlement could be made, it meant opened to settlement and entry under the homestead law.

In construing the statute we are not to look to any single phrase in it but to its whole scope in order to arrive at the intention of the makers of it. If a literal interpretation of any of it would be contrary to the evident meaning of the act taken

as a whole it should be rejected. There is no better way of discovering its true meaning when expressions in it are rendered ambiguous by their connection with other clauses than by considering the necessity for it and the causes which induced its enactment. Heydenfeldt *v.* Daney Gold Mining Company, 93 U. S., 638.

But there is no difficulty in arriving at this conclusion from the context alone, unaided by the report. The words "open to settlement under the public land laws" must necessarily have reference to laws under which settlement is one of the means of initiating a right and is an essential condition to the acquisition of title. It has a well known technical meaning, and has reference to settlement which can only be made and maintained in person as contradistinguished from occupancy and settlement, which may be maintained by tenants and agents as in the case of occupants of townsite lots.

This view is confirmed by other parts of the context, which when read together make clear the purpose of the act. The preference right of entry given to bona fide settlers "who are qualified to enter under the *homestead law*," residing upon any *agricultural lands* in said reservations is of itself indicative of the character of settlement contemplated by the act, but when read in connection with the proviso, "that persons who enter under the *homestead law* shall pay for such lands not less than the value heretofore or hereafter determined by appraisement nor less than the price of the land at the time of entry," the conclusion is irresistible.

It therefore follows that while the provisions of the act of July 5, 1884, remain unchanged and in full operation as to all abandoned military reservations, all lands within such reservations that have been placed under the control of the Secretary of the Interior prior to the passage of the act of August 23, 1894, where the area exceeds five thousand acres are also subject to disposal to actual settlers, who are qualified to make homestead entry and that they are not to be treated as "public lands subject to all the land laws of the United States including grants for school purposes." Where the grant to the State for school purposes had not attached to the designated sections prior to the location of the military reservations which are afterwards abandoned, such sections are not subject to the grant, but indemnity must be taken in lieu thereof.

As the lands within the Fort Cameron military reservation had been surveyed, and were subject to disposal under the act of August 23, 1894, at the date of the proclamation, January 4, 1896 (29 Stat., 876) admitting the State of Utah into the Union, the declaration in the circular of March 22, 1897, that "sections two, sixteen, thirty-two and thirty-six of this reservation are reserved for school purposes" would imply that the proviso to the sixth section of the act of July 16, 1894, (28 Stat., 107) providing for the admission of Utah into the Union, takes the grant for school purposes to said State out of the operation of the general rule herein announced.

The sixth section of said act grants to the State for the support of

common schools, sections two, sixteen, thirty-two and thirty-six with the usual condition that where such sections have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto may be taken in lieu thereof, with the proviso:

> That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

It will be seen that the grant to this State is in the same general terms as the grants to other States, that is, of specific sections in every township, and where such sections have been sold or otherwise disposed of at the date of survey, other lands equivalent thereto are granted in lieu thereof, and there is nothing in the proviso that takes this grant out of the operation of the general rule as to when the grant attaches to the specific sections, or as to the power of Congress to so provide for the disposal of all the lands within the reservations, upon their restoration to the public domain, as to defeat the right of the State to the specific sections. On the contrary, it is clear that nothing more was meant than, that upon the restoration of the lands to the public domain they shall be subject to the grant and its indemnity provisions, the same as all other parts of the public domain within said State, and there is nothing in the language of the proviso to indicate that the grant should take effect absolutely upon the extinguishment of the reservation so as to deprive Congress of the power to dispose of the public domain in any manner it might deem proper. If at the date of survey, and after the extinguishment of the reservation, the specific section had not been sold or otherwise disposed of by authority of any act of Congress, or if no provision had been made by Congress for the disposal of said lands incompatible with the grant to the State, the grant would attach to the specific sections, otherwise the State would be required, to select other lands in lieu thereof under its indemnity provisions of the grant.

The purpose of the proviso was two-fold: First, to deny the State the right to indemnity for any of the specific sections which the government might appropriate for permanent use and occupation; and second, to withhold from the State the benefits of section 2275, Revised Statutes as amended by the act of February 28, 1891 (26 Stat., 796), so far as it authorizes the selection of indemnity for school sections embraced in Indian, military or other reservations, during the existence of such reservations, whether surveyed or unsurveyed.

This section provides that where the school sections are embraced in a reservation, the selection of other lands in lieu thereof shall be a waiver of the right to the school section, and that it shall be the duty of the Secretary of the Interior without awaiting the extension of the

public surveys, to ascertain by protraction or otherwise the number of townships in such reservation and thereupon the State shall be entitled to select indemnity lands in lieu thereof, but that the State shall not be prevented from awaiting the extinguishment of the reservation and the restoration of the lands to the public domain, and then taking the school sections in place.

In the disposal of lands within the abandoned military reservations, you will be controlled by the views herein expressed, and to that extent the circular of March 22, 1897, 24 L. D., 269, and of November 20, 1896 (23 L. D., 567), in which a similar expression occurs, are modified.

SWAMP LAND CLAIM—STATE SELECTION—APPROVAL.

STATE OF CALIFORNIA.

Where a State, during the pendency of its appeal from the adverse action of the local office on a swamp land claim, selects the tracts involved in said claim under other State grants, and such selections are approved, the action of the State in making such selections must be held a waiver of its claims under the swamp grant.

The approval of selections so made is a final adjudication of the right of the State to make such selections, and operates to pass title thereunder; and the State having accepted the title thus acquired will not be heard to question the validity thereof.

Secretary Bliss to the Commissioner of the General Land Office, January 28, 1898.

(W. V. D.) (P. J. C.)

The Department is in receipt of your office letter "K" of September 4, 1897, wherein the following facts are shown:

It appears that lands in T. 3 S., R. 7 E., M. D. M., had been returned as high land by the approved plat in 1855. In 1866 the surveyor-general of California entered a claim in the local office alleging that this and other lands were swamp and overflowed under the act of September 28, 1850 (Section 2488 Revised Statutes). A hearing was had, and the local officers decided that the land was not swamp and overflowed as claimed by the State. An appeal was taken from this action, and the record was transmitted to your office, where it was mislaid and was not found until 1879, when "the matter was then taken up and a decision rendered July 13, 1879, which decision was declared final May 5, 1881."

It seems that your office reversed the decision of the local officers and found the following described tracts to be swamp land:

Lot 1 of Sec. 19; the S. ½ of the NE. ¼, the NW. ¼ of the NE. ¼, the NE. ¼ of the NW. ¼ (or lot 2), the S. ½ of the NW. ¼, the N. ½ of the SW. ¼, and the SE. ¼ of Sec. 20; and the SW. ¼ of the NE. ¼ and the NW. ¼ of Sec. 28.

No annotation was made on the tract books of your office showing the pendency of the hearing to determine the character of the land, and on October 18, 1871, the tracts in sections 19 and 20 were approved to the State under section eight of the act of 1841 (5 Stat., 455), and on

February 2, 1872, the tracts in section 28 were approved to the State under section thirteen of the act of March 3, 1853 (10 Stat., 244), which is a grant to California for public buildings. The lands thus approved were selected and applied for by the State in the manner prescribed by the statutes cited.

It appears that the State has conveyed the lands thus selected and approved under said acts of 1841 and 1853; that an application has been made to the State to purchase the lands as swamp and overflowed land. It is stated in your said office letter:

> It has been held by this office that it would be necessary for the State of California to reconvey to the United States the lands certified to the State under the acts of 1841 and 1853, *supra*, before they can be approved and patented under the swamp-land grant.
>
> I am now in receipt of a letter (with inclosures) from the attorney for the assignees of the State, from which it appears that there is no State official, authorized by law, to make such reconveyance. It is stated, however, that if a "reconveyance of the outstanding worthless title, based on a void listing, is necessary," the assignees of the State are willing to convey the land to the United States, in any manner deemed necessary, in order that they may procure a valid title to the land under the swamp grant.
>
> In view of the decision of the Department in the case of Stokes *v.* Pensacola and Georgia R. R. Co. (24 L. D., 396) and cases therein referred to, the matter is respectfully submitted to you for instructions as to whether a reconveyance from the assignees of the State shall be demanded, or shall the lands be included in a list to be submitted to you for approval under the swamp-land grant.

The status of this matter, to briefly recapitulate it, is as follows:

The land was originally returned as agricultural in character in 1855; some ten years thereafter the State sought to have it declared swamp and overflowed; as a result of the hearing ordered for this purpose, the local officers decided it was not swamp and overflowed; before a final determination of this inquiry the State applied for and secured the lands under the other acts named. It now seeks, through parties applying to purchase the land from the State as swamp-land, to have the former selections under the acts of 1841 and 1853 set aside and the tracts approved to it under the swamp-land act.

It is the opinion of the Department that this can not be done, or, rather, that the State by its own action is estopped from now claiming the land as swamp. The State, like any other party seeking redress or the enforcement of its rights, is charged with notice of the conditions it has produced. At the time it made its applications for the land under the acts of 1841 and 1853, it knew of its former application to have the tracts declared swamp and overflowed, and in view of this its later action in applying for it under other laws should be construed as a waiver of its first application. The fact that the record had been mislaid in your office and no action taken thereon for a number of years, and that no notation was made on the tract books of the hearing, is of no force so far as the State is concerned. It is charged with notice of the status of its former application, and if it elected to take

the land under other acts, it thereby waived its appeal and acquiesced in the adverse decision of the local officers.

At the time when the State made its selections and at the time when they were approved to it, the judgment of the local officers declaring the land not to be swampy in character was still in force. Instead of insisting upon its appeal to your office as a means of obtaining the land under its swamp grant, the State voluntarily selected the land and disposed of it under other grants.

The Department can not recommend, at this late day, a re-adjustment of the former action.

It is urged that under the act of August 3, 1854, (10 Stat., 346), it is the duty of your office to approve the land to the State as swamp. This act is as follows:

> That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest, shall be conveyed thereby.

It is the latter clause of this act which it is claimed makes the approval under the acts of 1841 and 1853 "perfectly null and void." This contention is not considered sound. So far as any determination of the question as to the swampy character of the land is concerned, at the time the same was approved to the State, it was that it was not swampy. The State then selected it under other grants with a full knowledge of that decision. If the land was, as a physical fact, swamp in character, it is hardly to be supposed that the State would have applied for it under other grants.. But be that as it may, the Department will assume, after this lapse of time, that the land was of the character contemplated by the acts of 1841 and 1853.

And aside from this the approval by the Department of the selection made by the State was a final adjudication of the right of the State to make the selection, and operated to pass title to the State. And the State having accepted the grant, neither it, nor its grantees, can now be heard to dispute the validity of the title thus acquired. (Chandler *v.* Calumet and Hecla Mining Co., 149 U. S., 79.)

In view of this determination it will be seen that the case of Stokes *v.* Pensacola and Georgia R. R. Co., cited by your office, is hardly in point. It was there determined that the grant to that road had not been finally adjudicated, hence the Department still had jurisdiction over the land, whereas in the case at bar the title has passed to the State, and the Department is therefore without jurisdiction.

The papers are herewith returned and you are directed to notify the parties in interest of this decision.

RAILROAD GRANT—ORDER OF RESTORATION MODIFIED.

UNION OIL COMPANY.

The departmental order of January 18, 1898, 26 L. D., 48, with respect to the restoration of lands within the forfeited primary limits of the Atlantic and Pacific grant modified.

Secretary Bliss to the Commissioner of the General Land Office, January 28, 1898.

(W. V. D.) (F. W. C.)

In departmental communication of January 18, 1898 (26 L. D., 48), you were advised that

> in so far as departmental letter of November 8, 1893, in answer to your office letter of October 25, 1893, operated to defer the opening to entry of the lands embraced in what was then known as suit No. 184 (which is the one recently decided in the supreme court, as hereinbefore stated), it is hereby recalled, and you will proceed as theretofore directed in departmental letter of July 15, 1893, relating to these lands.

This contemplated a restoration of the lands involved in said suit No. 184.

The decree which was passed by the circuit court of appeals declared that it was not to

> affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887.

In the decision of the supreme court (168 U. S., 1) the decree of the circuit court of appeals was

> affirmed in all respects to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the government to proceed in the circuit court to a final decree as to those defendants.

The order of suspension will therefore remain as to the lands shown by the record in said case No. 184 to be involved in the claims of the defendants other than the Southern Pacific Railroad Company and the trustees in the mortgage executed by that company.

SWAMP LAND CLAIM—ACT OF MARCH 3, 1857.

STATE OF MICHIGAN (ON REVIEW).

The act of March 3, 1857, did not confirm a certified list of swamp selections based on an erroneous survey, where, prior to the passage of said act, the certification had been corrected on evidence furnished by a resurvey.

Secretary Bliss to the Commissioner of the General Land Office, January 28, 1898.

(W. V. D.) (E. F. B.)

On March 8, 1889, your office transmitted to the Department a motion for review of the decision of the Department of December 17, 1888, (7 L. D., 514) affirming the decision of your office, rejecting the claim of the State of Michigan, under the swamp land grant, to certain tracts of land in the Reed City and Marquette land districts specifically set forth in said decision.

These lands had been reported to your office as swamp and overflowed lands and were embraced in two lists which were approved by the Secretary of the Interior in 1853 and 1854, respectively, but upon discovery that the surveys upon which such selections were made were erroneous, a resurvey of said townships was made, and supplementary lists of lands in such resurveyed townships were prepared, which did not embrace the lands in controversy and which abrogated and superseded all lists of lands in said townships made prior thereto.

The State claimed that the first certification was conclusive of its right to the lands not embraced in the second certificate, and that under the act of March 3, 1857, its title to all the lands described in such certifications was absolutely confirmed, both as to lands selected under the original as well as under the corrected survey.

The Department denied the claim of the State upon the ground, that as the lands were erroneously embraced in certifications based on original surveys that were erroneous, the State was not entitled to such lands as were not of the character granted and that the Secretary of the Interior in the exercise of a rightful jurisdiction, was authorized to correct such certification in accordance with the facts. Further, that the act of March 3, 1857, did not confirm the original selections based on erroneous surveys, as such selections had been corrected prior to the passage of said confirmatory act.

Said motion is based solely

upon the allegation of error in matters both of law and of fact appearing upon the face of the record.

Action upon this motion was suspended upon the application of the State of Michigan, it having been brought to the attention of the Department by a letter from the Attorney-General of said State under date of September 7, 1892, that the questions involved herein were also involved in a case then pending in the United States circuit court for the eastern district of Michigan.

The case referred to is the case of The Michigan Land and Lumber Company *v.* Charles A. Rust, which was decided by the supreme court, December 13, 1897, 168 U. S., 589.

The decision of the Department of December 17, 1888, is fully sustained under the rulings annunciated by the supreme court in the case above referred to and the motion is therefore denied.

SWAMP LAND CLAIM—HOMESTEAD—HEARING.

STATE OF MICHIGAN *v.* FOSDICK.

In a case arising between a homesteader and a State claiming under the the swamp grant, a hearing may be properly ordered to determine the character of the land, where the said grant is adjusted on the field notes of survey, but the survey having been made prior to the grant, furnishes no satisfactory evidence as to the actual character of the land.

Secretary Bliss to the Commissioner of the General Land Office, January 28, 1898.

(W. V. D.) (E. F. B.)

On November 4, 1884, Oscar E. Fosdick made homestead entry at the local office, Reed City, Michigan, of lot No. 8, Sec. 6, Bois Blanc Island, which is also claimed by the State of Michigan as swamp and overflowed land.

On December 24, 1884, your office held the homestead entry of Fosdick for cancellation, for the reason that the field notes of survey showed said land to be swamp and overflowed at the date of the swamp land grant to said State, but on March 12, 1886, your office re-examined the field notes of survey of the township embracing the tract in controversy and it was then held that they do not show that said tract was swamp and overflowed within the meaning of the swamp land grant. The action of your office of December 29, 1884, holding the entry of Fosdick for cancellation was revoked and the claim of the State rejected.

From this action the State appealed.

Bois Blanc Island was surveyed in 1827, prior to the date of the grant. At this date the deputy surveyors were not required to make surveys with special reference to the swamp land grant, indicating what lands are subject to the grant. See State of Louisiana 5 L. D., 514.

In the case of Cushing *et al.*, *v.* State of Michigan 4 L. D., 415, involving the claim of the State to lands in Bois Blanc Island as swamp and overflowed land, it was held that:

As the survey furnishes no satisfactory evidence of the character of this land, and the State cannot be deprived of it if it is of the character claimed, you are hereby directed to return the record of these several cases to the local office, with instructions to order a hearing to determine the character of these lands at the date of the grant, as near as may be obtained, after notice to all parties, and if it should appear from such examination that the greater part of any subdivision was swamp and

unfit for cultivation, such subdivision will inure to the benefit of the State under the grant, and if the evidence shows that the greater part of any subdivision was not of such character, such subdivision shall be subject to entry.

The same action should be taken on this case, and you are therefore directed to order a hearing to determine the character of the land as above set forth.

MINERAL AND AGRICULTURAL CLAIMS—ESTOPPEL.

REID ET AL. *v.* LAVALLEE ET AL.

The fact that as between a mineral claimant and one claiming under the settlement laws the settler is estopped by his own acts from denying the mineral character of the land, does not relieve the Department from the duty of determining the actual character of the land in dispute.

Land must be held non-mineral where no discoveries of appreciable value have been made, and it does not appear that a further expenditure would develop the presence of mineral in paying quantities.

Secretary Bliss to the Commissioner of the General Land Office, January 28, 1898.

(W. V. D.) (E. B., Jr.)

The land involved in this case is a part of the NE. ¼ of the NW. ¼ of section 26, T. 12 N., R. 8 E., M. D. M., Sacramento, California, land district. On October 9, 1893, W. H. Lavallee, the defendant herein, made homestead entry No. 6265 for the E. ½ of the NW. ¼ and the E. ½ of the SW. ¼ of said section, thus including the land first above indicated. On February 9, 1895, he commuted said entry to cash entries No. 269 for the E. ½ of the NW. ¼, and No. 270 for the E. ½ of the SW. ¼ of said section, by locating thereon military bounty land warrants Nos. 113,134 and 115,056, respectively.

On May 1, 1895, Thomas B. Reid, Isaac E. Reid and Anthony Dittmar, the last named as agent for his wife Mary E. Dittmar, filed their joint affidavit of contest, alleging that said Thomas B. and Isaac E. Reid and said Mary E. Dittmar are the owners of, in possession and entitled to the possession of, a five-sixth undivided interest in the West End Quartz lode claim, about three-fourths of which is situated in the NE. ¼ of the NW. ¼ of said section; that said lode claim was duly located by said Lavallee March 24, 1893; that affiants derive their interests in said claim from and through said Lavallee by purchase and conveyance prior to said cash entry No. 269; that said claim has been duly held and represented each year, according to law, under its said location, and is shown by the development thereof to contain a valuable ledge or lode containing gold; that said claim is more valuable for mining than for agriculture; that said Lavallee had personal knowledge of the existence of said ledge or lode at and prior to his said cash entry No. 269, having had a number of tons of ore therefrom reduced in a custom mill, and having reported to his co-owners, said affiants,

that three tons of the ore had produced two ounces of gold worth $18.00 per ounce, and in addition sulphurets or concentrates worth $21.00; that said Lavallee is not acting in good faith but is seeking fraudulently to acquire title to valuable mineral land under a pretended agricultural claim; wherefore affiants protest against the issuance of patent for any part of said lode claim, under or by reason of said cash entry No. 269, and ask that a hearing be had to afford them opportunity to prove the foregoing allegations. This affidavit was duly corroborated.

Pursuant to direction of June 7, 1895, by your office, the hearing asked was held at the local office, commencing October 7, 1895, at which appeared the contestants, said Lavallee, and, also, one H. T. Renton, who, claiming to be a transferee of Lavallee under said cash entries, was allowed to intervene. The local officers, on December 2, 1895, decided the land in controversy to be agricultural in character, and although they found the allegations of the contestants as to the location of said lode claim, and as to purchases and conveyances from Lavallee to be true, and also that he had executed other conveyances of his interest in said claim, prior to said cash entry No. 269, they further decided that the validity of this entry was not affected thereby, and recommended that the contest be dismissed and the said cash entries passed to patent. On March 25, 1896, your office affirmed the decision of the local office and dismissed the contest. From your office decision contestants appeal, assigning numerous errors of fact and law.

It appears from the record herein, in addition to the facts hereinbefore set out, that said lode claim was located by said Lavallee March 24, 1893, the certificate of location duly filed for record April 4, 1893, and that the locator and his grantees have held and worked the same since according to law; that about three fourths of said claim are within the NE. ¼ of the NW. ¼ of said section 26; that by conveyances duly executed and recorded Lavallee, as locator of said claim, had conveyed five-sixths of his interest therein to said Anthony Dittmar, T. B. Reid and one C. H. Hubbard, prior to September 22, 1893; that said Dittmar and C. H. Hubbard conveyed their interests to said Mary E. Dittmar and Isaac E. Reid, respectively, prior to February 10, 1894, and that the conveyances thereof were duly recorded; that during all the time from date of his said location Lavallee held a one sixth interest in said claim until July 25, 1894, when he conveyed the remainder of his interest therein to one C. A. Roberts, and that this conveyance was duly recorded December 20, 1894, all of the other aforesaid conveyances having been recorded prior to that time; that in all these conveyances said claim is particularly described by metes and bounds as lode mining ground; and that Lavallee, on February 16, 1895, executed a deed to said H. T. Renton for all the land embraced in said cash entries.

It is also shown that the mineral claimants and co-owners with Lavallee, of said lode claim, were induced to purchase their interests through their reliance on the validity of the location made by Lavallee and

through his representations of the existence therein of a valuable gold bearing lode or ledge; and that they employed him to develop the claim and paid him money from time to time, both before and after he made his said homestead entry, for the development work, consisting chiefly of a tunnel about one hundred feet in length, and expended considerable sums for supplies and materials needed in such development on the strength of his representations, which representations continued to be made as late as May, 1894.

It is urged, in effect, by protestants' counsel, that Lavallee, by reason of his previous connection with said lode claim and his representations as aforesaid, and protestants' reliance thereon, is estopped, as against these protestants, from denying the mineral character of the land in controversy, and that Renton, as grantee of Lavallee, under his said cash entry, with constructive knowledge of Lavallee's location of said lode claim and of his conveyance of his interest therein, is similarly estopped. It is not claimed that Renton had any knowledge of the special representations made by Lavallee to protestants either before or after the date of his homestead entry.

The contention as to estoppel, either as against Lavallee or Renton, is not well taken in this proceeding. There can be no doubt, from the evidence, that Lavallee has been guilty of bad faith as against these protestants. The only questions, however, properly before the land department in this proceeding are those which relate to the actual known character of the land in controversy at the date of cash entry No. 269. If the land was then known to be valuable chiefly for its mineral contents it was not subject to such entry, and the entry as to such land must be canceled regardless of the good faith or bad faith of Lavallee in the premises. The relations at any time existing between Lavallee and protestants could not, in themselves, obviously, have any bearing upon the real character of the land, nor could his representations, though false and fraudulent, relieve the land department of its duty to determine the actual known character of the land at date of the cash entry. The land department clearly could not regard the land as mineral in character and hold it for disposal under the mining laws, by reason of its location by Lavallee as mineral land and his representations to his said grantees that the land was mineral, if, in fact, the land was not then known to be mineral in character, nor could the status of the land be affected in any way by the further facts that such representations were fraudulent as against such grantees, and that Lavallee was at the same time claiming the land under the homestead law. If the land was agricultural in character when Lavallee made his cash entry therefor, and if he is shown to have possessed the necessary qualifications, and to have fully complied with the homestead law up to that time, his entry must stand. However much his conduct and representations might operate as an estoppel against him in his private affairs, the government can not be bound thereby. Lavallee's action in representing the land to be mineral and in attempting to dispose of

it as such, may subject him to liability for deceit but this department has no jurisdiction over such questions.

It does not appear from the evidence that any mineral of appreciable value has been found upon the land in controversy. The work upon the lode claim prior to the cash entry consists chiefly of a tunnel of about one hundred feet in length, which commences about three hundred and fifty feet west of the west line of the homestead. Within ten or fifteen feet of the mouth of this tunnel some small bodies of rock carrying gold appear to have been found, and a little farther on a stringer of quartz bearing small quantities of gold, but these all seem to have soon pinched out; and the amount of precious mineral obtained from the tunnel in the aggregate was of such small value as to afford no adequate compensation for the expenditure incurred. No well-defined ledge or lode carrying valuable mineral is shown to have been discovered; nor is the land shown to contain mineral in any state of such value as to justify expenditure to obtain it; nor does the showing warrant the belief that further expenditure would disclose the presence therein of valuable ore or valuable mineral of any sort. It is also shown, on the other hand, that the land in controversy, or the greater part thereof, has a rich, deep, black soil, is well adapted to the growing of fruits and vegetables and can be easily irrigated, and that Lavallee raised thereon vegetables of good quality.

The failure of Lavallee to appear again as a witness after a recess taken during the hearing, in order that further opportunity for cross-examination might be afforded, is not sufficient ground upon which to disturb the decision of your office, inasmuch as his testimony may be eliminated without affecting, in any way, the conclusion reached as to the character of the land in controversy. Lavallee, by reason of his previous acts and representations is shown to have been unworthy of belief, and his testimony has therefore not had any weight with the Department.

Renton's petition to intervene, supported by his own affidavit setting out the nature of his interest in the proceedings before the local office, and by a duly certified transcript of the record of his deed from Lavallee, executed February 16, 1895, for the land embraced in Lavallee's cash entries was properly allowed by the local office; and the motion of protestants that Renton be required to further support his petition by his oral testimony was properly denied.

It can not be held that the offer of Renton at the beginning of the hearing, to relinquish to the government the N. ½ of the NE. ¼ of the NW. ¼ of said section, in which subdivision the greater part of said lode claim lies, "with a sole view to saving the expense and time of litigation, and to the end that further controversy herein may cease," was, as protestants contend,

"a confession of judgment and a full and direct admission as to the truth of all the matters and things set up by the contestants in their affidavit of contest and petition for a hearing."

The offer was declined by protestants. That action on their part closed this incident in the case. It ceased thereafter to have any important bearing upon the case. This disposes of all the material issues.

The decision of your office is affirmed in accordance with the views expressed herein.

BRUNER *v.* MITCHELL.

Motion for review of departmental decision of November 27, 1897, 25 L. D., 438, denied by Secretary Bliss, January 29, 1898.

ALASKAN LANDS—POSSESSORY RIGHT—RESERVATION.

GEORGE KOSTROMETINOFF.

The protection accorded to the possessory rights of Alaskan Indians and other persons by section 8, act of May 17, 1884, was not intended to apply to cases where the settlement was made at a time when the land embraced therein was included within a public reservation.

Secretary Bliss to the Commissioner of the General Land Office, January 29, 1898.

(W. V. D.) (W. M. B.)

This Department is in receipt of your office letters, of dates December 4, 1896, and November 18, 1897, transmitting the petition and supplemental showing of George Kostrometinoff, wherein said petitioner asks that a certain tract of land located, improved and occupied by him and one Alexander Miletich for domiciliary purposes, situate in the town of Sitka, Alaska, the greater portion of which is embraced within the limits of a public reserve made under executive order of June 21, 1890, be excluded from the operations of said order making such reservation, upon the ground that said tract was inadvertently or improperly included within the reserve made by such order.

It appears that petitioner is a native of Sitka, Alaska, and he claims to be an American citizen by provision of article 3 of the treaty of the United States with Russia in 1867 (15 Stat., 539).

The said petitioner claims the right to occupy and hold quiet possession of tract claimed by him, under provision of section 8 of the act of May 17, 1884 (23 Stat., 24), until such time as Congress may determine the terms under which he may acquire title thereto.

The referred to provision of said section 8, of the act of May 17, 1884, entitled "An act providing a civil government for Alaska," is in words following:

Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

The petitioner furnishes evidence to the effect that on December 1, 1879—prior to the date of the executive order complained of—he located and occupied the tract in question, and posted on the premises, and recorded at that time, a notice of such fact, and that he has improved the land and continued to occupy and hold possession of the same himself or by and through his tenants since the date of location.

The referred to notice is in words following:

Notice is hereby given that the undersigned citizens of the United States, have located the following homestead claim:

A certain lot of land adjoining the town of Sitka, situated as follows:

Commencing on the south-easterly or easterly side of the cemetery attached to the Russian Trinity church, and running on a course about 40 degrees east of north 373 feet to the road leading to the old graveyard about 50 degrees west of north, then along said course 237 feet, then by sides parallel to these said lines so as to form a rectangular lot or plat of ground.

ALEX. MILETICH.
GEO. KOSTROMETINOFF.

It appears that the said Alex Miletich died on or about January 2, 1882, and that petitioner purchased what interest the deceased formerly had in the land. The tract which it is claimed by said petitioner was improperly included in the public reserve, herein before referred to, comprises an area of about 2.03 acres of land.

Relative to the *locus* of the said tract, your letter "G" of November 18, 1897, contains the following statement, to wit:

The certified copy of the record of location, (Exhibit A) describes the land as commencing at a point on the south-easterly or easterly side of the cemetery and running thence north 40 degrees east 375 feet to a road, running north 50 degrees west; "thence along said course" (direction not given, but platted on the map, Exhibit K, as S. 50 degrees E.) 237 feet, thence by sides parallel to these said lines so as to form a rectangular lot or plot of ground.

The tract platted in exhibit K does not correspond with the description given, in that it is described as a parallelogram cornering on the south easterly side of the cemetery, while it is platted as being on both sides of the cemetery. Moreover from the description it could as well be a parallelogram 373 feet by 237 feet immediately to the northwest of, and bordering on the tract platted; in which event it would embrace even more of the cemetery than is embraced in the tract as platted.

I have further to state the claim is apparently within the reservation established by Brevet Major General Davis, December 1, 1867.

The disclosures made by the record submitted sustain the correctness of the foregoing statement.

Paragraph 1 of General Orders No. 6, dated New Archangel, Alaska Territory, December 1, 1867, making the reservation referred to above as having been established by General Davis, reads as follows:

1. For the information of all persons who desire to build houses and improvements on the public lands in the City of Sitka and vicinity, and on the islands in the harbor of Sitka, it is hereby announced that, until such time as the government of the United States shall decide, through the proper agents, what locations and amount of land may be required for government and Territorial purposes, the following reserves are hereby declared, and the military authorities will hold and use them as such:

Paragraph 2 of said order contains a somewhat lengthy description—not deemed essential to be herein set out—of the delimitations of the reservation thereby made, within the limits of which it is supposed the tract claimed by petitioner is embraced. And it does not appear that the lands reserved in the town of Sitka by that order were restored to the public domain, either prior to the date of petitioners location and occupation of the land in question, on or about December 1, 1879, or prior to the date of the reservation made on June 21, 1890.

It is an admitted fact that almost the entire tract of land claimed by petitioner is included within the limits of the reservation which was made on the date last metioned, and if, as a matter of fact, it be true that the said tract is likewise embraced in the reservation made on the first named date, to wit on December 1, 1867, then the reservation of June 21, 1890, to which petitioner objects, could not be regarded as having been erroneously or unlawfully made, in so far as it embraced the claim of petitioner, since he had no right to occupy and claim a tract of land which formed part of a public reserve at the time of his settlement thereon and occupation thereof—which remained in a state of reservation during continuance of such occupation.

That particular provision of section 8 of the act of May 17, 1884, *supra*, which protects "Indians or other persons" in the district of Alaska "in the possession of any lands actually in their use or occupation or now (at date of said act) claimed by them," was evidently not intended to protect any person who located and occupied, as petitioner did, a tract of land situate within a public reservation, if at the time of settlement such tract was segregated from the public domain by a prior and then existing reservation, and therefore not subject to location and occupation. The occupation of such lands under such circumstances constitutes nothing less than an act of *trespass*, and the referred to provision of section 8 of the act cited cannot be construed as protecting such acts.

Recurring to the question as to the *locus* of the tract of land occupied by petitioner it may be observed that you do not state *positively* that said tract is within the reservation made by the order of December 1, 1867, but merely say that it is "apparently" within the limits thereof.

The matter under consideration cannot be properly disposed of without ascertainment of the exact locus of the land in question.

A careful consideration of the plat, found with the record submitted, in connection with the certified copy of the record of location of the tract, as also of an approved plat of the town of Sitka, whereon is traced or marked by the War Department the boundary lines of the reservation made by Brevet Major General Davis on December 1, 1867, fails to show the relative position of the land claimed by Kostrometinoff to that forming the reservation established in said year 1867.

For the foregoing reasons it is hereby ordered that you notify peti-

tioner of the action herein taken, and that you require him to make and file with the local officers of the land office at Sitka, Alaska, within such reasonable time as you may direct, satisfactory proof as to the true location of the tract claimed to be occupied by him, and of its relative position to the lands embraced in the reservation made by military order No. 6, dated December 1, 1867, with directions to said local officers to forward, as soon as filed, such proof—together with such report by them in connection therewith as the public interest may suggest or require—to your office for appropriate action thereon.

COAL LAND CLAIM—APPLICATION—TOWNSHIP PLAT.

ROSE *v.* DINNEEN.

The time within which a coal land claim must be perfected by purchase, where the filing when first offered is properly rejected on account of a defective township plat of survey, and is thereafter allowed on the correction of said plat, should be computed from the date when the corrected plat is filed, and the land opened to disposal.

The rule requiring notice of the filing of a township plat of survey, prior to the allowance of entries of land embraced therein, is only applicable in the case of an approved plat of survey, or where an amendment thereto adds to the area of public lands included therein.

The possession of a coal land claim by an agent is the possession of his principal, and all acts of said agent towards perfecting title will inure to the benefit of the principal.

Secretary Bliss to the Commissioner of the General Land Office, January 29, 1898.

(W. V. D.) (E. B., Jr.)

This is a contest for a title under the coal land law to lots 5 and 12 section 31, T. 35 N., R. 9 W., Durango, Colorado, land office. On March 7, 1892, William Dinneen, by Daniel J. Blackburn, his duly appointed attorney in fact, offered for filing his coal declaratory statement for lots 5, 6, 11 and 12 of said section, alleging possession since May 1, 1891. Said declaratory statement described the tract covered thereby according to the legal subdivisions thereof as shown by the latest plat of the township approved December 22, 1891, and filed in the local office March 7, 1892. It appeared, however, that parts of lots 11 and 12 were embraced in lot 4 of said section as that lot existed by virtue of the next preceding survey of the township approved November 13, 1883, the plat whereof was filed in the local office November 28, following, and that said lot four was embraced in coal entry No. 13 made January 4, 1888, by Anderson Shore and that patent therefor issued June 25, 1888.

No segregation plat of the land thus patented had been filed and the local office had no means "of identifying or describing the unsold portions" of lots 11 and 12 and therefore, although specifically stating in its decision that "no opposition appears to the filing so far as it seeks

to cover lots five and six only," acting upon the declaratory statement as an entirety, the local office rejected it. Dinneen duly appealed. Pending the appeal a segregation plat, approved October 18, 1894, showing the boundaries and areas of lots 11 and 12 was filed in the local office October 22, 1894, thus removing the only objection which had existed to Dinneen's offered coal filing.

On October 23, 1894, Dinneen, by his said attorney in fact, presented a new declaratory statement for lots 5, 6, 11 & 12, as shown by the segregation plat, which statement was on the same date received and filed as No. 204. Upon this state of facts your office on February 19, 1895, stating that "there appears to be no further action in the case required by this (your) office" dismissed Dinneen's appeal and closed the case.

On October 1, 1895, Gust Rose filed coal declaratory statement No. 424 for the same land embraced in Dinneen's filing, alleging possession thereof from September 30, 1895. On October 31, 1895, Dinneen, by Maria C. Blackburn his duly appointed attorney in fact (Mrs. Blackburn being the widow of his former attorney in fact then only recently deceased) applied to purchase said lots 5 and 12 under his coal filing. Notice of Dinneen's application was thereupon given Rose by the local office under paragraph thirty of regulations under the coal land law approved July 31, 1892, [1 L. D., 687] he being the only adverse claimant of record for the lots last above mentioned. On December 3, 1895, Rose filed a protest against the said application alleging in substance that the application was not filed within the time allowed by law; that the applicant had never been in possession of the land applied for, nor opened any vein of coal nor made any improvements thereon; that the filing and application of Dinneen had not been made in good faith to acquire title for his own use and benefit, but for the use and benefit of another; and that protestant had been in the exclusive possession since October 1, 1895, of all the land described in his filing and had opened a vein of coal thereon and expended at least fifty dollars in opening such vein and in making permanent improvements thereon with intent to acquire title thereto under the coal land law. Hearing between the parties was duly ordered, and was thereafter duly had before the local office commencing January 15, 1896, which resulted in a decision by that office on February 15, 1896, in favor of the applicant Dinneen. Said decision held that the evidence showed due compliance with law by Dinneen and that he should be allowed to purchase the lots applied for, and that Rose's protest should be dismissed and his filing as to these lots canceled.

Upon appeal by Rose your office on May 22, 1896, affirming the decision of the local office held specifically that Dinneen's application to purchase was made in time; that he had been in due and regular possession of the land; that no bad faith on his part had been shown; and that his expenditure of "something near two thousand dollars in opening up a coal mine on the tracts applied for" and in the systematic

preparation for mining coal was affirmative evidence of his good faith. From the decision of your office Rose appeals assigning numerous errors of law and fact therein, all of which have been duly considered.

Section 2349 Revised Statutes provides that all claims for the exercise of the preference right of entry of coal lands—

must be presented to the register of the proper land district within sixty days after the date of the actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office.

Section 2350 Revised Statutes provides, *inter alia*, that—

all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Section 2351 Revised Statutes provides, *inter alia*, that—

In case of conflicting claims upon coal lands . . . . priority of possession and improvements followed by proper filing and continued good faith, shall determine the preference right to purchase.

The status of said lot 12 when Dinneen sought to embrace it in his offered filing in March, 1892, was somewhat peculiar. The public survey had long since been extended over the entire township. It was therefore clearly surveyed land. There was no lot 12 in said section 31 until created by the survey approved December 22, 1891. That particular subdivision was made in ignorance apparently of the fact that part of it was no longer public land, having been taken and patented as part of lot 4 of the survey of 1883. A similar state of facts existed as to lot 11 also embraced in said offered filing. Until a segregation plat should be filed showing these lots as reduced by the patenting of said lot 4 the local office could not allow a filing therefor. It was therefore rejected, and the rejection was in effect affirmed by the dismissal of Dinneen's appeal by your office. As soon as the segregation plat was filed in the local office—the very next day—Dinneen filed his declaratory statement No. 204. His application to purchase was filed one year and eight days after the filing of his declaratory statement. Was this application, under the peculiar circumstances of the case, filed within the time allowed by law? The Department thinks it was. To hold otherwise would work a forfeiture in this case. Forfeitures are not favored and to avoid them the rule is to construe the law liberally in favor of the party against whom it is invoked.

The law does not require that the purchase shall be made within one year from the filing of the declaratory statement, but, as stated in said regulations, paragraph 30,

One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment.

In any case where the absence of the township plat prevents earlier filing the period allowed for filing extends sixty days from the receipt of such plat, and the period for purchase therefore one year longer or one year and sixty days from the filing of the plat. In this case while the latest township plat was filed in March, 1892, it was so defective so far as affording a correct description of the public land remaining in lots 11 and 12 thereof was concerned as to be unavailable for the purpose of the disposal of that land. Dinneen's attempt to file was denied on that ground. The segregation plat was in effect supplemental to the township plat as to that land, and the same rule as to time for filing therefor and for purchase thereof should be applied to Dinneen's case as if no plat of the township had theretofore been on file. Lot five as involved with lot twelve then so called, in Dinneen's claim, should of course be embraced within the rule. The segregation plat was just as essential in view of the peculiar conditions theretofore existing and especially of the decision of the local office rejecting his offered filing, and occupied the same status thereunder as the township plat in an ordinary case.

Either the filing of the plat of 1892 or of the segregation plat of 1894 must be taken as the point from which to compute time under said sections 2349 and 2350 in this case, as Dinneen's improvements on the land commenced before either was on file. The filing of the former cannot, obviously be taken, and the latter must therefore be taken. Dinneen's application to purchase having been clearly made within one year and sixty days from the filing of the segregation plat is held to have been made in due time.

The contention that Dinneen's filing should not have been allowed until notice had been given that the said segregation plat would on a day certain be filed in the local office has no foundation in the law, regulations or practice of the land department. Such notice is only required in case of the approved plat of the survey of a township, or where an amendment thereto adds to the area of public lands included therein.

In relation to the possession and improvements of Dinneen, the Department finds the facts to be substantially as stated in your office decision. There can be no reasonable doubt from the evidence that through his agents the Blackburns, Dinneen has been in possession and entitled to the possession of the land in controversy since May, 1891, and that there had been expended thereon, through his said agents, in his behalf, in the opening of a valuable mine of coal, in running a tunnel several hundred feet in length, building a shute and track, and making other improvements thereon prior to the said hearing, not less than two thousand dollars. Work is shown to have been done on the claim under Blackburn's direction during the summer of 1895.

The good faith of Dinneen and not of the Blackburns is in issue in this proceeding. His good faith is not impugned by the testimony of certain persons who state that they were employed to work on the claim

and paid by Daniel J. Blackburn and had no personal knowledge of the relation of principal and agent between Dinneen and Blackburn. Such testimony raises no presumption, as counsel for Rose seems to argue, against the *bona fides* of such relation, nor does it shift the burden of proof in the case in any respect from the shoulders of the contestant to those of the contestee. As agent for Dinneen to perfect title to the coal land claim of the former, all acts done by Blackburn in that direction would inure to the benefit of his principal. Blackburn having accepted the agency could have no lawful possession of the land adverse to Dinneen while the agency existed. The possession of the former was the possession of the latter; and it will be presumed, in the absence of clear proof to the contrary, that Dinneen furnished the money used by Blackburn in making improvements on the land. It is unnecessary to discuss the acts done on the land by Rose. The foregoing disposes of all the questions presented in the case.

The decision of your office is affirmed. Rose's filing will be canceled as to the land in controversy, and Dinneen allowed to perfect title thereto.

PRACTICE—NOTICE—ATTORNEY—DEPARTMENTAL JURISDICTION.

POWER *v.* OLSON ET AL.

Notice of a motion for review, and oral hearing thereon, may be given to an attorney of record representing a party before the Department, and when so given is as fully conclusive upon such party as though served upon him personally.

The case of Parcher *v.* Gillen, 26 L. D., 34, cited and followed.

Secretary Bliss to the Commissioner of the General Land Office, January 29, 1898.
(W. V. D.)

October 18, 1897, you transmitted to the Department a motion by Gunder Olson, to vacate the departmental decision herein of July 28, 1897 (25 L. D., 77), so far as it relates to the S. ½ of SE. ¼ of Sec. 34, T. 136, R. 52, Fargo, North Dakota, land district.

The grounds upon which the Department is thus asked to vacate its decision of July 28, 1897, are, briefly stated—

First. That said decision is not founded upon any hearing of which Olson was served with any notice, and is therefore void;

Second. That the decision of July 28, 1897, by the present Secretary reviewed and reversed a prior decision of October 16, 1896, by a preceding Secretary and that one Secretary is without authority to review and reverse a decision by his predecessor.

Notice of the departmental decision of October 16, 1896, was duly served upon the parties November 12, following, and on November 21, Power filed a motion for review thereof, together with an application for oral argument in support of such motion.

Rule 114 of rules of practice, provides that a motion for review,

seasonably filed, "will act as a supersedeas of the decision until otherwise directed by the Secretary," and further provides—

> If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the judgment before rendered. But if upon examination proper grounds are shown the motion will be entertained and the moving party notified, whereupon he will be allowed thirty days within which to serve the same together with all argument in support thereof on the opposing party, who will be allowed thirty days thereafter in which to file and serve an answer, after which no further argument will be received.

December 18, 1896, upon examination thereof, the Department entertained Power's motion for review, granted his application for oral argument, fixing January 11, 1897, as the time thereof, and directed that Power "without delay, serve upon opposing parties a copy of the motion for review filed in this case, and at the same time notify them of the date fixed for the hearing."

Thereafter full and satisfactory proof was presented by Power showing, among other things, that S. G. Roberts, attorney for Gunder Olson, had been duly served with a copy of the motion for review, with a written notice of the time fixed for oral argument thereon and with a copy of an application by Power for a postponement of the time for such oral argument. This service was all had upon Roberts, personally, in his office in Fargo, North Dakota, December 23, 1896. Roberts was then, and had theretofore been, the attorney of record for Olson, and is the attorney who presented on behalf of Olson the motion which is now under consideration.

Notice of a motion for review and notice of a hearing may be given to an attorney of record representing the claimant before the Department, and when so given is as binding upon the claimant as if made upon him personally. Notwithstanding the notice to Roberts, his attorney, Olson did not make any objection to the time fixed for oral argument and neither did he file any brief in opposition to the motion for review although that motion, as served upon Roberts, contained a statement of the grounds upon which it was based and was accompanied by an argument and a citation of authorities in support thereof.

Upon consideration of the proof of service upon Olson's attorney of the motion for review, notice of hearing, and application for postponement thereof, the Department granted the application for a postponement.

January 21, 1897, resident counsel for Power filed an additional, or supplemental, argument in support of the motion for review, accompanied by satisfactory proof that a copy thereof had that day been transmitted by registered mail to Roberts, attorney for Olson, and since the filing of Olson's motion to vacate there has been filed in the case the returned registry receipt, signed by Roberts, showing the receipt by him of that brief.

April 23, 1897, resident counsel for Power were, by letter of that date, advised that the oral argument on the motion for review would be heard

May 26, 1897, and they were directed to serve notice thereof upon the opposing parties without delay. Satisfactory proof of such service was duly made, showing, among other things, that on April 29, 1897, there was transmitted, by registered mail, to Roberts, attorney for Olson, a copy of the letter fixing the time for such oral argument. Since the filing of Olson's motion, now being considered, there has been filed in the case the returned registry receipt, signed by Roberts, showing the receipt by him of that notice.

Olson made no response to the additional or supplemental brief filed on behalf of Power and neither was he represented at the hearing. Pursuant to the last notice, oral argument was had and thereafter the record and arguments, both written and oral, including the written arguments filed before the decision of October 16, 1896, were carefully considered, resulting in the decision of July 28, 1897, which Olson now asks to be vacated.

Sufficient has been said to show that Olson had full notice of Power's motion for review of the decision of October 16, 1896, and that he had the fullest opportunity to be heard thereon, both by oral argument and written brief. That decision was not vacated without notice to Olson of the proceedings resulting in its vacation, and the decision of July 28, 1897, was not rendered without a hearing or without a full opportunity upon Olson's part to be heard. The alleged want of notice is distinctly disproved by the record.

The second ground of the present motion, namely, that one Secretary is without authority to review and reverse a decision by his predecessor, is not well taken. At the time of the last decision the legal title had not passed from the government, and as to this tract the public land laws were still in process of administration by the land department. This matter was fully discussed and disposed of adversely to Olson's contention in the recent decision of Parcher *v.* Gillen (26 L. D., 34).

It is not claimed in the motion to vacate that the decision of July 26, 1897, is erroneous either in its statements of fact or in its conclusions of law, the only contentions against the same being those which are hereinbefore stated and discussed.

For the reasons given, the motion should be, and is, hereby denied.

RAILROAD GRANT—INDEMNITY—SPECIFICATION OF LOSS.

BARNES *v.* NORTHERN PACIFIC R. R. CO.

Lands within the overlapping limits of the grants for the Northern Pacific main and branch lines, embraced within the act of September 29, 1890, forfeiting the grant for the unconstructed main line, and excluded from the moiety taken on behalf of the branch line, can not be made the basis for indemnity.

The company is not entitled to plead the protection extended by the order of May 28, 1883, to indemnity selections made without designation of loss, if, after making such selection, it assigns an insufficient basis therefor, and subsequently an adverse right intervenes.

The case of Brown *v.* Northern Pacific R. R. Co., 24 L. D., 370, cited and followed.

Secretary Bliss to the Commissioner of the General Land Office, January 29, 1898.

(W. V. D.) (F. W. C.)

Thomas M. Barnes and the Northern Pacific Railroad Company have each appealed from your office decision of April 15, 1896, in which the company's indemnity selection as to the S. ½ of the NE. ¼ of Sec. 15, T. 17 N., R. 45 E., W. M., Spokane land district, Washington, is held for cancellation with a view to the allowance of the homestead application of Thomas M. Barnes and said application by Barnes is rejected as to the N. ½ of the NE. ¼ of said section 15 for conflict with the indemnity selection by said company.

The said NE. ¼ of section 15 is within the indemnity limits of the grant made to aid in the construction of the Northern Pacific Railroad opposite the portion of its main line in the State of Washington; the S. ½ thereof was included in indemnity selection list of December 17, 1883, and the N. ½ thereof was included in the indemnity list of March 20, 1884. Both of said lists were unaccompanied by a designation of losses as bases for the selections included therein, the same being made under departmental order of May 28, 1883 (12 L. D., 196), which exempted this company from the general reqirement that indemnity lists should be accompanied by a designation of the losses on account of which the indemnity is claimed.

On October 26, 1887, the company filed a list of losses on account of the selection lists referred to, the losses being designated in bulk and not arranged tract for tract, and on September 2, 1892, it filed supplementary lists arranging the lost lands tract for tract with the selected lands.

In the latter list, being the re-arranged list, the company designated the N. ½ of the SW. ¼ of Sec. 35, T. 9 N., R. 15 E., as a basis for the S. ½ of the NE. ¼ of said section 15 in dispute.

From the record contained in your office letter it appears that the tract designated as lost to the grant is within the overlapping limits of the grants for its main and branch lines and opposite the unconstructed portion of the main line the grant for which was forfeited by the act of September 29, 1890 (26 Stat., 496). Under the provisions of the sixth section of the said act of forfeiture the Northern Pacific Railroad Company was called upon to elect as to the alternate odd-numbered sections it would take in satisfaction of the moiety for its constructed branch line within the overlap above described, and the remaining odd-numbered sections within said overlap were directed to be restored to the public domain (11 L. D., 625). Acting under this direction the company excluded section 35, T. 9 N., R. 15 E., a portion of which was designated

as a basis for the selection of the said S. ½ of the NE. ¼ of section 15, the land in dispute.

The company was clearly not entitled to indemnity for the tract named, and this was the condition of the selection at the date Barnes tendered his homestead application (October 19, 1893) covering the entire NE. ¼ of said section 15, and in support of his application alleged that the land had been in the possession and occupancy of successive settlers since October, 1879. Upon said allegation of continued occupancy hearing was duly ordered, but upon the record made both your office and the local officers concurred in the opinion that the showing made did not evidence "a legitimate claim under the government laws."

In view of the insufficiency of the basis assigned by the company as to said S. ½ of the NE. ¼ part of the tract in question, your office decision holds that the company's selection was no bar to the allowance of Barnes' application, but as to the N. ½ of the NE. ¼, for which a good basis had been assigned, your office decision holds that the selection was a bar to, and for that reason rejected, Barnes' application as to said tract. From said decision the company and Barnes each appeal as to the portion of the tract awarded to the other.

Relative to the appeal by Barnes from the rejection of his application as to the N. ½ of the NE. ¼ of said section 15, it is clear, under the decisions of the Department, that the company's right to said tract, under its selection before recited, dated back to the time of the filing of the original list, on March 20, 1884. (Brown *v.* Northern Pacific R. R. Co., 24 L. D., 370, and cases therein cited.) Further, that the showing offered in support of the allegation of continued occupancy evidences that one Alma Phelps resided upon and was in possession of the quarter section to the north of that here in question, and his only connection with the tract here in dispute was that a portion of his improvements, covering a triangular piece of land, three or four acres, was included in a corner of his enclosure that extended upon the quarter section in question.

It is clear that the showing made does not evidence such a claim as would bar the company's right of selection on account of its grant.

Relative to the company's appeal from so much of your office decision as awarded the S. ½ of the NE. ¼ of said section 15 to Barnes, the company claims that its rights are protected as of the date of its first selection list (December 17, 1883), which was protected by the order of May 28, 1883, and that any subsequent designation of a loss, although insufficient to support the selection, could not serve to invalidate the same. This contention is not sound. While it is true that the original list of 1883 was protected by the order of May 28, 1883, yet by departmental circular of August 4, 1885 (4 L. D., 90), railroad companies were required, where indemnity selections have theretofore been made without specification of losses, to designate the deficiencies for which such indemnity

is to be applied before further selections would be allowed. It was evidently acting under this circular that the company filed these lists of 1887 and 1892 before referred to. After filing the list of 1892 the company stood upon the designation of losses as assigned, and if insufficient, it was unprotected by its selection unless a sufficient basis had been designated prior to the intervention of an adverse claim. That the basis assigned in the list of 1892, for the S. ½ of the NE. ¼ of section 15, the tract in dispute, was insufficient, is clear, and as Barnes' homestead application was presented before a sufficient basis was named, your office decision holding that said indemnity selection was no bar to the allowance of the application by Barnes must be, and is accordingly hereby, affirmed. Barnes' application will therefore stand rejected as to the N. ½ of the NE. ¼ of said section 15, and upon his completion of entry, should he elect to enter the S. ½ of the NE. ¼ of said section 15 within a reasonable time, to be fixed by your office, the company's selection will be canceled.

INDIAN LANDS—RESERVATION IN PATENTS.

CHIPPEWA PATENTS.

In the issuance of patents on Chippewa Indian allotments the reservation of the right of the United States to reservoir sites, as provided by act of June 7, 1897, should only be inserted in patents which cover lands included in the list of reservoir lands furnished by the Secretary of War.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 29, 1898. (W. C. P.)

I am in receipt by your reference, with request for an opinion on the matter therein presented, of a letter from the Commissioner of the General Land Office, dated December 21, 1897, in reference to the form of patents for allotments to the Chippewa Indians in Minnesota.

The Commissioner refers to the fact that certain schedules of allotments to the various bands of said Indians have been approved, quotes a portion of the Indian appropriation act of June 7, 1897 (30 Stat., 62–67), providing that lands acquired from the Chippewa Indians and sold under the provisions of the act of January 14, 1889 (25 Stat., 642), shall be subject to the right of the United States to construct dams for creating reservoirs in aid of navigation, and submits his question as follows:

> I have, therefore, to respectfully request to be informed what construction of said act this office shall adopt, and if it is held that the provision should only be inserted in such patents as embrace lands shown by the map aforesaid to be overflowed lands, the Secretary of War be requested to furnish such map for the use of this office.

The provision in question is found in a paragraph making an appropriation for completing surveys of the Chippewa lands under the act of 1889, and reads as follows:

> *Provided*, That all lands acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,"

approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commissioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title.

This law would apply to all lands within its purview, whether its provisions were mentioned in the patents for such tracts or not, but a wise policy would suggest its mention, and accordingly, on September 16, 1897, you, upon the suggestion of the Commissioner of Indian Affairs directed the Commissioner of the General Land Office to insert the provisions of said act of June 7, 1897, in "patents to be issued to allottees under the act of January 14, 1889."

The Commissioner of the General Land Office now points out the fact that the reservoirs in question are, as shown by the act of June 20, 1890 (26 Stat., 169), at the head-waters of the Mississippi and St. Croix rivers in the States of Minnesota and Wisconsin, and the Chippewa and Wisconsin rivers in the State of Wisconsin, and that a large portion of the lands to be allotted under said act of 1889, especially those on the White Earth and Red Lake reservations, have no connection with the head-waters of those rivers.

Nothing should be inserted in a patent from the United States that suggests a cloud upon the title or an incumbrance that has in fact no existence. The law in question, however, is quite specific in its description of the tracts which are to be affected. The Secretary of War is to furnish a list of such lands, "with the particular tracts appropriately described," and it is in the disposal "of each and every one of said tracts" that the provisions of said law are to "enter into and form a part of the contract of purchase or transfer of title." The provisions of that paragraph should be inserted in those patents only which cover lands included in a list furnished by the Secretary of War as provided in said act.

Approved, January 29, 1898.

C. N. BLISS, *Secretary.*

SWAMP LAND CERTIFICATION—JURISDICTION—INDIAN OCCUPANCY.

STATE OF FLORIDA.

If it is made to appear that lands have been erroneously included in a certified swamp land list, and patent has not issued thereon, the action of a preceding Secretary of the Interior in approving such list may be corrected by his successor.

The status of the Seminole Indians, as occupants of public lands in the State of Florida, is too indefinite in character to receive recognition in patents issued under the swamp grant.

Lands occupied and cultivated by said Indians can not, however, be held as of the character contemplated by said grant, and if, on due investigation, lands so occupied and improved appear to have been certified to the State under said grant, the certification thereof should be revoked.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 31, 1898. (W. C. P.)

May 28, 1897, you referred to me a communication from the Acting Commissioner of Indian Affairs, dated May 26, 1897, for

opinion as to the authority of the Secretary to modify the decision of February 13, 1897, approving the list of lands to be patented to the State of Florida, so as to omit therefrom absolutely the particular tracts occupied by Indians, or upon which they have improvements, and reserve the same for their use and benefit; and also to insert a clause in the patents issued to the State expressly recognizing and preserving the rights of the Indians to lands which they occupy, or upon which they have improvements, as recommended by the Commissioner of Indian Affairs.

The facts, briefly stated, are as follows:

February 13, 1897, your predecessor, Secretary Francis, approved Florida swamp land list No. 87, which included certain unsurveyed land in what is commonly known as the "Everglades." In March, 1897, the Commissioner of Indian Affairs addressed a letter to you relative to the encroachment of a white settler upon lands said to be included in this list, which it is alleged had been occupied and improved by Indians. In that letter the Commissioner recommended that the approval of said swamp land list be modified, so as to except the tracts occupied and improved by Indians from the lands to be patented; and that there be inserted in the patent to be issued to the State a clause expressly reserving the rights of the Indians to the occupancy of lands possessed and improved by them at the date of patent.

From an examination of the opinion of Secretary Francis rendered at the time he approved said swamp land list (see 24 L. D., 147), it appears that the matter of the occupancy of lands in the "Everglades" by Indians had theretofore been referred by the Secretary to the Commissioner of Indian Affairs, and in response the Commissioner had stated:

If the Indians now have the right of occupancy of the lands within the "Everglades," and the United States should convey such lands by patent to the State of Florida, I am of the opinion that the State would take title subject to the right of occupancy of the Indians (see Beecher *v.* Wetherby, 95 U. S., 517, and the authorities therein cited).

This statement of the Commissioner was approved by Secretary Francis in the following words:

The views of the Commissioner of Indian Affairs respecting the rights of any Indians occupying the lands in question are concurred in.

The question as to the extent of the authority of the Secretary of the Interior to review and modify a prior decision was presented and fully discussed in the case of Parcher *v.* Gillen (26 L. D., 34). The pro-

visions of law and the authorities bearing upon the question are cited and quoted from and it is not deemed necessary to repeat them here. The conclusion then reached is formulated as follows:

A consideration of these decisions interpreting the statutes defining the authority and duties of the officers of the land department, clearly demonstrates that so long as the legal title remains in the government the lands are public within the meaning of those statutes, and the laws under which such lands are claimed, or are being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior.

And again it was said:

So long as the legal title remains in the government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law.

The grant of swamp and overflowed lands made by the act of September 28, 1850 (9 Stat., 519), provides for the issuance of patents and, therefore, until patent shall have issued the legal title remains in the United States and the Secretary has full power and authority to correct any mistake in the certification of lands as passing under this act.

In Michigan Land and Lumber Company *v.* Rust (168 U. S., 589, decided December 13, 1897), in discussing a similar question arising under the swamp land act of 1850, the court said:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. (Strother *v.* Lucas, 12 Pet., 410, 454; Grignon's Lessee *v.* Astor, 2 How., 319; Chouteau *v.* Eckhart, 2 How., 344–372; Glasgow *v.* Hortiz, 1 Black, 595; Landeau *v.* Hanes, 21 Wall., 521; Ryan *v.* Carter, 93 U. S., 78.) Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat., sec. 2449; Frasher *v.* O'Connor, 115 U. S., 102,) but whenever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, (Bagnell *v.* Broderick, 12 Pet., 436–450,) and while so remaining the grant is in process of administration, and the jurisdiction of the Land Department is not lost.

It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. (Cornelius *v.* Kessel, 128 U. S., 456; Orchard *v.* Alexander, 157 U. S., 372–383; Parsons *v.* Venzke, 164 U. S., 89.) In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

A patent has not yet been issued for the lands described in this Florida list 87, and if it be made to appear that lands were included in such certified list which should not have been so included, the action of a preceding Secretary in approving and certifying the list may be, and should be, corrected.

Said act of 1850 granted to the several States the "whole of those swamped and overflowed lands, made unfit thereby for cultivation,

which shall remain unsold at the passage of this act," and has been construed in numerous decisions of the supreme court and of this Department as a grant *in praesenti* passing to the State the title to such lands as should thereafter be identified as of the character embraced in the grant.

A question now presented is whether the occupancy of such Seminole Indians as remained in Florida after the tribe, as such, was removed to the country west of the Mississippi river, gives them any rights to the land occupied, and, if so, its effect upon the grant to the State. If the Indians have any right at all to swamp and overflowed lands in Florida, it is merely that of occupancy, and the only effect it could have would be to delay the right of possession in the State. This question was presented in the matter of The Stockbridge and Munsee Indians *v.* State of Wisconsin, and, in my opinion of July 12, 1897 (25 L. D., 17), it is discussed and the authorities bearing upon it are cited and quoted from. Upon further examination I find no reason for a conclusion differing from the one then reached which is formulated in said opinion as follows:

> The only conclusion to be deduced from these authorities is that the State took the fee to this land at the date of the grant of September 28, 1850, but that its right of possession was held in abeyance until such time as the Indian right of occupancy should be surrendered by them or otherwise ended by the United States.

If these Indians have any right of occupancy in any of the lands which thus passed to the State of Florida, that right can be determined only by the United States. This doctrine was announced as early as 1856 in the case of Fellows *v.* Blacksmith *et al.* (19 How., 366), and has has been accepted as the correct rule since that time. In Beecher *v.* Wetherby (95 U. S., 517), speaking of the Indians' right of occupancy, the following language is used:

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only a naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States.

Whether the government will issue a patent for lands to which an Indian right of occupancy exists, is a question of executive policy rather than of law. In the case of State of Wisconsin (19 L. D., 519), this Department refused to approve lists of lands in the Lac de Flambeau Indian reservation as passing under the swamp land grant, on the theory that the Indians had a right of occupancy in said lands and that

> nothing should be done which would tend to disturb or cloud that right while it exists, or which might appear to evidence a greater right in the State than it really has or can get at the present time.

The Seminole Indians, by the treaty of May 9, 1832, proclaimed April 12, 1834 (7 Stat., 368), relinquished to the United States "all claim to the lands they at present occupy in the Territory of Florida," and

agreed to emigrate to the country assigned to the Creeks, west of the Mississippi river, within three years. This treaty contains no provisions recognizing the right of any of these Indians to remain in Florida after that time. While the main body of the Seminoles was subsequently to said treaty, and before the grant to the State of swamp lands, removed in accordance with the provisions of said treaty, yet some were left behind and have remained in Florida until this time. Some of these are said to be upon lands embraced in this list 87. The government in its dealings with this tribe has, however, always recognized those in the Indian Territory as the Seminole Nation and all payments under said treaty have been made to them. In later years, however, some recognition has been given those remaining in Florida by the appropriation of money for their education and civilization. Appropriations have also been made for the purchase of homes for them. It will thus be seen that the question as to what rights, if any, these Florida Seminoles have in the lands which they are now occupying is involved in uncertainty, and it seems to me that their rights are too uncertain to justify recognition in patents issued under the swamp land grant.

Another question has presented itself in the investigation of this matter, which it seems proper to bring to your attention. From the various communications upon which the report of the Commissioner of Indian Affairs of May 26, 1897, was made, it seems that these Florida Seminoles have for many years had settlements and improvements upon different tracts of land which are apparently included within said list 87. If it be a fact, as is indicated by these communications, that portions of this land have been occupied and improved by these Indians, the inference would be that such tracts are not of the character contemplated by the granting act. It will be noticed that the fact that any portion of the land in question is actually occupied and improved is not adverted to in the decision of October 10, 1894 (19 L. D., 251), directing the issuance of patent when the State should furnish a meander survey giving the exterior metes and bounds of the "Everglades," accompanied by proofs that said survey did not include within its lines any lands not of the character granted. The proof furnished by the State as set forth in the decision of February 13, 1897 (24 L. D., 147), is general in character and nothing is said as to whether there are tracts within the limits of the survey actually occupied. From an extract from a report of the Commissioner of Indian Affairs found in said decision, it seems uncertain as to whether the land occupied by the Seminole Indians is within the limits of the survey made as a basis for a proposed listing and patent. The information now furnished by the report of the Commissioner of Indian Affairs and the accompanying papers, strongly suggests that there is land within said survey which is improved and cultivated and not swamp and overflowed and therefore not of the character contemplated

by the granting act. At least there seems to be sufficient in these papers to justify a further investigation, so that the mistake, if there be any, may be corrected before the Department by the issuance of patents, shall have been deprived of the authority to make such correction.

I am of opinion that the matter is still within the jurisdiction of this Department and that you have authority to revoke the approval of said list for the purpose of correcting any mistake that may have been made therein, and that the information furnished by the papers now presented to me suggests the need of further investigation to determine whether any of the land embraced within the limits to be covered by said patent is not of the character contemplated by the granting act. If it be found that there is land within these limits which at the date of the swamp grant was not of the character embraced in the granting act, then the location of such tracts should be ascertained so that the same may be excepted from list 87 and from any patent issued thereon.

Approved, January 31, 1898,

C. N. BLISS, *Secretary*.

MINING CLAIM—PROTEST—JURISDICTION—DEPUTY MINERAL SURVEYOR.

FLOYD ET AL. *v.* MONTGOMERY ET AL. 136

A transferee of a mining claim, whose interest is acquired during the pendency of departmental proceedings involving the status of said claim, takes no right better than that possessed by his grantor.

In the case of proceedings had on a protest against a mineral application, where the protestants, as shown by the record, are without interest, and hence not entitled to be heard as appellants, the Department may properly, by summary order, direct the General Land Office to forward the record, without awaiting the regular course by appeal, from the decisions below, where such action seems necessary to the termination of vexatious litigation.

An order for a hearing limited to a charge that the entryman had failed to expend the statutory sum for labor and improvements prior to the expiration of the period of publication, is in effect an adjudication that the fact that the entryman had failed to file the surveyor-general's certificate, as to such expenditure, during said period, is immaterial, where the failure to thus file such certificate is admitted by the entryman, and the effect of such failure is brought in question by the adverse parties.

Parties protestant, that allege an interest, and at the hearing assume without objection the burden of proof, will not be heard to say, for the first time when the case comes before the Department for disposition, that the burden of proof was wrongly placed on them.

The statutory expenditure required to be shown by section 2325 R. S., contemplates that five hundred dollars' worth of labor shall have been expended, or improvements to the same value made, for the development of the mining claim.

A deputy United States mineral surveyor is within the intendment of section 452 R. S., and consequently disqualified, under the prohibitive provisions thereof, from acquiring title to a mining claim in which he was interested at the time of his official report thereon, and at the date of application for patent.

The fact that a deputy mineral surveyor is disqualified to report upon the expenditures made on a mining claim, by reason of his interest in the claim at such time, does not operate to impeach the certificate of the surveyor general based on said report, if the facts as to such expenditures are correctly stated in said report.

The cases of State of Nebraska *v.* Dorrington, 2 C. L. L., 647; Dennison and Willits 11 C. L. O., 261; and Lock Lode, 6 L. D., 105, overruled.

Secretary Bliss to the Commissioner of the General Land Office, February 2, 1898.
(W. V. D.) (G. B. G.)

On January 3, 1893, Gus Hull, I. L. Stebbins, John Tompkins, W. H. Craigue, and W. S. Montgomery located a mining claim known as the Hull City Placer, in the southeast quarter of section 20, in township No. 15 south of range No. 69 west of the sixth principal meridian, designated as lot No. 8106, embracing 38.894 acres.

On May 20, 1893, W. H. Craigue, "for himself and his co owners" (the parties above named), filed in the United States Land Office application for a patent, due notice of which was given by publication from May 26, to July 28, 1893.

On August 24, 1893, a protest was filed against the allowance of said placer entry, signed by W. W. Elliott, C. S. Elliott, J. E. McKinley, and John Mears, but was not sworn to or corroborated. This protest is known as the protest of W. W. Elliott *et al.*, and it alleged, substantially, that they were the owners of the "Chillicothe" lode claim; that said lode claim conflicted with the placer, and was located prior thereto; that said placer claim was not on placer ground, and was located for the purpose of securing a townsite. The local officers took no action on this protest.

On April 4, 1894, final certificate of entry issued to W. S. Montgomery, C. C. Hathaway, John Tompkins, I. L. Stebbins, Gus Hull, A. D. Craigue and James F. Smith on the said Hull City Placer. It is recited in the certificate that the parties above named

this day made payment to the receiver in full, amounting to the sum of ninety-seven and $\frac{50}{100}$ dollars, (and that) upon the presentation of this certificate to the Commissioner of the General Land Office, together with the plat and field notes of survey of said claim and the proofs required by law, a *patent* shall issue thereupon to the said W. S. Montgomery, C. C. Hathaway, John Tompkins, I. L. Stebbins, Gus Hull, A. D. Craigue and James F. Smith.

On May 25, 1894, Mrs. J. B. Gedney, for herself and co-owners, filed a protest in the General Land Office, alleging ownership in and prior location of the "Scottish Chief" lode, and that a valid discovery of a vein had been made on a part of said lode in conflict with the placer.

On the same day, May 25, 1894, A. J. Lauterman, a stockholder and officer in the Wilson Creek Consolidated Mining and Milling Company, filed a protest on behalf of said company, alleging owenership of the "Minnie Bell," "Little Effie," "Little Giant" and "Little Dessie" lode claims, in conflict with said placer; that said lode claims were the prior locations, and that the existence of said lode locations was well known to the placer claimants at the time of their application for patent.

On June 20, 1894, your office dismissed the two last named protests for lack of corroboration, but, on the same day and in the same letter, the local officers were directed to allow Elliott *et al.* a hearing on due application, and should a hearing be had that Gedney *et al.* and the Wilson Creek Consolidated Mining and Milling Company be permitted to intervene. July 23, 1894, Gedney *et al.*, and the Wilson Creek company respectively refiled their original protests and made application to so intervene.

On the application of Elliott *et al.*, of date August 16, 1894, the local officers ordered a hearing, and set November 27, 1894, as the day of trial. On that day the placer claimants and all of the protestants, including the Wilson Creek Consolidated Mining and Milling Company, appeared by counsel, and the hearing proceeded.

On March 8, 1895, the local officers rendered their joint decision, wherein it was recommended that all of said protests be dismissed, and the placer entry be passed to patent.

On April 10, 1895, J. B. Gedney and the Wilson Creek Company appealed, alleging substantially:

1. Error not to have found from the evidence that known lodes existed within the territory covered by said entry at date of filing application for patent.

2. Error not to have found that no facilities for placer mining exist on said claim, and that said claim was not located in good faith for placer mining purposes.

3. Error not to have decided upon the evidence whether the entry was placer mining ground.

In your office decision of June 18, 1895, on these appeals, your office held, in substance:

1st. That it did not appear from the testimony that any lode location in conflict with said entry contains a valuable vein of mineral bearing quartz or rock in place, and that "not one of them is shown to have been operated for mineral in place, nor does it appear that one of them can be so operated with profit."

2d. That as to the question of placer mining facilities, the record and evidence presented no question, except as to the question of the sufficiency or insufficiency of the water supply, and that it did not appear "impracticable for claimants to operate said mine at a profit with existing facilities."

3d. "There is nothing in this case showing bad faith on the part of the claimants, or that said claim was originally located for other than placer mining purposes."

4. Appellant's third exception is not well taken.

The entry herein was allowed upon application made under the placer mining laws. The usual *ex parte* proofs were filed in support of said placer application in consequence of which you allowed entry to be made.

None of the protests or affidavits filed against said entry charge that the land entered is non-mineral in character. The charge is that the land contains known lodes or veins, and a decision is made on this issue.

In the absence of a specific charge that the land is non-mineral in character you were not called upon to decide upon this point nor to consider the evidence thereon offered over the objection of contestees. However, in my opinion, the evidence fails to show that said land entered cannot with existing facilities be operated for the placer gold it contains.

On October 24, 1895, your office in its decision on motions for review filed by the protestants said:

Upon examining this case it appears that four material questions were raised by the protestants, to wit: the existence within said placer claim of the lode claims by them specified; that said lode claims embrace well defined and valuable veins bearing mineral; that said lode claims were known to exist at the time the application for patent for the placer claim was filed, and that the land embraced in the placer entry is not placer mining ground.

Upon each of said questions the decision complained of is, in effect, against the contestants, and, upon a further examination of the records, I still adhere to the conclusions announced in said decision, inasmuch as it has not been shown to my satisfaction that there was any material error therein. 13 L. D., 562.

The Wilson Creek Company appealed to the Department, but the other protestants did not.

The errors alleged on appeal were as follows:

1. Not to have found from the evidence that valuable known lodes were shown to exist within the placer limits at date of application.
2. Not to have found that the evidence was insufficient to prove the land valuable for placer-mining purposes.
3. Not to have found bad faith on the part of the placer claimants.
4. Not to have therefore held the entry for cancellation.

On September 11, 1896 (unreported), the Department affirmed the decisions of your office, and held:

1. That the only issue properly before the Department under the allegations of the protest and involved in the hearing as ordered by your office, are the questions of fact as to the character of the land already indicated.
2. That while the question of bad faith raised by appellants' contention that claimants were seeking title, not for placer mining but for townsite purposes, was not embraced in the order for a hearing, it "was the subject of some testimony thereat, which shows that the land had no value for townsite purposes until long after the entry was made," and that "your office properly held that bad faith in that regard was not shown."
3. That the protest contained no allegation of any irregularity on the part of the deputy surveyor, nor as to expenditure, nor was such an allegation considered by your office. It is therefore not properly before the Department, and will not be considered here.
4. The Department fails upon careful examination to discover any error in the findings of your office. The decision complained of is therefore affirmed. The entry will remain intact, subject to such further examination and consideration of the proofs as may be deemed necessary.

The Wilson Creek Company filed a motion for a review of this decision, which was on December 3, 1896 (23 L. D., 476), denied.

Pending these proceedings six other protests were filed in your office, only two of which need be mentioned here for reasons which will appear further on—to wit: The protest of W. S. Floyd, filed in the local office

on September 18, 1896, and the protest of the Wilson Creek Consolidated Mining and Milling Company, filed therein November 27, 1896.

These protests allege, substantially:

1st. That the land is not placer mining ground.

2d. That said entry was not made in good faith, but for speculative purposes.

3d. That the entrymen have not discovered mineral upon the land embraced in said entry as required by the placer mining law.

4th. That the entrymen failed to expend the statutory sum of $500 for labor and improvements prior to the expiration of the sixty days of publication.

5th. That said Hull City Placer as entered contains valuable lodes known to exist prior to date of placer application.

Your office considered these protests, and had prepared a proposed draft of a letter ordering a hearing thereon, when, on January 14, 1897, before the promulgation thereof, Mr. W. K. Gillette, one of the present owners of the Hull City Placer, addressed a communication to my predecessor, Mr. Secretary Francis, petitioning him to summarily dismiss the pending protest as vexatious, and direct the immediate issuance of patent on the placer entry.

The Department, on January 20, 1897, addressed a letter to your office, referring to said communication, and requested a report at once as to the propriety of issuing the instructions asked for. In reply thereto, your office transmitted the proposed draft of your letter ordering a hearing, above referred to.

An oral hearing was ordered before the Assistant Attorney-General in the matter of Gillette's petition, at which hearing the protestants and the placer claimants were represented by counsel, after which my said predecessor issued an order directing a hearing before the local officers, which order is as follows:

FEBRUARY 13, 1897.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Referring to your letter ("N") of January 21, 1897, whereby you transmitted certain protests filed against the Hull City Placer, mineral entry No. 421, Pueblo, Colorado, land district, at the request of the Department, with the view of ascertaining if it were desirable to take summary action in regard to said protests, I have to say that on examination of the matter it is determined that your office be instructed to order a hearing on the protests, for the purpose of ascertaining whether the entrymen failed to expend the statutory sum of $500.00 for labor or improvements prior to the expiration of sixty days period of publication.

The inquiry should be confined to this subject only, and you will so direct the local officers.

The papers are herewith returned for your action in accordance with the above.

Very respectfully,

(Signed) DAVID R. FRANCIS, *Secretary.*

Pursuant thereto, on February 18, 1897, your office ordered a hearing. All of the protestants hereinbefore named were notified by the local officers of the day set for hearing, but all of said protestants, except W. S. Floyd and the Wilson Creek Consolidated Mining and Milling

Company, made default. This hearing was begun on May 27, 1897, and was concluded June 5, 1897.

On October 29, 1897, the protestants who participated in the hearing moved to re-open the case, on the ground of newly discovered evidence. This motion was denied on November 1, 1897, on which date the register and receiver in a lengthy decision held, in summing up, as follows:

> Entry having been made presupposes that $500 had been expended for labor and improvements, and that the entrymen had complied with all the requirements of the law, and it becomes necessary for the protestants to assume the burden of proof and prove the contrary, if possible, by a preponderance of the evidence. This, in our opinion, they have not succeeded in doing, while on the contrary, the claimants have shown by satisfactory evidence at least $680 to have been expended for labor and improvements upon the placer prior to the expiration of the period of publication.
>
> We accordingly recommend that the protests of the Wilson Creek Consolidated Mining and Milling Company and A. H. Cronkhite, Scott Williams, William Driver, C. L. French, Bell R. Graham, James M. Turner, W. E. Ansel, Ole Hanson, H. E. Hoyt, Owen Prentiss, Robert Mann, John Haughey, and Andrew Haughey, having made default, their protests are therefore dismissed.

On November 30, 1897, the protestants filed an appeal from the decision of the local officers refusing to re-open the case, and on November 29, 1897, an appeal from said decision on the merits of the case.

In the meantime, on November 2, 1897, the local officers forwarded the record in the hearing with their decision, which record your office, on November 15, 1897, returned to the local office to await the time allowed for appeal under the rules.

On November 13, 1897, the placer claimants again petitioned the Secretary of the Interior, the general purpose of which is disclosed by the following departmental order, issued on November 23, 1897, after an oral hearing had on said petition:

> On January 14, 1897, Mr. W. K. Gillett, one of the placer claimants herein, petitioned my predecessor, Mr. Secretary Francis, to direct the Commissioner of the General Land Office to summarily dismiss as vexatious the four protests then pending against the Hull City Placer entry, and to order the immediate issuance of patent for the placer claim.
>
> An oral argument on this petition was ordered and heard by the Assistant Attorney General for the Department, and thereupon Mr. Secretary Francis made the following order:
>
> * * * * * * *
>
> (This is the order of February 13, 1897, herein before set out in full.)
>
> * * * * * * *
>
> A hearing was had in pursuance of said order, and the evidence taken thereat has been transmitted to your office, together with the recommendation of the local officers thereon.
>
> On November 13, 1897, counsel for the placer claimants filed another petition, addressed to the Secretary of the Interior, praying the "exercise of the supervisory power with which he is vested by statutes, to the end that immediate action may be had in this cause and patent for said M. E. No. 421 issued under a special order."
>
> An oral argument has been heard on this petition, all of the parties in interest being represented by counsel.

In view of the premises, and for reasons which will be fully set forth in the decision of the Department on the merits of the case, I have to direct that the evidence taken at the local office as aforesaid be examined by your office, and that it and all the papers in the case be transmitted to the Department, together with the recommendation of your office upon the question upon which the hearing was ordered by departmental letter of February 13, 1897. It is desired that this action be had at the earliest time practicable, the matter being treated as special, to the end that final action by the Department may be had at an early day.

In this connection, it is proper to give the reasons which controlled the Department in directing your office to forward the record made at the hearing held pursuant to the order of February 13, 1897, without permitting the case to take the regular course of appeal from the decision of the local officers to your office, and from your office to the Department, and thereby probably postponing the ultimate decision for more than a year.

It may be premised that there can be no doubt that the supervisory control of the Secretary of the Interior over the public lands, may be exercised directly and without reference to appeals. See Knight *v.* Land Association (142 U. S., 162.)

The *authority* to make the order, *supra*, is conceded by counsel for the protestants, but the propriety and justice of the order are denied. It is thought that the action of the Department in this regard was both proper and just, and that when the whole record is considered there is little room for difference of opinion as to the correctness of this view.

The record history of this case shows that every material allegation embraced in the pending protests goes to questions which have been tried and determined in favor of the placer claimants, except the charge that the entrymen failed to comply with the law in the matter of expenditure, and failed to file the certificate of the surveyor-general in proof thereof before the expiration of the period of publication.

The Wilson Creek Company was a party to that litigation, and it was largely upon the allegations of its protest that the issues therein were framed, so that so far as that company is concerned the issues so tried and determined are clearly *res judicata.* The entire interest of the protestant Floyd rests in his ownership of the "Little Orphan Boy," an alleged lode claim in conflict with said placer. This lode claim had been the property of the Wilson Creek Company since August 10, 1895, including the time of the first hearing. It was conveyed to Floyd by the Wilson Creek Company September 15, 1896, and his protest against the placer entry was executed and verified by him on the following day and filed in the local office on the third day thereafter. If the Little Orphan Boy embraced a known lode within the placer claim at the time of the first hearing, the Wilson Creek Company by its protest should have put that fact in issue along with the other matters therein alleged against the placer claim. This it did not do, and if instead of openly presenting its entire complaint against the placer entry it purposely withheld this charge for a second or

further protest, in the event of the failure of its other charges then made, the company may very reasonably and justly be held to the decision made upon the first hearing. The company's failure to mention the Little Orphan Boy lode in its protest at that time, is not attempted to be justified or excused, and having thus voluntarily rejected an opportunity to fully present all of its objections to the placer entry it should be held to have waived such as were not presented. While again noting that no mention of the Little Orphan Boy lode was made in the protest upon which the first hearing was had, this statement should not be permitted to carry with it any inference that the existence of that lode was not a subject of actual controversy at that hearing. The evidence then taken has been again examined and it shows that the alleged known presence of that lode within the limits of the placer was made the subject of specific inquiry by both parties in the taking of testimony. The claim of the protestants in that behalf was rejected by the decisions of the local office, your office, and the Department, holding that there were no known lodes within the placer claim. Under all the circumstances, the inference is strong that the conveyance to Floyd was made for the purpose of introducing a new party in the case, thereby destroying the identity of the parties and escaping the effect of the previous decisions. However this may be, it appears that Floyd's purchase of the Little Orphan Boy was made after the departmental decision of September 11, 1896, and before the decision on review of December 3, 1896, and therefore while the matter was pending before the land department, of which proceedings Floyd had constructive if not actual notice. Obviously, by the conveyance to him, he obtained no better rights than were possessed by his grantor, the Wilson Creek Company.

All of these protestants are therefore concluded by the record and have the standing of protestants without interest, and as such have no right as appellants in the sense contemplated by the rules of practice. Even if it were established that there had not been five hundred dollars worth of labor expended or improvements made in the development of the placer that would not vitiate or avoid the placer location and the resulting right to its occupation and enjoyment as a placer claim, however much it might avoid the existing entry and prevent the issuance of a patent thereon. See Draper *et al. v.* Wells *et al.* (25 L. D., 550).

In this view, the propriety of departmental order of November 23, 1897, is manifest. The protests were alleged to be without merit and purely vexatious, and, so far as the alleged interests of these protestants were involved, this appeared to be so. Common justice to the placer claimants, therefore, demanded that a decision be reached at the earliest practicable time on the one allegation made which had not been fully investigated by the government, the truth of which, if established, would result in the denial of a patent to said claimants.

The first question arising on the record as now presented is, the effect of the order of February 13, 1897, (*supra*). It instructed your office

> to order a hearing on the protests for the purpose of ascertaining whether the entryman failed to expend the statutory sum of $500 for labor and improvements prior to the expiration of the sixty days' period of publication. The inquiry should be confined to this subject only, and you will so direct the local officers.

In the first place, this order excluded all other questions of fact, save the one specified. So much is not open to argument. It is further believed that it amounted to an adjudication in this case, that the fact that the placer claimants had failed to file the surveyor-general's certificate prior to the expiration of the period of publication was not material. This is believed to be so, because (1) the fact that it was not filed within that time was admitted by the placer claimants; (2) the contention of the protestants was that the failure to so file it was fatal to the application for patent, and (3) if it was thus fatal there would have been no occasion for a hearing.

If the Department had been at that time of opinion that the failure to file this certificate was fatal to the application for patent, the end of the case had then been reached; a hearing is not only not necessary, but it would have been utterly useless to have ordered a hearing, knowing at the same time that eventually the case must be decided against the placer claimants on the indisputable and undisputed proofs then before the Department. If it be said that this was a question of law which was not considered at the time, but reserved for a final decision on the whole case, the answer is, that the record precludes any such theory, and it is remembered by law officers of this Department who are familiar with the history of the case that it was not only considered, but that it was determined that the effect of the order directing a hearing was necessarily such that a decision in terms on this question was unnecessary.

Moreover, if it were an undecided question in this case, the Department has recently settled the principle involved against the contention of the protestants in the case of Draper *et al. v.* Wells *et al.* (25 L. D., 550). In that case it was said:

> With the record in the present case are affidavits showing the expenditure of five hundred dollars in labor and improvements on the claim before the expiration of the period of publication, but these affidavits were filed several days after that period.
>
> The first question presented in regard to these affidavits is whether they were filed in time to authorize their consideration; in other words, is the provision of the statute as to the time when proof of expenditure in labor and improvements shall be filed mandatory or only directory. The thing to be accomplished, the essence of the statutory requirement, is the development and improvement of the claim by the expenditure thereon of a stated amount in labor or improvements by the applicant or his grantors as a condition to patenting the claim. The proof thereof is required for the information and guidance of the government and not for the information or guidance of adverse parties. Differing from the annual expenditure of one hundred dollars required by law, this five hundred dollar expenditure is not a condition to the maintenance of a mineral location. It is only a prerequisite to a patent, the

obtaining of which is not necessary to the continued occupation and enjoyment of a mineral claim. The failure to make this five hundred dollar expenditure does not subject the claim to the acquisition of rights by others and much less would a failure to furnish proof of such expenditure do so. The time of filing such proof does not affect the rights of others prejudicially or at all.

Much argument has been submitted on both sides of this case on the question of the correctness of the action of the local officers in placing the burden of proof at the last hearing on the protestants. There can be no doubt that the action of the local officers in this regard was justified by the order pursuant to which the hearing was had. The language of Secretary Francis directing the hearing shows it was intended that the burden of proof should be placed on the protestants. This, probably for the reason that inasmuch as the placer claimants had submitted proof of the required expenditures which had been accepted by the government as sufficient, the burden of proof should be placed on any one alleging that said proof was false. The burden of proof rests upon the party against whom judgment would be given were no proof to be offered on either side. But it is not necessary to pass on the correctness of the proceedings in this regard. The protestants assumed the burden of proof at the hearing without objection, and in their view of the status they occupy in this litigation, if they are parties in interest, they are concluded, and can not raise that question here for the first time. From the standpoint of the government, it is not thought material where the burden was placed. The only interest the government has or had in this controversy is that a full, fair and impartial investigation be made of the alleged failure of the claimants to comply with the law in the matter of expenditures, and it is believed that this has been done.

Another question, preliminary to an intelligent consideration of the evidence adduced, grows out of the vagueness of the language used in the departmental order (*supra*) directing the hearing.

The hearing was ordered

for the purpose of ascertaining whether the entrymen failed to expend the statutory sum of $500 for labor or improvements, etc.

This language might be construed to mean that it was contemplated that, if proof of the expenditure of $500 was made on this claim for labor or improvements, the requirements of the law had been met, whether it was shown to consist of an expenditure of labor or improvements or both, without regard to the actual value of the labor performed or the improvements made, and without regard to whether such labor performed or improvements made contributed in greater or less measure or at all towards the development of the placer claim.

Section 2325 of the Revised Statutes provides, among other things, that:

The claimant, at the time of filing this application or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors.

It was not contemplated in the enactment of this statute that the *expenditure* alone of $500 on a mining claim, either in labor or improvements, or both, should be proof of a compliance with its requirements, nor was it contemplated that work done or improvements made on the claim, but not for the benefit of the claim in the development of its mineral resources, should be accepted as a proof of such compliance. If this were not so, then the payment of $500 for one day's work, or the expenditure of that amount for the building of a house for domestic purposes would satisfy the requirements of the statute.

Labor and improvements within the meaning of the statute are deemed to have been had on a mining claim . . . . when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, etc. Smelting Company *v.* Kemp, 104 U. S., 636.

The language of the statute considered, the order of February, 1897, directing the ascertainment "whether the entrymen failed to expend the *statutory* sum of $500 for labor and improvements," meant that the inquiry should be directed to the ascertainment of the fact whether the entrymen had expended "five hundred dollars' *worth* of labor," or made "five hundred dollars'" *worth* of improvements for the development of the claim. In this view, the amount paid for the labor performed, or expended for the improvements made, is not material, except as these facts are valuable in ascertaining the *worth* of the labor and improvements, for the purpose contemplated by the statute. Nor is it material who actually performed the labor or made the improvements, or whether it cost the claimants anything, if they are of value as placer improvements, and were performed or made for the claimants.

The evidence has been considered with these general principles in view. This consists of nearly one thousand pages of testimony detailed by the witnesses at the trial, as shown in a number of exhibits.

The certificate of the United States surveyor-general, filed December 1, 1893, in the United States land office, at Pueblo, Colorado, is predicated upon a report of U. S. deputy mineral surveyor James F. Smith, dated September 22, 1893, and shows the following improvements on the Hull City placer:

(1) A shaft which bears from cor. No. 1 S. 15° 35′ E. 800 ft., 4 x 6 ft., 10 ft. deep. Value, $75.00.

(2) A circular well which bears from cor. No. 1 S. 14° 45′ E., 540 ft., 5½ ft. diam., 24 ft. deep. Value, $240.

(3) A shaft which bears from cor. No. 1 S. 20° W. 750 ft., 4 x 6 ft., 10 ft. deep. Value, $75.

(4) A shaft which bears from cor. No. 1 S. 29° 24′ E. 348 ft., 4 x 6 ft., 10 ft. deep. Value, $75.

(5) A circular well which bears from cor. No. 1 S. 3° 59′ E., 458 ft., 6 ft. diam., 17 ft. deep. Value, $170.

Shaft No. 1.

It was asserted by the protestants that this shaft never existed, and their witnesses testified that there was no evidence on the ground to indicate that there ever had been a shaft at the point designated on the

official plat. The evidence shows, however, that it was incorrectly located on the plat, and that such a shaft as therein described was found about one hundred feet from that point. It was sunk for the placer claimants to a depth of ten feet, in January, 1893, by John Tompkins and Gus Hull, working eight or ten days each.

Circular Well No. 2.

Was sunk by Tompkins, Hull, Swanson and Bennett, for the placer claimants, in January and February, 1893, to a depth of twenty-four and a half feet.

Shaft No. 3.

Was sunk for the placer claimants fifteen feet deep, in January, 1893, by Tompkins, Hull, Bennett and Berry.

Shaft No. 4.

Was sunk for the placer claimants by Hull, Bennett, and the McNary brothers, during the period of publication, ten feet deep.

Well No. 5.

Was sunk to a depth of about ten feet before the Hull City placer was located; afterwards and during the spring of 1893, it was sunk by Tompkins, Hull, Summers and Bennett, to a depth of seventeen feet.

In addition to these, it is shown that the placer claimants placed other improvements on the claim after the third day of January, 1893, and before the expiration of the period of publication. These are designated on exhibit 1, as "Trench A," "Cut B," "Shaft C," "Trench D," "Shaft E," "Shaft northwest of 5." "A" is shown to have been a trench thirty feet long, 3 feet deep and 2½ feet wide; "B" a cut 20 feet long, 3 feet wide and 8 feet deep; "C" a shaft about 3½ x 6 feet, 7 feet deep; "D" a trench about 25 feet long, 1 to 3 feet deep, and 2½ to 3 feet wide; "E" a shaft about 4 x 7 and 4 feet deep, and "Shaft northwest of 5" a hole in the ground 7 x 7 and 6 feet deep. This work was done by John Tompkins, assisted by Isaiah Tompkins.

The foregoing statements of improvements are conclusions of fact drawn from a searching examination of nearly one thousand pages of testimony. Practically nothing is conceded by the protestants, and the wide divergence of opinion of a large number of witnesses as to the value of said improvements has made the examination especially difficult. The actual cost to the claimants of said development work is conclusively shown to have been about $800. This is the positive testimony of the locators, Tompkins, Hull and Montgomery, based on their recollection of a settlement at a meeting of the locators in August, 1893. Tompkins says it amounted to $800. Hull says he had a memorandum of the work done upon which the settlement was made, and that it amounted to $772. Montgomery says it was about $800; that

Mr. Hull had a memorandum, a sort of time book, in which he had kept his time and Bennett's time and the men he had employed. Tompkins put in his time as so many shifts, I do not remember the number of shifts. I do remember the work they put in and which we paid for at the time amounted to about $800. That was entirely on account of work done on the placer between January 3, and July 28, 1893.

James F. Smith testified that he was present at said meeting, and that the settlement was made on the basis of actual time put in by the parties who performed the work, and that it amounted to about $800.

Hull's memorandum book was not placed in evidence. He testifies that it was in a trunk which had been stolen from the cabin on the claim where he left it, and he knew nothing of its whereabouts.

There is no evidence to contradict these statements. The conclusion is, therefore, that at least $772 was expended in the development of the claim. Cost is an element in establishing value, and while not conclusive, strongly tends also to establish the good faith of the claimants in making the expenditures. It can not reasonably be presumed that the locators of a mining claim would expend $800 in the development thereof, unless they believed that the work done was reasonably worth that amount.

The actual value of the work done on these shafts, wells and trenches is estimated by the witnesses all the way from two dollars to ten dollars per foot, counting labor at three dollars per day, which is shown to have been the prevailing wages for miners' work in Colorado at that time. These estimates are of little value, most of them being altogether hypothetical, according to the assumed character of the ground and the time of year that the work was done. The witnesses who did the work testify that most of it was done in January and February, when the ground was frozen, and they are corroborated to an extent that it may be said that this fact is established beyond all reasonable doubt.

The testimony of the men who superintended and did the work is the best evidence as to when the work was done, the difficulties encountered in doing it, including the character of the ground, and the amount of labor performed in days' work. These men are Hull, John Tompkins, Stebbins, and the men employed by them. Their testimony is positive and establishes the fact that considerably more than $500 worth of work was done on the claim for the development thereof, estimated at the prevailing rate of miners' wages, at the time it was done. An effort is made to impeach the testimony of these witnesses, by showing that at another time they had all made a different statement, under oath, as to the time when the work was done. This is shown, but is not believed to be important, for the following reasons:

(1) These former statements, though incorrect, are shown not to be inconsistent with good faith when made.

(2) The testimony taken as a whole shows conclusively that their present statements are correct.

The facts are these: In December, 1896, Hull, Tompkins, and Steb-

bins made affidavits, on file in this case, that part of this work, therein specifically described, was done in the months of April and May, 1893. They now swear that the same work was done in January, February, and March, 1893. These affidavits were all drawn by Mr. Montgomery, for use before the Department, to show that $500 had been expended in developing the claim before the expiration of the period of publication. Time was not of the essence of the controversy, except that it was necessary to show that the work had been done within the statutory period, hence the affidavits were carelessly drawn.

The facts are thus stated by Mr. Montgomery, on page 822 of the record:

Q. State in your own words the conditions and circumstances relating to said affidavits, and the preparation of same?

A. At that time a motion was pending before the department in Washington to dismiss the protest filed by Cronkhite and others, and I received a letter from our attorneys in Washington, asking that affidavits be prepared and sent to Washington as quickly as possible, to show that the work claimed to have been done upon the placer was done prior to the expiration of the period of publication, which was the 28th of July, 1893. During the next two or three days following the time I received this letter from Thayer and Rankin I got several telegrams urging me to expedite those affidavits as much as possible; I went over to Independence; I saw Tompkins and Hicks, and several others, and told them what I wanted, and asked them in a general way as to whether they could testify that the work was done prior to the 28th of July. They said they could. I returned to Cripple Creek and prepared the affidavits. In preparing those affidavits the details were stated as near as I remembered them myself at the time. And I found Mr. Stebbins in Cripple Creek I think a few days after that; he had come up there for a day or two from Pueblo, and I asked him to sign an affidavit to the same effect; I prepared his affidavit, he looked it over, and signed it I think just as I had prepared it. I prepared an affidavit for Gus Hull and mailed it to him at Black Hawk, enclosing with it a letter asking him that if the facts stated were substantially correct as he remembered them, to sign the affidavit and return it to me, which he did. The affidavits were hastily prepared, and were prepared for the purpose of showing that the work was done prior to a certain date, and for that purpose only.

The witnesses themselves swear that while they read the affidavits before signing them, they gave no thought as to the specific time therein stated, their attention only being specially directed to the fact that it was a statement in general effect that the work specified was done before the expiration of the period of publication.

This explanation is reasonable and sustained by the record. For instance, Stebbins stated in his affidavit that "Circular Well No. 2" was sunk by Bennett and Hull in May, 1893, that he was keeping a boarding house at the time in Hull's camp, and that they boarded with him while they were doing this work. Yet the testimony shows conclusively that Bennett and Hull did do that particular piece of work, and that they did board with Stebbins while they were doing it; that Stebbins was running a boarding house at Hull's camp during the months of January, February and March; that he was not running such boarding house during the month of May, but moved away from there

during the month of April. The statement in his affidavit is thus shown to have been an inadvertence, pure and simple. No motive is shown to influence any of these witnesses to make false statements at the time these affidavits were executed, and it is believed that the record shows that none of said statements were intentionally false.

From the testimony of these witnesses at the hearing, strongly corroborated by eye-witnesses and valuable expert testimony, it is believed that more than five hundred dollars worth of work was done by the locators on the Hull City placer for the development of the claim after the location thereof and before the expiration of the sixty days period of publication.

One other question remains to be considered.

It is urged by the protestants that this entry should be vacated for the reason, as alleged, that one of the entrymen, James F. Smith, was interested in the original location of the claim, and was a part owner therein at the time he executed his affidavit of expenditures upon which the surveyor-general's certificate was predicated, and that during this period he was a deputy United States mineral surveyor.

On this question your office report of January 13, 1898, says:

> It seems that sufficient reasons have been shown for the recommendation that this survey should be set aside, because it was made in violation of law, and that Smith's commission be revoked, under authority of section 452 U. S. Rev. Stat.

This section provides that—

> The officers, clerks and employees in the General Land Office, are prohibited from directly or indirectly, purchasing or becoming interested in the purchase of any of the public lands; and any person violating this section shall forthwith be removed from office.

In Herbert McMicken *et al.* (10 L. D., 97, on review 11 L. D., 96), Secretary Noble held that an officer, clerk or employee in the office of a United States surveyor-general is an officer, clerk or employee in the General Land Office within the meaning of this section; in Muller *v.* Coleman (18 L. D., 394), Secretary Smith held that a deputy surveyor is such an employee, and in the Neill case (24 L. D., 393), the present Secretary held that a surveyor-general is within the inhibition so declared. A circular of similar import was issued September 15, 1890 (11 L. D., 348). From an examination of these authorities and a consideration of the language and manifest purpose of the section, it seems clear that its prohibitive provisions embrace a deputy mineral surveyor. In so far as the cases of State of Nebraska *v.* Dorrington (2 C. L. L., 647); Dennison and Willits (11 C. L. O., 261), and Lock Lode (6 L. D., 105), are in conflict with the views expressed in these later cases they are overruled.

That Smith was such deputy mineral surveyor is admitted, so it only remains to inquire whether he was interested in the original placer location, and if not, whether he was a part owner of the claim at the time of his report thereon as such deputy mineral surveyor.

There is nothing in this record to show, or tending to show, that Smith had an interest in this claim prior to May 20, 1893. John Tompkins testifies on this point as follows:

Q. When was this arrangement entered into that you, Hull and Stebbins were to do the work, and Smith, Craigue and Montgomery pay for the patent?

A. About the time the location was made.

Q. That was about the 3rd of January, 1893?

A. Yes sir, something near that, might have been afterward or before.

* * * * * * *

Q. If Mr. Smith was not interested in the placer on the 3rd day of January, why is it he was to help to pay for and help to obtain the patent?

A. I think at that time Mr. Craigue and Mr. Smith were partners together.

* * * * * * *

Q. You located on the 3rd of January, on the 4th you obtained a certified copy of the location certificate, and applied for an order to survey it for patent?

A. I don't know anything about that.

Q. Who did that part of the business?

A. As I stated, Montgomery, Smith and Craigue I suppose.

Q. Explain to us why Smith was to help get a patent for it if he had no interest in it?

A. From what I learn, him and Craigue was partners and I suppose what one had an interest in the other had.

There is nothing in this testimony indicating that Smith was an interested party on January 3, 1893, except the very violent supposition of the witness. The fact that Craigue was interested and that Craigue and Smith were partners in business is no evidence whatever that Smith was interested in this mining venture.

The witness Montgomery testifies on this matter as follows:

A. At the time of the placer location and up until May sometime, I did not know, and I do not believe any other of the placer claimants knew that Mr. Smith had any interest directly or indirectly in the placer, and I do not think he had.

Smith himself positively disclaims any interest in the claim, contingent or otherwise, prior to May 20, 1893.

On that date, May 20, 1893, C. C. Hathaway conveyed an undivided one-twentieth interest in the claim to James P. Smith and W. H. Craigue, by deed, which was recorded on July 1, 1893. Smith swears in relation to this deed that he did not know at the time that the interest had been sold to him; that Craigue paid for it with an assay outfit in which he had no interest, or may have given Hathaway some money in the trade, or Hathaway may have paid Craigue some money in the trade.

Q. Didn't you give Mr. Hathaway a check when that deed was delivered in part payment for that interest?

A. I do not remember that I gave him a check, it is just as probable if a check was given I gave it as Craigue.

Q. Then you did not know what you gave him the check for?

A. I knew I was giving him a check on Craigue's account if I did.

Q. You swear now that you probably gave him a check at the time the deed was made conveying that interest to you, and if you did so you did not know you were giving it as a part payment of the interest conveyed to you?

A. No, if I gave him the check I knew I gave him the check for payment of that interest, but I was giving it on Craigue's account.

* * * * * * *

Q. But you did not know anything about it (the deed) until August you say?

A. No, I am not sure I knew about it before October.

Q. Was not the original deed returned to you after it was recorded?

A. Returned to my office.

Q. Didn't you have it recorded yourself?

A. That I do not remember; chances are even that either I or Craigue sent it down for record.

Q. If you sent the deed down for record, you could not be ignorant of its existence?

A. I may have been ignorant of the contents; we were sending a good many papers, and do yet; Craigue might have had some papers prepared and I prepared some.

No proof was ever offered of the existence of the check suggested by the foregoing questions, and Craigue has not testified in this record.

Smith testifies that the August settlement hereinbefore referred to was made in his office, and that he was present when it was made.

Montgomery swears that his understanding was that Smith was representing Craigue at the settlement, but admits that he (Montgomery) knew of Smith's interest at the time. In fact, it appears that the deed conveying this interest was executed before Mr. Montgomery as a notary public.

It thus appears that at the date this deed was acknowledged, Hathaway knew it, Montgomery knew it, and Craigue knew it; yet Smith, who admits that he may have given a check in part payment for the interest, that the "chances are even" that either he or Craigue sent the deed down for record, and that he participated in the settlement in August, which the above-named interested parties attended, and at which the estimates of work and improvements on this claim were submitted and paid for, "thinks it was probably in October, 1893," that he first knew he had any interest in the claim.

It is significant, too, that the application for patent was made on the same day this deed was executed. It is believed that the record shows that Smith knew and that his co-owners knew at the date of the application for patent that he was interested in the claim. This being true, what is the effect of it?

It is the duty of a deputy United States mineral surveyor to report to the surveyor-general, among other things, the value of the work done and improvements made on a mining claim, and this report forms the basis of the surveyor-general's certificate.

In this case Smith's affidavit of expenditures upon the Hull City Placer is dated September 22, 1893, and the surveyor-general's certificate issued September 26, 1893. Smith was disqualified, by reason of his interest, to make a report in the matter of expenditures on this claim, but it is not believed that this should operate to impeach the certificate of the surveyor-general. The integrity of this certificate does not depend upon the authority of Smith to make the report, but depends upon the correctness of the fact stated in the report—to wit,

that the claimants had within the time provided by law made the required expenditures and improvements. It was to determine this that the last hearing was ordered and it was there shown, as has been seen, that the law had been complied with.

The pending protests are hereby dismissed.

The law will not, however, permit the patenting of this claim to James F. Smith. You are directed to correct the final certificate and entry in this case by striking therefrom the name of said Smith, and then to pass the entry to patent.

The matter of your recommendation that Smith's commission be revoked, will receive the further attention of the Department.

SUPPLEMENTAL PROCEEDINGS—REPORT OF SPECIAL AGENT.

FLOYD ET AL. *v.* MONTGOMERY ET AL.

The result of proceedings against a mineral entry, in which the parties thereto have had full opportunity to present evidence in support of their claims according to the recognized rules of procedure, should not be disturbed or affected by the report of a special agent on the entry involved.

Secretary Bliss to the Commissioner of the General Land Office, February 3, 1898.

The protestants, Floyd *et al.*, have filed a written application for an oral argument herein and have also requested that the Department consider a report of an investigation of this mineral entry recently made by a special agent and said to be on file in your office.

An oral argument can not be granted and neither can any report of a special agent be considered. This case was thoroughly examined in the Department and was given personal consideration by me, after which a decision was rendered yesterday dismissing the protests of Floyd *et al.*, and directing that the entry be passed to patent. In that decision it was held that the protestants were without interest in the land in controversy and that their repeated protests were vexatious to the extent that the mineral claimants were entitled to immediate and decisive action thereon. The charges made against this mineral entry by the protestants have heretofore been the subject of inquiry and investigation at hearings in the local office, openly conducted, where both the protestants and the mineral claimants had full opportunity to present the evidence in support of their respective claims and to test the strength and character of opposing testimony by cross examination, impeachment, and otherwise, according to recognized rules of procedure. It is believed that the result of these hearings should not be disturbed or affected by the report of a special agent.

You will notify the protestants of this ruling and you will carry the decision rendered herein yesterday into effect without delay.

Herewith is returned the application first above referred to.

BOUNDARY LINE BETWEEN THE CHOCTAW, CHEROKEE AND CREEK NATION.

OPINION.

Natural boundaries should control in the settlement of the boundary lines between the Choctaw, Cherokee and Creek Nations, hence the boundary line of the Cherokee Nation should stop where it first meets the Canadian river in its southern course from the four mile post referred to in the treaty of May 23, 1836, and from this point the river will mark the boundary between the Creek and Choctaw Nations.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, February 8, 1898. (F. W. C.)

I am in receipt, through your reference, of a letter from C. H. Fitch, addressed to the Director of the Geological Survey, with request for opinion upon the question therein presented as to the true boundary line between the Choctaw, Cherokee and Creek Nations.

In said letter it is stated that:

The only information in my possession bearing upon this question is contained in a copy of the "Boundaries and Area of the Southern Tract of Cherokee Lands" from "Senate Document No. 120, 25th Congress, 2nd Session, Vol. 2, page 952." In this paper the boundary is defined and followed from the N.E. corner of the Creek Nation, south to the Verdigris river; along the Verdigris river to the Arkansas river; across the Arkansas river to a post on its south bank marked 38 mile post; from this point in a south-westerly direction 34 miles, 28.80 chains to a post marked 4 mile, and from this latter post due south four miles to a post located at the mouth of the North Fork of the Canadian river at its confluence with the Canadian river; thence down the Canadian river, on its north bank, to its junction with the Arkansas river.

The three posts above mentioned have been found and fully identified. No meander corners were found on the river where such corners should have been established had the line crossed the river as indicated in the diagram, nor could any post be found at the point where the 1st mile post should have been located. In fact there is no evidence to show that the line was ever run across the river.

If the Canadian river, at this point, is the north boundary of the Choctaw Nation, it will be seen that a north line from the initial monument as a boundary line for the Cherokees will precipitate a conflict. Again, if the north bank of the Canadian river, down stream from the initial monument, is the southern boundary of the Cherokee Nation, such north line from the same monument, as a boundary for the same nation, must be in error, as it is in conflict with the boundary as defined by the river. No good reason is apparent for extending this boundary further south than to the point where it first intersects the river, just south of the 2nd mile corner.

If the line is extended due south from this point to the initial monument, about three acres of land will accrue to the Cherokees adjoining and immediately north of said monument. Should the river be taken as a boundary from the initial point, then the area of Cherokee lands will not begin until the point is reached where the line intersects the river south of the 2nd mile post.

I may add that there is no evidence tending to show that any appreciable change in the course of the river has occurred since the date of the original survey, and the elevations, as shown by contour lines in the immediate vicinity of the river will indicate the impossibility of any material change.

In the treaty with the Choctaw Nation, proclaimed January 8, 1821 (7 Stat., 211), the United States ceded to that nation the country bounded as follows:

Beginning on the Arkansas river, where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red river, thence down Red river, three miles below the mouth of Little River, which empties into Red river on the north side; thence a direct line to the beginning.

This clearly made the right bank of the Canadian river a part of the northern boundary of the Choctaw country.

Article 1 of the treaty with the Choctaw and Chickasaw Nations, proclaimed March 4, 1856 (Revision of Indian Treaties, p. 275), is as follows:

The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas river, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red river; thence up Red river to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning.

This treaty established the right bank of the Canadian river as part of the northern boundary of the Choctaw country.

In the treaty with the Cherokee Nation, proclaimed May 23, 1836 (Revision of Indian Treaties, p. 67), is found the following:

Whereas by treaty of May 6, 1828, and the supplementary treaty thereto of February 14, 1833, with the Cherokees west of the Mississippi, the United States guaranteed and secured to be conveyed by patent, to the Cherokee Nation of Indians, the following tract of country:

Beginning at a point on the old western territorial line of Arkansas Ter, being twenty-five miles north from the point where the territorial line crosses Arkansas river; thence running from said north point south on the said territorial line, where the said territorial line crosses the Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence *along said four-mile line to the Canadian;* thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory, etc.

In the treaty with the Creek Nation, proclaimed May 28, 1856 (Revision of the Indian Treaties, p. 105), the boundaries of their country, being the same as those set forth in the treaty of February 14, 1833, are described as follows:

The following shall constitute and remain the boundaries of the Creek country, viz: beginning at the mouth of the north fork of the Canadian river, and running *northerly four miles;* thence running a straight line so as to meet a line drawn from the south bank of the Arkansas river, opposite to the east or lower bank of Grand river,

at its junction with the Arkansas, and which runs a course south, forty-four degrees west, one mile, to a post placed in the ground; thence along said line to the Arkansas and up the same and the Verdigris river, to where the old territorial line crosses it; thence along said line, north, to a point twenty-five miles from the Arkansas river, where the old territorial line crosses the same; thence running west with the southern line of the Cherokee country, to the north fork of the Canadian river, where the boundary of the cession to the Seminoles defined in the preceding article first strikes said Cherokee line; thence down said north fork, to where the eastern boundary-line of the said cession to the Seminoles strikes the same; thence, with that line, due south to the Canadian river, at the mouth of the Ock-hi-appo, or Pond creek; and thence down said Canadian river to the place of beginning.

The difficulty in the matter of establishing these several boundaries arises from an apparent misconception as to the actual location of the Canadian river immediately to the east of the point of the junction of the North Fork with that river. As it now appears a line drawn north for four miles from the point of junction will, inside of two miles, cross the river twice, thus leaving two small bodies of land in the bends of the river, one to the east and the other to the west of that line. The land to the west of that line is covered by the treaty made with the Choctaws and it was clearly never the intention to include the same in the Creek country.

As before stated, the Canadian river was intended to be the boundary between the Choctaw and the Creek and Cherokee countries, and the natural boundary should control.

To the east of the four mile line before referred to, there remains about three acres on the left bank of the Canadian river and clearly within the Creek country.

If the boundary line of the Cherokee country was continued southward for four miles, crossing the Canadian river twice, as before stated, these three acres would seem to belong to the Cherokee Nation, although separated at some distance from the main body of their lands.

In this case it would seem that the natural boundary shall also control and these three acres be held to belong to the Creek Nation.

To carry into effect these views the boundary line of the Cherokee Nation should stop where it first meets the Canadian river in its southern course from the four-mile post referred to in the treaty, and from this point the river will mark the boundary between the Creek and Choctaw Nations.

Approved, February 3, 1898,

C. N. BLISS,

Secretary.

PRACTICE—RECONSIDERATION OF DEPARTMENTAL ACTION—NOTICE.

MISSOURI VALLEY LAND CO. *v.* FITCH.

Prior to the reconsideration of final departmental action, due notice should be given all parties adversely affected thereby, and intervening claimants called upon to show cause why their entries should stand.

Secretary Bliss to the Commissioner of the General Land Office, February (W. V. D.) *3, 1898.* (F. W. C.)

With your office letter of August 5, 1897, was transmitted an appeal by the Missouri Valley Land Company, successor to the Sioux City and Pacific Railroad Company, from the action of the local officers at O'Neil, Nebraska, in rejecting its list covering the W½ of Sec. 29, T. 20 N., R. 11 W. and NW¼ Sec. 1, T. 21 N., R. 10 W., for conflict with certain claims of record allowed under the decision of this Department in the case of the Sioux City and Pacific Railroad Company *v.* William R. Fitch (216 L. and R., 184), in which it was held that a school indemnity selection made prior to any statutory authority therefor but of record at the date of attachment of rights under the grant, under which this company claims, served to except the tracts included in such invalid school selection from the operation of the railroad grant.

This decision has been specifically overruled as to said holding. See Union Pacific Ry. Co. *v.* United States, 17 L. D., 43; also Sioux City and Pacific R. R. Co. *v.* Wiese, 21 L. D., 316.

In view of these latter decisions you transmit the appeal without action, and request instructions.

The entries of record do not appear to have been patented so that this Department is not deprived of jurisdiction over the land, and as the previous adjudications, so far as the school indemnity selections made at a time when there was no authority of law therefor are held to have been sufficient to defeat the attachment of rights under the railroad grant, are, in the opinion of this Department, erroneous and should not be followed, you are directed to require the railroad company to serve its appeal from the rejection of its lists upon the claimants of record; and you will also call upon such persons, allowing them a reasonable time, to be determined by your office, within which to show cause why their entries should not be canceled as to any extracts, covered by their entries, not excepted from the grant for other reasons than the existence of the invalid state selection, and at the expiration of the time allowed, you will again submit the entire record with your recommendation thereon for the further consideration of this Department.

TOWNSITE PATENTS—KNOWN LODE—JURISDICTION.

GREGORY LODE CLAIM.

The issuance of townsite patent for land known at the date of the townsite entry to contain a valuable lode claim, does not pass title to such claim, but leaves it in the United States, subject to the jurisdiction of the land department.

Secretary Bliss to the Commissioner of the General Land Office, February 3, 1898.
(W. V. D.) (E. B., Jr.)

On September 18, 1890, your office, under authority of the decision of the Department in the case of the Pike's Peak Lode claim (10 L. D., 200), held for cancellation Central City, Colorado, mineral entry No. 1045, made July 8, 1878, by Charles H. Briggs, J. Smith Briggs and George W. Briggs, for the Gregory lode claim, on the ground that the claim was entirely within the limits of the townsite of Central City, for which patent issued July 10, 1876, whereby the jurisdiction of the land department was terminated as to all land within such limits. The New Gregory Mining Company, as transferee of the entrymen named above, and present owner of the Gregory lode claim, thereupon appealed to the Department, contending that the claim was known to be valuable lode mining property, and held and worked as such under local mining regulations and mining laws of the United States long prior to the townsite entry, and that therefore the land embraced therein did not pass under said patent, nor the jurisdiction of the land department over the same thereby terminate. The papers in the case were forwarded to the Department by your office under date August 19, 1896.

Extended discussion of the issue presented in this case is unnecessary. The application for patent to the said claim was filed November 11, 1873. The disposition of the case by your office was long delayed by various causes not now deemed of sufficient importance to justify recitation here. The delay in forwarding the appeal to the Department appears to have been due to inadvertence. No one is now objecting to the issue of patent for said claim, nor has any objection to such issue appeared since the dismissal, August 13, 1875, of the adverse suit instituted February 5, 1874, by the Camper Gold Mining Company, claimant of the Dead Broke lode claim, against the Gregory lode claimants.

The doctrine of the Pike's Peak case, *supra*, relied upon by your office, was overruled by the decision in the South Star case (20 L. D., 204). These cases were cases of conflicting lode and placer claims, the latter having been patented, but the law concerning the rights of the lode and placer claimants, respectively, is very similar to the law relative to the rights of lode and townsite claimants, respectively, under like conditions.

In the recent case of Pacific Slope Lode *v.* Butte Townsite (25 L. D., 518), in which all the material facts were essentially similar, in every

respect, to those of the case at bar, the Department held (syllabus) that—

A townsite patent that in terms provide that "no title shall be hereby acquired to any mine . . . . or to any valid mining claim or possession held under existing laws of Congress," does not divest the Department of jurisdiction to subsequently issue a patent for a lode claim within the limits covered by said townsite patent, if at the date of the townsite entry such lode claim was known to exist.

Cash entry No. 148, for the townsite of Central City, Colorado, which embraces within its limits the Gregory lode claim, was made May 16, 1873. This entry was merged in cash entry No. 211, made May 27, 1874, for the townsite of Central City, Colorado, which embraced additional ground, and for which patent issued July 10, 1876. It is abundantly shown by testimony adduced at a hearing held February 6, 1889, pursuant to direction of your office on its own motion, that the Gregory lode claim existed and was known to be valuable for its mineral contents as early as the year 1859, and that it had been held and worked since, continuously, under local mining regulations and the mining laws of the United States, and had yielded during that time large quantities of gold. At the said hearing the mayor and city attorney, representing the municipal corporation of Central City, Colorado, filed a disclaimer of "all right, title and interest of, in and to the land embraced within the boundary lines of said Gregory lode claim, M. E. No. 1045, survey No. 254," and further declared therein that said corporation "does not and will not object to the issuance of a patent therefor."

Applying to these facts the law as stated in the decision of the Department last above mentioned, the Department holds that no title to the Gregory lode claim, or any part thereof, passed by the patent for the Central City townsite, but the same remained in the United States, and subject to the jurisdiction of the land department thereof.

The decision of your office is accordingly reversed, and you will pass the Gregory lode claim to patent if the proofs are otherwise regular.

MINING CLAIM—PUBLICATION OF NOTICE.

INSTRUCTIONS.

In the selection of a newspaper for the publication of notice of a mineral application a reasonable discretion may be exercised by the register in determining what is a newspaper, and which of several papers is the one published nearest to the claim, having in view the purpose of the statute in requiring publication.

Secretary Bliss to the Commissioner of the General Land Office, February 3, 1898.

(W. V. D.) (W. A. E.)

By letter of April 29, 1897, your office asked for instructions relative to the publication of notice under the mining laws.

Section 2325 of the Revised Statutes provides that:

> 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.

Paragraph 37 of the regulations under the mining laws, as they existed at the time your office letter was written, provided that the register should in all cases designate the newspaper of general circulation that is published nearest the land, "geographically measured."

In the case of Bretell *v.* Swift (on review), 17 L. D., 558, it was held that in the selection of a newspaper for the publication of notice of mineral application the register, in the exercise of a proper discretion, may designate a paper that he regards best for the purpose of giving the greatest publicity to the notice, even though it may not be the paper nearest to the land.

Your office letter calls attention to the apparent conflict between the regulation and the decision above cited, and further stated that:

> Prior to the regulation above cited, it was the practice of the office to allow the publication to be made in the newspaper nearest to the claim as ascertained by the most usually travelled route.

Since your office letter was written the regulations under the mining laws have been revised, and the revised edition was approved December 15, 1897, 25 L. D., 561.

Number 52 of the new regulations provides that:

> The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

The words "geographically measured" contained in the old regulations have been omitted from the revised edition.

The statute clearly seems to indicate that the register is given some discretion in the selection of the newspaper. It may sometimes happen, as in the case of Bretell *v.* Swift, that the newspaper nearest the land, geographically measured, is not the paper nearest to the land by the usually traveled route, and is not the paper best calculated to secure publicity of the notice in the neighborhood of the claim. The statute is not simply that the publication shall be in a newspaper "published nearest to such claim," but is that the publication shall be "in a newspaper to be by him (the register) designated as published nearest to such claim." There are three elements in this requirement: First, the publication shall be in a newspaper; second, that newspaper shall be the one "published nearest to such claim;" and third, the register shall designate and determine what newspaper is "published nearest to such claim." As applied to newspapers, printing is not the sole act of publication. To be published within the meaning of this statute, a newspaper must be circulated, that is, it must be dis-

tributed as a means of disseminating news. The performance of the register's duty, under the statute, requires the exercise by him of reasonable judgment and discretion, both in determining what is a newspaper and in determining which of several papers is the one published nearest to the claim. He should not act arbitrarily or indifferently in the matter, but should be guided by the purpose of the statute in requiring publication, which is the diffusion of information and notice respecting the application for patent in the vicinity of the claim and among those whose residence or presence in that locality bespeak their interest in the claim or their knowledge thereof. In Condon *et al. v.* Mammoth Mining Co. (on review, 15 L. D., 330), in discussing this statute, Secretary Noble said:

> I am of the opinion that this means that the register shall publish the notice of such application in a paper to be by him designated as being the newspaper published nearest to such claim, not by actual measurement in a direct line between newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever in his judgment will best subserve the public interest and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows, that in this matter the register has some discretion in the designation of the newspaper, as to its established character as a newspaper, its stability and general circulation and the like. But it is a legal discretion and in its exercise his act is certainly subject to review and control by your office and the Department, and where it is shown that he has abused such discretion, your office, as well as the Department, has the power to set aside his action in order to avoid injustice or unfair discrimination, or an ignoring of the provisions of the law and the rules and regulations of the Department.

In this conclusion I fully concur.

REINSTATEMENT—NOTICE OF DECISION—ADVERSE CLAIM.

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

On application for the reinstatement of an entry, the applicant should not be heard to say that he did not receive proper notice of the decision holding his entry for cancellation, where his failure to be heard on appeal is in no way due to the alleged insufficiency of such notice.

Reinstatement of a canceled entry will not be made, where negligence on the part of the applicant in the assertion of his claim appears, and an adverse right has intervened.

Secretary Bliss to the Commissioner of the General Land Office, February 4, 1898.

(W. V. D.) (W. M. W.)

By your office decision of July 12, 1889, the timber culture entry of Edward P. Messer for the NW. ¼ of Sec. 15, T. 123 N., R. 45, Minnesota, was held for cancellation for conflict with the claim of the St. Paul, Minneapolis and Manitoba Railway Company, main line, subject

to appeal to the Department, or to a right, within sixty days from receipt of notice, to apply for a hearing to enable him to show that the railway company's selection of the tract was improperly allowed. There being no appeal and no application for a hearing, your office letter of March 10, 1892, declared the decision of July 12, 1889, to be final and Messer's entry canceled.

February 3, 1896, counsel for Messer filed in your office a motion to reinstate said entry and re-open the case, upon the following grounds:

1. That said case was closed without any proper service of notice on said Messer of the decision of July 12, 1889, and that he has had no opportunity for either moving for review thereof or appealing therefrom, intelligently.

2. That he has good and meritorious grounds for complaining of said decision.

By your office decision of April 18, 1896, this motion was rejected and Messer appeals. He filed his affidavit in support of the motion, stating, in substance, that he received a notice from the local land office, at Marshall, Minnesota, purporting to be a decision by the local officers holding his entry for cancellation and then saying:

That said notice contained no statement with reference to the Commissioner of the General Land Office having decided the case, and no mention of the Commissioner is contained therein; that the letter containing said decision did not enclose a copy of the Commissioner's decision, as required, and affiant was never served with a copy of said Commissioner's decison.

The original letter thus referred to is attached to the affidavit as an exhibit, is dated July 16, 1889, at Marshall, Minnesota, and is directed to Messer. It recites the allowance of Messer's timber culture entry of the land in question by the register and receiver, at Benson, Minnesota, June 21, 1886, when the records of the local office showed that the tract had been selected by the St. Paul, Minneapolis and Manitoba Railway Company October 16, 1883, states that the land is within the twenty-mile indemnity limits of the above railroad, and holds that the railway company's selection shown upon the official records was a bar to the admission of any other class of entry, and that instead of admitting Messer's entry the local officers should have permitted him to contest the company's claim, by hearing, if so desired. Messer's entry is then held for cancellation subject to his right to appeal to the Secretary of the Interior, or to apply for a hearing to enable him to show that the railway selection was improperly or illegally admitted, and it is stated that—"A failure to apply for a hearing or file an appeal within the usual time (60 days) will be deemed a waiver to further claim to the land."

The affidavit states that within the time allowed for an appeal Messer—

Employed T. M. Grant, Esq., a notary public, to prepare an appeal from said decision and forward the said appeal to the Interior Department at Washington, D. C. That the said Grant was employed to make and transmit the appeal aforesaid, and for no other purpose, and the said Grant was not at that time or any subsequent time the attorney of this affiant in this matter, never entered his appearance as such

in the case, and was not authorized to act for affiant in any way beyond preparing of the appeal papers, which appeal was signed by this affiant, to the best of his information and belief. That affiant never received any notice from the Commissioner of the General Land Office of the insufficiency of his said appeal to the Secretary, and that if said T. M. Grant received such notice, it was not as the attorney of this affiant in the case, and that any action (if any) of said Grant in forwarding the appeal to the Hon. S. G. Comstock was without the knowledge or authority of affiant. That affiant never employed the said Hon. S. G. Comstock as his attorney in the case, and that said Comstock has not, with the knowledge or consent of affiant, entered any appearance for affiant in said case; that he has not been informed by said Comstock of any action by the Commissioner with reference to said appeal, and is therefore not bound by any notice to the said Comstock of the insufficiency of the appeal.

That on or about the 19th day of June, 1894, affiant was notified by Hayden French, clerk of the district court of said county of the action of the Commissioner of the General Land Office cancelling said entry under date of March 1 (10), 1892, and that said notice was the first information affiant had of the insufficiency of said appeal; that notice given to said T. M. Grant or Hon. S. G. Comstock was not constructively notice to affiant, and that he should not be bound thereby. * * * That the information given affiant by Hayden French, as aforesaid, was obtained from a letter from the land office at Marshall, Minnesota, the same being hereto attached, marked "Z" and made a part of this affidavit.

This exhibit has endorsed upon it: "April 15, 1892, notified claimant at Bigstone, Minn., and S. G. Comstock, at Moorhead, Minn., of the cancellation."

It appears from your office decision of April 18, 1896, that on September 10, 1889, Messer forwarded an appeal from your office decision of July 12, 1889, which was returned to him at Ortonville, December 10, 1889, in care of T. M. Grant, for service upon the opposite party according to the Rules of Practice.

December 17, 1889, Mr. Comstock returned to your office Messer's appeal, without service, and December 19, 1889, said appeal was returned by your office to Mr. Comstock, with full explanation of Messer's case, and with the further information that the time within which Messer's appeal could be perfected under the Rules of Practice would expire December 29, 1889.

From Messer's affidavit it clearly appears that he received notice of your office decision holding his entry for cancellation. The notice so received was from the local office, stated that his entry had been held for cancellation, gave the reason therefor, and informed him of his right to appeal to the Secretary or to contest the railroad company's selection. The notice was informal, and did not literally comply with the rule requiring a copy of a decision to be served upon the party against whom it is rendered; but it gave the requisite information and Messer evidently understood it, and acted upon it by causing an appeal from your office decision to be prepared and forwarded. His appeal was not questioned on account of any defect therein, but was returned for the reason that it was not served upon the opposite party. In view of his action, it is now too late for him to say that the notice of your office decision was so defective that he could not intelligently appeal. He

swears that he "never received any notice from the Commissioner of the General Land Office of the insufficiency of his appeal to the Secretary." This may be true, for there was no suggestion that his appeal was insufficient. He does not deny the fact that he was apprised of the requirement of your office letter that he serve his appeal upon the opposite party.

If it were conceded that Messer's first intimation that his appeal had been returned for service was when he received notice of the action of your office of March 10, 1892, his showing would still be insufficient to justify the re-opening of the case. Your office letter of that date recites the action of your office in the case from its inception. He received a copy of it about June 19, 1894, and was then fully informed of all the steps taken in the case, including the return of his appeal and the purpose for which it was returned. He took no steps to have the decision canceling his entry reviewed or to have the original case re-opened, but, knowing his entry was canceled, allowed the matter to rest from June 19, 1894, to February, 1896, when this application was made. In June, 1894, he knew that his appeal had been returned, the reasons therefor, and that his entry had been canceled, as well as he did in February, 1896.

An informal inquiry at your office elicits the information that the land involved herein is covered by the homestead entry of Edward C. Jellison, made February 17, 1896, and this is a circumstance to be considered in determining the justice and propriety of allowing Messer's application to re-open the case.

His application is accordingly denied.

SOLDIERS' HOMESTEAD—PERIOD OF RESIDENCE.

PETER BORTLE.

In the computation of the time that may be deducted, under section 2305 R. S., from the period of residence required of a homesteader, it is only the time actually served that can be credited to the entryman, unless he was discharged for wounds received or disability incurred in the line of duty.

Secretary Bliss to the Commissioner of the General Land Office, February 4, 1898.

(W. V. D.) (P. J. C.)

The record has been examined in the appeal of Peter Bortle from your office decision declining to accept his final proof made on his homestead entry of the W.½ NW.¼ Sec. 8, and E.½ NE.¼ Sec. 7, Tp. 11 S., R. 2 W., S. B. M., Los Angeles, California, land district, for the reason that his residence on the land, together with his service in the United States Navy, made a total of only three years, one month and twelve days.

Your office directed that when the entryman

> can show such additional residence, which, together with his residence and naval service will make the full period of five years, he will be allowed to submit supplemental proof without readvertisement, showing such additional residence.

The claimant insists that he should have credit for service from June 22, 1863 to July, 1867. It appears that his first enlistment covered the period from June 22, 1863 to July 12, 1864; that he re-enlisted July 18, 1864 for three years, but was discharged July 4, 1865. It does not appear that his final discharge was on account of wounds received, or disability.

Section 2305, Revised Statutes, provides that the time the homestead settler *has served* in the Army or Navy shall be deducted from the time required to perfect title,

> or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served.

It is true that the register of the local office by a letter written May 27, 1895, to the attorney for Bortle, informed him that Bortle would be entitled to

> credit for the full term of enlistment whether he is discharged before he serves his full term, because of the close of the war.

This information was evidently relied on by the entryman, and probably under this view of the law the local officers approved the final proof. But by the terms of the statute quoted the allowance of the entry was clearly erroneous. It is only the time actually served that can be credited to the applicant unless he was discharged for wounds received or disability incurred in the line of duty.

Your office judgment is therefore affirmed.

CONTEST—SUFFICIENCY OF CHARGE—TIMBER LAND.

HARPER *v.* EIENE.

To determine the sufficiency of an affidavit of contest as the basis for a hearing it is necessary to consider whether or not, if any one or more of the charges taken singly, or all the charges taken together as a whole, are established, the entry must be canceled.

A homestead entry made for the purpose of securing the timber on the land covered thereby, and not for the purpose of obtaining a home, must be canceled.

Secretary Bliss to the Commissioner of the General Land Office, February 4, 1898.

(W. V. D.) (W. A. E.)

On March 8, 1895, Tormod T. Eiene made homestead entry for the SW ¼ of Sec. 15, T. 21 N., R. 9 W., Olympia, Washington, land district, and on July 5, 1895, after due notice, he submitted final proof before H. M. Sutton, U. S. circuit court commissioner at Montesano, Chehalis

county, Washington. It was alleged in this proof that he had established residence on the land in May, 1890; that he has since resided there except for short absences, but that his family, consisting of wife and one child, has never resided there owing to ill health and bad condition of the road and rough weather; that his improvements consist of a house fourteen by sixteen, a barn, three acres under cultivation, three acres slashed, an orchard, some fencing, and a road, all valued at $750, and that he has raised crops two seasons on one and one half acres. This proof was approved and final certificate issued July 8, 1895.

On November 6, 1895, Jennie E. Harper filed in the local office an affidavit of contest against said entry, alleging that the improvements upon which the final certificate was based consist of the remains of a small house twelve by fourteen feet and a small shed twelve by twelve feet, both burned, and an acre of ground underbrushed, with green timber standing thereon; that the value of said improvements would not exceed one hundred dollars; that both the residence and improvements of the homestead claimant are the merest pretense; that said tract is heavily covered with merchantable timber and is chiefly valuable therefor; and that the same is wholly unfit for agricultural purposes.

This affidavit was transmitted to your office with favorable recommendation by the local officers, but by letter of May 21, 1896, your office declined to order a hearing thereon, whereupon Miss Harper appealed to the Department.

To determine the sufficiency of an affidavit of contest as the basis for a hearing it is necessary to ask whether or not, if any one or more of the charges taken singly, or all the charges taken together as a whole, are established, the entry must be canceled.

Reading the allegations contained in this affidavit of contest together as a whole, it seems clear that if they are established, this entry must be canceled as fraudulent.

In the case of Wright *v.* Larson, 7 L. D. 555, it was held that while lands chiefly valuable for timber and stone, and unfit for ordinary agricultural purposes, are not excluded from settlement by the act of June 3, 1878, yet settlement on such lands should be carefully scrutinized as the exception in said act is in favor of the "*bona fide* settler." See also Porter *v.* Throop, 6 L. D. 691.

If the charges contained in this affidavit are true, the conclusion would be that Eiene made this entry not for the purpose of obtaining a home for himself and family, but for the purpose of obtaining the timber on the land.

Your office decision is accordingly reversed, and you will direct the local officers to appoint a day for hearing and notify the parties thereof.

RAILROAD GRANT—INDEMNITY—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* KIRKPATRICK.

Within the indemnity limits of the grant to the Northern Pacific the company has no claim, prior to selection, that will defeat the acquisition of a settlement right.

Secretary Bliss to the Commissioner of the General Land Office, February 4, 1898.

(W. V. D.) (J. L. McC.)

The Northern Pacific Railroad Company has appealed from the decision of your office, dated July 10, 1896, rejecting the indemnity selection of said company to the NE. ¼ of Sec. 11, T. 14 N., R. 43 E., Walla Walla land district, Washington, and allowing the application of William W. Kirkpatrick to make homestead entry of the same.

The land described is within the limits of the withdrawal upon the line of amended general route of said road, the map showing which was filed February 21, 1872. Upon definite location of the road the tract fell within its indemnity limits, on account of which an order of withdrawal was issued by your office December 2, 1880. Said withdrawals, however, had no effect upon the status of the land, inasmuch as they were unauthorized by law (Guilford Miller, 7 L. D., 100).

On November 13, 1883, William W. Kirkpatrick applied to make homestead entry of the tract, in his application alleging settlement thereon "in the spring of 1879." Your office, on March 28, 1894, notified the railroad company that it would be allowed ninety days within which to file affidavit showing that Kirkpatrick did not make settlement on said land as he had alleged. Within the time prescribed the company filed an affidavit; but as it failed to set forth facts tending to show that Kirkpatrick had not made settlement on the land as alleged in his application, your office refused to allow a hearing.

Within the indemnity limits of the Northern Pacific Railroad Company's grant, the company has no claim, prior to selection, that will defeat the acquisition of a settlement right. (Northern Pac. R. R. Co. *v.* Jackson, 20 L. D., 288; same *v.* Lillethun, 21 L. D., 487.)

Kirkpatrick having alleged settlement in the spring of 1879, which allegation the company does not deny, his right acquired by virtue of such settlement is not defeated by the company's subsequent selection (on March 20, 1884).

The decision of your office holding said indemnity selection for cancellation is therefore hereby affirmed.

FLOYD ET AL. *v.* MONTGOMERY ET AL.

Motion for review of departmental decision of February 2, 1898, 26 L. D., 122, denied by Secretary Bliss, February 5, 1898.

RIGHT OF WAY PROCEEDINGS—OFFICIAL RECEIVER.

THE GILA BEND RESERVOIR AND IRRIGATION COMPANY.

The maps and papers pertaining to right of way proceedings may be delivered to the receiver of an irrigation company, for purposes of amendment, on due showing that he is acting under judicial authority.

Secretary Bliss to the Commissioner of the General Land Office, February 7, 1898.

(W. V. D.) (H. G.)

On December 16, 1895, your office was directed by this Department to certify all proceedings in the above entitled matter for departmental review, and this order was complied with by your letter of April 8, 1896, enclosing all the papers in the case, including proof of service of the departmental order upon the parties interested.

It appears from the record that the Gila Bend Reservoir and Irrigation Company filed its application and accompanying maps and papers for the right of way for an irrigating canal, under sections 18 to 21, both inclusive, of the act of March 3, 1891 (26 Stat., 1095), in March, 1891, but these maps were found defective by your office, and were returned for correction. The articles of incorporation were accepted by the Secretary of the Interior, July 25, 1891, and are now on file in your office.

The map was thereafter refiled several times and returned for correction, and, finally, upon March 27, 1894, the map, field notes and other papers were returned for correction to the local office, at Tucson, Arizona, with instructions to forward a copy of your office letter, with the enclosed map and papers, to the proper officer of the company.

The local office, prior thereto, had been notified by the secretary of the Peoria Canal Company that his company had purchased and had a conveyance of the canal, dam and all property of the Gila Bend Reservoir and Irrigation Company, but on April 19, 1894, the secretary of the latter company made formal demand, in writing, for the map and papers.

In response to a letter of inquiry from the register of the local office, on April 22, 1894, James McMillan, as receiver of the Gila Bend Reservoir and Irrigation Company, the Arizona Construction Company, and the Peoria Canal Company, asked that the map be delivered to him.

On April 23, 1894, the said register advised the receiver that, in face of the demand and protest of the Gila Bend Company, the maps would be held until the question of ownership thereto was settled, but stating, however, that if the judge of the district court of Arizona, appointing the receiver, would order that the map be delivered to the receiver and not to the officers of the Gila Bend Company, such order would be obeyed. It appears that the judge declined to make this order, for the reason that he had no jurisdiction or control of the papers in the custody of the land office.

The request of the Gila Bend Company for the papers was denied by the register, and the adverse claimants were notified of their right to apply for a hearing within thirty days.

From this decision the Gila Bend Company appealed. Its appeal was filed within time, but was not served upon the adverse parties, and its attorney insists that no service thereof was necessary. Your office, in reviewing the matter, on June 12, 1895, held that such service of the notice of appeal was necessary, and under Rule 48 of Practice dismissed the appeal, recognizing the decision of the register as final.

Considering the proceeding upon its merits, your office held that the receiver of the Gila Bend and the other company was entitled to the papers for the purpose of making the required corrections.

The matter is before the Department upon the record of the proceedings transmitted by your office.

It is contended that the register alone had no authority to decide the matter and erred in his decision, and that as different suits and proceedings are pending in the courts of Arizona and in the supreme court of the United States, contesting the validity of the appointment of a receiver, the *status in quo* should be preserved, at least, and that pending such litigation no ruling should be made by the Department that would tend to confuse or prejudice the rights of any of the parties litigant.

It is immaterial that the order appointing a receiver may have been improper or erroneous. No one can interfere with the possession of such an officer of the court on the ground that the order appointing him ought not to have been made. It is enough that the order of the court is a subsisting order. 20 Am. and Eng. Encyc. Law, 136, 142, and cases cited. The order of the court appointing the receiver, a certified copy of which accompanies the papers, is broad enough to authorize him to demand the papers, in order to perfect the title to the right of way of the Gila Bend Company. He is appointed as the custodian of the court of all and singular the property, franchises, rights and choses in action of the property of such corporation, including such rights therein as may be determined to vest in the other corporations and the individual parties to the suit. He is given by the order the usual powers of receivers, and is directed to repair, rebuild and protect the dam on the property against loss or damage by flood, and to save the same and all of the property from loss, and it is directed that the possession of the property be surrendered to him. He is admitted to be in possession of the property, which is the possession of the court appointing him. It would seem that he has clearly the right to preserve, protect and use the property, and to prevent its waste or destruction, not only by making necessary repairs, but also to preserve its franchise, and to secure its right of way, an important franchise, by taking all required steps to perfect its application therefor. In all things he is under the direction and control of a court having assumed

jurisdiction and control of the property in order to preserve the rights of all of the parties litigant thereto, and it can not be considered that his possession is adverse to the rights of any party to the suit, wherein he was appointed. Occupying such a fiduciary relation as he does toward the Gila Bend Reservoir and Irrigation Company and the other litigants, whatever action he may take in the premises must be considered as a matter enjoined upon him by the court under whose direction and control he acts, and for the best interests of all of the parties litigant according to their respective rights.

The decision in the local office was by the register alone, and objection is taken to its validity on that ground. This does not preclude the Department or the General Land Office from deciding the proceeding on its merits. Knight *v.* Deaver, 20 L. D., 387.

The decision of your office is affirmed, and the papers applied for will be surrendered by the local office to the receiver of the Gila Bend Reservoir and Irrigation Company, upon his demand therefor, in case he furnishes satisfactory proof that he is acting in that capacity.

RYAN *v.* BAKER.

Motion for review of departmental decision of November 23, 1897, 25 L. D., 399, denied by Secretary Bliss, February 7, 1898.

HEIRS OF NICHOLAS RODRIGUEZ.

Motion for review of departmental decision of December 11, 1897, 25 L. D., 491, denied by Secretary Bliss, February 7, 1898.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT RIGHT.

IOWA RAILROAD LAND CO. *v.* BEATLEY.

Prior to the filing of the maps showing the definite location of the modified line of road, under the act of June 2, 1864, there was no authority for the withdrawal of the even sections within the six mile limits of the original grant, and such withdrawal, when made, was not operative upon lands included within homestead entries.

Lands thus excepted from the withdrawal made in aid of the act of 1864, are not subject to selection thereunder, if at the date of such selection a qualified homesteader is residing thereon.

Secretary Bliss to the Commissioner of the General Land Office, February 8, 1898.

(W. V. D.) (C. J. W.)

The Iowa Railroad Land Company, successor to the Cedar Rapids and Missouri River Railroad Company, has appealed from your office decision of March 24, 1896, holding for cancellation its selection cover-

ing the N. ½ of the NW. ¼ and the NW. ¼ of the NE. ¼ of Sec. 2, T. 84 N., R. 44 W., Des Moines land district, Iowa.

Said tract is within the six-mile limits adjusted to the line of location under the act of May 15, 1856 (11 Stat., 9), and was selected under the provisions of the act of June 2, 1864 (13 Stat., 95), on August 23, 1884.

The act of June 2, 1864, *supra*, authorized the modification of the unconstructed portion of this road, and further provided that when the map of definite location of the modified line and connecting branch therein provided for shall be filed in the General Land Office "the Secretary of the Interior shall reserve and cause to be certified and surveyed to said company from time to time, as the work progresses on the main line," etc., etc. As held in the case of Railroad Company *v.* Herring *et al.* (110 U. S., 27), the map of location contemplated by the act of 1864 was not filed until December 7, 1867.

In the opinion of your office it is stated that

> these lands and other lands were withdrawn from market June 16, 1864, and were restored to homestead and pre-emption entry August 25, 1864. The lands were again withdrawn June 7, 1865; and again restored November 1, 1867. Once more withdrawn June 12, 1875, ... and they were finally restored May 22, 1891. St. Paul and Sioux City R. R. Co. *et al.* (12 L. D., 541).

One Seth Smith made homestead entry covering this tract September 23, 1867, which entry was canceled upon relinquishment December 21, 1870. William H. Otto made homestead entry covering this land September 1, 1871, which entry was canceled for abandonment July 15, 1884. John Beatley made homestead entry covering this tract August 30, 1890, alleging settlement April 3, 1882, which entry is still of record.

By your office letter "F" of January 27, 1894, a hearing was ordered to determine the status of this tract at the date of the company's selection. Upon the testimony adduced the register and receiver, on December 8, 1894, rendered a joint decision as follows:

> 1st. John Beatley, deceased, established his residence upon the tract of land in controversy April 3, 1882, and with his family (until his death in 1891) continued to reside upon and cultivate the same, and since his death his widow, Senea Beatley, and family have resided upon and cultivated the land. That the improvements thereon are worth about $1,000.
>
> 2nd. That on August 30, 1890, John Beatley's H. E. No. 1086, was allowed and became of record.
>
> 3rd. The Cedar Rapids & Missouri River Railroad Co., on the 18th day of July, 1884, filed with the register and receiver their selection of this tract, with other lands.
>
> 4th. That prior to November 18, 1887, Herdschel Van Shaak applied to enter as a timber culture claim the tract in controversy.
>
> We are of opinion that the selection of the C. R. & M. R. R. R. Co., should be canceled for the reason that it was made at a time when the improvements and settlement of John Beatley were so notorious as to confer no rights upon said company.
>
> We are of the opinion that the attempted entry of Herdschel Van Shaak conferred no right as against the settlement and improvements of John Beatley, and that the same should be rejected.
>
> We are of the opinion that H. E. No. 1086 is and should be held in full force and effect.
>
> Thirty days from receipt of notice is allowed for appeal.

From this action the company appealed and on March 24, 1896, you sustained the action of the local officers and held for cancellation the company's selection, from which action the company has appealed to this Department. In its appeal the following assignments of error are made:

(1) In failing to hold that the act of June 2, 1864 (13 Stat., 95), amendatory of the act of May 15, 1856 (11 Stat., 9), under which appellant claims, created a legislative withdrawal of the land in question upon the definite location of appellant's modified line of route, and that by reason of such legislative withdrawal the NW. ¼ of the NE. ¼ of said section, being then free from any kind of claim or entry, became reserved from settlement and entry, and hence was a bar to the subsequent homestead entry of William H. Otto and the claim of John Beatley, deceased husband of said Senea Beatley.

(2) In failing to hold that upon the cancellation of homestead entry 404, made September 23, 1867, by Seth Smith on December 21, 1870, the land included therein, to wit, the N. ½ of the NW. ¼, Sec. 2, aforesaid, became by reason of such legislative withdrawal reserved from appropriation under the settlement laws, pending the exercise of the right of selection by appellant or its vendor, the Cedar Rapids and Missouri River Railroad Company.

As thus presented the case is in all important particulars similar to that of the Iowa Railroad Land Co. *v.* Ertel (10 L. D., 176), in which it was held that under the act of June 2, 1864, *supra*, the right of the company to even sections within the six-mile limits of the grant of May 15, 1856, does not attach until selection and that the right of selection can not be exercised until after the definite location of the modified line. It was further held in said opinion:

Until this entire line was established and the map showing such definite location was filed in the General Land Office, there was no authority in the Secretary to withdraw these lands because the direction in the act—that when the line is established and definitely located the Secretary shall reserve the lands—is an implied prohibition against the power to withdraw or reserve them before that time, and the withdrawal of the Secretary, when properly made, can not operate upon land to which a homestead right had attached but such lands were expressly excluded therefrom by the terms of the act.

At the time of the filing of the map showing the location of the modified line as well as the date of the executive withdrawal which followed the filing of said map, the lands in question were embraced in homestead entries of record.

It must be held, therefore, that the tract in question was never reserved on account of this grant, at least not prior to the filing of the company's selection list, August 23, 1884.

The record made at the hearing ordered by your office clearly shows that long prior to the filing of said list John Beatley, together with his family, had begun a residence upon the land, which has since been continued and the land improved to great value.

It is clear, under the decisions of the courts, that no title passes to indemnity lands until the approval of the company's list of selections by the Secretary of the Interior, and in view of the showing made in this case your office decision is affirmed and you are directed to cancel the company's selection of the tract in question.

It appears from the record transmitted that Senea Beatley, widow of John Beatley, deceased, has made proof upon the entry made August 30, 1890, and that final certificate issued May 5, 1896.

If said proof, upon examination, is found regular and satisfactory, patent will issue upon the entry.

APPLICATION TO ENTER—INTERVENING ADVERSE CLAIM.

McCORNACK *v.* VIOLET (ON REVIEW).

An application to enter embracing in part land covered by the prior entry of another, while pending, serves to protect the rights of the applicant as to the land open to entry.

Secretary Bliss to the Commissioner of the General Land Office, February 8, 1898.

(W. V. D.) (C. J. G.)

This case involves lot 10 of Sec. 3, T. 11 N., R. 3 W., containing 16.24 acres, in Oklahoma land district, Oklahoma.

On December 4, 1895, (21 L. D., 451– there entitled McCormack *v.* Violet), this Department rendered a decision in the case, affirming your office decision of July 31, 1894, rejecting James M. McCornack's application to make homestead entry of lots 6, 7, 8, 9 and 10 of section 3 aforesaid, for conflict with Oscar H. Violet's homestead entry No. 6695 of said lot 10. The said decision contains the following paragraph:

> 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.

On February 1, 1897, your office transmitted to this Department McCornack's petition for reconsideration and modification of the following sentence contained in said departmental decision, to wit, "The time prescribed by law for the exercise of McCormack's preference right has expired." This petition was filed because your office, on November 28, 1896, in a decision rendered in the case of Thomas J. Bailey *v.* James M. McCornack (a copy of which was filed with the petition), construed the words quoted above to be an authoritative departmental decision adverse to the exercise by McCornack of the preference right to enter lots 6, 7, 8 and 9, which he claims as successful contestant in the case of Eichelberger *v.* Calhoun, McCornack, Bailey and Violet, finally decided by this Department on July 12, 1894 (291 L. and R., 62). The petition in effect asks for the construction or explanation of the true intent and meaning of the decision complained of.

The case of Bailey *v.* McCornack aforesaid is now pending before the Department on appeal by McCornack, which presents for adjudication the same questions as are presented by the petition aforesaid. The appeal and petition will therefore be considered together.

The facts in this case are as follows: On April 23, 1889, Calvin A. Calhoun made homestead entry for lots 6, 7, 8 and 9, of the NW. ¼ of Sec. 3 aforesaid, lying contiguous to each other on one side of the North Canadian river, and lot 10 of the same quarter-section on the opposite side of said river. At that time the North Canadian was a meandered stream and was so delineated on the official township plat; hence the subdivision of the said quarter-section into lots. May 21, 1889, one Theodore W. Eichelberger filed affidavit of contest against Calhoun's entry, and May 27th following, James M. McCornack contested both Calhoun and Eichelberger. January 25, 1890, one Robert H. Linthicum filed a contest against Calhoun's entry as to lot 10, alleging that said lot was not contiguous to the remaining lots of the entry, being separated therefrom by a meandered stream, and that Calhoun had wholly abandoned said lot 10. February 7, 1890, your office suspended Calhoun's entry and allowed him thirty days within which to relinquish the land on one side or the other of the river. March 17, 1890, Calhoun relinquished lot 10 and March 18, 1890, one Oscar H. Violet, apparently without objection from Linthicum, made homestead entry therefor, and Linthicum no longer appears in the case. June 20, 1890, Thomas J. Bailey filed an affidavit of contest against Calhoun, Eichelberger and McCornack. October 20, 1890, a hearing was had, and upon the record made up the local officers recommended the cancellation of Calhoun's entry, the dismissal of the contests of Eichelberger and Bailey, and the award of preference right of entry to McCornack.

On May 29, 1891, in the case of Hattie Fuhrer (12 L. D., 556), this Department held that the north fork of the Canadian river should not have been meandered, and that thereafter it should not be regarded as a meandered stream.

On June 8, 1892, your office on appeal by Calhoun, Eichelberger and Bailey, affirmed the decision of the local office, and on November 22, 1893, this Department affirmed the concurrent decisions below, which action was promulgated by your office on December 12, 1893. It was stated in your said office decision that "the parties appear to have acquiesced in the relinquishment of lot 10, included in the entry in question, and the contest has proceeded in respect to the remaining tracts;" and also, in the said departmental decision, that "the parties to the record appear to have all acquiesced in said relinquishment, and lot 10 is not now in controversy."

In the meantime, on August 14, 1893, Violet made final proof, and on December 29, 1893, was awarded final certificate for lot 10. January 2, 1894, McCornack made application to enter lots 6, 7, 8, 9 and 10, which was rejected for conflict with Violet's entry. January 10 and 16, 1894, respectively, Bailey and Calhoun filed motions for review of departmental decision of November 22, 1893, which were denied July 12, 1894. On July 31, 1894, your office affirmed the action of the local office in rejecting McCornack's application to enter all the land formerly covered by Calhoun's entry, but allowed him the usual time for appeal or thirty

days to enter lots 6, 7, 8 and 9. McCornack appealed. August 16, 1894, Bailey filed an application to enter said lots 6, 7, 8 and 9, which was suspended to await final action on McCornack's appeal. December 4, 1895, this Department affirmed the action of your office in rejecting McCornack's application, concluding with the paragraph heretofore quoted. December 23, 1895, but before the departmental decision was promulgated by your office, McCornack filed a waiver of his appeal; also an application for lots 6, 7, 8 and 9, which was placed of record the same day. December 26, 1895, the local office rejected Bailey's suspended application for conflict with McCornack's entry. From this action Bailey appealed, and on November 28, 1896, your office reversed the said action and held McCornack's entry subject to Bailey's "superior" right. McCornack's appeal from your said office decision is now before this Department, as hereinbefore stated.

Your said office decision of November 28, 1896, is as follows:

> Bailey's application to enter was filed after the Department had directed the cancellation of Calhoun's entry. It was suspended pending McCormack's application to enter. He, McCormack, allowed his preferred right of entry to expire as decided by the Hon. Secretary in his aforesaid decision of December 4, 1895, 21 L. D., 451, and his application to enter, filed December 23, 1895, had no connection with the former proceedings, or litigation. So far as that application is concerned, he stood as a stranger. It was an independent transaction, an attempt by him to secure the land separate and apart from his former attempts to secure the object. Bailey's rights under his application of August 16, 1894, had intervened, and McCormack's application should, for that reason have been rejected.

The appeal assigns as error the whole of said finding.

It is obvious from the statement of facts in this case that upon Calhoun's relinquishment of lot 10 and entry thereof by Violet, under the circumstances stated, the said lot was eliminated from the controversy. McCornack's application of January 2, 1894, was filed within thirty days after notice of the departmental decision of November 22, 1893, which awarded him the preference right to make entry of lots 6, 7, 8 and 9. In view of the fact that he included in his application lot 10, which at the time was not subject to entry, the question arises whether said application, together with the appeal taken from the rejection thereof, as a whole, can be considered as operative to withhold lots 6, 7, 8 and 9, which were subject to entry, from any other disposition, until final action on the appeal.

There can be no doubt that the application was properly rejected so far as said lot 10 is concerned. But because of its rejection as a whole, it does not follow that McCornack lost his rights thereunder as to lots 6, 7, 8 and 9. These lots were subject to entry, and the application was therefore one which might have been allowed as to them and rejected as to lot 10. See the case of McCreary *v.* Wert et al. (21 L. D., 145), in which it was held (syllabus):

> 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.

And in the case of Lindsey *v.* Adams (21 L. D., 444), based on the case of Cornelius *v.* Kessel (128 U. S., 456), it was held that—

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.

See also Duncanson *v.* Duncanson, 25 L. D., 108.

It is true that McCornack applied to enter the whole tract after lot 10 had been expressly declared to be not subject to entry and after he had been served with notice to that effect. But the Department is inclined to the belief that, under the circumstances, he took this action in good faith. His contest was originally against all the land embraced in Calhoun's entry, and Calhoun relinquished lot 10 because the same was not contiguous to the remaining lots of the entry, being separated therefrom by the North Canadian river, which was at that time held to be a meandered stream. The Department subsequently, in the case of Hattie Fuhrer, *supra*, held that said river should not have been meandered, thus reversing the holding upon which decision against McCornack was based. From this it may fairly be presumed that McCornack was honestly misled into including lot 10 in his application, in the belief that under the changed ruling he was entitled to that also, which would have been the case but for the intervening entry of Violet, in the absence of any claim by Linthicum.

McCornack's application of January 2, 1894, was a good and valid application as to lots 6, 7, 8 and 9. The subsequent proceedings had thereon were directed to the status of lot 10 merely, and upon their settlement his right as to the remaining lots became effective as of the date of said application. During the pendency of these proceedings, as we have seen, said remaining lots were reserved from other disposition. Hence, Bailey's application of August 16, 1894, can not be regarded as an intervening adverse right. The second application, filed by McCornack December 23, 1895, was merely ancillary to the one of January 2, 1894, and can not be held as a waiver of any rights thereunder, and the entry allowed will be treated as though allowed under the former application.

The statement in the departmental decision of December 4, 1895, that "the time prescribed by law for the exercise of McCornack's preference right has expired," was unnecessary to the decision of that case and will not therefore be regarded as an adjudication of that question.

The action taken with regard to lot 10 is final; the petition and appeal do not seek a reversal of that portion of the departmental decision awarding said lot to Violet.

Your office decision of November 28, 1896, holding McCornack's entry subject to "Bailey's superior right of entry" is hereby reversed, and McCornack's entry will be allowed to stand. McCornack's petition is disposed of in his favor without the formality of entertaining the the same, as opposing counsel had notice thereof, and filed briefs in reply thereto.

PRACTICE MOTION FOR REHEARING—NEW CONTEST.

LARK *v.* LIVINGSTON.

A decision of the Department denying a motion for rehearing does not preclude the General Land Office from directing an inquiry, in the nature of a new contest between the parties, to determine questions arising since the original hearing.

Secretary Bliss to the Commissioner of the General Land Office, February 8, 1898.
(W. V. D.) (C. J. W.)

On March 11, 1896, your office reversed the local officers in upholding the homestead entry of Jessie C. Livingston, for the SE. ¼ of Sec. 31, T. 27 N., R. 5 W., made at Enid, Oklahoma, October 6, 1893, and held said entry subject to the prior settlement of plaintiff, Joseph Lark, who filed contest against the entry on the day it was made.

Defendant appealed from your office decision, and on July 27, 1897 [unreported], the case was considered here and your office decision affirmed.

Defendant moved for review of said departmental decision, which was denied on September 27, 1897. The defendant has filed a motion for rehearing in said case, supported by affidavits tending to show the abandonment of the land by plaintiff since the date of the hearing. The acts charged are not proper ground for rehearing of the present case, and the motion is denied, but, as held in the cases of Griffin *v.* Smith (25 L. D., 329), and Corbin *v.* Dorman (ib., 471), the decision of the Department denying the motion for rehearing does not preclude your office from directing an inquiry in the nature of a new contest to determine questions arising since the original hearing.

APPLICATION TO ENTER—ADVERSE CLAIM.

HASKINS *v.* ADDISON ET AL.

An application to enter, embracing in part land not open to entry, while pending, operates to protect the right of the applicant as to such portion of the land as may be subject to appropriation at the date of his application.

Secretary Bliss to the Commissioner of the General Land Office, February 8, 1898.
(W. V. D.) (W. A. E.)

On April 23, 1892, Eva Haskins filed homestead application for lots 1, 2, 5, and 6, of Sec. 17, T. 11 N., R. 7 W., Oklahoma, Oklahoma, land district. This application was rejected by the local officers for conflict with the homestead entry of Tilghman H. Addison, made June 17, 1891, for lots 1 and 2 of said section.

On April 27, 1892, William H. Wall filed a soldier's declaratory statement for lots 5 and 6 of said section 17, being that portion of the land

embraced in Haskins' application which was not covered by Addison's entry.

On May 19, 1892, Haskins appealed from the rejection of her application, and this appeal was dismissed by your office on August 27, 1892, for the reason that there was no evidence of service of the appeal upon Addison, the adverse claimant of record.

On September 27, 1892, Haskins filed motion for review of your office decision dismissing her appeal. It was alleged in this motion that she had settled on the land applied for by her on April 19, 1892; that Addison had abandoned his claim to lots 1 and 2; and that she had filed affidavit of contest against Addison's entry. She therefore asked that her application be accepted and suspended to await the result of her contest, and that Wall's declaratory statement be held subject to her right to make entry. It does not appear from the record when this affidavit of contest referred to by her was filed. Notice thereof, however, was served upon Addison on September 5, 1892, but it does not appear that a hearing has been had or any further action taken thereon.

On September 28, 1892, Wall made homestead entry for the lots covered by his soldier's declaratory statement.

On March 3, 1896, your office denied Haskins' motion for review, and on May 12, 1896, she filed appeal to the Department.

Haskins' homestead application was properly rejected by the local officers so far as lots 1 and 2 were concerned—those lots being covered at that time by Addison's entry. If she had any settlement rights on those lots, her proper course would have been to contest Addison's entry, secure its cancellation and then file her application. The principal question, we have to consider here, then, is, whether or not that application gave her any right to lots 5 and 6, which were vacant and unappropriated at the time she filed said application.

In the case of McCreary *v.* Wert *et al.*, 21 L. D., 145, it was held that 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. Again, in the case of Lindsey *v.* Adams, 21 L. D., 444, it was held that 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.

It was error on the part of the local officers, therefore, to reject her application as to the portion of the land not in conflict with Addison's entry. She has preserved her right to said lots 5 and 6 by her successive appeals to your office and to the Department, and her claim to those lots is superior to that of Wall, who entered subsequent to the date of her application.

You will therefore call upon Wall to show cause why his entry should not be held subject to Haskins's superior right to make entry for said lots 5 and 6.

HOMESTEAD CONTEST—RESIDENCE.

FORSLOF *v.* CRARY.

Residence is not acquired by going upon and visiting land solely for the purpose of complying with the letter of the law; the acts of going upon the land, and the occupancy thereof, must concur with the intent to make it a permanent home to the exclusion of one elsewhere.

Secretary Bliss to the Commissioner of the General Land Office, February 8, 1898.
(W. V. D.) (J. L. McC.)

John H. Crary, on April 25, 1894, made homestead entry for the SW. ¼ of Sec. 15, T. 153 N., R. 62 W., Grand Forks land district, North Dakota.

On May 5, 1895, Andrew Forslof filed affidavit of contest (dated May 2, 1895), which was served on the 16th of the same month, alleging that defendant had never resided on said land, and had wholly abandoned the same.

The hearing was had commencing June 17, 1895, before the judge of the county court of Ramsey county, and occupied five days.

The local officers, on July 20, 1895, rendered decision in favor of the defendant (Crary).

The contestant (Forslof) appealed to your office; which, on March 10, 1896, reversed the finding of the local office, holding that the entryman had not, prior to the service of notice in the case, established a home or residence on the land in controversy to the exclusion of one elsewhere; therefore it reversed the decision of the local officers, and held Crary's entry for cancellation.

Crary has appealed to the Department.

He alleges two errors. The allegation that your office erred "in holding the entry of John H. Crary for cancellation" is not sufficiently specific to warrant consideration. There remains the single allegation that your office erred in not holding "that the defendant had, prior to the service of notice in this case, established residence upon the land in controversy to the exclusion of one elsewhere."

Counsel for the defendant, in his argument in support of his appeal, lays great stress upon the fact that "the undisputed testimony" shows that the defendant broke nineteen acres, plowed five acres that had previously been broken, bought lumber, built a small house on the land, afterward moved a larger house on to the land, put furniture into one of the houses, hauled a load of firewood, etc. But inasmuch as your office in no degree based its decision upon a failure to improve or cultivate the land, this "undisputed testimony" has no bearing upon the question of residence.

The land in controversy is situated not quite one mile from the village of Crary, North Dakota. The defendant, or his wife (it matters not which), was proprietor of the leading hotel in said village; and the contention of the contestant is that their actual home was that hotel,

and that the defendant was keeping up a merely colorable residence at his claim by visiting it occasionally while doing or overseeing the doing of farm work upon it, and sleeping upon it at rare intervals.

The defendant testifies that he "established residence" upon the land on November 14, 1894—six months and nineteen days after his entry thereof—by going out to the land and sleeping in one of the houses hereinbefore mentioned, upon blankets and quilts that he carried with him from the hotel for that purpose. He slept there again (he thinks) on the night of the 16th of November. He testifies further: "I spent a part of the time from that time to the first of May on the place"; but whether such part of the time was day or night, workdays or Sundays, he fails to state. One of his witnesses testifies that he staid with the defendant on his claim one night in the winter. He says:

> I used to work for him, and he wanted me to go out and keep him company. I was awake often, and put wood in the stove to keep it warm in there. I waked up to keep the fire from going out. I did not go out to sleep, but to keep company, to play cards and eat and drink.

If this visit was not on the 14th or 16th of November, it would appear to have been shown by Crary and his witnesses that he spent three nights on his claim between the date of entry (April 25, 1894) and the 1st of May, 1895—a little more than twelve months.

It does not appear that, during this period, his wife or any member of his family had been on the claim. The defendant testified that his wife was sick, and could not with safety take up her residence on the land. In corroboration of this statement he introduced his family physician, who testified to her illness, beginning the first week in August, 1894. But upon being asked: "Would it have endangered her health to be taken out to the farm and taken up her residence there if the dwelling had been warm and comfortable?" he replied; "I refuse to answer that question." This action on his part is mentioned in the decision of your office, whereupon said physician makes an affidavit, which is filed in support of the appeal, in which he alleges he was in a hurry to get away, and did not want to be delayed to answer hypothetical questions.

Contestant Forslof, on May 1, 1895, went to Devil's Lake (about a dozen miles from the land in controversy), and there arranged with an attorney for the initiation of contest; he signed and swore to the contest affidavit on May 2nd; it was filed in the land office at Grand Forks on May 5th; and service of the same was made on the defendant May 16, 1895. The defendant contends, in substance, that in case he can not be considered as having "established residence" on the land on the 14th of November, 1895, he certainly did so on May 1, 1895, previously to service of notice of contest, and thereby cured his previous laches (if any).

This contention renders it important to consider with especial care the testimony relative to the defendant's residence from May 1, 1895, until the service of notice upon him.

His own testimony relative to residence subsequently to May, 1895, was as follows:

On the first day of May I moved my wife and family onto the land. My wife and family have resided continuously on the land since May 1, 1895. They were absent three nights; one night at Devil's Lake, Decoration night; and the other two nights at Crary in the hotel; they were in town and got caught in the rain.

The above is all the defendant testifies to relative to residence on the land after May 1st, not only until May 16th (date of service of notice), but until the date of the hearing.

Several of Crary's witnesses testify to seeing Mrs. Crary on the land on the morning of the 2nd of May. Possibly she was seen on the land on the morning of the 3rd of May—but it appears probable that there was a confusion of dates. At the most Mrs. Crary was seen on the land twice between May 1st and May 16, 1895 (never before).

Contestant Forslof testified that between May 1st and May 16th, 1895, he was at the house upon the land in controversy three or four times; that he looked into the house, but no one was there; it was in the daytime—either forenoon or afternoon, not in the evening—when he looked in; was not able to swear that somebody may not have slept there nights.

Earl Parker testified that he owns and occupies a tract adjacent to that in controversy; on the night of May 1, 1895, Mr. Crary and his wife rode out to their claim, about eight o'clock; Crary put his horse in witness's barn; they left next morning; has "seen them going out and coming in from the land in dispute three or four times a week"; "saw the little girl there once, but saw no other members of the family there at any time."

Dan Boyd, harness maker, testified to seeing Mr. and Mrs. Crary drive by his harness shop several times a week—going out toward the land about 8 o'clock in the evening and coming back very early in the morning.

Caspar Bye testified to substantially the same thing as the preceding witness.

Hans Anderson testified that, during May, 1895, he boarded at Crary's hotel; Mr. Crary managed the hotel, and took pay of witness for his board; Crary ate supper at the hotel—is not certain about breakfast;

his family were there, except when they would take a drive in the evening; when they took a drive they went out to the farm; Mr. Crary told me so—that is how I know; don't know whether they returned that night or not—they would be there at the hotel in the morning.

Crary testified that said hotel—land, building, and appurtenances—belong to his wife. The register of deeds for that county was introduced as a witness, who produced the records of his office, and testified that they showed that said hotel property had been deeded to "John H. Crary," and that there was no deed from J. H. Crary to any other party upon said records. Crary, upon being recalled, testified that he had deeded it to his wife, but had not yet sent the deed to the county seat

to be recorded. Whether Crary, or his wife, was the real owner of the hotel is a question, however, of less importance than the defendant appears to regard it—the question at issue being, not the ownership of the so-called "Crary's hotel," but the residence of Crary.

Forslof's affidavit charged not only abandonment of the tract for more than six months but failure to establish residence upon the land up to the date of filing the affidavit. The evidence unquestionably sustains the allegation of the affidavit of contest in this respect. Thereupon the burden of proof was on the defendant to show, by a clear preponderance of evidence, that before he either had knowledge of the proposed contest, or notice thereof, he had cured his default, by in good faith establishing his residence on the land, to the exclusion of a residence elsewhere. This he utterly failed to do. He was manifestly making a mere pretense of colorable compliance of the law by occasional presence when cultivating or making improvements upon the land or by visiting it at night—meanwhile making no change in his actual residence, which continued to be at his hotel—in the village of Crary.

The Department has repeatedly held, as in the case of Dayton *v.* Dayton (8 L. D., 248, syllabus), that

> residence can not be acquired by going upon and visiting land solely for the purpose of complying with the letter of the law; the act of going upon, and the occupancy of the land, must concur with intent to make it a permanent home to the exclusion of one elsewhere. (See also Sydney F. Thompson, ib., 285; Mary Campbell, ib. 331; Gibbs *v.* Kenney, 16 L. D., 22; and many other cases.)

The decision of your office holding Crary's entry for cancellation is therefore affirmed.

RELINQUISHMENT—INSANE ENTRYMAN—INTERVENING CLAIM.

THORNTON *v.* HALE.

Where the relinquishment of an entry is procured from a person of unsound mind, by one who is aware of the mental unsoundness of the entryman, the entry must be reinstated; and the intervening entry of a third party, in such case, is made subject to the right of the Department to investigate the circumstances under which the relinquishment was obtained, and determine the good faith of such party in connection therewith.

Secretary Bliss to the Commissioner of the General Land Office, February 9, 1898.

(W. V. D.) (H. G.)

Carpus S. Hale appeals from your office decision of February 25, 1896, adverse to him, holding his homestead entry for the W½ of the NW¼ and the W½ of the SW¼ of Sec. 24, T. 10 N., R. 21 E. W. M., in the North Yakima land district, Washington, for cancellation and directing that the homestead entry of John S. Thornton to said tract be reinstated.

October 24, 1892, John S. Thornton made homestead entry for such tract and on November 29, 1894, he executed a relinquishment of said

entry. On the day following, the said relinquishment was filed by George W. Merton, and the local officers canceled Thornton's entry and Merton made homestead entry for said land. On January 16, 1895, Merton relinquished his entry, and on the same day, Carpus S. Hale, the contestee, made homestead entry for the tract.

On December 11, 1894, after Merton's entry and prior to that of Hale, Thornton was adjudged unable to take care of himself and incapable of managing his affairs, by reason of his infirmity of body and mind, by the superior court of Yakima county, Washington, and his nephew, William E. Thorton, the contestant, was by said court appointed guardian of his person and estate. Thereafter, and on March 1, 1895, John S. Thornton was adjudged insane and was committed to the State hospital for the insane.

On February 9, 1895, William E. Thornton, as guardian, filed in the local office his application for the cancellation of the entry of Hale, and the re-instatement of the homestead entry of his ward. The grounds of this application are, in effect, that since his entry of the tract, John S. Thornton had failed in health and his mind became so affected that he was incapable of transacting business of any kind; that for some time prior to November 29, 1894, the date of his relinquishment of the tract to Merton, he was practically helpless and the victim of delusions, and that while in his enfeebled and incapable condition, Merton procured such relinquishment, taking advantage of the condition of Thornton, and obtaining the same through fraudulent representations and without any consideration; that Hale had full knowledge of the condition of Thornton at the time the relinquishment was made through the fraud and imposition of Merton, and that Merton and Hale conspired together to secure the relinquishment.

On April 15, 1895, a hearing was had upon these allegations, and upon the testimony submitted thereat, the local officers recommended that the entry be allowed to stand and that the contest be dismissed.

This decision was reversed by your office, and Hale appeals therefrom.

The evidence fails to disclose the alleged conspiracy between Merton and Hale to secure by fraud the homestead of Thornton, and that allegation of contest may be eliminated from the case.

The important questions to be determined are: Was Thornton of unsound mind at the time he relinquished his homestead entry, and did Merton know of this condition and take advantage of it?

The witnesses testifying to the mental infirmities of Thornton were his nephews, one by blood and the other by marriage, his former employer, those who had slept with him, and the people of the immediate neighborhood, all of whom had frequent opportunities to observe his moods, actions and speech. In the spring of 1894, Thornton was engaged as sawyer at a lumber mill, but was relieved from his employment because of his erratic condition. He would endeavor to perform

useless and unnecessary work at the mill, although reasoned with and directed to refrain from doing it. He became clumsy and awkward around the saw, and was in danger of being injured. At one time he fell near the saw which was in motion, and upon being remonstrated with by his fellow workmen, declared that the sooner his head was cut off the better. In the autumn of 1894, prior to the month in which he relinquished his homestead, he would attempt to irrigate the roads, and obstinately refused to cease his useless labors in that direction. He talked incoherently on ordinary subjects, and was continually brooding; he seemed afflicted with melancholia and wild delusions; he threatened suicide; he talked earnestly of robbing banks and railroad trains; he announced his intention of writing to the President to secure the amelioration of the condition of the poor; he believed that he was in danger of prosecution for imaginary offenses, and he feared assassination; he wrote one witness to the effect that he had a *bona fide* proposal of marriage from a young lady; on one occasion he did not know a neighbor and friend during a conversation, frequently asked his name; he talked about plowing and planting corn in the month of November; he threatened the life of some of his friends, without the slightest provocation; he declared that his cabin was infested with spiders and tarantulas, not thousands but millions of them and he calked his dwelling with rags to keep them in; he emptied a straw mattress and burned the straw claiming that it was literally alive with spiders; he was known in the neighborhood as "Crazy" Thornton. He was a man sixty-two years of age, and had formerly been in vigorous health and capable of performing skilled labor steadily and intelligently, but for six months or a year prior to his relinquishment he became subject to these illusions and delusions.

His condition was evidently well known to people in the neighbourhood and must have been known to Merton who resided near him. One witness, a young lady, who was at the residence of Merton, when he and Thornton were present, was told by Merton not to mind Thornton as he was crazy, and after the latter left, Merton informed the witness that her sister who was engaged as a domestic at his house "could work him and get him to throw up his homestead," and then her father could "jump it." This conversation occurred about two weeks before the relinquishment was executed.

Thornton gave different reasons for making the relinquishment. One was that he must leave the State to avoid a threatened but groundless criminal prosecution, and that Merton had agreed to take his claim and hold it for him until he could safely return; another was that he was living on the claim for the benefit of others, who had agreed to furnish him with food but had not done so, and that he was tired of living there alone, for the benefit of others. To another he stated that owing to the presence of dangerous insects about the place he could not live there. The consideration for the relinquishment was three promissory

notes, aggregating $400 and due in unequal sums in one, two and three years at eight per cent interest, an order on a local store for $25 and six dollars in cash, which Merton said he advanced in order to make up for the high prices for the goods charged at the store. These notes could not be found and were apparently destroyed by Thornton prior to his confinement in the insane asylum, as they were accessible to him while living at his nephew's place, and he had been caught destroying like instruments due to him before. The notes were payable to Thornton personally and were non-negotiable, the words "or order" having been erased from the printed form by Merton, his reasons being that he knew Thornton was addicted to drinking to excess, and might in some debauch dispose of the notes for less than their face. It appears that Thornton had no means at his command when he executed the relinquishment and he probably spent the small sum paid him by Merton for liquor, as he appeared directly thereafter to be under the influence of intoxicants, and attempted to borrow money from his acquaintances. He was compelled to seek shelter with his relatives, and seemed thereafter to utterly break down to such an extent that he was placed under guardianship twelve days after executing the relinquishment and in an insane asylum about three months thereafter.

Merton's explanation of the circumstances attending the execution of the relinquishment shows that he knew that Thornton needed protection at times, owing to the form of the notes which was changed at his suggestion. He must have known the financial condition of Thornton at the time, and that he was largely dependent upon his relatives for food. He knew that Thornton was left with but the sum of six dollars at his disposal, and was unable to perform manual labor, for he refused to give him work on account of his incapacity, when Thornton sought it, as he states, for the sake of obtaining board and properly cooked food. He dealt with this enfeebled and helpless man without consulting his relatives and his own testimony indicates that he took advantage of one infirm of body and without mental poise. He denies that he ever called Thornton "crazy" in the sense the term is attributed to him, but it is impossible to escape the conclusion from the testimony, including his own, that he was dealing with one incapable of managing his affairs.

The testimony of his witnesses to the effect that Thornton was sane, is of a limited character. They either had but occasional talks with him, or saw him for a short time when he executed the relinquishment. They had no opportunities to observe his demeanor for any length of time or to form any judgment based upon more than a cursory examination of his condition.

The great preponderance of the evidence is to the effect that Thornton was incapable of managing his affairs and that his mind was affected by general fatuity at the time he executed the relinquishment, and that Merton knew he was dealing with a demented person at the time.

It may be that the facts detailed by any one witness with reference to the condition of Thornton previous to his relinquishment, considered separately and apart from the statement of other witnesses, do not show incapacity to transact business on his part, nor establish insanity, either continued or temporary. But when all the facts are marshalled, their combined effect is to lead irresistibly to the conclusion that if Thornton was not afflicted with insanity for some time before the date of the relinquishment of his homestead entry, his mind wandered so near the line which divides sanity from insanity as to render any important business transaction with him of doubtful propriety, and to justify a careful scrutiny into its fairness. Allore *v.* Jewell, 94 U. S., 506, 508.

Upon an issue of insanity, where the validity or invalidity of the acts of an insane party are under examination, the question is whether by reason of mental disease, the party was unable to comprehend the nature of the act, its relations, effects and legal consequences. Buswell on Insanity, Sec. 18. Thornton evidently knew that he was relinquishing his homestead, but his mental condition was so clouded that he was incapable of contracting intelligently as to that matter, or any other matter of business. The rule has sometimes been announced that unless there is inadequacy of consideration, or some other evidence of fraud, imposition or overreaching, any degree of insanity or imbecility short of total business incapacity will not suffice to avoid a contract. Jackson *v.* King, 4 Cowen, 207, and notes to that case in 15 Am. Dec., 363, with cases cited. It was held in that case, that while weakness of understanding is insufficient to avoid a deed, it furnishes grounds for suspicion of improper influence, and, therefore, wherever fraud can be inferred from the circumstances of a transaction, equity will interpose against it. The imbecility must be such as would justify a jury, under a commission of lunacy, in putting the property and person of the contractor under the protection of a chancellor. 1 Story on Eq. Jur., sec. 237. This was done shortly after the transaction in question, and the proceedings finally culminated in the confinement of Thornton in an insane asylum.

The curator of an interdict, under the statute of Louisiana, filed a bill to have the contract of the latter declared null and void, averring that at the time of making it, the interdict was losing and to a great extent had lost his capacity to attend to business and to manage his affairs, and that his mind was seriously impaired to such an extent as to affect his understanding and judgment, and so continued until he was judicially interdicted or declared insane, but this averment was held not to entitle the plaintiff to relief upon the ground that the interdict was incapable in law of making a binding agreement under the provisions of the Civil Code of the State. The proof failed to show that the persons who at that time generally saw and conversed with him, knew or even believed him to be in a state of mental derangement or that the party who dealt with him had any ground whatever to doubt

his capacity to contract, but on the contrary disclosed that at the time in question, he was not incompetent for the transaction of business, although peculiar and at times eccentric. Stockmeyer *v.* Tobin, 139 U. S., 176, 187. The time of the disputed transaction in that case occurred in January, and in November of the same year the party was judicially interdicted.

In the case at bar, but twelve days intervened between the challenged transaction and the judicially declared incapacity of Thornton. This is not considered proof of his imcompetency to contract, but only a circumstance leading to the conclusion that the witnesses for the contestant had good grounds for their belief in his insanity, which does not appear to have been a sudden overthrow of reason, but the result of mental disturbance of at least six months prior to the time he was placed under guardianship. It must be shown that he was insane at the date of the relinquishment, and subsequent judicial proceedings which resulted in placing him under guardianship and restraint are not conclusive, as the courts generally hold that a finding of lunacy upon an inquisition, even prior to the contract, is merely *prima facie* evidence, and is not conclusive in other proceedings. Beach on Modern Law of Contracts, Sec. 1381.

The doubtful and uncertain point at which the sound and disposing mind disappears and incapacity begins can be ascertained only by the particular circumstances of each case, to be duly weighed and considered by the tribunal before which the matter is to be determined. Dennett *v.* Dennett, 44 N. H., 531.

If a conveyance is obtained by the exercise of undue influence over a man whose mind had ceased to be a safe guide of his actions, it is against conscience for one who has obtained it to derive any advantage therefrom. It is the peculiar province of a court of conscience to set it aside. That a court of equity will interpose in such a case is among its best settled principles. Harding *v.* Handy, 11 Wheat., 125, followed in Allore *v.* Jewell, 94 U. S., 506, 511.

A careful review of the evidence leads to the conclusion that Thornton was *non compos mentis* at the time he executed the relinquishment of his homestead.

He had given his notes for two thousand dollars to one of his relatives two years before for the relinquishment of the tract and the possessory rights thereto. He receives for his relinquishment a consideration of about $431.00, six dollars of which was cash and the residue to the extent of $400.00 was in promissory notes, due at different intervals, and these notes were unsecured. It appears by slight evidence it is true, that Merton, the payee, was not possessed of any great amount of property, and it is doubtful if these notes could be collected. Rights of like character had been sold for about the same amount in the locality, and the consideration can not therefore be said to be grossly inadequate, but was not a fair price for the claim.

It appears by a preponderance of the evidence that Merton knew of the unfortunate condition of Thornton, and that he was taking an unfair advantage of one who was demented and unable to care for himself, and whom he stripped of his possessions, leaving him with but a small sum of money. This was done without consultation with the relatives of the unfortunate man and with full knowledge that even the small cash payment would be squandered in drink. Within forty-six days after his entry, Merton disposes thereof by relinquishment in favor of another. He did all he could to protect himself from innocent transferees by making his obligations payable to Thornton personally, and by furnishing him with but a small cash and merchandise payment. Such a transaction ought not to be supported. Although such contracts are set aside on the ground of fraud, by the courts, fraud is presumed from such conditions as exist in this case. 2 Beach on Modern Law of Contracts, Sec. 1392.

Under the earlier English rule, a *non compos*, according to the strict rules of law, was not allowed to stultify or "blemish" himself, yet a party dealing with him was held to do so at his peril, for the contract might be declared void, provided a commission issued before his recovery, or by his heirs or devisees after his death. The party himself could not obtain relief against his deeds or instruments conveying an interest in property in a court of law, but a court of chancery always had jurisdiction to relieve against the acts of such person of unsound mind, which were exposed to the imputation of fraud, even where no commission in lunacy had been issued. 1 Collinson on Law of Idiots and Lunatics (Ed. 1812) 402, 409. And a court of equity might decline to interfere to set aside a conveyance of a person *non compos mentis*, if great hardship would accrue to the party against whom the decree was sought. Ibid., 414.

The doctrine of the English courts, that a person of full age would not be permitted to plead his mental incapacity to avoid his contracts, is no longer the law in England and has been exploded in America. Notes to the case of Jackson *v.* King, 15 Am. Dec., 361.

It appears to be the settled law in nearly all the American courts that the deed of a lunatic who has not been placed under guardianship is not absolutely void, but voidable. Hovey *v.* Hobson, 53 Maine, 451—89 Am. Dec., 705. However, in Dexter *v.* Hall, 15 Wall., 9, it was held that a power of attorney executed by a lunatic is absolutely void, and the opinion seems to lean to the position that all grants and deeds of a lunatic are void.

The question is not one of moment in this case, as it is sought to have the relinquishment declared void by the representative of the lunatic. The fact that third persons have acquired an interest under the contract of one who is *non compos mentis*, in good faith for value without notice of the infirmity, can not, of itself, defeat the right of the insane person or his guardian to avoid the contract. This rule applies to deeds and negotiable instruments as well as to other con-

tracts, and it applies whether the contract be regarded as void or merely voidable. To protect *bona fide* purchasers in such cases would be to withdraw the protection from the insane person. Clark on Contracts, 273. It has been well said that "if the acts of an insane person can thus be made valid and binding, an easy method would thereby be found for disposing of his property." Rogers *v.* Blackwell, 49 Mich., 192. See also Anglo California Bank *v.* Ames, 27 Fed. Rep., 727, and cases there cited; Hull *v.* Louth, 109 Ind., 315; Long *v.* Fox, 100 Ill., 43.

A deed executed by persons incompetent to contract or convey passes no title, even as against a purchaser for value without notice, notwithstanding that the purchaser can ascertain the competency of the parties only by inquiries *in pais*. Maupin on Marketable Titles to Real Estate, 181. The contrary doctrine is announced in Odon *v.* Riddick, 104 N. C., 515, but that case was decided mainly upon the ground that a purchase from an insane person of lands for value and without notice of the mental incapacity of the grantor, is generally upheld, and that an innocent purchaser for value of the grantee of such undeclared lunatic would stand in the same position as his grantor, and that the *status in quo ante* must be preserved.

In this case Merton knew of the incompetency of Thornton when he executed the relinquishment. Hale does not show that he was an innocent party. The evidence does not disclose that he had any actual knowledge or notice of Thornton's incapacity, but he was bound by the public record in the land office, and before Merton relinquished he had constructive notice by publication of the statutory notice of the appointment of a guardian for Thornton.

This was sufficient to put him upon inquiry, if the various transactions had been ordinary transfers of real property. Although put upon the stand by the contestant and testifying that he did not know Thornton, the insane man, he did not offer his own testimony to show that he was in the attitude of an innocent purchaser for value without notice of the insanity of the former entryman. It nowhere appears that he advanced any moneys to Merton, or that he paid anything for the relinquishment. The rule is that when it is established by averment or evidence that the grantor was a person of unsound mind, at the time of the conveyance, the burden is upon the other party to the transaction to show, among other things, that he accepted the conveyance in ignorance of such mental unsoundness. Riggs *v.* American Tract Society, 84 N. Y., 330, cited and followed in Hull *v.* Louth, 109 Ind., 315, 323. The same rule ought to apply to Hale, who stands in the shoes of Merton, but it is not necessary that he should have had notice of Thornton's incapacity at any time.

If the relinquishment was the act of an incompetent person, Hale has no rights to preserve, for one can not be said to be an innocent purchaser of public lands prior to the issuance of a patent therefor. A purchaser of an entryman takes the same always subject to the supervision of this Department. Orchard *v.* Alexander, 157 U. S.,

372. The departmental supervision has been exercised to the extent of holding that a relinquishment executed by the guardian of an insane person under the direction of a probate court is unauthorized by law and invalid. Dyche *v.* Beleele, 24 L. D., 494.

A purchaser of a relinquishment can acquire no right by virtue of his purchase. Bentley *v.* Bartlett, 15 L. D., 179, 181. The relinquishment runs to the government, and the consideration passing between the entryman and another therefor, is not a matter of departmental inquiry, except as an incident tending to show, in connection with other facts, that the entryman was fraudulently deprived of his land. Winston *v.* Barnard, 22 L. D., 150. Hale, therefore, made his entry subject to the right of the Department to investigate the validity of Merton's entry based upon the relinquishment by Thornton.

A relinquishment is not such a contract as can be enforced by the Department. An entry made upon such relinquishment may be set aside for fraud, and for the reason that the entryman was incapacitated by intoxication or by dementia to such an extent that he could not realize the nature, consequences and effect of his acts, and where the unfortunate condition of the one who released his entry is known to the one who profits by it, and who obtains it for the purpose of filing on the land for himself or for another, and this power has been frequently exercised by the Department.

The case of Alden *v.* Ryan, 12 L. D., 690, in which it is announced that a tender must be made of the consideration for which a relinquishment was made, before its validity can be successfully attacked, appears to have largely influenced the decision of the local officers in this case, and is relied upon by the contestee. The facts in that case are not analogous to those of the case at bar.

It is only in cases where the sane party has acted fairly and in good faith with the insane party with whom he contracts, without actual or constructive knowledge of the other's insanity, that he is protected on an executed contract. Clark on Contracts, p. 263, *et seq.*; Buswell on Insanity, Sec. 413. Both of the elements of fair dealing and want of knowledge of the incapacity of the other party must be present in such a case to warrant a court in directing a restoration of the consideration, or the maintenance of the *status in quo ante* where a restoration can not be had, or where the parties can not be reinstated to the condition in which they were prior to the purchase. A tender could not in any event be required by the Department as an antecedent condition to the initiation of a contest in a case like the one at bar, where it appears from the evidence that the sane party did not act in good faith and knew of the mental derangement of the party with whom he was dealing.

The decision of your office directing the cancellation of the entry of Carpus S. Hale and the reinstatement of the entry of John S. Thornton is, for the foregoing reasons, affirmed.

JURISDICTION- SUPERVISORY AUTHORITY—SETTLEMENT RIGHTS.

CAGLE *v.* MENDENHALL.

A change in the person holding the office of Secretary of Interior does not prevent or defeat a review or reversal of departmental action, if the legal title to the land still remains in the government, and the Secretary making the ruling or decision, if still in office, would be in duty bound to review or reverse his own action.

The supervisory authority of the Secretary may be exercised on behalf of a party whose rights have been denied in a decision that has become final under the rules of practice, but has been overruled in subsequent cases involving the same question.

If an entry is relinquished pending attack by several parties alleging priority of settlement, the question of priority should be determined before allowing either of the parties contestant to make entry of the land involved.

Secretary Bliss to the Commissioner of the General Land Office, February (W. V. D.) *9, 1898.* (P. J. C.)

January 10, 1897, counsel for Byron E. Cagle filed in this office a petition for the exercise of the supervisory authority of the Secretary of the Interior "to correct an error of the Department's own making in a case where no error can be charged against" him (Cagle). This petition was preliminarily entertained, and by direction of the Department was duly served upon the opposite party, who has presented his views in opposition thereto in an extended written brief.

September 19, 1893, L. Haskins made homestead entry of the NW. ¼ of Sec. 22, T. 23 N., R. 1 W., Perry, Oklahoma, land district. October 14th, 1893, Mendenhall filed an affidavit of contest against this entry, alleging prior settlement. November 16th, 1893, Cagle filed an affidavit against Haskins' entry, alleging settlement prior thereto, and February 5, 1894, he filed an amended affidavit, alleging settlement prior to Haskins, Mendenhall, and all others. March 15, 1894, Haskins filed a relinquishment, and Mendenhall was permitted to make entry of the tract. A hearing was then had between Cagle and Mendenhall before the local officers, who held December 5, 1894, that Cagle was entitled to the land by reason of prior settlement, and recommended that the homestead entry of Mendenhall be canceled. Mendenhall appealed, and your office made the case special, and by decision of February 5, 1895, affirmed the action of the local officers. Mendenhall appealed to the Department where the case was again made special and by decision of May 16, 1895 (20 L. D., 446), the judgment of your office was reversed and the entry of Mendenhall held intact. In this decision the controlling question in the case was stated to be "whether or not the contestant, Cagle, was disqualified because of his having entered the territory from the west line of the Otoe and Missouria Indian reservation," and it was answered in the affirmative and Cagle held disqualified.

That decision was adhered to upon motion for review August 8, 1895 (21 L. D., 90), but it was overruled in Brady *v.* Williams, December 23, 1896 (23 L. D., 533; 25 id., 55).

There were quite a number of cases involving the identical question raised in Cagle *v.* Mendenhall and Brady *v.* Williams, and the others have been disposed of according to the decision in the latter case. Of those who made the run from the Otoe and Missouria Indian reservation side and effected a prior settlement, Cagle is the only one who has not been awarded the benefits thereof where the claim was otherwise free from objection.

The finding of your office and of the local office was that Cagle was the prior settler. The testimony taken at the hearing has been re-examined and it is found that it amply sustains these concurring decisions.

Cagle admitted having made the run from the Otoe and Missouria side, and the ruling of the Department in his case was that this was unlawful. That ruling was not based upon any controverted question of fact, but solely upon what was subsequently and is now held to have been a misinterpretation of the law and of the President's proclamation opening the lands to settlement.

The parties to the present controversy and the subject matter are the same as at the time of the original decision. The land has not been patented and the legal title is still in the government.

This case was advanced upon the docket both in your office and in the Department, in order that an early decision might be had upon a question of law, which at that time was new and affected many cases pending in the land department. The case was advanced, not upon the request of Cagle, but because it was deemed advisable by your office and the Department that some one of the many cases presenting that question should be selected as a test case, advanced to an early decision, and made a precedent by which to determine the other cases. As before stated, Brady *v.* Williams and the other cases involving that question were not disposed of according to the ruling in Cagle *v.* Mendenhall but were disposed of according to a decision expressly overruling that case. If Cagle *v.* Mendenhall had not been thus advanced, but had been permitted to keep its regular place upon the docket, in all probability the ruling therein would have been exactly the reverse of that which was actually made. That decision was not acquiesced in by those interested in the question there discussed, but remained a subject of contention in proceedings in the land department. Although Cagle's motion for review was denied, he did not accept the ruling of the Department but, it appears, has continued to reside upon the land, and has, in the local courts and otherwise, attempted to continue the assertion of this claim thereto. Mendenhall has also resided upon the land, has been in possession of the greater portion thereof, and has always resisted the claim of Cagle, but whatever has been done by either

Cagle or Mendenhall has been done with full knowledge of the continued assertion of the claim of the other.

The question which is now presented is whether the law which has been applied to all others similarly situated shall be also applied to Cagle and Mendenhall, or whether as to them the original decision in their case shall control the disposition of the land in controversy notwithstanding that decision involves a manifest misapplication of the law and the President's proclamation. As an incident to this is the further question whether, the title to the land still remaining in the government, the ruling of one Secretary can be reviewed and reversed by a succeeding Secretary. The latter question was carefully considered and discussed at length in Parcher *v.* Gillen (26 L. D., 34), where, in conclusion, it was said:

> The true rule drawn from an examination of all of the authorities is that the jurisdiction of the land department ceases where the jurisdiction of the courts commence, viz: when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights.
>
> The office of the Secretary of the Interior is a continuing one. Its incumbents come and go but the office remains. The powers and duties of the office are impersonal, and operate uniformly at all times and upon all controversies without reference to who may be exercising those powers or performing those duties. A change in the person holding the office does not authorize, and should not invite, a review or reversal of prior rulings or decisions; and neither does such change prevent or defeat a review or reversal in any instance where the Secretary making the ruling or rendering the decision, if still in office, would be in duty bound to review and reverse his own act. Administrative reasons as well as the principles of common justice require that a secretary should not disturb or reverse prior rulings or decisions, except where it is affirmatively shown that manifest injustice has been done or the law clearly misapplied; but this is equally true of his own rulings and decisions, and is not limited to those of his predecessor.
>
> So long as the legal title remains in the government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law. The issuance of a patent is the final act and decision in that disposition and with it and not before does the supervisory power and duty of the Secretary cease.

In Williams *v.* United States (138 U. S., 514–524), the court said:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

In Osborn *et al. v.* Knight (23 L. D., 216), it was held (syllabus):

> The doctrine of *res judicata* will not prevent departmental action where such course is the only one by which substantial justice can be secured, and the subject matter remains within the jurisdiction of the Department.

In the same connection, see Gage *v.* Atwater (21 L. D., 211); Moores *v.* Sommer (23 L. D., 514); Mullen *v.* Porter (25 L. D., 444) and Seixas *v.* Glazier (26 L. D., 49).

In common with others, among whom was Mendenhall, Cagle lawfully participated in the race for homestead claims on the day of the opening and by reason of his prior settlement obtained the first and better right to the land in question. Without fault upon his part the Department, by its original and erroneous ruling herein, has unjustly deprived him of that right. The original parties are before the Department and the subject-matter is still within its jurisdiction. Cagle is entitled to have the same law applied to him which has been and is being applied to others similarly situated. He has not acquiesced in the erroneous ruling but has been vigilant in the assertion of his claim. The facts of the case call for the exercise of the supervisory authority of the Secretary and the restitution of the right which was wrongfully taken from Cagle by the decision complained of.

The entry of Mendenhall will be canceled, and Cagle will be permitted to make homestead entry of the land in dispute.

Attention is called to the fact that when Haskins relinquished his entry of the tract in question there were then pending against that entry two contests, each based upon alleged prior settlement; one by Mendenhall, and the other by Cagle. Upon the filing of Haskins' relinquishment the local officers permitted Mendenhall to make entry at once. This was contrary to established rulings. Before an entry by either of the contestants was allowed a hearing should have been had to determine which had the prior and better right. A hearing was actually had after the entry by Mendenhall and this hearing resulted in Cagle's favor, so that the error of the local office in permitting an entry by one of the contestants before it was determined which was entitled to such entry, may have been without prejudicial effect.

Mendenhall has filed a motion for rehearing on the ground of newly discovered evidence, and presents in support thereof several affidavits. In opposition thereto Cagle presents the affidavits of eight persons and also a certified copy of the testimony given in another case by some of the witnesses whose affidavits are presented by Mendenhall. In this other case these witnesses testified about the same subject-matter and what was then said by them does not sustain their present affidavits. An examination of all that is presented in that connection demonstrates that the showing made does not warrant an order for a rehearing and the motion therefor is denied.

RIGHT OF WAY—STATION GROUND—ADVERSE CLAIM.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An intervening entry should not defeat the approval of a station plat, if the land was open to appropriation under the right of way act at the date of filing said plat.

Secretary Bliss to the Commissioner of the General Land Office, February 9, 1898.
(W. V. D.) (F. W. C.)

With your office letter "F" of April 22, 1897, was transmitted an appeal by the St. Paul, Minneapolis and Manitoba Railway Company from the action taken in your office letter of October 5, 1896, rejecting its application, made under the provisions of the act of March 3, 1875 (18 Stat., 482), for right of way for station grounds at Camden, in sections 3 and 4, T. 29 N., R. 44 E., Spokane land district, Washington.

The company's plat was filed in the local office June 29, 1896. On July 9th following, Matthew B. Lyons made homestead entry for lot 1, the S. ½ of the NE. ¼ and the NW. ¼ of the SE. ¼ of Sec. 4, T. 29 N., R. 44 E., and it was on account of said entry that the company's plat was rejected, it being held in your office letter that

none of the tracts embraced in the application for station grounds are vacant public lands, and that said application is not subject to approval by the Department.

As originally presented, the company claimed a right of way across section 3. Said section is within the primary limits of the grant for the Northern Pacific Railroad Company, and for that reason the application was rejected as to said section 3.

The company has amended its plat waiving any claim to the portion in section 3, so that the only question submitted or raised by the appeal is as to the approval of the plat for the portion shown in section 4.

As before stated, the tract in section 4 was vacant at the time the company's plat was filed, and the question arises: Can it be deprived of its right to have the same approved, if satisfactory, by the subsequent entry of the land covered by the plat before said plat is approved by the Secretary of the Interior and noted upon the records in the land office?

The fourth section of the act of March 3, 1875 (*supra*), under which the present application is filed, 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.

In its appeal the company alleges that "the station grounds in question have been in the occupation and possession of the company since their selection for that purpose."

Where a company has complied with the law by filing its articles of incorporation and due proofs of organization, it is clearly entitled to a grant of the right of way over the public lands under the act of March 3, 1875 (*supra*). To secure this right, however, it must file maps of the location of its road and plats of necessary station grounds.

It is true, the law makes the maps and plats filed by the companies subject to approval by the Secretary of the Interior, and it would seem that, until approved, no right is vested in the company thereunder.

After filing the maps and plats as required by the statute, the company has done every act necessary to be performed on its part.

Much time must necessarily elapse before these maps can go through the regular course of examination and be presented to the Secretary of the Interior for his approval.

Is the company's right in jeopardy, although it may be in the actual use of the land, during this period, and can its right be made to depend upon the action of others, as would be the result of your office decision?

It is not believed that such was the intention of Congress, but rather that in determining whether a map should be approved the condition existing at the time of its filing must control.

As no other objection appears to the approval of this plat than the fact that an entry has been permitted to be made of the land covered by the claimed right of way since the filing of the map, for the reasons herein given the plat is approved, subject to any valid adverse right, and is herewith returned, with accompanying papers, for proper action.

SWAMP LANDS—ADJUSTMENT OF GRANT CONFIRMATION.

STATE OF MICHIGAN *v.* LISTZON ET AL.

Where the field notes of the survey of a township have been made the basis of a final adjustment of the swamp grant, and the State has accepted a patent thereunder, it is estopped, while holding the lands so conveyed, from claiming additional tracts under a resurvey which also shows that a portion of the lands patented were not of the character granted.

The act of March 3, 1857, did not confirm swamp lands to the State where the grant had been adjusted as to any particular township, or townships, and such adjustment had become final and conclusive by the acceptance, on the part of the State, of a patent for the lands covered by such adjustment.

Secretary Bliss to the Commissioner of the General Land Office, February 11, 1898.
(W. V. D.) (E. F. B.)

This appeal is taken by the State of Michigan from the decision of your office of March 25, 1887, rejecting its claim to certain lands in township 34 N., R. 5 E., and 35 N., R. 4 E., Detroit, Michigan, under

the swamp land grant. By said decision you also suspended the following homestead entries for conflict with said claim, to wit:

No. 2379 made Aug. 11, 1884, for E. ½ NW. ¼ and NW. ¼ NW. ¼ Sec. 18, and W. frl. ½ SW. ¼ Sec. 7, T. 35 N., R. 4 E., by Hermann Listzon, as to the W. ½ SW. ¼ Sec. 7.

No. 2215, made June 11, 1881, for N. ½ SW. ¼ Sec. 14, T. 35 N., R. 4 E., by William Meden.

No. 1626, made Feby. 29, 1876, F. C. No. 833 issued Oct. 10, 1881, for NE. ¼ SE. ¼ Sec. 17, T. 35 N., R. 4 E., to Johan Globke.

No. 2401, made Feby. 2d, 1885, for NE. ¼ of Sec. 23, T. 35 N., R. 4 E., by Frank Ostrofski, as to the NE. ¼ NE. ¼.

No. 1683, made Sept. 23, 1876, for S. ½ SE. ¼ Sec. 19, and N. ½ NE. ¼ Sec. 30, T. 34 N., R. 5 E., F. C. No. 937 issued Oct. 31, 1883, to John Schalk.

No. 1654, made July 6, 1874, for E. ½ SW. ¼ Sec. 18, and NE. ¼ NW. ¼ and NW. ¼ NE. ¼ Sec. 19, T. 34 N., R. 5 E., F. C. 940, issued to Frederick Natzke, as to the SE. ¼ SW. ¼ Sec. 18, and NE. ¼ NW. ¼ and NW. ¼ NE. ¼ Sec. 19.

It appears from the record that the lands in controversy were not included in the list of swamp and overflowed lands under the original surveys of these townships, which was approved by the Department, but subsequently, upon discovery that said surveys were erroneous, new surveys were made of such townships, and after the resurveys, new selections of swamp and overflowed lands in said township embraced in supplemental list were made and transmitted to your office, which was intended to abrogate and supersede all lists of swamp and overflowed lands in said townships made prior thereto. Before said supplemental list was received by your office most of the lands selected by the State in said townships as swamp and overflowed were patented to it upon the approved list of selections made under the old or original surveys.

On June 18, 1864, your office addressed a letter to the local officers at Detroit, Michigan, in which they were advised as follows:

The supplemental list "D" to which you refer, was made from the *re-surveys* and was originally intended to abrogate or supersede the old lists in the townships contained in said supplemental list "D," but inasmuch as the selections under the old surveys, in that portion of the Detroit district had been acted upon and carried into patent, that course was found to be impracticable. As this office cannot recognize two lists of swamp land selections for the same townships made from different and conflicting surveys, and having, as stated, acted upon *one*, we must of necessity ignore the other. You will therefore consider the *original list*, made under the old surveys, a copy in part of which was sent you on 15th April last, as being the only list to govern you in the townships therein contained.

In view of this action your office on March 25, 1887, advised the local officers "that the claim of the State thereunder, for the lands herein (therein) described as being in conflict, is this day held for rejection," from which action the State appealed.

Townships 34 N., R. 5 E., and 35 N., R. 4 E., were surveyed in 1841. The tracts in controversy are shown by the field notes of this survey to be dry lands, and were therefore not included in the original list of swamp and overflowed lands embracing these townships, which was reported to your office and approved December 24, 1852.

The lands included in this list were patented to the State June 1, 1854, but subsequent to the issuance of this patent the townships embraced therein were resurveyed and a new and supplemental list of swamp lands in said townships were received in your office February 24, 1857. While, by far the greater part of the lands embraced in the supplemental list were also embraced in the original list, for which patent had issued,—some of the lands in the supplemental list which are shown to be swamp and overflowed, by the field notes of the new survey, (like the lands in controversy) are shown by the field notes of the original survey to be dry and were therefore not embraced in the original list. On the other hand some tracts embraced in the original list for which patent has issued and which are shown by the field notes of the original survey to be swamp and overflowed, are shown by the field notes of the resurvey to be dry and not subject to the grant. The result is that while the greater part of the lands in said townships for which patent has issued are shown by both surveys to be of the character contemplated by the grant, the State has received patent for some lands which by the corrected surveys are shown to be dry, and patent has been withheld for lands which by the resurvey are shown to be swamp and overflowed.

The grant to the States made by the the act of September 28, 1850, is "the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold, at the passage of the act." It is, however, made the duty of the Secretary of the Interior to ascertain the character of the lands granted, and the manner in which that duty shall be discharged is left to his discretion. As a general rule the mere fact that the State has received patents for lands in a particular township under an original survey which was afterwards discovered to be erroneous, would not deprive it of the right to a patent to other lands in the same township selected after a resurvey if the lands are in fact swamp and overflowed. But in this case, the agreement made between the State and the Secretary of the Interior to accept the field notes of surveys as evidence upon which the character of the lands should be determined, was intended to be a final and complete adjustment of the grant as to the particular township. As said by the court in Michigan Land and Lumber Company *v.* Rust (168 U. S., 589):

> Undoubtedly the beneficiary of such a grant is interested in its adjustment and may properly be heard before the officers of the grantor in determining what lands are embraced within it and any assent by the grantee to a determination made by the officers of the grantor as to the lands passing within the grant would be binding upon it. In this case the grant was for the benefit of the State of Michigan, but in the act of 1850, making the grant, Congress, as it had a right to do, clearly indicated the officer of the State, to wit, the governor, whose action in the premises should be the action of the grantee.

The errors in the original surveys of certain townships in the State were well known at the time the State received the patent for the

lands included in the original list which embraced the townships in controversy, and the resurveys of such townships were made not only with the knowledge, but upon the request of the State. Although it was the intention of the Secretary of the Interior, as well as of the governor of the State, that the supplemental lists, made from the resurveys, should abrogate and supersede the lists made from the original surveys, yet, as the list of selections of swamp and overflowed lands in these townships made from the original surveys had been approved and patented to the State long before the resurveys were made, the adjustment of the grant as to those townships must be held to be final and conclusive, and the acceptance of the patent by the State for such lands a waiver of all claim to any other land in such townships. It is within the power of the Department at any time prior to the issuance of patent to review its action approving a list of lands as swamp and overflowed, and it was equally within its power to have accepted from the State a relinquishment and reconveyance of the lands embraced in the patent issued June 1, 1857, in order that the grant might be adjusted according to supplemental list D, made from the resurveys.

But no such offer was made by the State. It received a patent for the land embraced in the original list in 1854. The resurvey was approved November 5, 1856, and the supplemental list of selections made from this resurvey was received in your office February 24, 1857. From an examination of the list it could be seen that the State had received patent for lands to which it was not entitled according to the field notes of the new survey, and that it was entitled to lands by that survey which were shown to be dry by the original survey, and are not included in its patent. These facts were evidently known to the State, or could have been known as they were matters of record, but no action was taken looking to a substitution of the supplemental list for the original list, and in 1864, your office notified the local officers that the original list must control as to the townships embraced therein, and the supplemental list could not be considered as giving the State any right to lands which were not embraced in the list upon which patent issued.

Upon this authority Listzon and others made entries of the lands in controversy, to which the State asserts a claim upon the ground that as the surveys made by the United States were agreed to be taken as establishing the character of the land, the State is entitled to all lands shown to be swamp and overflowed by any township survey that the United States may see fit to make.

The case of the Michigan Land and Lumber Company *v.* Rust, cited above, involved the question of the power of the Secretary of the Interior at any time prior to the issuance of patent to correct an erroneous survey and to substitute a list of swamp land selections made upon a resurvey of such township for an approved list made upon the erroneous survey. In that case the original approved list was set aside and

the claim of the State adjusted upon the supplemental list made upon the new survey upon which patent issued. As to the effect of this patent by the State the court says:

> This clearly shows an acceptance by the officer of the State, charged under the act of Congress with the duty of so doing, of the resurveys, as within the authority of the Land Department, and makes the adjustment of the grant upon the basis of such resurveys final and conclusive. The act of the State in accepting the new and corrected survey as the basis of adjustment is tantamount to a waiver of any claims under the prior and erroneous survey, for it cannot be that a grantee accepting a patent for lands which according to a final and correct survey are shown to be within the terms of the grant can thereafter be heard to say, Notwithstanding I have taken all the lands shown to belong to me by this correct survey, I also claim lands which by a prior and erroneous, if not fraudulent survey, appear to pass under the grant. He cannot in that way enlarge the scope of the grant, and after taking lands which are finally determined to pass under the grant say, I also insist upon lands which upon such final survey are shown not to be within the grant, simply because under a prior erroneous survey they appear to be within its terms.

In the case cited the adjustment of the grant was made upon the basis of the resurveys which the court said was final and conclusive, and that the acceptance by the State of the new and corrected surveys as the basis of adjustment, is tantamount to a waiver of any claim under the prior and erroneous survey. So in like manner, if the adjustment was made upon the original surveys as a basis, the State by its acceptance of a patent for all the lands embraced in the original list, selected upon the erroneous surveys is tantamount to a waiver of its claim to any other lands, although the issuance of the patent may have been inadvertent. It is the acceptance of the patent covering lands shown by the resurvey to be dry which the State does not offer to reconvey, that estops it from claiming lands shown to be swamp by such resurvey.

In the 6th ground of error, it is alleged that the W. ½ SW. ¼ Sec. 7; N. ½ SW. ¼ Sec. 14; and NE. ¼ Sec. 23, T. 35 N., R. 4 E., are shown to be swamp land by the plat and field notes of the original survey as well as by the resurvey, and it was therefore error to reject the claim of the State to such lands.

In answer to this it is sufficient to say that these subdivisions are clearly shown by the plat of the original survey to be dry lands and were therefore not included in the original list upon which the patent issued.

It is also claimed that as the lands in supplemental list D were reported to your office prior to the passage of the confirmatory act of March 3, 1857 (11 Stat., 251), said act has confirmed all such selections and passed the title to the State.

The act of March 3, 1857, did not confirm to the State, lands embraced in any list upon which affirmative action had been taken by the Department, or where the grant to the State had been adjusted as to any particular township or townships and such adjustment had been made final and conclusive by the acceptance by the State of a patent for the lands covered by such adjustment.

The purpose of the act was to confirm selections of swamp lands theretofore reported to the General Land Office, upon which the Secretary of the Interior had failed to take action. As said by the court in Martin *v.* Marks 97 U. S., 345,

> It seems that, seven years after the passage of the swamp-land grant, this failure of the Secretary to act had become a grievance, for which Congress deemed it necessary to provide a remedy, by the act of March 3, 1857 (11 Stat., 251), which declares that the selections of swamp and overflowed lands granted to the States by the act of 1850, heretofore made and reported to the Commissioner of the General Land-Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the States in conformity to the provisions of said act.

As to the swamp lands within these townships the Secretary had taken action and had patented to the State, all of such lands, upon an adjustment of the grant made by him, which was final and complete as to such townships. The adjustment of the grant upon the basis of the original surveys and the acceptance of the patent by the State was tantamount to a waiver by the State of all claim to any further adjustment upon the basis of the resurveys so long as it retained the benefits of the first adjustment, and hence, within the meaning of the act of 1857, there were no selections pending at the date of the passage of the act upon which it could operate.

Again in the case of Michigan Land and Lumber Company *v.* Rust, *supra*, the court says:

> Now, the obvious purpose of this act of 1857 was to ratify and confirm the various steps taken by the Secretary of the Interior in the selection of swamp and overflowed lands. It was general in its terms, reaching to all the States, and the different modes by which identification of the swamp and overflowed lands had been attempted to be accomplished.

The decision of your office of March 25, 1887, rejecting the claim of the State to the lands in controversy is affirmed, and you will therefore relieve from suspension the entries of Herman Listzon and others, and take such action thereon as may be necessary.

GRADUATION ENTRIES—CONFIRMATORY ACT OF JANUARY 18, 1898.

JOHN P. COOK.

Graduation entries, invalid on account of the failure of the local office to collect the full price of the lands covered thereby, are confirmed, if otherwise regular, by the act of January 18, 1898.

Secretary Bliss to the Commissioner of the General Land Office, February 11, 1898.
(W. V. D.) (F. W. C.)

With your office letter "C" of August 20, 1897, was forwarded an appeal, filed on behalf of John E. Cook, alleged to be the son of John P. Cook, deceased, who, on October 24, 1854, made graduation cash

entries, at Demopolis, Alabama, numbered 14, 618–19–20 (paid for at the rate of seventy-five cents per acre), from your office decision of March 8, 1897, in which it was held that there was yet due on account of said entries an additional amount equal to twenty-five cents per acre, said lands being properly rated at one dollar per acre at the date of the above described sale.

In your said office decision it was stated that upon payment of the amounts due upon said graduation cash entries the same would be approved for patenting.

In view of the recent act of Congress, approved January 18, 1898 (Public No. 5), in which it is provided—

> That all entries of the public lands made under the provisions of the act entitled "An Act to graduate and reduce the price of the public lands to actual settlers and cultivators," approved August fourth, eighteen hundred and fifty-four, which are illegal and invalid because of the failure of the registers and receivers to previously collect from the settler the full price of the lands covered thereby, be, and the same are hereby, confirmed, if, upon examination by the Commissioner of the General Land Office, the same are found to be otherwise regular and in compliance with said act and the acts supplemental thereto,—

it is unnecessary to consider the question raised by the appeal as to the proper rating of these lands, as the entries would seem to be confirmed by the act quoted.

The record is therefore herewith returned for your further consideration and action in view of said legislation.

SECOND CONTEST—SUCCESSFUL CONTESTANT.

GRANFLADEN *v.* HAMILTON (ON REVIEW).

A contest allowed during the pendency of prior proceedings involving the same land can not operate to confer any right as against the successful party in said proceedings.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 12, 1898.* (W. A. E.)

Fred Dede, intervening contestant, has filed motion for review of departmental decision of November 17, 1897 (25 L. D., 384), in the case of Thomas L. Granfladen *v.* James Hamilton, involving the N. ½ of the NE. ¼ and the SW. ¼ of the NE. ¼ of Sec. 23, T. 106 N., R. 50 W., Mitchell, South Dakota, land district.

The history of the case, in brief, is as follows:

February 10, 1880, Mary T. Jacobson filed pre-emption declaratory statement for the land above described, but died before making final proof and payment, leaving an infant boy, Lewis T. Jacobson, as her sole heir.

September 8, 1893, T. J. Spangler made homestead entry for the same land, and on April 25, 1895, James Hamilton filed affidavit of contest against said entry, charging abandonment.

While this contest was pending and before decision therein, to wit, on June 29, 1895, Thomas L. Granfladen, guardian of Lewis T. Jacobson, minor heir aforesaid, filed an application to make proof and payment under the decedent's filing. This application was rejected, and Granfladen appealed to your office, which affirmed the action of the local office, whereupon Granfladen filed further appeal to the Department.

In the meantime, the local officers considered the contest of Hamilton against Spangler, and recommended the cancellation of Spangler's entry. No appeal from this action having been filed, your office, by letter of January 28, 1896, canceled said entry, and on February 6, 1896, Hamilton was allowed to make homestead entry for the land.

July 25, 1896, while Granfladen's appeal was pending before the Department, Fred Dede filed affidavit of contest against Hamilton's entry, alleging that said entry was speculative and fraudulent, and that the entryman had never resided upon or cultivated said land.

A hearing was had on this affidavit, at which Hamilton made default, and the local officers recommended the cancellation of the entry, but when the record reached your office it was at once forwarded to the Department, without action by your office, for consideration in connection with Granfladen's appeal.

By departmental decision of November 17, 1897, it was held that failure to submit pre-emption final proof and make payment for the land within the statutory life of a filing on unoffered land, does not defeat all rights under the filing, but subjects the claim to any legal settlement claim that may intervene; that as between a pre-emptor thus in default and a homestead claimant for the same land, who is also in default in the matter of settlement and residence, the superior right is with the one who first takes steps to cure his default; and that a successful contest against the homestead entry in such a case will not defeat the right of a minor claimant under the pre-emption filing to submit final proof, if, prior to the conclusion of said contest, application is made to complete the pre-emption claim, and it appears that the contestant had not made settlement on the land at such time, and was aware at the time of initiating his contest, of the fact that the minor with his guardian was residing upon and claiming the land. In regard to Dede's contest, it was said: "As Dede's affidavit of contest, filed July 25, 1896, is subsequent to Granfladen's application to make proof and payment under Mrs. Jacobson's filing, any rights that Dede may have in the premises are subject to those of Granfladen."

Granfladen's application was accordingly allowed, Dede's contest was suspended, and you were instructed, in case the proof submitted by the guardian should be found satisfactory, to call upon Hamilton to show cause why his entry should not be canceled.

Hamilton has not filed motion for review of said decision, but Dede has filed motion for review of so much thereof as holds his rights subject to those of the minor heir of Mrs. Jacobson.

Dede claims that as he has successfully contested Hamilton's entry, he has a statutory preference right of which the Department can not deprive him.

It was error on the part of the local officers to order a hearing on Dede's contest while Granfladen's appeal, involving this land, was pending before the Department, and consequently his success in that contest can not give him any rights that would defeat those of the minor heir.

His affidavit of contest was filed nearly thirteen months after Granfladen's application, and is clearly subject to said application.

The motion for review is accordingly denied.

OKLAHOMA LANDS—ADDITIONAL HOMESTEAD—ACT OF FEBRUARY 10, 1894.

CÆSAR *v.* SALES.

The right to make additional homestead entry under the act of February 10, 1894, cannot be exercised by one whose claim to the land embraced in his original entry was initiated after the passage of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 12, 1898.* (J. L. McC.)

Porter T. Cæsar, on June 25, 1894, made homestead entry of lots 3 and 4 of Sec. 15, T. 14 N., R. 3 E., Guthrie land district, Oklahoma Territory.

On June 17, 1895, he applied to enter lots 9 and 10 and the S½ of the SW¼ of the same section, under the act of February 10, 1894 (28 Stat., 37), which provides (under certain limitations attached):

That every homestead settler on the public lands on the left bank of the Deep Fork river, in the former Iowa reservation, in the Territory of Oklahoma, who entered less than one hundred and sixty acres of land, may enter, under the homestead laws, other lands adjoining the land embraced in his original entry, when such additional lands become subject to entry, which additional entry shall not, with the lands originally entered, exceed in the aggregate one hundred and sixty acres.

The local officers rejected his application; and upon his appeal, your office affirmed their action, holding that (irrespective of the fact that one Benjamin Sales had made homestead entry of the tract on May 24, 1895,) the act of February 10, 1894, applied only in the case of persons whose claim to the land embraced in the original entry had been initiated prior to the approval of the act.

This conclusion is clearly in accordance with the language and intent of the statute; furthermore, the departmental circular of May 18, 1895 (20 L. D., 470–1), instructing local officers how to proceed in the enforcement of the act, directs that "no party will be entitled to an additional entry under said provision whose claim to the lands

embraced in his original entry has been initiated since the approval of said act."

The decision of your office is affirmed.

HOMESTEAD—CITIZENSHIP—NATURALIZATION.

MITCHELL *v.* BACKES.

A slight difference in the spelling of the name as shown in the declaration of intention to become a citizen, and the final papers, will not be held sufficient to defeat a claim of citizenship on behalf of a homesteader, where from the testimony it appears that he is the identical person referred to in each instance.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 12, 1898.* (G. B. G.)

On April 26, 1889, John Backes made homestead entry for the NE. ¼ of Sec. 21, T. 16 N., R. 2 W., Guthrie, Oklahoma.

On November 3, 1890, Willard P. Mitchell filed a contest against said entry, alleging "soonerism" and speculative intent in making the entry.

After a hearing duly and regularly had, the local officers recommended that the contest be dismissed and the entry of Backes held intact.

On the appeal of Mitchell, your office, on May 17, 1895, affirmed the decision of the local officers.

The case is before the Department on the appeal of Mitchell from said decision.

It is urged, substantially, that your office erred in its conclusions of fact, and further:

1. Error in not finding from the record in the case and the homestead papers of John Backes that the entryman has not shown that he was a duly qualified homesteader, and wholly failed to show that he was a naturalized citizen of the United States, as sworn to in his homestead affidavit.

On the questions of alleged disqualification for "soonerism" and speculative intent in making the entry, which were the only questions in issue at the hearing, the record, by an overwhelming preponderance of the testimony, sustains the concurring conclusions of your office and the local officers. Moreover, since the trial herein, and since the decision of your office was made, Joseph Turner, Charles Stoelting and Walter L. Finch, three of the principal witnesses relied upon by the contestant to establish the allegation of the premature and unlawful entry of the defendant into the Oklahoma country, have been indicted and convicted of the crime of perjury for their evidence given in this case, Turner and Stoelting pleading guilty in answer to the indictments against them.

The question of citizenship requires more extended consideration.

This question was first raised on appeal, and was not the subject of investigation at the hearing.

Attached to the entry papers in this case is a certified copy of the

declaration of intention of "Johann Bakes" to become a citizen of the United States, made before the clerk of the district court in and for Dodge county, Nebraska, dated June 30, 1883, and in answer to the appellant's contention that the said John Backes is not a citizen of the United States, counsel for the defendant has filed a "naturalization final paper," issued from the United States district court for Logan county, Oklahoma, December 15, 1890, wherein "Johann Backes" is admitted to become a citizen of the United States. It is thus seen that the surname in the certificate of naturalization differs from that in the certified copy of the declaration of intention, it appearing in the copy of the declaration as "Bakes" and in the certificate of citizenship as "Backes." This discrepancy may easily be explained on the theory that the spelling in the copy of the declaration is an inadvertence, and that "Bakes" and "Backes" may be and is the name of the same person. But the defendant herein writes his name as John Backes, and the name so appears everywhere in the record wherever mentioned, except in the papers above referred to. This might easily be explained by the fact that Johann and John are the same Christian names, the former being the German equivalent of the latter, were it not for the further fact that the defendant has testified in this case that he had a brother "Joahann Bechas," who had been living in America but was then dead. It will be observed that both the Christian and surname are here spelled differently than appears elsewhere.

The record shows that John Backes is a man of good character, and he swears that he filed his declaration of intention to become a citizen of the United States in Dodge county, Nebraska, in the year 1883; that he afterwards filed a copy of this declaration in the Guthrie land office at the time he made entry for the land in controversy. It is believed that he is the identical person named in the declaration of intention and certificate of citizenship on file, and that he is a citizen of the United States.

It is directed that his entry be held intact, subject to further compliance with law.

The decision appealed from is affirmed.

SOLDIERS ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

C. W. DARLING.

Where a certificate of a soldier's additional homestead right has been located by an assignee, and the location canceled in part, and patent issued for the remainder, the assignee is entitled to a recertification, under the act of August 18, 1894, of the additional right for the number of acres not secured under the original certificate.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 12, 1898.* (P. J. C.)

The question presented by the appeal of C. W. Darling from your office decision of June 18, 1896, may be briefly stated as follows:

A certificate was issued by your office on December 12, 1878, to one William Hughes, by which he was held entitled to make a soldier's additional homestead entry of 106.12 acres. Through his attorney-in-fact, C. W. Darling, an entry was made, in 1879, of one hundred and twenty acres in the Fargo, North Dakota, land district. Without going into detail, it is sufficient to say that this entry was finally canceled as to one forty acre tract included therein, for the reason that there was a prior entry thereon, and the remainder, eighty acres, was subsequently patented under said entry.

In 1896 Darling presented an application to your office to have a recertification to him of the certificate to cover forty acres. He presented his own affidavit that he purchased said original certificate for a valuable consideration and that he was and is the owner thereof. He also presented the affidavit of the surviving member of a banking firm from whom he purchased this and other certificates, by which it is shown that the bank did sell him the certificate. There was also furnished the original irrevocable power of attorney from Hughes to Darling, authorizing the latter to enter, convey, etc., the land included in the entry.

By your said office letter it was decided:

> The entry located under this certificate has been patented, and although said entry failed in so far as one forty acre subdivision is concerned, yet the patenting of the remainder thereof was in full satisfaction of the additional right of William Hughes.
>
> Therefore the application for the recertification of the said certificate is denied, and said certificate will be filed with the papers in said final certificate No. 408, where it rightfully belongs.

From this decision Darling has appealed.

The ruling of your office that the entry of eighty acres under the original certificate was in full satisfaction of Hughes' right of entry was probably based on the doctrine announced in Hiram S. Thornton (3 L. D., 509), where it was decided (syllabus):

> Under a fair construction of the original homestead act, and the legislation supplemental thereto, conferring the right, under section 2306 of the Revised Statutes, to make an additional entry, such right is held to be exhausted when once used, although for a less quantity than sufficient to make up one hundred and sixty acres.

But in the case of Webster *v.* Luther (163 U. S., 331) it was held by the supreme court that no limitation could be placed on the right conferred by the certificate, either in the hands of the ex-soldier or his transferee; that this was a gratuity in the nature of a compensation for past services to the country, and that it was not intended the right thus conferred should be hampered in any way to defeat or impair its value. In view of this decision by the supreme court of the United States, the Thornton case will not be followed.

By the act of August 18, 1894 (28 Stat., 397), all soldier's additional homestead certificates that had been issued were declared "good and valid in the hands of *bona fide* purchasers for value." By circular of October 16, 1894 (19 L. D., 302), assignees of these certificates were,

prior to any entry by the assignee, required to present them to your office for examination and additional certification. It also provided that:

> Holders of such certificates desiring to exercise a right of entry in their own names, must file such certificates in this office, together with satisfactory proof of ownership and a bona fide purchase for value. If, upon examination, the proof so filed is satisfactory, an additional certificate will be attached to the original authorizing the location thereof, or entry of land therewith, in the name of the assignee or his assigns. You will allow no entries in the names of assignees except upon presentation of such additional certificates issued by this office. When such additional certificates are presented, you will issue homestead papers and the final certificate and receipt, in the name of the transferee, referring to him in said papers as the "Assignee" of the soldier.

It appears that the right of entry by the certificate has not been exhausted. The evidence presented is *prima facie* sufficient to show that Darling is the owner of this certificate, having purchased it for a valuable consideration. Under these circumstances it is clear that under the law and the circular quoted, he is entitled to an additional certification to the amount of the acreage that has not been covered by the former entry under the original certificate.

Since, under the act of Congress, and the decision of the supreme court, the transferee is vested with all the rights the original holder had, there would seem to be no good reason why an additional certificate may not be issued to Darling for the number of acres not yet entered under the original certificate.

Your office decision is therefore reversed, and you are directed to issue to Darling an additional certificate for twenty-six and twelve one-hundredths (26.12) acres.

HOMESTEAD ENTRY—MARRIED WOMAN—WIDOW—RESIDENCE.

LEONORA H. FORES.

In the case of a man and woman who make homestead entry of adjacent tracts and thereafter marry, and maintain residence in a house built across the line dividing their claims, the residence of the wife must be held to have been abandoned from the date of her marriage; but, if the husband subsequently dies, the widow, without forfeiting her right to perfect her husband's claim, may resume residence on her own land, in the absence of any intervening adverse right, and perfect title thereto after due compliance with law.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 12, 1898.* (J. L. McC.)

Your office, by letter of September 3, 1893, transmitted a letter from Leonora H. Fores (formerly Leonora H. French), and suggested its consideration as an informal appeal from your office decision of March 2, 1896, sustaining the action of the local officers in rejecting the final proof offered by her in support of her homestead entry, made July 30,

1889, for the S. ½ of the NE. ¼ and the S. ½ of the NW. ¼ of Sec. 8, T. 21 N., R. 36 E., Spokane Falls land district, Washington.

On the same day (July 30, 1889) when Miss French made homestead entry of the tract above described, Victor E. Fores made homestead entry of the SW. ¼ of the same section.

Said Victor E. Fores and Leonora H. French were married October 23, 1889; and the testimony shows that they lived in a house built across the line between the two claims, and that both claims have been cultivated each year since the entry.

It is also shown that Victor E. Fores died on October 6, 1893; and that his widow, Leonora H. Fores, on January 10, 1895, made final proof on her deceased husband's homestead entry; that final certificate was issued to her as his widow on that day; and that patent issued therefor on June 8, 1895.

Your office, in its decision appealed from, says:

> It has been frequently held by the Department that a single woman, who makes a homestead entry and subsequently marries, and thereafter lives with her husband (who had filed on an adjacent tract) in a house built across the dividing line between the two claims, by such residence abandons her own entry. See 17 L. D., 215, and cases therein cited.

For the reason above set forth your office rejected Mrs. Fores' final proof, and held her homestead entry for cancellation.

The final proof was unquestionably properly rejected; but it does not necessarily follow that the entry in question should be canceled.

It may be conceded that, during the lifetime of her husband, and while she was residing with him, Mrs. Fores' residence on her own entry was abandoned. But it is not a requirement of the law that she should continue to reside upon his land, after his death, in order to make final proof thereon. When she became a widow it was competent for her to reside upon land of her own. No reason appears why (in the absence of any intervening adverse claim) she may not show that she established residence on the tract formerly entered by her after her husband's death, if such be the fact. It is true that between that date (October 6, 1893, *supra*,) and the date when she made final proof (December 5, 1895,) five years had not intervened; but no reason appears why, after showing proper compliance with the requirements of the law, she may not, if she so elects, commute said entry to cash, or continue to reside thereon for five years and make the ordinary homestead proof.

The decision of your office is modified as above indicated.

DISCOVERY PLACER CLAIM *v.* MURRY.

Motion for review of departmental decision of December 9, 1897, 25 L. D., 460, denied by Acting Secretary Ryan, February 14, 1898.

MINING CLAIM—PRACTICE—APPEAL—ANNUAL EXPENDITURE.

DAVID FOOTE LODE.

On appeal from a decision refusing to entertain a protest against a mineral entry, the appellant is not required to serve notice of the appeal on the entryman.

Annual expenditure is not required upon a mining claim after entry thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 14, 1898.* (P. J. C.)

It appears that Frederick L. Sigel *et al.* made mineral entry No. 192, David Foote lode mining claim, Rapid City (formerly Deadwood), South Dakota land district, on February 25, 1885.

For reasons not material now, your office held the entry for cancellation August 8, 1894, but on April 2, 1897, on a showing made to the satisfaction of your office, the entry was reinstated and approved for patenting.

Subsequently Helen M. Stout filed a protest against the entry, which your office dismissed. Stout filed an appeal, but did not serve the same on the claimants. Your office thereupon sent the appeal back to the local office, with instructions to have service of the same made on the entrymen. Due notice of this action was served on Stout, but no attempt was made to comply with the order. Your office therefore, by letter of January 31, 1898, forwarded the record to this office for consideration under the authority of Hannon *v.* Northern Pacific Railroad Company (11 L. D., 48).

Under the ruling in Henry C. Evans (23 L. D., 412) and Gladys A. Mining Company *v.* Gross (24 Id., 349) the appellant was not required to serve notice of his appeal from your office decision dismissing his protest, on the entrymen. As said in the first case, the rule requiring service of notice of appeal on the opposite party "applies only to cases in which jurisdiction has been acquired over the entryman." In an application for a hearing, such jurisdiction has not been acquired.

Since the case is before the Department under the rule requiring the case, where there are defective appeals, to be sent up (Eimstad *v.* Northern Pacific R. R. Co., 24 L. D., 230), and as this case is special anyhow, under the special order of January 29, 1896 (22 L. D., 120), the case will be considered on its merits.

The only grounds alleged in the protest are the failure of the owners of the David Foote lode to perform annual labor thereon for the years 1887 to 1893, inclusive, and that by reason of such failure the claim has been relocated.

Paragraph 17 of the mining circular of December 15, 1897, 25 L. D., 563 (paragraph 5 of the old circular), specifically declares that annual expenditure is not required on a mining claim after entry. In Benson Mining and Smelting Co. *v.* Alta Mining and Smelting Co. (145 U. S., 428) the supreme court held (syllabus):

When the price of a mining claim has been paid to the government, the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work in order to obtain a patent.

One of the questions raised in that case was similar to the one sought to be raised by the protest in the case at bar. The owners of the Alta lode made entry in 1879, but failed to do the annual work for 1882, whereupon other parties relocated the ground as the Ben Butler, and took possession thereof. The court held that the ground was not subject to relocation.

It is clear, therefore, that there was no forfeiture of the David Foote lode by reason of failure to do the annual work, and the ground was not subject to relocation.

Your office judgment dismissing the protest is affirmed.

LAWRENCE *v.* SEEGER.

Petition for re-review denied by Acting Secretary Ryan, February 14, 1898. See departmental decisions of May 25, 1897, 24 L. D., 477, and November 12, 1897, 25 L. D., 377.

CLASSIFICATION OF LANDS—HEARINGS—EVIDENCE.

F. ADKINSON.

Evidence may be taken by deposition, as provided in the rules of practice, in the case of hearings ordered on protest against a classification of lands under the act of February 26, 1895.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 14, 1898.* (E. F. B.)

I am in receipt of a communication from Mr. F. Adkinson of Helena, Montana, complaining of the action of your office in holding that testimony to be used in hearings ordered under the act of February 26, 1895 (28 Stat., 683) providing for the classification of mineral and non-mineral lands, within the grant to the Northern Pacific Railroad Company in certain districts in Montana and Idaho, can not be taken outside of the land district, when the witnesses reside more than fifty miles from the land office, but all such testimony must be taken before the local officers.

The letter of your office of January 28, 1898, in which the ruling complained of was made, is enclosed with the communication of Mr. Adkinson above referred to. It does nor appear from this letter that you notified Mr. Adkinson that the *testimony* to be offered in the hearing could not be taken under the rules and regulations of the Department, governing the hearing of contests involving the mineral or non-mineral character of the land, because after quoting that portion of the act which provides that where protests are filed against the acceptance of the classification as made by the commissioners

a hearing shall be ordered by and conducted before the said register and receiver under rules and regulations as near as practicable in conformity with the rules and practice of such land office in contests involving the mineral or non-mineral character of the land in such cases

you say; "It would seem therefore that under said act hearings can be held only before the local officers."

There is no question as to the correctness of this proposition, but, what the writer of the letter desired to know was—whether the testimony to be submitted at said hearing could be taken under the rules and practice governing contests.

The act expressly provides that the hearings shall be ordered and conducted before the register and receiver under rules and regulations as near as practicable in conformity with the rules and practice of the land office in contests involving the mineral or non-mineral character of the land. The rules under which hearings are conducted embrace rules for the taking of testimony to be submitted upon such hearing, and Rule 23—Rules of Practice, controls in hearings ordered under this act as well as in all other contest cases.

You will notify Mr. Adkinson that testimony in such cases may be taken under said rule.

MINING CLAIM—ADVERSE CLAIM—NOTICE—APEX OF VEIN.

WOODS *v.* HOLDEN ET AL.

In the case of a common conflict between several mining claims, a relinquishment or exclusion by the applicant for patent, in favor of one who did not adverse the application, is of no effect, as against another adverse claimant who, prior thereto, has prosecuted his adverse claim to a favorable judgment.

Where adverse proceedings involving a common conflict are filed and prosecuted, that fact necessarily appears of record, and the parties in interest are charged with notice thereof. It is then incumbent upon each adverse claimant to take such action as will determine his right, not only as against the applicant for patent, but also as against the other adverse claimants. Until this is done the the stay of proceedings commanded by section 2326 R. S., is not relieved, and the "controversy" is not "settled or decided by a court of competent jurisdiction."

Notices of application for patent which exclude stated areas "without waiver of rights," do not require the filing and prosecution of adverse claims to the areas thus excluded; and the fact that no adverse claims are filed in such a case does not warrant the inclusion of said excluded areas in the entry.

An adverse claim filed and prosecuted successfully against a mineral application can have no effect as to the areas expressly excluded from said application, or confer any right thereto in such adverse claimant.

An applicant for the right of mineral entry, who expressly excludes from notice of his application stated areas, is not entitled thereafter to make entry of such excluded ground without due notice of such intention.

For the purposes of exploration, discovery, and purchase, the legal apex of a vein that dips out of ground disposed of under the placer or non-mineral laws, is that portion of the vein within the public lands which would constitute its actual apex, if the vein had no actual existence in the ground so disposed of.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 14, 1898.* (P. J. C.)

June 18, 1894, Warren Woods, trustee, made application for patent for the Hartford lode, survey No. 8839, Pueblo, Colorado, land district, and during the period of publication the owners of the Mary Mabel,

and the owners of the Sierra Nevada and Starlight lode mining claims filed separate adverse claims against the Hartford, and in due time brought suits thereon. Upon the institution of these suits certificates of the clerk of the district court of El Paso county, in which the claims are situate, were filed in the local office, showing that such suits had been commenced and were then pending.

During the pendency of these adverse suits, and on November 22, 1894, A. M. Holden and David W. Rawley made application for patent for the Mary Mabel lode mining claim, survey No. 8912, in the same land district. The posted and published notices of this application contained the requisite descriptive matter and, without any words of qualification, excluded the area in conflict with certain specified mining claims. They also contained a clause "excepting and excluding the conflicts with" certain other claims, "without waiver of rights." Included in the last exception is the Hartford claim and the Little Montana claim. No adverse was filed against the Mary Mabel during the period of publication.

December 6, 1894, a judgment in the Mary Mabel's adverse suit was rendered by the court in favor of the Mary Mabel and against the Hartford, the latter having made default. The Hartford then filed a motion to set aside the default judgment, but January 23, 1895, this motion was denied and the former judgment confirmed. A certified copy of the judgment roll was filed in the local office February 11, 1895. Subsequently it was discovered that there was a mistake in this judgment in the description of the Mary Mabel, but this error was corrected by a *nunc pro tunc* order October 7, 1895.

The Thanksgiving lode, which conflicts to a considerable extent with both the Mary Mabel and the Hartford, at the westerly end thereof, did not adverse the Mary Mabel. It filed in the local office an adverse claim against the Hartford, but no suit was brought in support thereof. After the rendition of the judgment in favor of the Mary Mabel in its adverse suit against the Hartford, and on August 21, 1895, the applicant for the Hartford patent, executed a paper in the nature of a relinquishment to the Thanksgiving, by which he "releases and excludes from his said application for the Hartford lode, all that portion of the Hartford lode so in conflict with the Thanksgiving lode, Sur. No. 8827, as appears from the official plat and field notes of the said claims." Such a relinquishment and exclusion in favor of one who failed to adverse is of no effect against one who did adverse and successfully prosecuted his adverse claim to a favorable judgment.

March 27, 1895, the Mary Mabel owners made application to purchase, excluding all the area in conflict mentioned in the notices of its application for patent, except the Hartford conflict and a small portion of the Little Montana conflict relinquished to the United States for the use of the Mary Mabel. This application was allowed by the local officers, and mineral entry No. 595 was made April 2, 1895.

June 18th, following, your office called the attention of the local office to the fact that the Mary Mabel conflicted with the Mt. Rosa placer, which had been patented April 24, 1893, and stated that the placer intersected "about seventy five feet of the assumed lode line of the Mary Mabel claim, thus dividing said lode into two non-contiguous parts." It was then held by your office, under the authority of Silver Queen lode (16 L. D., 186), "that a lode claim intersected by a prior placer location can not be allowed to include ground not contiguous to that containing the discovery;" and that therefore the right of the Mary Mabel does not extend beyond the point where the lode line intersects the west line of the Mt. Rosa placer. This ruling resulted in a hearing in the local office to determine whether the Mary Mabel vein or lode is intersected by the patented placer, in which proceedings the owners of the Hartford and Thanksgiving claims appeared as protestants. At the conclusion of the hearing the local officers divided in opinion, the register holding that the Mary Mabel vein or lode departs from its assumed course and passes to the north to such an extent that it is not intersected by the placer, and the receiver holding that the vein or lode is so intersected.

Both parties appealed, and your office April 7, 1897, affirmed the decision of the receiver and held the Mary Mabel entry for cancellation as to all that part thereof lying easterly from the point of intersection of the Mary Mabel lode with the westerly side line of the Mt. Rosa placer. Thereupon the mineral claimants prosecuted this appeal. The principal questions presented by the record are:

(1) Did the judgment in favor of the Mary Mabel upon its adverse against the Hartford entitle it to the entry of the areas in conflict with the Sierra Nevada and Starlight, while their adverse suit against the Hartford was pending in court undecided?

(2) Under the mining laws, do notices which except and exclude stated areas "without waiver of rights" require the filing and prosecution of adverse claims to the areas thus excluded and can entry thereof be made upon such notices where no adverse claim is filed?

(3) What is the effect of two separate and conflicting judgments for the possession of common ground?

(4) Is the Mary Mabel vein so segregated by the Mt. Rosa placer as to avoid the location and entry of that portion thereof lying easterly from the point of intersection?

Section 2326, Rev. Stat., provides that when an adverse claim is duly filed—

> all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

At the time of the Mary Mabel's entry the adverse suit of the Sierra Nevada and Starlight, involving parts of the ground entered, was pending in court, and this was shown by the records of the local office.

To the extent of the areas in conflict in this suit, section 2326 stayed all further proceedings in the land department, until the controversy should be decided by the court or the adverse claim waived. October 27, 1897, there was filed in the Department a certified copy of a judgment rendered in that suit October 21, 1897, upon stipulation of the parties. By this judgment the owners of the Sierra Nevada are found to be entitled to the possession of a parcel of ground in conflict with the Hartford, and the owners of the Hartford are found to be entitled to the possession of a parcel in conflict with the Starlight. These parcels are located in the eastern portion of the Mary Mabel.

The adverse suit of the Sierra Nevada against the Hartford having resulted in a judgment in favor of the former, a somewhat anomalous condition is presented. Here are two separate judgments rendered by the same court finding that, as against the Hartford, the Mary Mabel and the Sierra Nevada are each entitled to the possession of the ground which is common to the three claims. There is no reference in either judgment to the adverse claim recognized in the other, and the apparent controversy between the two successful adverse claimants is left wholly undecided.

Where adverses involving a common conflict are filed and prosecuted, that fact is necessarily shown by the records of the local office and the parties in interest are charged with notice thereof. It then devolves upon each adverse claimant to see to it that such proceedings are had as will determine his right, not alone against the applicant for patent, who is the common defendant, but also against the other adverse claimants. Until this is done, the stay of proceedings commanded by section 2326 is not relieved and the "controversy" is not "settled or decided by a court of competent jurisdiction." The word "controversy" used in this section includes broadly the right of possession to the area in conflict against all who are contending therefor in the manner prescribed by the statute.

The controversy growing out of the Starlight adverse had not been decided at the time of the Mary Mabel entry, and the inclusion in that entry of the area covered by this conflict, was in violation of the statute directing a stay of proceedings, but since the controversy was afterward decided by the court in favor of the Hartford against which the Mary Mabel had previously obtained judgment for the possession of that and other ground, the error in allowing entry thereof during the period of suspension is not prejudicial. The controversy arising from the Sierra Nevada adverse had not been decided at the time of the Mary Mabel entry, and, under the view of section 2326 herein taken, that controversy is still undecided between the Mary Mabel and the Sierra Nevada, and the stay of proceedings continues as to this conflict, so that the error in the entry thereof has not been either cured or rendered harmless.

The owners of the Sierra Nevada are not now before the Department,

and for obvious reasons no opinion is expressed respecting any right which they may assert under their judgment.

While the conflicts with the Hartford and the Little Montana were not excepted or excluded from the Mary Mabel's application for patent, they were in its posted and published notices stated to be excepted and excluded "without waiver of rights."

One purpose in requiring notice to be given of applications for patent is that owners of conflicting claims may be apprised of such application and may have an opportunity to assert and protect their interests. There is no right under such a notice which an applicant can reserve by use of the qualifying words "without waiver of rights." He must decide what ground he believes himself entitled to, or desires to apply for, and must give notice accordingly.

Section 2325 Rev. Stat., provides that the applicant must file a "plat and field notes of the claim," made "under the direction of the United States surveyor-general, showing accurately the boundaries of the claim;" that he must post such plat on the land and in the local office, together with notices of the application; and that he must publish such notice in a newspaper. Exceptions and exclusions of ground may be made either in an application for patent, or in the notices thereof, but when an exclusion is made "without waiver of rights" it is either absolute, so far as that application or that notice is concerned, or it is misleading and introduces into the proceeding an uncertainty inconsistent with the purpose of the statute. It follows that the Mary Mabel did not give notice of its application for patent to the areas in conflict with the Hartford and Little Montana and that parties asserting a claim to these areas were not required to adverse the Mary Mabel's application. Canuck Lode, 22 L. D., 711. The fact, therefore, that no adverse claim was filed against the Mary Mabel application did not authorize the inclusion of these areas in the Mary Mabel entry.

It is contended, however, by the Mary Mabel applicants that even if the notices given of their application for patent did not include the Hartford conflict, the judgment in the adverse suit of the Mary Mabel against the Hartford, according to the provisions of section 2326, fully authorized the entry of that area without further notice than that given by the Hartford. This would be true if it were not for the important fact before stated that in response to the Hartford notice the Sierra Nevada filed its adverse claim and proceeded with its prosecution in the manner provided by law, and that this worked a suspension of further proceedings, as to the ground claimed by the Sierra Nevada, until the controversy should be adjudicated by the court or the adverse claim waived.

The notices given of the application for the Hartford patent expressly excluded the conflict with the Little Montana. An adverse claim could not affect the area excluded by those notices, and hence the Little Montana conflict, which was excluded from the Hartford notices, was

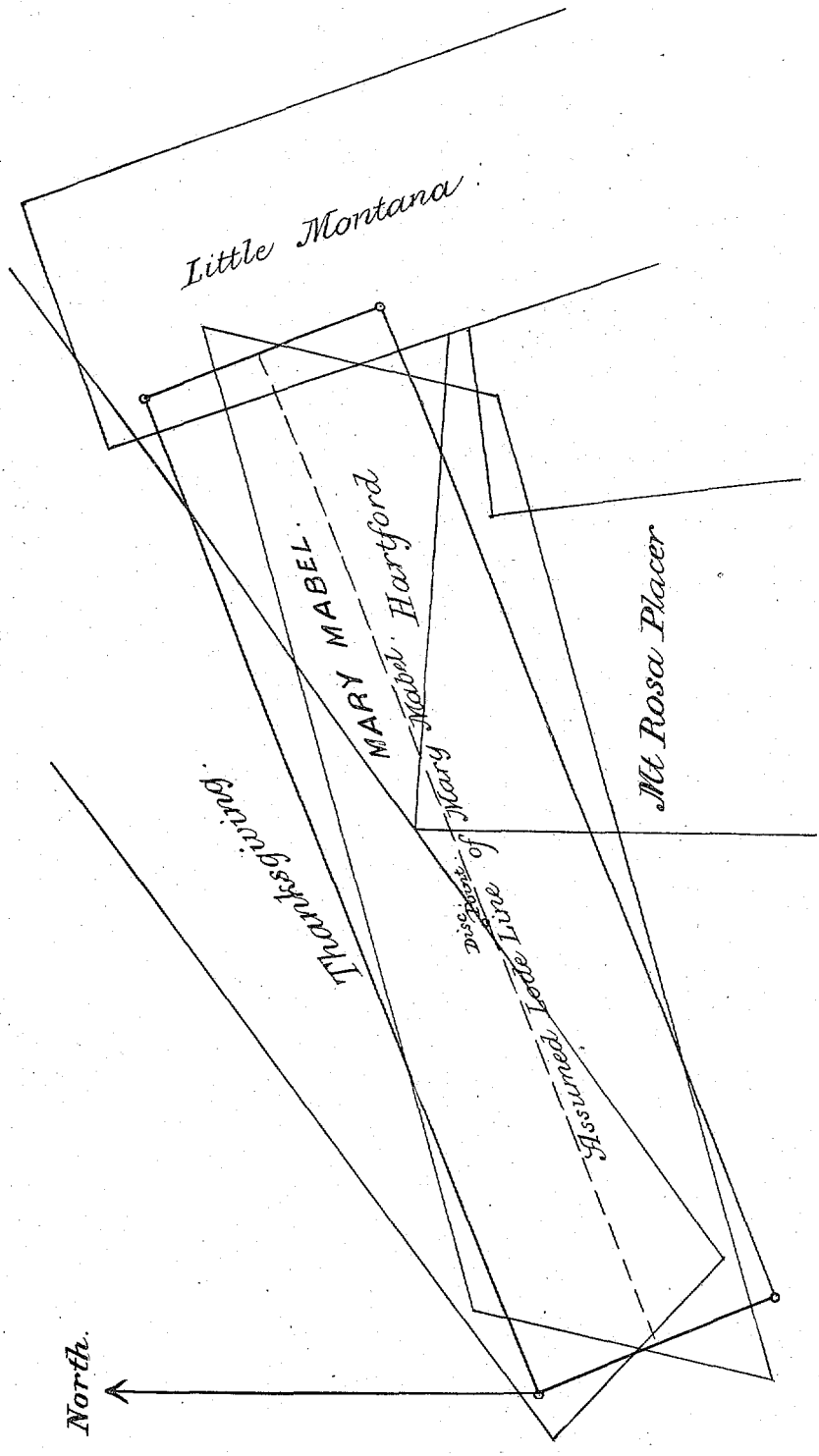
equally excluded from the Mary Mabel's adverse and from any judgment rendered upon that adverse. As before stated, the conflict with the Little Montana was also excluded by the notices given of the application for the Mary Mabel patent; so that neither the Mary Mabel's judgment against the Hartford nor the proceedings upon the Mary Mabel's application, authorized the inclusion in the Mary Mabel entry of any portion of the Little Montana. This entry of a parcel of ground without the giving of any notice whatever by any one, of an application for patent to the same, was manifestly erroneous. It is true, that only a portion of the Little Montana conflict was covered by the Mary Mabel entry and that this was relinquished by the claimed owners of the Little Montana to the United States for the use of the Mary Mabel, but, however this relinquishment may, as against the Mary Mabel, operate to estop the Little Montana from thereafter asserting claim to the ground relinquished, it is wholly without effect against other adverse claims thereto. In the absence of any notice requiring the filing and prosecution of such adverse claims, it can not be successfully claimed, or authoritatively determined, that there are none such.

As will be seen by the accompanying plat, the ground in conflict between the Mary Mabel and the Hartford included much the larger part of both claims. The Mt. Rosa placer, which was patented April 24, 1893, nearly a year before the Mary Mabel was located, cut into and segregated the assumed lode line of the latter.

Much evidence was taken at the hearing ordered by your office, to determine whether the Mary Mabel vein or lode is intersected by the patented placer. The local officers reached different conclusions upon this question; the register holding that the Mary Mabel vein or lode departs from its assumed course and passes to the north of the placer, and the receiver holding that the vein or lode does not depart from its assumed course, and that it is intersected by the placer. Your office adopted the conclusion of the receiver, and it is now insisted by the protestants that the concurring findings of the receiver and your office are supported by a preponderance of the evidence. It will be assumed that these concurring findings are right, and that the course of the vein or lode at its actual apex is intersected by the patented placer as shown upon the plat.

If this intersection of the Mary Mabel vein or lode affected the Hartford's right of possession to any part of the ground in conflict that claim should have been asserted in the proceeding and in the tribunal where alone the right to possession can be determined in cases of conflicting mining locations.

The placer does not extend across the Mary Mabel location so as to divide it into two disconnected parts, but it does extend across and sever the actual apex of the lode. The Mary Mabel discovery is to the west of the placer, and the protestants urge that the Mary Mabel vein is divided into two non-contiguous parts, that the location can not law-


Little Montana
MARY MABEL
Mary Mabel Hartford
Thanksgiving
Division Line of Mary
Assumed Lode Line
Mt Rosa Placer
North.

fully include any part of the vein not contiguous to the discovery, and that the right of the Mary Mabel can not extend easterly beyond the point where its lode line is intersected by the westerly line of the placer.

Section 2320, Rev. Stat., in prescribing the extent of a lode location, says:

> A mining claim . . . . may equal but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface. . . . . The end-lines of each claim shall be parallel to each other.

Section 2322 Rev. Stat., defines the rights under a lode location as follows:

> The locators of all mining locations . . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations.

The undisputed evidence shows that the Mary Mabel vein dips to the north, that only the apex and a small portion of the vein upon its dip is located within the placer and that in dipping to the north the vein passes into that portion of the Mary Mabel location lying between the northerly side line thereof and the placer. Along its course from west to east the vein has an actual existence within the Mary Mabel from one end line to the other, so that the location of that claim does not involve or present a violation of the statutory requirement that a lode mining claim shall be located "along the vein." The vein, after dipping out of the Mt. Rosa placer, is either lawfully included in the Mary Mabel claim, or a valid location thereof can not be made. This latter part of this alternative proposition can not be recognized because it has no support in any statute and is inconsistent with the express provision of section 2319, Rev. Stat., which declares:

> All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase.

There is no claim that the existence of this lode was known at the time of the Mt. Rosa placer entry or patent, and therefore the portion thereof within the placer passed to the placer claimants under the provision of section 2333, which reads:

> but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

It has been indisputably settled, and is admitted by protestants, that a placer claimant can not follow a vein or lode beyond the surface

boundaries of his claim extended vertically downward. The portion of this vein lying outside of the placer is "in lands belonging to the United States," and under section 2319 is "free and open to exploration and purchase." While the actual apex of the vein is within the placer, the United States has dealt with and disposed of the placer claim as non-lode ground, and for all purposes of disposition by the United States under future exploration and discovery any vein or lode in adjacent ground stops at the point of its intersection with the boundary of the placer. Within the placer it is not subject to exploration or purchase, except according to the will of the private owner. For the purposes of discovery and purchase under the mining laws, the legal apex of a vein like the Mary Mabel, dipping out of ground disposed of under the placer or non-mineral laws, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of. Under this view the apex of the vein extends throughout the entire length of the Mary Mabel claim, if that be necessary to the valid entry thereof. Protestant's contention that the Mary Mabel vein or lode is segregated and divided into two non-contiguous parts by the Mt. Rosa placer and that the location and entry of the easterly part is thereby rendered invalid can not be sustained.

The Mt. Rosa being patented ground constituted no part of the Mary Mabel location and was excluded from the entry thereof, so that the westerly and northerly lines of the placer, where they come in contact with the Mary Mabel, became a part of the southerly side line thereof. Under this adjustment the two side lines are not parallel, but it is not necessary that they should be. The provision upon that subject is by its own terms confined to end lines. No portion of either side line as thus constituted is more than 150 feet from the middle of the vein, and protestant's assertion of an infraction of the Colorado statute limiting the width of lode claims to 150 feet on each side is not supported by the record.

Your office decision herein is reversed and—

(1) The Mary Mabel entry is hereby sustained except as to the areas in conflict with the Sierra Nevada and the Little Montana.

(2) The entry of the area in conflict with the Sierra Nevada is hereby canceled, subject to the right of the Mary Mabel to enter that area, without giving further notice, should the controversy be adjudicated by a court of competent jurisdiction in favor of the Mary Mabel or the adverse claim of the Sierra Nevada be waived, but unless proceedings to accomplish such adjudication are prosecuted with reasonable diligence the right to make entry of this area will be lost.

(3) The entry of a portion of the area in conflict with the Little Montana is hereby canceled subject to the right of the Mary Mabel, within a reasonable time, to complete its application for patent to this area by giving notices thereof and otherwise complying with the law, and mining regulations, and,

(4) If, by reason of the cancellation hereby made there remains in the Mary Mabel entry any non-contiguous area in the easterly portion thereof, your office will make such cancellation or disposition of such non-contiguous ground as may be proper. This direction is made necessary because there is in the record no plat showing the Sierra Nevada conflict.

CONTEST—INDIAN LANDS—ALLOTMENT.

WILLIAM KALMBACH.

In proceedings by the government to determine whether an application by an Indian to select certain tracts as an allotment shall be allowed, a stranger to the record, alleging prior settlement rights, will not be heard to set up his claim, but must await the disposition of the pending action.

Secretary Bliss to the Commissioner of the General Land Office, February 17, 1898.

(W. V. D.) (H. G.)

April 4, 1895, William Kalmbach applied to make homestead entry for the E. ½ of SW. ¼, the SW. ¼ of SE. ¼, and the NW. ¼ of SW. ¼ of Sec. 11, T. 66 N., R. 21 W., in the land office at Duluth, Minnesota.

His application was rejected by the local office, for the reason that the land applied for was covered by the following applications for Indian allotments, filed September 15, 1894, by Louisa Christian, as an Indian woman of the Lac Court Oreille band of the Chippewa tribe of Indians, and the head of a family, viz: No. 249, for the N. ½ of SW. ¼ of Sec. 11, T. 66 N., R. 21 W., for herself; No. 248, for her minor child, Martha Christian, for the S. ½ of SE. ¼ of said Sec. 11; and No. 254, for her minor child, Flora Christian, for the S. ½ of the SW. ¼ of said section 11.

In his homestead affidavit accompanying his application, Kalmbach alleges settlement on the tract embraced in his application May 23, 1892, and that he has lived thereon continuously since that time, and has made valuable improvements thereon, consisting of a comfortable house, a clearing of one and one-eighth acres in a state of cultivation, all of which are worth $140.00. Upon appeal from the rejection of his application, Kalmbach contended that he showed prior settlement and was entitled to enter the land under section 3 of the act of May 14, 1880 (21 Stat., 140), that the applications for Indian allotments did not segregate the land, and that the local office should have ordered a hearing to determine the rights of the parties.

November 30, 1895, your office held that the land applied for by him was, at the time of his application, covered by the said Indian allotment applications, and was, under the terms of section 4 of the act of February 8, 1887 (24 Stat., 388), segregated from entry, and that, if the said allotment applications ought to be canceled, such action could be attained by a proper procedure on the part of Kalmbach or any

interested party. Your office accordingly sustained the action of the local office in rejecting Kalmbach's application.

January 23, 1897, under the instructions of your office, the special alloting agent of the Duluth, Minnesota, land district, made his report to the Commissioner of Indian Affairs upon the said application, No. 254, of Louisa Christian for her minor child Flora, in which he found that the applicant was a quarter blood Chippewa Indian of the Lac Court Oreille band, and was living at the time of her application in Flambeau, Wisconsin, where she has ever since resided, and has never lived in the State of Minnesota; that she has no personal knowledge of the land, which was located for her by her husband, a white man and a citizen of the United States; and that it was, at the time of filing the application and at the time of the examination, chiefly valuable for the pine timber growing thereon. From these findings, and in view of the further fact that the said Indian applicant had never made settlement or improvement of the tract, it was recommended that the application be disallowed and canceled. A like report was made upon the individual application of the same party, No. 249, and also upon her application, No. 248, for her minor child Martha.

February 11, 1897, Kalmbach filed his verified and corroborated application to contest the said Indian allotment applications, alleging as grounds therefor, that the land covered by the applications is wholly unfit for agricultural purposes, can not be cleared and put in cultivation for less than twenty dollars per acre, and, when cleared, will not, on account of its poor soil, afford a support as a farm for either of the allottees, should their applications be approved; that the land is at least fifty miles from any railroad, and that the nearest market to the land is about thirty miles; that the land contains about one million feet of good, merchantable timber standing thereon of the value of fifteen hundred dollars; and that the land was selected as an Indian allotment solely on account of the timber thereon, and not for a home for said Indian applicant and her minor children. The corroborative affidavit, verified by two witnesses, confirms these statements generally, and contains a specific additional allegation that the land is wholly unfit for farming purposes, and, if the timber were removed, would not afford a support for the allottees, either for farming or for stock raising, and that the land is very valuable for the timber growing thereon.

April 30, 1897, your office dismissed this application to contest, as it was filed subsequently to the order of this Department suspending all allotments made in Minnesota, pending investigation thereof by special agents. It appears by this decision that other parties, who had made applications to contest these Indian allotment applications, and one other, that of Henry Christian, a minor child of the said Louisa, nearly two years before the application of Kalmbach was filed and prior to the said departmental order, were allowed a hearing, but it

further appears that by your office letter of October 27, 1897, addressed to this Department, these parties contesting the applications prior to the departmental order suspending them "took no action" on your order for a hearing, probably because of failure to serve notice on the Indian applicants; the case was closed as to them, and the allotment applications, which Kalmbach desires to contest, were transmitted in said letter.

It also appears by the said letter of your office that the Commissioner of Indian Affairs, by his letter to your office bearing date March 26, 1897, returned the applications for allotments on behalf of the minor children of said Louisa, numbered 248, 254 and 255, and recommended that the same be severally held for cancellation, but no action of the Office of Indian Affairs is reported on the personal application No. 249 of Louisa Christian, the mother of said children.

Kalmbach took no appeal from your office decision of November 30, 1895, rejecting his homestead application, and the sole question to be determined is the action of your office in dismissing his application to contest the allotment applications of Louisa Christian and her minor children, Martha and Flora, which he raises by his appeal.

Considering his application to make homestead entry for the tract upon which he alleges settlement with the application to contest the applications for allotments, his good faith may well be questioned.

His affidavit in support of his homestead application alleges improvements on the tract claimed by him and continuous residence for nearly three years, yet in his application to contest he alleges under oath that the land is chiefly valuable for timber, is unfit for a home, owing to the fact that the soil is barren and would be of no value if cleared of its timber, and when denuded of timber would be unfit for farming or stock raising purposes; it is remote from a railroad and is distant from a market, and is evidently—under his own showing—no more fit for a home for Kalmbach than for the Indian allottees. Buckley *v.* Murphy, 24 L. D., 352.

In the proceedings by the government against an entry, a stranger to the record alleging intervening settlement rights will not be heard to set up his claim, but must await the disposition of the pending action. (United States *v.* Alexander, 11 L. D., 507.) This application to contest is not against an existing entry, it is true, but is against an application to secure to an Indian woman and her minor children, severally, allotments of public lands lying outside of the limits of an Indian reservation; but undoubtedly the same rule should be applied as in contests against an entry under examination by the Department, for the same reasons exist in the latter as in the former case, as the rights of a third party can not be determined in such a proceeding against the applicants.

The same matters are involved in the reports of the special allotting agent as are offered as a ground of contest, and if the applications for

allotments are rejected, the tracts are open to entry. If the applications are approved, upon their approval and before issuance of the first or trust patent thereupon, a contest can be initiated (24 L. D., 264,) upon a proper showing, but not before that time.

The decision of your office, dismissing the application of Kalmbach to contest the application of Louisa Christian and her minor children, is affirmed.

CONTEST—COSTS—RESIDENCE.

DAMMON *v.* SINCLAIR.

In a contest brought on a general charge of non-compliance with law, accompanied by an offer to pay the expenses of the hearing, the contestant should be required to pay all of the costs of the hearing; and on his failure so to do, the case may thereafter be treated as between the entryman and the government.

The continuity of residence is not interrupted by absences from the land, where good faith and the intention to make a permanent home on the land are apparent.

Secretary Bliss to the Commissioner of the General Land Office, February (W. V. D.) *17, 1898.* (C. W. P.)

This case involves lots 1, 2 and 3 of Sec. 20, T. 39 N., R. 9 W., Eau Claire land district, Wisconsin.

On December 20, 1890, Jeremiah D. Dammon made homestead entry of the above described tract, together with lot 4 of the same section, and on December 22, 1890, Francis L. Box and Jessie M. Sinclair presented applications for lots 1, 2 and 3, which were rejected for conflict with Dammon's entry. On February 19, 1894, the Department held in the case of said Box against Dammon *et al.*, 18 L. D., 133, that the said Jessie M. Sinclair was entitled to make entry of said land, and on June 4, 1894, Miss Sinclair's application to enter said land was placed on record at the local office.

On March 26, 1895, said Dammon filed an affidavit of contest, charging abandonment, failure to maintain residence and failure to improve and cultivate the land entered. A hearing was thereupon had before the county judge of Sawyer county, Wisconsin, on February 10, 1896.

But before the hearing on Dammon's contest, Miss Sinclair, on January 27, 1896, made her final proof. Dammon appeared as protestant and cross-examined Miss Sinclair and her witnesses, paying the costs for taking the testimony on cross-examination.

At the hearing on the contest, the parties entered into a stipulation, to the effect that Dammon should be allowed to introduce, as part of his cross-examination of Miss Sinclair, the testimony given by her on her final proof, and that said testimony should be considered as part of her cross-examination in the contest case, and that the testimony taken in the contest case should be considered as part of the testimony taken on the final proof of Miss Sinclair, and that the evidence offered in the contest case should be considered not only as evidence on

the contest for abandonment, but, also, as evidence on the final proof of Miss Sinclair, "so that no further hearing may be ordered, or had on said application to make final proof."

Testimony was thereupon submitted. During the taking of the testimony Dammon objected to paying the costs of taking the testimony of the contestee, under rule 54 of practice, alleging that he claimed the preference right to enter the land in controversy by virtue of his settlement right, without reference to the act of May 14, 1880, and under rule 57 of practice, and also claimed the preference right to enter said land by virtue of his having paid for the taking of the cross-examination of Miss Sinclair and her witnesses on the taking of her final proof. And it was agreed between the parties that the question of the payment of these costs should be submitted to the local officers for their decision. The local officers decided that "the parties should pay the costs of the direct examination of their several witnesses and the costs of cross-examination of their witnesses, respectively."

Upon the merits the local officers decided in favor of Miss Sinclair, recommended the dismissal of Dammon's contest, and that Miss Sinclair's final proof be accepted.

On appeal, it was held by your office that Dammon had forfeited his preference right under the statute and his own direct promise to pay the expenses of the hearing; that the sole question presented by Dammon's appeal was whether the testimony is sufficient to warrant the cancellation of Miss Sinclair's entry in the interest of the government; and from a consideration of the evidence your office held that the entrywoman has acted in good faith; that her final proof is sufficient, and that she is entitled to a patent, and you dismissed Dammon's contest. Dammon has appealed to the Department.

That the decision of the local officers on the question of costs is erroneous there can be no doubt.

Dammon, in his affidavit of contest, asserted no right to the land, but simply charged the entrywoman with non-compliance with the homestead law, and offered to pay "the expenses of such hearing." In such case it is held, in Thompson *v.* Smith, 22 L. D., 248, that the costs should be assessed under rule 54 of practice, and that on the refusal of the contestant to pay the same the contest may properly be dismissed. See also Roberts *v.* Stanford, 22 L. D., 419; and Heggen *v.* Floyd, Id., 462, where it is held that under a contest instituted under the act of May 14, 1880, and prosecuted until the charges in the affidavit of contest have been apparently sustained, should not be dismissed, though the contestant refuse to make further advances for costs, or do any other act indicating his retirement from the case, but treated thereafter as between the government and the entryman.

Dammon should have been required to pay all the costs of the hearing, and if he had refused or failed to do so, the case would then have been left to the government to continue the prosecution of the case.

The testimony in the case is voluminous and conflicting. But it is not disputed that Miss Sinclair settled on the land on December 20, 1890, and commenced permanent improvements; that she began to reside on the land on May 22, 1891, and lived thereon continuously until August 29, following; that during the autumn and winter of 1891–1892, she visited the land on several occasions and did some clearing; that from April 1, 1892, to August 26, following, she was continuously residing on her claim; that during September, October and December following, she was on the land several times and did some work thereon; that during March, April, and May and the summer months of the year 1893, she made visits to the land, but did not live upon her claim continuously, until April 17, or 18, 1894, when she returned to the land and lived there continuously during the spring and summer of 1894, leaving on September 17. She did not return to the land to live until about March 28, 1895, but visited it on December 9, previous.

She erected three houses on the land, one built on December 20, 1890; another built in May, 1891, and a third in May, 1894. She also built a log barn and dug a well, twelve feet deep. She has cleared and broken, according to her witnesses, about two acres and a half, and cultivated about two acres: according to the contestant and his witnesses, she has plowed and broken about two acres and cultivated about half an acre. She has constructed about three hundred and twenty rods of wire fencing. Her improvements are worth from $200 to $300. She is a teacher, and also a dress-maker and seamstress. She is unable to make a living on the land, but she swears that it has been her home ever since she established her residence thereon in May, 1891. She has spent most of the spring and summer months on the land, with the exception of the summer and spring of 1893. The land is situated in the northern part of Wisconsin, and the evidence shows that the winters are long and cold, and that there is no farming work to be done during that season of the year, and Miss Sinclair testified that her absences from the land were for the purpose of making a support, to obtain means to improve the land and to meet the expenses of her first contest, which was not decided until January 19, 1894.

It is true that during the autumn of 1893 and the winter of 1893–1894, Miss Sinclair attended as a pupil the normal school at River Falls, but it was for the purpose of better fitting her to make a living as a teacher, and she swears that she had had no other place of residence and that she settled on the land for a permanent home.

Under all the circumstances, it can not be denied that Miss Sinclair, in spite of her long absences from the land, which (with the exception of the summer of 1893) were at a season when no profitable work could be done on her claim, has shown good faith and an intention to make her permanent home on the land.

In Sandell *v.* Davenport, 2 L. D., 157, it is said that:

The question of *bona fide* residence is equally one of intention as of fact. There is no question touching his commencing his residence within the prescribed period, and I take it that if the temporary absences in question are—as I think they have been—satisfactorily accounted for, then his residence has been constructively if not actually sufficient. The Department has repeatedly held—and it invariably holds—that where a claimant leaves his claim for the purpose of earning an honest livelihood, coupled with the *bona fide* intent to maintain his residence upon and cultivate and improve his claim, such absence is accounted a constructive residence upon the same, and compliance with legal requirements.

And in Charles C. Boulton's case (6 L. D., 338) it is held that actual residence being established, and permanent and valuable improvements made, temporary absences at a season of the year when but little, if any, work could be done on the land, are not inconsistent with good faith in the matter of residence.

In Peter Weber's case (on review), 9 L. D., 150, it is said:

The absences in this case were for the purpose of gaining means to live and improve his claim, and being for that purpose, were excusable, and no evidence of an intent to abandon.

In Bomgardner *v.* Kittleman, 17 L. D., 207, it is said:

It is true that she (Miss B.) spent more time in working for others than she did at home. But it nowhere appears that she had any other home, and the evidence shows that she was dependent upon her own labor for support, and that it was necessary to work away from home for her own subsistence and to gain means to improve her place. This she did, and the improvements she made on the place were in themselves ample, under all the circumstances, to show her good faith.

In Fyffe *v.* Mooers, 21 L. D., 167, it is said:

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*.

And this is repeated in Tekseth *v.* Noben, 25 L. D., 147.

Your office decision is accordingly affirmed.

PRACTICE—ORDER OF CANCELLATION—REINSTATEMENT—TOWNSITE.

OAKES *v.* WEST RENO CITY.

Where an entry has been canceled on account of an adverse claim, when it should have been held intact subject to the perfection of said adverse claim, it may be treated, on application for reinstatement, as though the latter action had been taken.

A townsite entry cannot be allowed if the proof offered fails to show that the land is occupied for the purposes of trade and business or settled upon and occupied as a townsite.

Secretary Bliss to the Commissioner of the General Land Office, February 17, 1898.
(W. V. D.) (G. B. G.)

This case is before the Department on the appeal of Persie Oakes from the decision of your office of June 15, 1897, dismissing her protest against the allowance of townsite proof and rejecting her application for reinstatement of homestead entry, No. 3489, as to the W. ½ of the NE. ¼ of Sec. 29, T. 13 N., R. 7 W., Oklahoma.

The case is "current work," under departmental order of June 11, 1896 (22 L. D., 675), and will be disposed of as such.

With the record is a motion to dismiss the appeal, on the ground, substantially, that all the issues now raised by the protestant have been heretofore finally adjudicated against her, that she is a protestant without interest, and therefore not entitled to the right of appeal.

The history of this case may be stated briefly.

The land is in the Cheyenne and Arapahoe country, which was opened to settlement and entry at noon on April 19, 1892. On that date Snowden, now Oakes, made homestead entry for the whole of the NE. ¼ of said section, township and range. On April 20, 1892, one Rosa Goenawein filed a contest against said entry, alleging settlement prior to Snowden, or any other person.

On May 14, 1892, John Fox, probate judge of Canadian county, Oklahoma Territory, applied to enter said quarter section, together with lot 5 of Sec. 28, for townsite purposes, which application was rejected for conflict with Snowden's entry.

A hearing was ordered between Snowden and the townsite claimants, and no hearing having been had between Snowden and Goenawein, the latter was allowed to intervene.

The Department, on July 9, 1896 (23 L. D., 74), affirmed the decision of your office, rejecting the claim of Goenawein, sustaining the claim of the townsite occupants as to the W. ½ of the NE. ¼ of said section 29, and holding Snowden's entry to that extent for cancellation. Snowden filed a motion for review of said departmental decision, which was denied on October 3, 1896, and, accordingly, on October 30, 1896, Snowden's entry was canceled as to the said W. ½ of the NE. ¼, and the case closed.

On February 18, 1897, W. R. Brown, probate judge (successor to the said John Fox), submitted townsite proof, covering the said W. ½ of the NE. ¼, under sections 2387, 2388, and 2389 of the Revised Statutes, at the request and on behalf of the occupants of West Reno City. Pending publication, pursuant to which said proof was made, said

Persie Oakes, on February 8, 1897, filed in the local office a protest against the proof so advertised to be made, wherein she alleged:

That she is the identical person, who as Persie Snowden, made homestead entry No. 3489, on April 19, 1892, for the NE. ¼ of section 29, township 13 north of range 7 west. That said eighty acres attempted to be proved up as a townsite in this proceeding, to wit, the west ½ of the said NE. ¼ is used only to a very small extent for purposes of trade and business, from sixty-five to seventy acres of the same being in the sole use, occupancy and possession of the affiant for agricultural purposes, about fifty-five acres of the said eighty acres being in actual cultivation by this affiant by virtue of her homestead entry thereon; that of the remaining portion of said eighty acres, only from eight to fifteen acres in all is in the possession of the alleged townsite settlers, by far the greater portion of this eight to fifteen acres, being used for pasturage and agricultural purposes and only a small portion actually used either for business or residence purposes. That the entire population of said alleged townsite consists of three heads of families, with their families, and one single man, in all twelve persons. That your affiant therefore predicated upon the above facts, says that said townsite is practically abandoned as such for purposes of trade and business and is not used to such an extent for purposes of trade and business, and the value of the improvements is not sufficient to show good faith as to render it subject to entry as a townsite; and that said condition has existed for more than six months last past and next prior to the date of this protest. Wherefore, your affiant asks for the privilege as such protestant of appearing at the date of said final proof, to wit, February 18, 1897, and of cross-examining the witnesses on the said final proof and of introducing evidence if she desires in rebuttal of the testimony of said witnesses and in support of this protest.

In the protestant's application for reinstatement of her entry, filed in the local office on February 8, 1897, it is further urged:

That said pretended townsite settlers can not make proof on said eighty acres and obtain title thereto, for the reason that said eighty acres is not actually used and occupied for purposes of trade and business, and that the entry of this applicant having been held for cancellation, not on account of any invalidity, but simply for conflict with said pretended prior right of said townsite settlers, her homestead entry should not have been canceled, but should have been held intact subject to the consummation of said title in said townsite settlers by proper proof of the occupancy of said land for townsite purposes, and that the cancellation of the said west eighty of affiant's homestead entry was therefore premature and erroneous, and in the face of the abandonment of said land by said townsite settlers, should be reinstated.

It is not thought that appellee's motion to dismiss the appeal of protestant should prevail. It is true that the issue joined between Persie Oakes and the townsite claimants has been heretofore ruled by the Department in favor of the townsite claimants, and the entry of Oakes canceled to the extent of the conflict. Her entry, however, should not have been canceled, but held intact on the record, subject to the final proof of the townsite claimants. This would have been the better practice, and the matter will now be treated as though that had been the action taken in the premises. Treating the case, then, as though the entry of Mrs. Oakes was still of record, she is a protestant with an interest and as such entitled to the right of appeal.

On the merits of the case, it is not believed that the proof offered by the townsite claimants warrants the patenting of the land involved for townsite purposes. It is not occupied for the purposes of trade and business and is not "settled upon and occupied as a townsite."

In reaching this conclusion the informal allegations and ex-parte affidavits in the record, to the effect that many of the alleged inhabitants of the so-called town have abandoned it since final proof was offered, have not been considered. The infirmity in the townsite proceedings is apparent without looking to these newly filed papers.

Your office decision is reversed, the townsite proof is rejected, and it is directed that Mrs. Oakes's entry of the land in controversy be reinstated.

MINING CLAIM—HOMESTEAD ENTRY.

MONTGOMERY *v.* GILBERT.

The fact that a placer claimant has conducted profitable mining operations upon a part of his claim does not, in itself, give him any right as against an adverse homestead claimant for another part of such claim, lying in a different quarter section, and that had been prior thereto adjudged non-mineral in a departmental decision.

Secretary Bliss to the Commissioner of the General Land Office, February 17, 1898.

(W. V. D.) (E. B., Jr.)

The land involved in this case, comprising about thirty acres, is all that portion of lot No. 46, mineral survey No. 2809, which is within the SE. ¼ of section 18, T. 12 N., R. 9 W., Helena, Montana, land district. Lot No. 46, known as the Buckhorn placer, embraces portions of sections 7, 8, and 18, said township and range, and contains fifty-six acres. The placer claim was located April 17, 1889, by Lee Montgomery and four other persons, and was surveyed January 11, 1890.

On May 6, 1889, one Clarence Christofferson filed his pre-emption declaratory statement for said SE. ¼. On January 21, 1890, Montgomery, having acquired the interests of his co-locators in the Buckhorn placer, filed application for patent therefor. On January 22, 1890, Christofferson appeared to offer final proof, and at the same time Montgomery appeared and protested, on the ground that a portion of the land which Christofferson proposed to enter as a pre-emption claim was mineral land and was embraced in his (Montgomery's) said placer mining claim. A hearing thereupon followed, ending January 31, 1890. Upon the evidence adduced the local office held the land in controversy to be non mineral and dismissed the protest. On successive appeals by Montgomery the decision of the local office was affirmed by your office, and your office decision by the Department on July 26, 1892 (unreported: L. and R., 249, p. 184). On August 29, 1893, Christofferson executed and filed in the local office a relinquishment to the United

States all right, title and interest in the land covered by his pre-emption filing, which filing was therefore canceled by your office on October 3, 1893.

On May 29, 1895, Harris P. Gilbert made homestead entry for the quarter section formerly embraced in Christofferson's filing. On July 18, 1895, Montgomery applied to purchase, under his application filed January 21, 1890, the land embraced in his placer claim, which application was denied on the ground that the portion thereof in the said southeast quarter had been decided by the Department to be non-mineral. On July 18, 1895, Montgomery filed his duly corroborated contest affidavit, alleging, in substance, that his mining operations on the land in controversy since the close of the previous hearing in January, 1890, had demonstrated the same to be more valuable for mining than for agricultural purposes. A hearing duly followed, commencing September 3, 1895, and ending October 15, 1895. On March 24, 1896, the local office decided the case in favor of the homestead claimant and recommended that the mineral application be canceled to the extent of its conflict with the homestead entry. On appeal by Montgomery your office, on June 20, 1896, affirmed the decision of the local office. Montgomery duly appealed from your office decision, assigning error as follows:

First: It was error to hold that the evidence shows the land to be more valuable for agricultural purposes than for mining.

Second: It was error not to have held that as no practical value for agriculture was shown and the land being absolutely necessary to carry on mining operations, that it did not have a greater value for mining.

Third: It was error not to have held that as the land was appropriated for mining purpose, before it was entered as agricultural land, that it was incumbent on the agricultural claimant to show substantial and paramount value for farming purposes.

In your office decision it is said:

The ground under consideration, as I judge from the evidence, has no very great value for any purpose. It appears to be situated at quite an altitude where frosts are likely to occur in every month in the year, and is therefore not first class agricultural ground. It appears, however, that portions of the land have produced fair crops of hay. In view of the former departmental decision which fixed the character of this land as non-mineral, and in view of the pending agricultural entry, it devolved upon the contestant to prove not simply that the land has no very great value for agricultural purposes, but that as a present fact it has a positive value for mineral purposes, and that in excess of its agricultural value.

The chief use which the proof shows the contestant to have made of the ground is for dumping purposes, and but a small area thereof has been used for this purpose. Active mining operations have not been conducted upon that part of the Buckhorn Placer in conflict with Gilbert's homestead entry, so that the evidences of mineral consist of the results of exploration and testing made by the various witnesses.

There appears to be no question but that the ground in conflict contains some quantity of fine gold in placer deposit, but as to the extent of this deposit there is a wide variance between the statements of the witnesses for the contestant and those of the homestead entryman.

I conclude, however, that the explorations and testings made since the former hearing have not been very extensive nor the results thereof very important, and that they are certainly insufficient to show affirmatively that the ground is valuable for its minerals.

Inasmuch as, in my judgment, the evidence fails to show, by a preponderance thereof, that the land in conflict, nor any smallest legal subdivision thereof, is valuable on account of the mineral deposit therein contained, I conclude that the contestant has failed to make a case.

After a very careful examination and consideration of the evidence and the law applicable thereto, the Department finds no warrant to disturb the decision of your office. Although it is shown, as stated in the decision of your office, that a small area of the land in controversy has been used for dumping purposes, or, more accurately speaking, used to receive the tailings which are carried down upon it from the higher land along the stream where the ground has been mined, it is not shown that the possession or control of such area, nor of any part of the land in controversy, by the mineral claimant, is necessary to the successful mining of the portion of the placer which lies outside the said quarter section.

The fact that the land in controversy was embraced in the Buckhorn placer location prior to the pre-emption filing, or that when the filing was canceled Montgomery again took possession of it as placer land, claiming it under the placer location, gives him no right thereto as against Gilbert's homestead entry, if in fact, as would seem to be the case, the land is not mineral in character. Montgomery has had ample time and opportunity since the close of the prior hearing, and especially since the cancellation of Christofferson's filing, to have demonstrated the mineral character of the land, if mineral in quantity sufficient to pay for its extraction from the earth exists thereon, as he contends. He seems to have chosen, instead, to prosecute his mining operations on that part of his location which lies within the northeast quarter of said section, where he was more sure of a profitable return for his expenditure of money and labor. He can not complain, therefore, if the result of such election is unfavorable to him in the present contest. That he has conducted profitable mining operations upon his location in the northeast quarter of the section, gives him, *ipso facto*, as against the homestead claimant, no right to the land in controversy, which was *prima facie* non-mineral land under previous departmental decision.

The decision of your office is affirmed.

APPLICATION TO ENTER—ABANDONMENT.

SHOOK *v.* DOUGLAS.

Pending final action on an application to enter the land embraced therein is not only reserved from any other disposition, but until the application is allowed a charge of abandonment will not lie; nor is the applicant in such case required to reside on the land covered by his application pending final decision thereon.

Secretary Bliss to the Commissioner of the General Land Office, February 17, 1898.
(W. V. D.) (C. J. G.)

The record in this case shows that on September 28, 1891, John Douglas made homestead entry for the N. ½ of NE. ¼ and the E. ½ of NW. ¼ Sec. 8, T. 3 N., R. 3 E., Humboldt land district, California.

On the same date Marion F. Shook made application to enter the E. ½ of SE. ¼ Sec. 5, and the N. ½ of NE. ¼ Sec. 8, same township and range, which was rejected by the local office for conflict with Douglas' entry as to said N. ½ of NE. ¼ Sec. 8.

Upon Shook's appeal from this action a hearing was ordered, and upon the testimony submitted thereat, the local office rendered decision recommending the cancellation of Douglas' entry as to that part in conflict with Shook's application.

Douglas appealed from this decision to your office, where, under date of March 20, 1895, the decision of the local office was affirmed, his homestead entry as to the N. ½ of NE. ¼ Sec. 8, being held subject to the prior right of Shook. Douglas thereupon prosecuted a further appeal to this Department.

On October 14, 1895, and during the pendency of Douglas' appeal, his daughter, Georgia A. Douglas was allowed to make homestead entry for the E. ½ SE. ¼ Sec. 5, embraced in Shook's application.

June 9, 1896 (22 L. D., 646), the Department affirmed your said office decision of March 20, 1895.

October 3, 1896 (23 L. D., 331), the Department rendered decision denying a petition for rehearing in the above case, and on November 6, 1896, your office in promulgating the said decision, closed the case and directed the local office

to notify G. A. Douglas to show cause why her H. E. No. 3590, covering the E. ½ of SE. ¼, Sec. 5, T. 3 N., R. 3 E., erroneously allowed pending final disposition of the application of Shook to enter said tracts of land should not be canceled, and Shook allowed to perfect his application in accordance with departmental decision of June 9, 1896.

January 13, 1897, there was transmitted to your office the answer of Georgia A. Douglas to the order calling upon her to show cause. The substance of said answer is that at the time she made her homestead entry the land included therein was vacant, public land; that Shook had abandoned said land for more than six months prior to the date of said entry.

March 1, 1897, your office held Georgia A. Douglas' said homestead entry for cancellation "for conflict with the right of Shook to perfect his application," and she has now appealed to this Department.

It is apparent from the record in this case that Georgia A. Douglas' homestead entry for the E. ½ of SE. ¼ Sec. 5 was erroneously allowed, as the tract had been appropriated by the prior application of Shook which was protected by the proceedings pending before this Department at the date of her entry. She must have known of Shook's settlement claim as well as his application to enter. A possible explanation for the allowance of her entry may be found in the accompanying brief filed by Shook. It is stated therein that when Shook's application of September 28, 1891, was presented at the local office and rejected as to the land in conflict with John Douglas' entry, there was a failure to make entry in the tract-book or on the plat showing the acceptance of Shook's application for the land in Sec. 5; or if any memorandum of Shook's application was made it was by pencil which became erased. Subsequently there was a change in the officers of the Humboldt land office, and when Georgia A. Douglas applied to make homestead entry, the land in question appeared to be vacant, public land.

An examination of Shook's application discloses the fact that it covers the tracts in both sections 5 and 8.

Pending final action on Shook's application, which, having been made within three months after the plat of survey was filed in the local office, was equivalent to actual entry, the land in question was not only reserved from any other disposition, but until his application was allowed the charge of abandonment did not lie. Neither was he required to reside on the land embraced in his application, pending final decision thereon. See cases of Griffin *v.* Pettigrew (10 L. D., 510); Goodale *v.* Olney (12 L. D., 324); and Rice *v.* Lenzshek (13 L. D., 154).

Your office decision of March 1, 1897, is hereby affirmed, and Shook will be allowed to perfect his application upon due showing of compliance with law.

MINING CLAIM—PROTEST—STAY OF PROCEEDINGS.

THOMAS ET AL. *v.* ELLING (ON REVIEW).

The Department may properly direct a stay of action, under an application for mineral patent, during the pendency of judicial proceedings, even though said proceedings are based upon a protest that does not require an adverse suit under the statute, if such stay of action is in aid of a proper disposition of said protest by the Department.

Secretary Bliss to the Commissioner of the General Land Office, February 17, 1898.

(W. V. D.) (F. W. C.)

With your office letter "N" of January 28, 1898, was forwarded a motion, filed on behalf of Henry Elling, for review of departmental decision of December 13, 1897 (25 L. D., 495), in the case of William

H. Thomas *et al. v.* Henry Elling, involving the disposition of a protest filed against the application for patent by Henry Elling upon the Spratt lode mining claim, survey No. 4766, Helena land district, Montana, in which protest it was claimed that protestants are the owners of an undivided half interest in said location.

The grounds of error set forth in the motion are as follows:

I. Error in holding that action must be suspended upon the application involved, during the pendency in court, of suit in the case of Thomas *et al. v.* Elling, after concluding as a matter of law, that said suit is not a suit on an adverse claim under sections 2325 and 2326 U. S. Rev. Stat.

II. Error in holding, in effect, that possessory title to the Spratt lode claim must be determined in court, in a proceeding other than such a one as is contemplated by said sections 2325 and 2326, U. S. R. S.

III. Error in not directing the allowance of entry by Elling, and the issuance of patent to him, notwithstanding the pendency of said suit, in view of the fact that, in the event of the issuance of patent to Elling, plaintiffs in said suit would still have the same remedy which they are now pursuing.

IV. Error in suspending action upon Elling's application for patent, because of, and during the pendency of, said suit, while at the same time holding that it is doubtful whether or not any decision which may be rendered in said suit would be "conclusive upon the Department."

V. Error in not finding from the record that the complete legal title in and to said Spratt lode claim is vested in Elling, and that patent must therefore be issued to him subject to any equities in the plaintiffs in said suit of Thomas *et al. v.* Elling.

After a review of the matter, the motion is denied.

It was not held in the decision under review that, on account of the protest and suit of William H. Thomas *et al.*, action upon Elling's application for patent *must* be suspended; nor was it held, either directly or in effect, "that possessory title to the Spratt lode claim must be determined in court, in a proceeding other than such a one as is contemplated by said sections 2325 and 2326, U. S. R. S."

Said decision held just to the contrary.

In referring to said protest by Thomas *et al.*, the decison states:

It follows, therefore, that the protest in question is not such a one as can be recognized as an adverse claim necessitating the institution of proceedings thereon, in a court of competent jurisdiction.

It was further held in said decision that:

It is the duty of the Land Department, excepting in controversies referred to the courts by the statute, to determine *before issuance of patent* whether the applicant is entitled thereto, and the fact that such controversies may be litigated in the courts *after issuance of patent* does not relieve the Department of its duty in the premises.

Relative to proceedings not specifically referred to the courts by sections 2325 and 2326, U. S. R. S., the opinion holds:

Where the matter has already been decided by a court of competent jurisdiction, the question may arise whether such a decision is conclusive upon the Department, but without deciding that question it seems clear that where the dispute does not involve the character of the land, or the qualifications of the entryman, or his compliance with the law under which title is sought, the Department may properly accept and follow the judgment of a court of competent jurisdiction, determining as

between contending parties their respective rights to, and interests in, the land in controversy. The Department is not required to await the bringing of suit, because it is not so provided in the statute and because there is no obligation upon either party to invoke the jurisdiction of a court as there is in the instance of an adverse claim. Here suit has been instituted in the local court for the purpose of settling the question of joint ownership. Jurisdiction of the subject-matter may exist even though not recognized by sections 2325 and 2326. The land department may therefore well await the result of that suit before giving further consideration to the protest.

It is the plain duty of this Department to determine whether Elling is entitled to patent as applied for. Protest has been filed by others claiming an interest, who have been excluded from the application for patent.

A suit has been instituted and is now pending involving the question as to the interest of the protestants in the Spratt location.

The land department can not ignore the protest. The decision under review directed that action upon the application for patent be suspended awaiting the determination of the case in the court, not that the Department was required by law to wait, but that an adjudication by the court would at least aid in the proper disposition of the protest.

No sufficient reason is assigned in the motion for revoking the direction given, and the papers are herewith returned for the files of your office.

SISSETON AND YANKTON LANDS—PAYMENT ON COMMUTED ENTRIES.

STATE OF SOUTH DAKOTA.

In the commutation of homestead entries in the former Sisseton and Yankton reservations the entrymen are not required to pay one dollar and twenty-five cents per acre in addition to the price fixed by the acts of March 3, 1891, and August 15, 1894, opening said lands to entry.

Secretary Bliss to the Commissioner of the General Land Office, February 17, 1898.

(W. V. D.) (W. M. W.)

On November 2, 1897, the agent of the State of South Dakota addressed a communication to you claiming that homestead entrymen of lands embraced in the ceded portions of the Sisseton and Yankton Indian reservations, who commute their entries, should be required to pay one dollar and twenty-five cents per acre for land covered by such entries, in addition to the other payments required by law.

On November 17, 1897, you replied to said letter, and advised the agent of the State that in the matter of payments in the cases referred to in his communication your office is governed by approved departmental instructions of March 22, 1892 (14 L. D., 302), and May 17, 1895 (20 L. D., 435), opening the Sisseton and Wahpeton and Yankton reservations; that under the act of March 3, 1891, each entryman of lands in the Sisseton and Wahpeton reservation must pay two dollars and

fifty cents per acre for the land taken, in addition to the fee and commissions on double minimum land provided by law; that under the act of August 15, 1894, each applicant to enter land in the Yankton reservation must pay for the land entered at the time of making his original entry fifty cents per acre, and at the time of making proof the further sum of three dollars and twenty-five cents per acre, in addition to the fees required by law. You called the attention of the agent for the State to the fact that homestead entries on the ceded portions of the great Sioux reservation are commuted under a proviso in section 6 of the act of March 3, 1891 (26 Stat., 1095), while homestead entries on the ceded portions of the Sisseton and Yankton reservations are commuted under the general law. You also invited his attention to the fact that under section 22 of the act of March 2, 1889 (25 Stat., 898), all payments made under said act for lands embraced in the ceded portion of the great Sioux reservation are covered into the Treasury as a special fund for the benefit of the Indians, while all moneys paid for lands on the ceded portions of the Sisseton and Yankton reservations are covered into the Treasury as receipts from public lands.

You also informed said agent that the two dollars and fifty cents per acre for Sisseton and Wahpeton lands, whether paid on a commuted or final homestead entry, and the fifty cents per acre paid at the time of original homestead entry for Yankton lands, and the three dollars and twenty-five cents per acre required to be paid on such lands at the time of making proof, either final homestead or commuted, "are included in the same general fund upon which the five per cent of net proceeds due the State of South Dakota is computed."

The State filed an appeal.

The material contentions of the State are, that in commuted entries of public lands in the Sisseton and Yankton reservations the lands have been disposed of for less than should have been charged for them; that in all cases where the land has been paid for before the expiration of five years, the entrymen should have been charged one dollar and twenty-five cents per acre, in addition to the two dollars and fifty cents per acre charged in the Sisseson and three dollars and seventy-five cents per acre in the Yankton reservations.

Under section 13 of the act of February 22, 1889 (25 Stat., 680), the State of South Dakota is entitled to five per cent of the proceeds of the sales of public lands lying within said State which may be sold by the United States since the admission of said State into the Union, after deducting all the expenses incident to the sale.

It clearly appears from your letter to the agent of the State that said State has received five per cent of the proceeds of all sales of public lands, made up to the present time, in the Sisseton and Yankton reservations, and that under the present practice it will continue to receive the same on sales hereafter made.

It appears that the practice of your office respecting the amounts to

be charged for public lands in the ceded portions of these reservations has been and is in strict conformity with the instructions approved by the Department governing the disposition of lands in said reservations to entrymen under the respective acts of Congress relating thereto.

A careful examination of said acts and departmental instructions fails to disclose any error on the part of the Department in the construction placed upon said acts at the time the instructions were approved, and therefore there is no reason for any change or modification of said instructions.

The action of your office in the premises, is therefore approved.

RAILROAD RIGHT OF WAY—VESTED RIGHT—INDIAN RESERVATION.

SPOKANE AND PALOUSE RY. CO.

The grant of a railroad right of way across an Indian reservation, that has vested by reason of compliance with the conditions precedent, is not lost through failure to construct the road within the period specified (a condition subsequent), where no advantage of such failure has been taken by the government.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, February 21, 1898. (F. W. C.)

I am in receipt, through your reference of the 8th instant, of a letter from the Commissioner of Indian Affairs, dated January 6, 1898, enclosing letter dated December 21, 1897, from the United States Indian Agent at the Nez Perces agency, relative to the rights of the Spokane and Palouse Railway Company to, at this time, continue the construction of its railroad across the lands within the Nez Perces Indian reservation.

It appears that the right of way across said reservation was granted said railway company by act of Congress approved May 8, 1890 (26 Stat., 104). The third section of said act provides:

That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing and be open for the inspection of any party interested therein, and until the compensation aforesaid has been fixed and paid; and the surveys, construction, and operation of such railroad, including charges of transportation, shall be conducted with due regard for the rights of the Indians and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision: *Provided*, That the consent of the Indians to said right of way and compensation shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe before any right under this act shall accrue to said company.

From the letters referred to it appears that the route was surveyed and permanently established by the company during the year 1891; that the company

acquired the right of way over the route named by actual purchase on May 2, 1891, paying to the individual allottees along the said route, proportionately, the damages sustained by them, amounting to $3876.06, to the government for damages to the agency property the sum of $195.00, and the sum of $1414.00 to the Nez Perce tribe for passing through their tribal lands. It was also observed that the company agreed to move off the said right of way the building standing thereon now occupied as the agency office, replace with sufficient iron pipe the old mill flume to carry water for mill purposes—the old flume no longer belongs to the government as it was sold at public auction to a private individual—and agreed to give free and open access to this tribe to the tract of land reserved as a "boom" for the benefit of the Indians.

The road has not, to this date, been constructed across the reservation, but the agent reports that the company

contemplates the early extension of their road from the present terminus at Juliaetta, Idaho, to Lewiston, Idaho, a distance of about twenty-five miles. This extension should it be constructed as contemplated, will pass through twenty-four allotments, will pass about mid-way through the tract of land reserved for agency purposes, and through certain tracts formerly known as the tribal lands of the Nez Perce tribe.

This is the route established in 1891.

The fourth section of the act of May 8, 1890 (*supra*), provides:

That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed: *Provided,* That the company may mortgage said franchise, together with the rolling stock, for money to construct and complete said road: *And provided further,* That the right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order across said reservation within two years from the passage of this act.

The Indian agent states in his letter of December 21, 1897:

By reference to office letter, dated April 24, 1895, Land 17043–1895, I find that John Lane, Esq., special agent in charge of this agency, on that date, was advised that the Spokane and Palouse Railway Company, had forfeited and lost the right of way over this reservation granted it by the act of Congress of May 8, 1890, since it had failed to complete the road within the two years time specified in the act, and that since no renewal of the grant had been made by Congress, no recognition should, on that account, be given the company of the lost and forfeited right.

The matter is therefore referred to me for "opinion as to the right of the within named railway company to construct its line through the Nez Perce reservation."

From the above recitation, taken from the letters referred, it would appear that the conditions named in section three of the act of May 8, 1890 (*supra*), have been complied with and that consequently the grant of the right of way has vested.

The provision in section four relative to the construction of the road is clearly a condition subsequent, to be taken advantage of only by the grantor. In what manner this reserved right of the grantor must be asserted, depends upon the character of the grant.

If it be a private grant, that right must be asserted by entry, or its equivalent; if the grant be a public one, it must be asserted by judicial proceedings, authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership of the property on account of a breach of the condition. Schulenberg *v.* Harriman (21 Wall., 63), and cases cited.

No action has been taken in the manner prescribed to enforce the forfeiture, and in my opinion the right to construct under the grant made by the act of May 8, 1890, continues.

Approved, February 21, 1898,

C. N. BLISS, *Secretary.*

RAILROAD GRANT—FORFEITURE—SETTLEMENT RIGHT.

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

The conditions on which the extension of time was given by the act of June 22, 1874, operate as a revocation of the grant to the extent of the rights of actual settlers at the date of said act; and such revocation is operative though the lands may have been patented under the grant.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (F. W. C.)

I am in receipt of your letter of August 2, 1897, in the matter of the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Thom Anderson, involving lot 5, the NE. ¼ of the SW. ¼ and the NW. ¼ of the SE. ¼ of Sec. 1, T. 146 N., R. 49 W., Crookston land district, Minnesota.

This tract is within the primary limits of the grant made by the act of March 3, 1871, to aid in the construction of what is known as the St. Vincent Extension of said road, as shown by the map of definite location filed and accepted December 19, 1871.

Under the provisions of the act of March 3, 1865 (13 Stat., 526), this road was required to be completed by March 3, 1873, but by the act of March 3, 1873 (17 Stat., 631), the time was extended to December 3, 1873. The company failed to complete the road within the time allowed, and by the act of June 22, 1874 (18 Stat., 203), the time was again extended to March 3, 1876, 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 of 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.

Following the passage of this act, to wit, on October 8, 1874, Anderson was permitted to file pre-emption declaratory statement for this land, in which he alleged settlement on May 3, 1872. Prior to this time, to wit, on November 28, 1873, the company listed this tract on account of its grant, which list was duly approved on April 30, 1874,

and was patented to the State of Minnesota for the use and benefit of said company January 14, 1875.

On March 8, 1882, Anderson submitted final proof upon his filing, against the acceptance of which the company duly protested. Upon the hearing held upon the company's protest the local officers found that Anderson was a qualified pre-emptor and that his final proof showed compliance with the pre-emption law.

By your office decision of July 20, 1883, it was held that Anderson's claim was confirmed by the provisions of section 3 of the act of April 21, 1876 (19 Stat., 35), under which decision the local officers permitted Anderson, on August 3, 1883, to make payment for the land, upon which cash certificate issued. The company appealed from said decision, however, and on June 12, 1895, this Department held that it was error on the part of your office in allowing Anderson to complete entry of this land after the certification and patent on account of the grant, and you were directed to call upon the company to show cause why it should not re-convey the title erroneously conveyed on account of said grant, as contemplated by the act of March 3, 1887 (24 Stat., 556).

Your letter now under consideration reports that the company was duly called upon, by letter of June 25, 1895, to which no response was made by the company. You call attention, however, to the fact that as Anderson was residing upon this land on June 22, 1874, the date of the act extending the time for the completion of said road, it would appear that his rights are saved and secured the same as though said lands had not been granted, and refer to the departmental decision in the case of Tronnes *v.* said company (18 L. D., 101).

An examination of the two cases shows that they are similar in all important particulars, and as I can see no reason to depart from the holding made in the Tronnes case, after a full consideration of the matter, I have to direct that Anderson's entry, if otherwise regular and satisfactory, be passed to patent.

RAILROAD GRANT—LAND EXCEPTED—STATE TITLE.

LOTT *v.* NEW ORLEANS PACIFIC RY. CO.

The sale by a State of land to which it has no title, can not be recognized as excepting the land from the operation of a railroad grant.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.
(W. V. D.) (J. L. McC.)

James H. Lott has appealed from the decision of your office, dated May 26, 1896, rejecting his application to make homestead entry of the N½ of the NE¼ and E½ of the NW¼ of Sec. 11, T. 5 N., R. 1 W., New Orleans land district, Louisiana, on the ground that said land had inured to the New Orleans Pacific Railway Company.

The land is within the primary limits of the grant to the company named, opposite the portion of the road that was definitely located October 27, 1881; it was listed by the company November 13, 1883; the N½ of the NE¼ was patented March 3, 1885, and the E½ of the NW¼ on August 8, 1889. On October 1, 1894, Lott applied to make homestead entry of the land.

The company protested, whereupon a hearing was had, as the result of which the local officers, and on appeal your office, found that the testimony showed no such occupation by a qualified actual settler at the date of definite location of the road as would except the land from the operation of the grant, or that it was in possession of such settler at the passage of the act of February 8, 1887, or in possession, at that date, of the heirs or assigns of such a settler.

Lott has appealed. His first allegation is that your office erred

in holding that there is nothing in the testimony to show that the land in dispute was occupied by an actual settler at the date of definite location of said road.

A careful examination of the testimony sustains the conclusion of the local officers and your office in this respect.

He alleges that your office erred—

2. In not recognizing that the E½ of the NW¼ of said land was excepted from said grant, as said land was entered by the father of claimant, as per receipt filed in the testimony.

Said receipt was issued by an officer of the State of Louisiana, on January 21, 1863—at a time when said State refused to recognize the authority of the Federal government; and the sale, by said State, of land to which she had no title or right, can not be recognized by the United States as having effected a segregation of the land, or excepted it from the operation of the grant to said railway company.

The decision of your office was correct, and is hereby affirmed.

RAILROAD LANDS—SECTIONS 3, AND 5, ACT OF MARCH 3, 1887.

LUEDTKE *v.* KRICKLAU.

A homestead applicant is not entitled to a reinstatement of his claim under section 3, act of March 3, 1887, if it appears that he in fact never actually resided on the land involved.

One who purchases railroad land with notice of a pending homestead claim is not himself a bona fide purchaser in contemplation of section 5, of said act, but if his grantor holds under a bona fide purchase, made prior to said homestead claim, such purchaser succeeds to the right of his grantor and may perfect title under said section.

Secretary Bliss to the Commissioner of the General Land Office, February
(W. V. D.) *21, 1898.* (F. W. C.)

Paul Luedtke has appealed from your office decision of June 8, 1897, rejecting his homestead application, covering the SE. ¼ of the SE. ¼ of Sec. 11, T. 114 N., R. 28 W., Marshall Land district, Minnesota, with a

view of allowing Johann Kricklau to purchase said tract under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556).

This tract is within the indemnity limits of the grant made by the act of May 12, 1864 (13 Stat., 72), to aid in the construction of the St. Paul and Sioux City Railroad.

On May 14, 1857, one Richard Holden filed pre-emption declaratory statement covering this land, together with adjoining tracts, in which settlement was alleged on the 8th of that month.

On October 15, 1860, this tract was offered at public sale under executive proclamation, to which was attached a notice to pre-emptors, requiring them, under penalty of forfeiture of their rights, to come up and make proof and pay for the land on or before the day of offering. Holden did not comply with this requirement.

On May 28, 1887, Kricklau applied to make homestead entry of this tract; his application was rejected for conflict with the indemnity withdrawal made under the grant of 1864. From such rejection Kricklau appealed, alleging that the filing by Holden, which was not canceled on the tract-books, operated to except the land from the effect of the railroad withdrawal.

Upon appeal, your office held that Holden's rights under his filing were extinguished by the offering of the tract at public sale in 1860, and that therefore the land was free from claim at the date of the indemnity withdrawal made under the act of 1864, and was therefore not subject to Kricklau's application presented, as before stated, March 28, 1887.

On appeal, the action of your office was affirmed by departmental decision of July 7, 1891 [unreported].

On May 22, 1891, the withdrawal for indemnity purposes made under the act of 1864 was revoked by departmental order, and as no selection of the tract had been made on account of the railroad grant, prior to this time, the land then became subject to selection or entry by the first legal applicant.

On June 1, 1893, Luedtke tendered homestead application for this tract, which was rejected by the local officers for conflict with the railroad grant; from which action he duly appealed.

On October 19, 1893, the railroad company made selection of this tract, which was permitted to go of record notwithstanding the pending appeal by Luedtke from the rejection of his application.

On October 23, 1894, your office considered Luedtke's appeal, reversed the action of the local officers, and held that his application to enter should have been allowed and, therefore, held for cancellation the company's selection, with a view to allowing Luedtke's application. From this action the company duly appealed.

During the pendency of this appeal, to wit, on April 30, 1895, Kricklau filed in the local office an application for reinstatement of his homestead claim, alleging that he was entitled to such relief under the provisions

of section 3 of the act of March 3, 1887, *supra*. This application was denied by the local officers, and Kricklau duly appealed to your office.

On March 11, 1896 [unreported], your office decision of October 23, 1894, holding for cancellation the company's selection, with a view to allowing Luedtke's application, was affirmed, in so far as to direct the cancellation of the railroad's selection; but in view of an allegation made in the company's appeal, to the effect that Kricklau was in possession of the land under purchase from the company, the case was returned to your office for appropriate action.

Departmental decision of March 11, 1896, it appears, was promulgated by your office letter of June 12, 1896, in which the local officers were directed to notify Kricklau and allow him thirty days within which to show cause why Luedtke should not be permitted to make entry of the land under the homestead laws, as applied for.

Acting thereunder, Kricklau, on July 16, 1896, filed an affidavit in which he alleged that his application presented in 1887 was erroneously rejected because of the fact that the filing by Richard Holden excepted the tract from the operation of the indemnity withdrawal, and that he was entitled to reinstatement under the provisions of the act of March 3, 1887; further, that he was a *bona fide* purchaser of the land through mesne conveyances from the railroad company; that he (Kricklau) was a *bona fide* settler on the land; that Luedtke did not make his application to enter honestly or in good faith, for the purpose of actual settlement or cultivation, and that he had never resided or intended to reside thereon and had made no permanent improvements upon the tract.

Upon this affidavit hearing was duly ordered and held, and upon the testimony adduced, the local officers recommended that Luedtke's application be accepted. Kricklau duly appealed to your office, resulting in the decision of June 8, 1897, appealed from, in which it was directed that Luedtke's application be rejected "with a view to the allowance of Johann Kricklau's application to purchase the land from the government under the 5th section of the act of March 3, 1887."

An examination of the record does not disclose that Kricklau ever made formal application to purchase the land under the 5th section of the act of March 3, 1887. It is true that in his affidavit he alleges that he was a *bona fide* purchaser of the land through the company, and after petitioning for the reinstatement of his homestead application, prayed that in event that such relief was denied him, he be allowed to purchase or otherwise perfect title to the land.

The hearing was ordered to determine the respective rights of Luedtke and Kricklau in the premises, and although no formal application to purchase had been made, this will not defeat Kricklau's claim, if, upon the record as made, he is shown to be entitled to purchase under the act of 1887.

The record shows that Kricklau lived upon land owned by him in

the neighborhood of the tract in question, and while he cultivated a part of this tract he never actually resided thereon, and cannot therefore be considered an actual settler within the meaning of the third section of the act of March 3, 1887 (*supra*). His application for reinstatement of his homestead application rejected for conflict with the indemnity withdrawal is therefore denied.

Relative to his alleged purchase from the railroad company, the showing offered at the hearing consisted of copies of a quit-claim deed, executed June 29, 1891, by the railroad company and the trustees for the bondholders, in favor of one Horace E. Thompson, conveying all its claim, right, title and interest, both in possession and expectancy, in and to certain described lands, covering about a thousand acres, among which is the tract in question. The consideration named in this deed was $3,400. Copy was also filed of a quit-claim deed, executed November 14, 1891, by Horace E. Thompson and wife, in favor of the Prince Investment Company. This deed covered about two hundred acres, including the tract in question. The consideration named therein is $100. Copy of a contract between the Prince Investment Company and Kricklau, dated August 22, 1894, having in view the transfer of the land in question to Kricklau, was also filed. A special warranty deed, dated August 23, 1894, conveying this tract to Kricklau in consideration of $500, is also with the record. There is also an affidavit, made by one Moore, who was attorney for the railroad company and also for the Prince Investment Company, in which he swears that the sums named in the several deeds referred to were paid as stated.

This is all of the showing respecting the claimed right to purchase under section 5 of the act of 1887. Nothing was offered on behalf of Luedtke tending to attack the *bona fides* of these transactions.

Relative to Luedtke's connection with the tract, it appears that in June, 1893, he built a house on the land, which was shown not to be habitable during cold weather, and that he did a little breaking upon the tract, but has never actually resided thereon, his residence being in Arlington township, where he owns a farm. The house built upon the tract by Luedtke was destroyed by fire about July 4, 1896, and had not, at the date of the hearing, been rebuilt.

It is clearly shown that Kricklau purchased the land from the Prince Investment Company with full knowledge of the fact that Luedtke had, prior to this purchase, applied to enter the tract under the homestead laws. Kricklau stated, in his testimony, that he was induced to make the purchase of the tract from information received at the local office to the effect that Luedtke's application had been rejected for conflict with the grant. It appears, however, that in answer to an inquiry addressed to the Commissioner of the General Land Office, a letter was written him by your office, prior to his purchase from the investment company, advising him of the pendency of Luedtke's application, on

appeal from the action of the local officers rejecting the same for conflict with the railroad grant. Charged with the knowledge, and also with notice of the occupation of the land by Luedtke, it can not be held that his purchase from the Prince Investment Company in itself constitutes him a *bona fide* purchaser under section 5 of the act of March 3, 1887, and in order to make him such a purchaser it is necessary that there be a *bona fide* purchase from the company antedating the tender of Luedtke's application.

As before stated, Luedtke's application was made June 1, 1893, and the conveyances from the railroad company to Thompson and from Thompson to the Prince Investment Company were made June 29, 1891, and November 14, 1891, respectively. The proof submitted respecting these conveyances constituted a *prima facie* showing that Thompson and the Prince Investment Company were *bona fide* purchasers, and Luedtke did not assail the *bona fides* of either of these transactions. Kricklau succeeded to the rights acquired under these conveyances and since they antedate Luedtke's homestead application it would seem, in the absence of any showing to the contrary, that Kricklau holds under a prior *bona fide* purchase.

Further action upon Luedtke's application will therefore be suspended for a reasonable time to afford Kricklau an opportunity to make formal application to purchase, and, after due notice, to make proof as required in the case of Samuel L. Campbell (8 L. D., 27). Since there was no formal application to purchase and no notice of such an application, the hearing heretofore had will not preclude further inquiry into the claim of Kricklau as a *bona fide* purchaser nor will it relieve him from making proof in the regular way.

ALASKAN LANDS—SURVEY—CHARACTER OF OCCUPANCY.

ALFRED PACKENNEN.

A survey of Alaskan land, as provided for in the act of March 3, 1891, is special in its character, and there is no authority therefor except as preliminary to a purchase, and it therefore follows, that before such a survey is made there should be a *prima facie* showing of the right to purchase, and due compliance with the departmental requirements regulating applications for the survey of said lands.

The word "trade" as used in section 12 of said act is employed in its commercial significance, and Congress by its use in defining the character of occupancy which would authorize a purchase of land, did not intend to include thereby lands used for farming, cattle grazing, or fox raising.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (W. M. B.)

This Department has considered the appeal of Alfred Packennen from the decision of your office of April 16, 1895, wherein was suspended survey No. 86, executed July 9 and 10, 1894, by Frank H.

Lascy, U. S. deputy surveyor, under provision of section 13 of the act of March 3, 1891 (26 Stat., 1100), and the rules and regulations of June 3, 1891 (12 L. D., 583).

The land embraced in this survey, and which is sought to be purchased by appellant under the provision of section 12 of the said act of March 3, 1891, comprises an area of 29.93 acres, and is situated on Fox Island in Uyak Bay, western coast of Kadiak Island.

Respecting the execution of this survey the record submitted fails to show that certain prerequisites relating thereto were complied with by appellant.

Section 13 of said act is as follows:

SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, ex officio surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, ex officio surveyor-general; and on the receipt of such estimate from the United States marshal, ex officio surveyor-general, the said person, association, or corporation shall deposit the amount in a United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, ex officio surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, ex officio surveyor-general; and the said United States marshal, ex officio surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same.

Paragraphs 1, 2, 3, 4 and 13 of the rules and regulations adopted [June 3, 1891, 12 L. D., 583] under said act, are as follows:

1. Applications for surveys must be made in writing, by the person entitled to purchase land under said act, or by the authorized agent of the association or corporation so entitled. The application must particularly describe the character of the land sought to be surveyed, and as accurately as possible, its geographical position, with the character, extent, and approximate value of the improvements. If a private survey had previously been made of the land occupied by the applicant, a copy of the plat and field-notes of such survey should accompany the application which must also state that the land contains neither coal, nor the precious metals, with reasons for such statement; that no part of the land described in the application includes improvements made by or in possession of another, prior to the passage of said act; that it does not include any land to which natives of Alaska have prior rights, by virtue of actual occupation; that it does not include a portion of any town site, or lands occupied by missionary stations, or any lands occupied or reserved by the United States for public purposes or selected by the United States Commis-

sioner for Fish and Fisheries, or any lands reserved from sale under the provisions of this act. These statements must be verified by affidavit.

2. If, upon examination, the application shall be approved by the ex officio surveyor-general, he will furnish the applicants with two separate estimates, one for the field work, and one for office work, the latter to include clerk hire, and the necessary stationery. The ex officio surveyor-general will be careful to estimate adequate sums in order to avoid the necessity for additional deposits.

3. Upon receiving such estimates, applicants may deposit in a proper United States depository, to the credit of the Treasurer of the United States, on account of surveying the public lands in Alaska, and expenses incident thereto, the sums so estimated as the total cost of the survey, including field and office work.

4. The original certificate must in every case be forwarded to the Secretary of the Treasury, the duplicate to the ex officio surveyor-general, the triplicate to be retained by the applicant as his receipt.

* * * * * * *

13. When the duplicate certificates of deposit of the amounts estimated for field and office work, shall have been received by the ex officio surveyor-general, the requisite instructions for the surveys and making returns thereof, will be issued to the deputy surveyor who may be designated to do the work. The amount of compensation to the deputy surveyor must be stated in the instructions and the same must not exceed the amount deposited for the field work. The land to be surveyed under any one application, can not exceed one hundred and sixty acres, and it must be in one compact body, and as nearly in square form as the circumstances and the configuration of the land will admit.

Here there does not appear to have been any application for the survey, verified or otherwise; there does not appear to have been any estimate of the cost of making the survey or of the cost of the clerical work in the office of the ex officio surveyor-general; it does not appear that this officer ever employed or designated any person or deputy surveyor to make the survey, or issued any instructions for executing this survey and making returns thereof. It is true that a deposit was made to pay the cost thereof but the survey was executed on July 9 and 10, 1894, while the deposit was not made until December 6, 1894, which was almost five months subsequent thereto. Where there has been so gross a failure to comply with the law and regulations as is here indicated the survey is certainly very irregular, if it is not altogether unauthorized.

The general laws relating to surveys have not been extended to Alaska and the survey contemplated by the act and regulations under consideration is a special survey which can subserve no purpose whatever if the land embraced therein is not subject to purchase under that act. There is no authority for the survey, except as a step toward a purchase, and, therefore, to obtain the survey the application therefor should make a *prima facie* showing of a right to purchase.

It is evident that the information specified in paragraph 1 of the regulations, was required to be submitted to the ex officio surveyor-general in order that he might primarily determine whether the land sought to be surveyed was subject to purchase under the act and whether there was any occasion or authority for the survey thereof.

By the terms of sections 12, 13 and 14 of the act, only lands possessed

and occupied "for the purpose of trade or manufactures" can be purchased thereunder. The possession and occupancy of land for the purpose of trade or manufactures can, in a measure at least, be determined by the character and extent of the improvements thereon.

No showing was made by the appellant either before or after the survey respecting the existence of improvements upon the land claimed, or respecting its possession and occupancy. The only information upon these points is contained in the report of the deputy surveyor, which forms a part of his return of the survey. This report states that the "improvements are of the approximate value of 100 dollars and consist of a frame dwelling house 12x14 ft.;" that "the claimant has built and lives in a frame house 18x21 lks. (12x14 ft.) and is engaged in fishing, raising foxes and cattle, and trading with the natives," and that "the claimant is in possession residing on the island when not absent fishing and trading." It is doubtful whether the character of these improvements indicates a permanent occupancy of the land for any purpose, and certainly it does not indicate that the land is possessed or occupied otherwise than as an abode or habitation. The extent and character of the fishing and of the trading with natives are not shown, but the report seems to indicate that the same are carried on by claimant in part, if not altogether, when he is absent from the island. From the connection in which the matter is mentioned in the report it is inferred that the locus of the fox and cattle raising industry is upon the island, although the statement of the deputy is somewhat indefinite. If there are any fences, enclosures, or buildings upon the island which are used in restraining or caring for the foxes and cattle they are not mentioned.

A question arises whether the raising of foxes and cattle is embraced by the words "trade or manufactures" in section 12 wherein it is provided that—

> Any citizen . . . . association . . . . and any corporation . . . . now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres . . . . of such land.

Webster gives two definitions of the word "trade:" one is,

> The act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter; (and the other is,) The business which a person has learned and which he engages in, for procuring subsistence, or for profit; occupation; especially, mechanical employment as distinguished from the liberal arts, the learned professions, and agriculture; as, we speak of the *trade* of a smith, or a carpenter, or mason, but not now of the *trade* of a farmer or a lawyer or a physician.

An examination of the public land laws, shows that the word "trade" was used in section 2258 Revised Statutes, wherein were excepted from the right of pre-emption lands "occupied for purposes of trade and business, and not for agriculture," and is used in the act of May 14, 1890 (26 Stat., 109), which provides that townsite entries in Oklahoma

may include lands occupied "for purposes of trade or business;" but it has never been suggested that under these statutes lands occupied for raising either domestic or wild animals were for that reason excepted from pre-emption or made subject to townsite entry.

From the definitions before quoted it is seen that the word "trade" has two well defined meanings. In the one case it has a commercial signification; while in the other it is the equivalent of vocation or occupation.

From an analysis of the legislation of Congress, with respect to the District of Alaska, and especially of the laws under which title to public lands in said district can be acquired, it appears that the word "trade," as there employed is used in its commercial signification.

Section eight of the act of May 17, 1884 (23 Stat., 24), establishing a civil government for the district of Alaska, provides:

> The laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district. . . .
>
> But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

This general provision, withholding from sale and entry all public lands in the district of Alaska save those claimed for mining purposes, continued in full force, without change or modification, until March 3, 1891, when by sections 11, 12 and 13 of the act of that date authority was given for the entry of non-mineral public lands in said district for townsite purposes and for the purchase of such lands when possessed and occupied "for the purpose of trade or manufactures." None of the public land laws authorizing the entry of lands for agriculture in any of its forms apply to that district.

When the act of March 3, 1891, was adopted, certain portions of the public lands in Alaska were possessed and occupied as sites for trading posts and for canning and manufacturing stations. At such posts trading with the natives was carried on in the various forms of mercantile transactions, and at such stations salmon were prepared for market and fish-oil and other articles were manufactured for domestic and export trade. Suitable buildings and improvements had been and were being erected at considerable expense in both instances.

Considering the history of land legislation relating to Alaska and the situation prevailing there when the act under consideration was adopted, it is believed that it was not the purpose of Congress to authorize the purchase of land used for farming, or for grazing cattle, or for the domesticating and breeding of wild animals.

The appellant failed to make the required application for the survey, and even if that fault were waived, the report of the deputy surveyor does not show that the land is subject to purchase.

This survey embraces an area of 29.93 acres, but does not include all of the land upon the island, and should the harbor and landing place

at the easterly end of the same, which are completely covered by the land surveyed, afford the only approach or access to the island, appellant would obtain a complete monopoly of the use of all of the land upon the island by the purchase merely of the particular portion embraced in this survey.

By reason of the irregularities surrounding the survey, and the fact that the land is not possessed and occupied for the purpose of trade or manufactures, your office decision suspending survey No. 86, is affirmed.

ABANDONED MILITARY RESERVATION—FORT RANDALL.

INSTRUCTIONS.

Commissioner Hermann to the register and receiver, Chamberlain, South Dakota, February 21, 1898.

The Fort Randall military reservation was established by executive order of June 14, 1860; said reservation was subsequently found to be situated partly in Nebraska and partly in South Dakota. A portion of the part in South Dakota was relinquished July 22, 1884, and provision was made for the disposal thereof under the homestead laws, by the act of October 1, 1890 (26 Stat., 648). The remainder, situated partly in Nebraska and partly in South Dakota, was relinquished October 20, 1893, with fifty buildings, for disposal under the act of July 5, 1884 (23 Stat., 103). All of the buildings have been sold according to law.

The area of that portion of the reservation in South Dakota is 64,479.05 acres.

The act of March 3, 1893 (27 Stat., 593), provides that all that portion of the reservation in South Dakota may be selected by the State within one year after the passage of the act, or the approval of the survey, under the provisions of the act providing for the admission of the State into the Union, approved February 22, 1889.

The plats of the survey of the lands in question were accepted August 29, 1896.

By office decision of September 15, 1897, addressed to you, it was held that as the State of South Dakota refused to make selections of that portion of the land in Fort Randall abandoned military reservation situated in South Dakota, as provided by said act of March 3, 1893, said lands were opened to settlement under the act of August 23, 1894 (28 Stat., 491), and you were directed to give notice of the filing of the triplicate plats of survey, fixing a date when entries for said lands would be allowed to go to record. It appears that the date fixed by you was October 25, 1897.

The lands in question have been appraised in order to facilitate their disposal under said act of August 23, 1894, and the appraisal has been approved by the Secretary of the Interior.

On April 9, 1895 (20 L. D., 303), the Secretary of the Interior directed this office to issue instructions under said act of August 23, 1894, as follows:

> That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry and that the rate of interest upon deferred payments be charged at the rate of four per cent. per annum.

A copy of said appraisal has been filed in your office and upon the request of entrymen you will inform them at what rate the lands entered by them have been appraised.

In allowing entries for lands in this reservation you will, in each case, endorse on the applications "Fort Randall Reservation, Act of August 23, 1894," and make the same annotation on your abstract of homestead entries.

Under the provisions of the homestead law an entryman has the right either to commute his entry after fourteen months from the date of settlement, or offer final proof under Sec. 2291 R. S. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months with full payment in cash, or, after submitting ordinary five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof without interest, or he may make payment in five equal instalments, the first payment to be made one year after the acceptance of his final proof and subsequent payments to be paid annually thereafter, interest to be charged at the rate of 4 per cent. per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after fourteen months from date of settlement you will, if the proof is satisfactory, issue cash certificate and receipt; and, in the event that regular final proof is made and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of the principal and interest paid, reporting the same in a special column of the Abstract of Homestead Receipts and at the time the last payment is made you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers land in the Fort Randall reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service, applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs the entrymen elect to make payment for the lands entered in five annual instalments you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made you cannot charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in instalments, you will not give said proofs current numbers and dates but will, if they are acceptable to you, make proper notes on your records showing that satisfactory proof has been made and the dates upon which the partial payments must be made and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure the payment of the instalments but if, when each instalment is due, any entryman fails to pay the same you will report the matter to this office, when proper action will be taken in the case.

Under date of January 28, 1898 (26 L. D., 87), the Honorable Secretary of the Interior decided that school sections in abandoned military reservations of more than five thousand acres, subject to disposal under act of August 23, 1894 (28 Stat., 491), were not excepted from the operation of said act where the grant to the State for school purposes had not attached by reason of survey prior to the establishment of the reservation; and further, that the lands within such abandoned reservations were "not to be treated 'as public lands subject to all the land laws of the United States, including grants for school purposes.'"

Under said decision you will allow qualified persons to make entry for lands in sections 16 and 36 in the above reservation.

Approved,

C. N. BLISS, *Secretary.*

HOMESTEAD—CERTIFICATION—CONFIRMATION.

EDWIN F. FROST ET AL.

The right of purchase under section 2, act of June 15, 1880, on behalf of an entryman, who after the passage of said act and prior to his application for the exercise of said right, had sold the land to another, cannot be recognized, nor is the case of John D. Hay, 1 L. D., 74, authority therefor.

If a contest against a homestead entry fails, and more than two years have elapsed since the allowance of the entry, it is confirmed under the proviso to section 7, act of March 3, 1891, though under the body of said section the entry is not susceptible of confirmation.

The inadvertent certification of a State selection at a time when the land covered thereby is included within an existing entry, made prior to the selection, is inoperative, and constitutes no bar to the issuance of patent on said entry.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (F. W. C.)

Mr. B. F. Hampton, as agent and attorney for the State of Florida, has filed a motion for re-review of departmental decision of December 26, 1896 (24 L. D., 228), in which it was held that the inadvertent certification of lots 3 and 4, Sec. 35, and lots 3 and 7, Sec. 36, T. 31 S.,

R. 39 E., Gainesville, Florida, on June 28, 1895, said tracts at that time being included in the entry of Edwin Frost, is inoperative and constitutes no obstacle to the issuance of patent upon said entry.

The motion previously filed by Mr. Hampton for review of said departmental decision was denied June 15, 1897 (24 L. D., 525), because it did not appear that he had complied with the regulations in regard to the admission of attorneys to practice before this Department, and his authority to represent the State was not shown.

It now appears that Mr. Hampton has been duly recognized, for a number of years, both by your office and this Department, as the agent of the State in the matter of the selection of its school lands, but no sufficient reason is disclosed in the motion for reversing the decision in question.

The facts relative to the entry made by Frost, covering the tracts in question, have been several times recited in the previous decisions of this Department, but will be briefly repeated here for the reason hereinafter given.

Frost made homestead entry May 7, 1877. On August 25, 1883, he purchased the tracts here involved under the provisions of the act of June 15, 1880.

Prior to his purchase, to wit, on March 27, 1883, one D. C. Erwin contested his entry for abandonment.

Said contest, after dragging along through a number of years, without proceeding to a hearing, was dismissed by the local officers July 21, 1891, for want of prosecution, and by your office letter "H" of September 25, 1891, the action of the local officers was affirmed and the case closed.

Thereafter, to wit, on May 15, 1893, your office held Frost's entry for cancellation, because Frost had, prior to final entry, deeded the land to another; consequently there was nothing upon which to base his cash entry, which was erroneously allowed by the local officers.

The transferee of Frost, one Cleveland, conveyed part of the land to one Lowe, and the remainder to one Kessler. Lowe and Kessler appealed from your said office decision, claiming (1) that the purchase was a proper one, and (2) that the entry was confirmed by the provisions of section 7 of the act of March 3, 1891.

Said appeal was considered in departmental decision of December 8, 1894 (not reported), in which the action of your office was affirmed and it was held that the entry was not confirmed, because the purchase was made before final entry.

A motion was filed for the review of said decision, but during the pendency of said motion the State made selection of the lands covered by Frost's entry as school indemnity, and the selection was approved, as before stated, June 28, 1895.

The motion for review was considered in departmental decision of July 6, 1895 (21 L. D., 38), in which it was held that at the time Frost

sold to Cleveland the rulings of this Department permitted an entryman to make purchase under the act of June 15, 1880, notwithstanding he had sold the land, and therefore reversed the decision of December 8, 1894, and directed that patent issue upon Frost's entry.

This action was apparently taken regardless of the approval of the list of school lands June 28, 1895.

To establish the prior ruling the case of John D. Hay (1 L. D., 74) was referred to.

That was a decision made by your office, and in the case of Gunning *v.* Herron (10 C. L. O., 273), in referring to said decision, it was stated:

> The letter of this office to the register and receiver at Montgomery, Alabama, in the case of John D. Hay, to which you refer (9 C. L. O., 132) as authority for holding that transfer of a portion of the land is no bar to an application to purchase under the act of June 15, 1880, was inadvertently signed, and in the broad sense in which it may be understood, is not in accordance with law nor with established rulings and practice. Neither the letter of the law nor its legal intent can be understood as implying a purpose by Congress to permit a party to sell his claim to a portion or the whole of the land embraced in his entry, receive the purchase money, and then, after his transferee has made the land valuable by labor and expenditure, to seize and appropriate to himself or sell to another such possession and property through a purchase under this act.
>
> It was undoubtedly to protect *bona fide* purchasers from original entrymen against the liability of this injustice of the necessity of a resort to the courts to enforce specific performance, that the provision allowing purchase by attempted transferees was incorporated into the law.
>
> In this case there is a *bona fide* instrument in writing, drawn with more than usual care, executed prior to June 15, 1880, proven in due form and recorded.
>
> The conditions of the law being fully satisfied, the right of purchase from the United States inures to Gunning for so much of the land as was embraced in Herron's attempted transfer.

It would further appear that the sale referred to in the Hay case was one made prior to the act of June 15, 1880, and not subsequently thereto, as in the case here under consideration.

On a re-examination, I am unable to find that it was ever held by this Department that a purchase could be made under the act of June 15, 1880, by an entryman who had, subsequently to the passage of the act and prior to his application to purchase, sold the land to another.

The reason given, therefore, for the reversal of the previous decision of December 8, 1894, was not sufficient.

It does appear, however, that the contest filed by Erwin against Frost's entry was dismissed and the case closed in 1891.

More than two years had then elapsed since final entry, and upon the termination of said contest proceedings it would appear that the entry was confirmed by the terms of the proviso to the 7th section of the act of March 3, 1891. (Weyher *v.* Smith, 13 L. D., 489; Tyndall *v.* Prudden, Id., 527.)

It is true that the entry could not be confirmed under the provisions contained in the body of the section, because sale was made before

final entry, but this did not defeat the operation of the proviso upon the termination of the contest by Erwin.

It must therefore be held that the order for the cancellation of Frost's entry contained in decision of December 8, 1894, was error, as said entry was confirmed and should be patented, unless the inadvertent certification on account of the school grant removed the land from the jurisdiction of this Department.

This was the very question considered in the decision of December 26, 1896, *supra*, for the review of which the motion under consideration is filed.

That it was a pure inadvertence can not be doubted, as the land was both at the time of the State's selection and the approval thereof embraced in the entry of Frost, against which an order for cancellation had been made, but which had not become effective.

The certification could therefore have no operative effect as against said entry, and I have to direct that patent issue thereon as previously ordered. (Weeks *v.* Bridgman, 159 U. S., 541.)

The motion for review is accordingly denied.

HOMESTEAD ENTRY—WIDOW—PATENT.

ANNA ANDERSON.

If a homesteader dies prior to compliance with the requirements of the law, and the submission of final proof, and his widow thereafter submits final proof, the patent should issue in her name; and a patent in such case issued in the name of the homesteader is in violation of law, and no bar to the correction of the final certificate and the issuance of patent thereon in the name of the widow.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (V. B.)

The appeal of Anna Anderson, from your decision of May 18, 1896, relating to the issue of patent for the NW. ¼ of Sec. 12, T. 112 N., R. 54 W., Watertown land district, South Dakota, is before the Department for consideration.

It appears from the papers accompanying the appeal, that on May 20, 1884, Peter Anderson, husband of the appellant, made homestead entry for said tract and thereafter died. Subsequently and on May 5, 1891, his widow submitted final proof, which was accepted, the fees paid and final certificate was issued on same day in the name of the deceased entryman and patent was issued thereon, October 14, 1891, also in the name of the entryman.

This patent was returned to your office, on May 5, 1896, by Mrs. Anderson asking that the same be corrected so as to be in the name of the widow who made the proof. This you refused to do and from your action this appeal was taken.

The date of the death of Peter Anderson is not given in the papers sent up, but it is stated in the appeal that he died "long prior" to the making of the final proof.

The law, relating to the succession to the homestead right, in case of death of the entryman, prior to making final proof by him, is found in Sec. 2291 Revised Statutes, and is as follows:

> No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead his widow; or in case of her death, his heirs, or devisee; . . . . proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the filing of the affidavit . . . . then in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law.

It is apparent under this statute that, in this case the law cast the succession to said homestead upon Anna Anderson, the widow of the entryman; and she having submitted final proof, which was accepted, it was the plain duty of the local officers to have issued final certificate in her name, and likewise the duty of your office to have issued patent to her.

It appears that these plain requirements of the law were not complied with but a patent has been issued in the name of the dead man whereby, if valid, the widow is deprived of her rights; and the title to the land, under Sec. 2448 R. S., "will enure to and become vested in the heirs, devisees or assignees of such deceased patentee."

Your action, declining to change said patent as requested, so that it stand in her name, was correct and is approved.

But when you say "Section 2448 R. S., covers this case" you are in error.

That section 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 vest in the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life.

A careful examination of this section shows that it is not applicable to the case of Mrs. Anderson and suggests no sufficient reason why she should not have proper relief in the premises.

It will not be questioned that at common law a patent issued in the name of a dead person is ineffectual to pass title, and therefore inoperative and void. Davenport *v.* Lamb (13 Wall., 418, 427). By the act of May 20, 1836 (5 Stat., 31), embodied in section 2448, *supra*, Congress modified the general rule, which had theretofore obtained, but did not abolish it. The modifications made by Congress must be respected, but that legislation being in derogation of the common law rule is not to be carried further by implication or inference than was the plain intent of Congress as disclosed by the language of its enactment.

It will be observed that said section only applies to cases where patents were issued "in pursuance of any law of the United States" etc. In this case patent was not issued in pursuance of law, but in direct violation of section 2291 R. S., which required it to be issued to the widow; and, in giving effect to the two statutes it should be noted that both being found in the Revised Statutes are to be taken as having been regarded at the time of the revision as not in conflict, and that such construction should now be followed if consistent with the terms of the two sections. This view is especially forcible when the contrary would operate to deprive the widow of a right and transfer the same to "the heirs, devisees, or assigns" of the deceased entryman.

A fair and reasonable construction of section 2448 easily permits both sections to stand together and each to operate upon the class of cases to which they are respectively applicable.

Under this construction section 2248 is held to operate upon cases where persons during life had earned the land and become entitled to patent by compliance with the legal prerequisites to its issuance. In other words, where the right to the patent itself was perfect before or at the time of the death. In such case the modification by section 2448 operates and the title to the described land enures to and vests in the heirs, etc. This case is not of that kind. The deceased entryman at the time of his death, had not complied with the prerequisites of the law and earned the right to the land and a patent therefor.

These views are not in conflict, but in harmony, with the rulings of the Department in the cases of Joseph Ellis (21 L. D., 377) and Henry E. Stich (23 L. D., 457). In the former case the entryman, before death, had earned the right to a patent by complying with the essential prerequisites of the law and making proof thereof; and the Department decided that patent should be issued in his name, the case being within the modification of the common law rule, made by section 2448. In the latter case, the entryman died after entry, before proof, which was made by his widow; and it was directed that the patent should be issued in the name of the widow.

The case under consideration, not coming within the modifications made by Congress in section 2448, is governed by the common law rule; and it follows, from what has been said, that the patent to the dead man, issued not merely without authority of law, but in clear violation thereof, is null, void and of no effect.

Entertaining these views, your judgment is reversed and you will cause the final certificate to be so corrected as to stand in the name of Anna Anderson, the widow, and have patent issued thereon.

INDIAN LANDS—TREATY OF FEBRUARY 27, 1867.

LEVEL *v.* PAPE.

The preferred right to purchase the unallotted Pottawatomie lands, conferred by the treaty of February 27, 1867, upon the Atchison, Topeka and Santa Fe R. R. Co., is not defeated by failure to make payment for a tract of such land within the period specified in said treaty, where said tract was unsurveyed and hence could not be conveyed by the government; and the said company having attempted to convey such a tract, may, for the benefit of its transferee, perfect title thereto by making the proper payment therefor.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (C. J. G.)

On July 3, 1895 (21 L. D., 290), the Department approved an application made by Frank Level for the survey of an island in the Kansas river situated in T. 11 S., R. 15 E., Topeka land district, Kansas.

It was stated in the departmental decision referred to that there was with the record a letter from one Chas. W. Pape, claiming that he bought the island sought to be surveyed by Level from one George W. Watson, in 1882.

The survey was duly made, and the plat thereof, wherein the land is described as lot 8 of section 29, containing seventeen acres, and lot 8 of section 30, containing 11.40 acres, T. 11 S., R. 15 E., was approved in September, 1896.

On October 14, 1896, Frank Level was allowed to make homestead entry of the above described lots, which entry was held for cancellation by your office January 18, 1897, as having been erroneously allowed, and was finally canceled March 27, 1897.

The land in question is within the old Pottawatomie Indian reservation. By article five of the treaty of November 15, 1861, proclaimed April 19, 1862 (12 Stat., 1191), it was provided that the Leavenworth, Pawnee and Western Railroad Company should have the privilege of purchasing the unallotted lands belonging to the Pottawatomie Indians. It was further provided in said treaty that:

In case said company shall not purchase said surplus lands, or, having purchased, shall forfeit the whole or any part thereof, the Secretary of the Interior shall thereupon cause the same to be appraised at not less than one dollar and twenty-five cents per acre, and shall sell the same, in quantities not exceeding one hundred and sixty acres, at auction to the highest bidder for cash, at not less than such appraised value.

In the amendments to the treaty of February 27, 1867, proclaimed August 7, 1868 (15 Stat., 531), it was provided:

That the Leavenworth, Pawnee and Western Railroad Company their successors and assigns, having failed to purchase said lands, the Atchison, Topeka and Santa Fe Railroad Company may, within thirty days after the promulgation of this treaty, purchase of said Pottawatomies their said unallotted lands, except as hereinafter provided, to St. Mary's mission, at the price of one dollar per acre, lawful money of the United States, and upon filing their bond for the purchase and payment of said lands in due form, to be approved by the Secretary of the Interior within the time

above named, the said Secretary of the Interior shall issue to the last-named railroad company certificates of purchase, and such certificates of purchase shall be deemed and holden, in all courts, as evidence of title and possession in the said railroad company to all or any part of said lands, unless the same shall be forfeited as herein provided. The said purchase-money shall be paid to the Secretary of the Interior in trust for said Indians within five years from the date of such purchase, with interest at the rate of six per cent per annum on all deferred payments, until the whole purchase-money shall have been paid; and before any patents shall issue for any part of said lands one hundred thousand dollars shall be deposited with the Secretary of the Interior, to be forfeited in case the whole of the lands are not paid for as herein provided; (said money may be applied as the payment for the last one hundred thousand acres of said land;) payments shall also be made for at least one-fourth of said unallotted lands at the rate of one dollar per acre, and when so paid the President is authorized hereby to issue patents for the land so paid for; and then for every additional part of said land upon the payment of one dollar per acre. The interest on said purchase-money shall be paid annually to the Secretary of the Interior for the use of said Indians. If the said company shall fail to pay the principal when the same shall become due, or to pay all or any part of the interest upon such purchase-money within thirty (30) days after the time when such payment of interest shall fall due, then this contract shall be deemed and held absolutely null and void, and cease to be binding upon either of the parties thereto, and said company and its assigns shall forfeit all payments of principal and interest made on such purchase, and all right and title, legal and equitable, of any kind whatsoever, in and to all and every part of said lands, which shall not have been, before the date of such forfeiture, paid for as herein provided: *Provided, however*, That in case any of said lands have been conveyed to bona fide purchasers, by said Atchison, Topeka and Santa Fe Railroad Company, such purchasers shall be entitled to patents for said lands so purchased by them upon the payment of one dollar and twenty-five cents per acre therefor under such rules and regulations as may be prescribed by the Secretary of the Interior.

On March 30, 1897, your office addressed a letter to this Department, wherein, after referring to the treaties named and stating that the last-named company also failed to purchase these lots, it was said:

> As it appears, therefore, that the land in question should be sold for the benefit of the Indians, I have the honor to recommend that this office be empowered to direct the register of the land office at Topeka, Kansas, within a few miles of which city the land lies, to make an appraisal of the land and to sell the same in accordance with article five of the treaty aforesaid.

On April 1, 1897, this letter was referred for report to the Commissioner of Indian Affairs, who, on April 20th following, recommended that the authority asked for therein be granted.

On April 28, 1897, your office forwarded to the Department a communication from one Emma L. Pape, asking that patent issue to her as the owner of the land herein described, under mesne conveyance from the Atchison, Topeka and Santa Fe Railroad Company, which said company, she alleged, had purchased said island under the treaty of February 27, 1867, *supra*, and offering, in the event said company had not paid for this land as provided by law to do so.

On June 7, 1897 (24 L. D., 513), the Department rendered a decision, which, after quoting from the treaty of February 27, 1867, *supra*,

including the last proviso of the amended second article thereof, concluded as follows:

In this connection it is deemed proper to call to your attention the application of Emma L. Pape, hereinbefore referred to. It is alleged that the Atchison, Topeka and Santa Fe Railroad Company, on the third day of January, 1872, by warranty deed, conveyed this land to Aaron Sage, and that by regular mesne conveyances this land became the property of Emma L. Pape on the fourth day of November, 1891.

This showing is not sworn to, and the Department has not deemed it proper to pass upon the question thus raised, it being the well-established usage of the Department to await a determination by your office upon such questions before the taking of final action here.

It is therefore determined that it would not be proper at this time to grant the request of your office that the register at Topeka be authorized to have the lots in question appraised in view of the fact that should it be determined that Emma L. Pape is entitled to patent for the land, the act itself (*supra*) has fixed the price.

Should Emma L. Pape, after a reasonable time given her, to be fixed by your office, fail to properly assert her claim, there appears to be no good reason why, at the expiration of such time, the register at Topeka should not be authorized to have the said lots appraised, and you are accordingly so directed.

On June 23, 1897, your office, in pursuance of the directions thus given, instructed the local office as follows:

You are hereby directed to notify Emma L. Pape, through her attorney aforesaid, that she must furnish an abstract of title from the officer having charge of the records, before this office can pass upon her right to a patent. Such abstract must show the date upon which the railroad company purchased or made application to purchase the land in question in accordance with the treaty and the amendments thereto aforesaid.

It appears from your office decision of August 28, 1897, that Emma L. Pape, under date of July 29, 1897, transmitted an abstract of title, certified on July 26, 1897, by the register of deeds of Shawnee county, Kansas, showing that on January 3, 1872, the Atchison, Topeka and Santa Fe Railroad Company, by warranty deed, conveyed to Aaron Sage, with other real estate,—

A certain island situated in Kansas River between sections 29 and 30, containing 11.1 acres, be it more or less, being in T. 11, R. 15 East of the 6th P. M., in Shawnee Co., Kansas.

It was stated in your said office decision that while the area of the island sold by the railroad company to Aaron Sage in 1872 was given as 11.1 acres, more or less, it was evidently the same tract that was recently surveyed.

The abstract of title referred to further shows that on November 4, 1891, Emma L. Pape acquired the said island by regular chain of title, her grantor being Charles Wesley Pape. The abstract does not show, however, when the railroad company purchased or that they ever completed their purchase of this land.

It is further set out in your said office decision that a bond dated September 3, 1868, for $680,600 was duly filed with the Department by the Atchison, Topeka and Santa Fe Railroad Company, in accordance

with the terms of the treaty of February 27, 1867; that on October 10, 1868, the Department approved the form of certificate showing that said railroad company, upon a full compliance with the stipulations of the treaty, would be entitled to demand and receive a patent for the unallotted lands belonging to the Pottawatomies, and directed a certificate to be prepared accordingly; that such a certificate was prepared and approved by the Department, and on October 20, 1868, receipt of the same was acknowledged by the attorney for the railroad company; that on February 5, 1869, by instructions from the board of directors, the attorney and chief engineer of the railroad company requested the cancellation of the original certificate and the issue, in lieu thereof, of separate certificates for each quarter section or fractional quarter section of land included in the purchase under the treaty; that under instructions from the Department, dated February 9, 1869, the original certificate having been canceled separate certificates were issued, and receipt of same was acknowledged by the attorney for the railroad company March 3, 1869; that a settlement was made with the railroad company, and on August 28, 1869, a schedule was submitted to the Department containing a description of the unallotted lands (338,766.82 acres) by legal subdivisions, as the same appeared on the tract books on file in the Indian Office, which purported to embrace all the lands of the Pottawatomie Indian reservation in Kansas at the date of the treaty; and that upon this schedule patent was issued September 16, 1873, to the railroad company. The island in question was not included in this or any other patent to the said company.

In view of the facts as herein set forth it was concluded by your office that, under the last proviso of the amended second article of the treaty of February 27, 1867, Emma L. Pape is entitled to a patent for the land in question, upon payment by her of the price fixed by said treaty, viz: $1.25 per acre.

Frank Level has appealed from your said office decision to this Department, it being alleged, *inter alia*, that the Atchison, Topeka and Santa Fe Railroad Company never made application to purchase the land in question, and therefore had no right or equity in said land; that the only lands purchased or pretended to have been purchased by the railroad company were included in the certificates and patents issued to said company, and this land is not included in said patents; that the railroad company never having made application for said land, and no certificates or patents having been issued therefor, Sage and each of the grantees in the pretended chain of title took with notice; and that the land in question, being an island and never having been surveyed until the appellant made application therefor, neither Pape nor her grantors could acquire any rights until after such survey had been made and a plat thereof filed in the local office.

The first article of the treaty of November 15, 1861, *supra*, authorized the Commissioner of Indian Affairs to cause the whole of the

Pottawatomie Indian reservation to be surveyed in the same manner as the public lands are surveyed. For some reason this island was never surveyed until after application therefor was made by Frank Level, though reference is made to it in the field notes, showing that it was in existence at the date of the survey of the surrounding lands. It therefore remained unallotted Pottawatomie land which the Atchison, Topeka and Sante Fe Railroad Company had been given preference right to purchase, but which purchase they did not and could not complete on account of the same never having been surveyed.

According to the language of the amended second article of the treaty of February 27, 1867, *supra*, it was the evident intention to give to the Atchison, Topeka and Santa Fe Railroad Company the privilege of purchasing from the Pottawatomies all of their unallotted lands, with certain specified exceptions; and it was provided that the Secretary of the Interior, upon the filing of the bond for the purchase and payment of these lands, should issue to said railroad company "certificates of purchase, and such certificates of purchase shall be deemed and holden, in all courts, as evidence of title and possession in the said railroad company to all or any part of said lands, unless the same shall be forfeited as herein provided." The land in question was not included in any certificates of purchase issued to the company, nor was it embraced in the schedule of lands on which patents were issued to said company. The reason of this omission is obvious. The tract-books from which the schedule was made up contain only surveyed lands. The railroad company therefore, is without that evidence of title provided for in the treaty, in the form of a certificate of purchase, to the part of the unallotted lands in question.

The decision of your office, recommending the patent issue to Emma L. Pape, was evidently based upon the theory that the Atchison, Topeka and Santa Fe Railroad Company, having complied with the requirements of the treaty for the purchase of all of these unallotted lands, were justified in believing that they had the right to sell the land in question, and that the purchaser thereof from said company was of the same belief. The Department is disposed to agree with this view, but it does not concur in your office opinion that Emma L. Pape is entitled to patent for this land under the last proviso of the amended second article of the treaty. That proviso refers only to lands for which certificates of purchase were issued to the railroad company, and which the company may have failed to pay for. It is conceded that the railroad company complied, within the specified time, with all the requirements of the treaty as to those lands for which certificates were issued; consequently, as the proviso contemplates a forfeiture on the part of the company in the manner suggested, it is inapplicable to the case under consideration. The Department is of opinion that Emma L. Pape must secure her title, if at all, through the railroad company. It would seem, under all the circumstances of the case, that

the only obstacle in the way of conferring such title by the company is the absence of evidence of a title in them. The question, therefore, arises as to whether, by the terms of the treaty limiting the time for payment, the railroad company is now debarred from making payment for and perfecting title to the island in question.

As previously set out herein it was not due to the fault of the railroad company, but failure on the part of the government to have this land surveyed, that said land was not paid for and included in the patents issued to the company. The records of the Department, in addition to the facts set forth in your office decision, disclose that on the settlement with the railroad company they were allowed a rebate on account of excess of interest paid for the years 1869, 1870, 1871 and 1872, showing that their bond was for a sum larger than the number of acres for which the company completed purchase and secured patents under the treaty.

Until this island was surveyed the railroad company could not know what they were required to pay for the same. They secured the right to purchase this land by fully complying with the treaty in other respects. That treaty gave this company the privilege of purchasing the *whole* of the unallotted lands belonging to the Pottawatomie Indians at the date of said treaty, and the company can not be held to have forfeited that right. It was the duty of the government to have this land surveyed; hence, until it was surveyed and thus placed in such condition that the company might exercise their privilege of purchasing the same, the five years limitation as to payment provided by the treaty could not reasonably be held to run against the company as to this particular tract. The said company having attempted to convey this land, without having paid therefor, your office will proceed to notify the company that they will be afforded a reasonable time, to be prescribed by your office, within which to consummate their purchase by paying for this land; and in the event of their making the required payment for the land, patent will issue to said company in regular form. If the said company should fail to thus consummate their purchase within a reasonable time, your office will make report to this Department.

It is apparent from what has been set out herein that the land in question has never been public land subject to homestead entry. The entry of Frank Level, at whose instance the land was surveyed, was therefore properly canceled as having been erroneously allowed. He could gain no rights by such entry, although the allegations contained in his appeal may be substantially true.

Your office decision of August 28, 1897, with modification suggested herein, is hereby affirmed.

RAILROAD LANDS—RIGHT OF PURCHASE—HOMESTEAD.

COOPER *v.* SCHERRER.

The amendment of section 3, act of September 29, 1890, by the act of January 23, 1896, whereby actual residence as a pre-requisite to the right of purchase is not required if the lands have been fenced or improved, can not operate to divest the right of an intervening homesteader acquired under the original act.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (E. F. B.)

I am in receipt of your letter of February 3, 1898, resubmitting for consideration by the Department, in view of the amendatory acts of January 23, 1896 (29 Stat., 4) and February 18, 1897 (29 Stat., 535) the application of John L. Cooper to purchase the W. ½ of NW. ¼, NE. ¼ NW. ¼ and NW. ¼ NE. ¼ Sec. 21, T. 1 N., R. 13 E., W. M., The Dalles, Oregon, under the third section of the act of September 29, 1890 (26 Stat., 496).

It appears from the record that John L. Cooper filed in the local office at The Dalles, Oregon, notice of intention to purchase said tract under the third section of the act of September 29, 1890, but failed to exercise his right of purchase within the time limited by the act of September 29, 1890, and as extended by the act of January 31, 1893 (27 Stat., 427.)

On February 24, 1894, Markus Scherrer made homestead entry of the land in controversy. Cooper contested the entry alleging that he was in possession of the land at the date of the passage of the act of September 29, 1890, and had improved the same with the intention of purchasing the land from the railroad company when it earned it and that it had not been settled upon by Scherrer nor cultivated by him.

The Department by decision of February 10, 1896 (22 L. D., 127), affirming the decision of your office, held that as Cooper did not have possession of the land under a deed, written contract, or license from the railroad company, his right to purchase could only be based on the second paragraph of the third section of the act of September 29, 1890, which right is limited to two years from the passage of the act, which was extended to January 1, 1894, by the act of January 31, 1893, *supra.* Having failed to exercise his right of purchase within the time required, his contest was dismissed, and as no testimony was introduced at the hearing touching the allegation that Scherrer had not settled upon or cultivated the tract no action was taken thereon.

As Cooper did not have possession of said lands under a deed, written contract or license from the company, he did not come within the first class provided by section 3 of said act, and as he had not established a residence on the land claimed by him he did not come within the second class, provided for by said section. This was the law in force at the date of the rejection of his application and the allowance

of the homestead entry of Scherrer. The amendment of said section made by the act of January 23, 1896, *supra*, which provides "that actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants" will not operate to divest the right acquired by the homestead settler under the act as originally passed, and prior to said amendment.

If however, it is true that Scherrer has not complied with the homestead law, which may be determined by a contest, I see no reason why Cooper, upon the successful determination of such contest might not renew his application to purchase under said section as amended.

HADLEY *v.* WALTER.

Motion for review of departmental decision of September 22, 1897, 25 L. D., 276, denied by Secretary Bliss, February 21, 1898.

NATURALIZATION—RAILROAD GRANT—SECTION 5, ACT OF MARCH 3, 1887.

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

A declaration of intention to become a citizen filed before a clerk of a court in 1868 (prior to the revision of the United States Statutes) is valid, and qualifies, in the matter of citizenship, the person taking such action, as a claimant under the settlement laws.

The settlement claim of a qualified pre-emptor, existing at the date of the attachment of rights under a railroad grant, excepts the land covered thereby from the operation of the grant.

Rights under a pre-emption filing are forfeited by long continued failure to assert the same in the manner provided by law.

The fact that a railroad company may have known of the existence of a settlement claim that covered a tract of land at the date of its sale by the company is not material in determining the right of purchase under section 5 act of March 3, 1887, if the purchaser was not at such time apprised of said claim.

In the exercise of the right to perfect title under said section, it is not material whether the purchase from the company was made before or after the passage of the act, if made in good faith, believing the title to be good, and before the land was held to be excepted from the grant.

Secretary Bliss to the Commissioner of the General Land Office, February 21, 1898.

(W. V. D.) (F. W. C.)

An appeal has been filed on behalf of the Central Pacific Railroad Company from your office decision of August 15, 1895, holding that the SE. ¼ of Sec. 29, T. 10 N., R. 2 W., Salt Lake City, Utah, was excepted from the operation of the grant made by the act of July 1, 1862, 12 Stat., 192, and July 2, 1864, 13 Stat., 358, and directing the cancella-

tion of the company's list covering said tract. This tract is within the limits of the grant, as adjusted to the map of definite location filed October 20, 1868.

A land office in the Territory of Utah was not opened until March 9, 1869, and the order of withdrawal issued on account of the grant to the Central Pacific Railroad was not made until May 15, 1869, so that on May 14, 1869, Lars Neilsen was permitted to file pre-emption declaratory statement for the above described tract, in which settlement was alleged April 28, 1869.

Upon the application of the company made with the view of clearing the record of Neilsen's filing, hearing was set for March 23, 1885, of which it appears notice was given Neilsen by registered letter, addressed to the post-office nearest the land. Neilsen did not enter an appearance at the hearing, and on the *ex parte* testimony offered by the company the local officers recommended the cancellation of Neilsen's filing. No action was taken upon the record in said case until August 15, 1888, when upon examination of the record the recommendation of the local officers was sustained, and Neilsen's filing was ordered canceled. Thereafter, to wit: On November 19, 1888, the company included the tract in its list No. 21. Said list remained unchallenged until on January 10, 1894, Neilsen filed a corroborated affidavit, alleging that at the date of the attachment of rights under the grant he was in the open, peaceable, exclusive, notorious and adverse possession of the tract, occupying the same with the intention to claim the land under the settlement laws. Upon this showing a hearing was directed by your office, which was duly held. William F. House, one of the heirs of Herman House, deceased, intervened in the case, alleging that his father had been in possession of the land, cultivating and improving the same since September 21, 1881; that his title came through a chain of mesne conveyances from the Central Pacific Railroad company, and he asked to be protected in his purchase and possession. He was allowed to introduce testimony in support of his claimed right through purchase from the company. Upon the record as made the local officers found that while Neilsen was an alien when he went upon the land that he cured his disability before the right of the company attached, by declaring his intention to become a citizen on October 7, 1868, and held:

Our joint opinion is that on October 20, 1868, the SE. ¼ of Sec. 29, T. 10 N., R. 2 W., Salt Lake Meridian, was not free from a valid pre-emption claim, and this land was therefore excepted from the operation of the grant to the Central Pacific Railroad Company.

From this decision the railroad company appealed, and August 15, 1895, your office affirmed the decision of the local officers in holding that Neilsen's claim as it existed at the time of the definite location of the company's road excepted the land from the grant; but further held that Neilsen had lost his rights by his laches. It was further held in

your said office decision, in referring to the claimed rights of House, intervenor, through purchase from the company, that—

> the company well knew when it sold this land that under the established rulings of the Department the settlement thereon by a qualified pre-emptor, October 20, 1868, with the intention of acquiring a title to the same from the government, reserved it from the operation of the grant. . . . It is the opinion of this office that purchasers from a company, after the approval of the act of March 3, 1887, are not protected by the remedial provisions of section five of the act for the reason that to hold otherwise the company would be enabled to put upon the market lands not granted to it, and a purchase made under such circumstances will not be regarded as *bona fide* within the terms made use of in the statute.

This decision, in effect, disposes of the claimed rights of Neilsen, the railroad company and House, the intervenor. It would appear that only the company has appealed. In its appeal, however, it alleges error in holding (1) That the company knew or had reason to know when it sold the land and Mr. House purchased it in 1891, that the land was in possession of a qualified settler when its rights attached. (2) Error in holding that Neilsen was, on October 20, 1868, a settler on the land with the intention of acquiring title from the government. (3) Error in holding that Neilsen had, prior to or on October 20, 1868, declared his intention to become a citizen of the United States, and (4) Error in holding the company's list for cancellation.

Relative to the company's claim to the tract under its grant; in the record made upon Neilsen's application for a hearing, both your office and the local officers concurred in finding that Neilsen went upon the land in 1867, and was cultivating and claiming it at the time the map of definite location of the company's road was filed.

You further find that Neilsen when he went upon the land was disqualified by reason of not being a citizen of the United States, but that this disability was removed before the attachment of rights under the grant by the declaration of intention to become a citizen made by Neilsen on October 7, 1868. It is clear that if Neilsen was a duly qualified claimant of the land on October 20, 1868, and filed his declaratory statement on May 14, 1869, within three months after opening of the local office, his claim was one which, under the terms of the grant, would except the land from the operation thereof.

The company in its second assignment of error denies the fact of settlement and occupation as claimed by Neilsen at the date of the attachment of rights under the grant; and while the testimony upon this point is very conflicting, yet in view of the concurring opinions of your office and the local office upon this question, I must sustain the finding as made.

The question arises, therefore, has Neilsen shown himself to have been a qualified settler at the date of the attachment of rights, under the grant?

Neilsen's declaration of intention to become a citizen was made before the clerk of the supreme court of the Territory of Utah.

The company in support of its appeal says:

The naturalization laws—Section 2165 R. S.—require the declaration of intention to become a citizen to be made before "*A court* having a seal," etc., and not before a clerk of a court.

In this case the declaration was made before *the clerk* of the court, and no seal is attached. The clerk was not authorized by law to take such a declaration, and therefore Mr. Neilsen was not qualified on October 7, 1868, or on October 20, 1868, to make a pre-emption claim.

We are aware that Congress by the act of February 1, 1876 (19 Stat., 2), authorized declarations of intentions to become a citizen of the United States to be taken before a clerk of any court named in section 2165, and declaring legal all such declarations heretofore made before a clerk of one of the courts named in said section.

Mr. Justice Field, after the passage of said act of 1876, *In re* Langtry (12 Saw., 467), held that when a declaration of intention was made before the clerk of the court, it, to be legal, must be made "in open court."

The question as to the effect of a declaration of intention to become a citizen of the United States taken before a clerk of the court was considered by the circuit court of the United States for the 1st circuit, in the case of Thomas H. Butterworth (Woodbury & Minot, Vol. 1 p. 323; 4 Fed. Cas., 924, No. 2251), in which the court says:

In this case, by the act of 14th April, 1802, ch. 28, (2 Stat., 153,) the alien must have declared on oath, before some court, his intention to become a citizen, etc., two years before he can be admitted. When that time has expired, he furnishes proof of his good character to the court, and is, after proper examination and an oath of allegiance, permitted to become a citizen, if the court is satisfied he has the proper qualifications.

It will be seen, that no judicial duty is to be performed by the court till the time of the taking of the second oath, and that the first one is taken and filed merely to give public and recorded notice of the intention to become a citizen.

Taking it, then, before the clerk, and filing it with him, would seem to comply with all the spirit of the act, as the court is there not required to do anything as a court, but to have the oath administered and filed, and those are both acts done through or by the clerk.

But beside this reasoning in favor of that construction, Congress by act of May 26, 1824, ch. 186, (4 Stat., 69), provided further, that the first declaration under oath, "if the same has been made before the clerks of either of the courts," etc., "shall be as valid as if made before the said courts respectively."

The only doubt now is, whether that provision was intended to cover future cases as well as past ones of such oaths taken before clerks.

Though the language covers the past, and was meant to, when the act passed, I think, for the reasons before named in favor of that oath being administered before the clerk rather than the court, or the clerk acting for the court for that mere ministerial purpose, Congress meant to provide if in any future time, the preliminary declaration should be presented and sworn to before a clerk, it should be valid, etc., as if sworn to before a court.

There was as much reason for making it apply to future cases of that kind as to past ones; and it would save inconvenient and renewed legislation on the subject, to have it prospective as well as retrospective.

In addition to this, a cotemporaneous construction sprung up under it in many cities, to make and file those declarations with the clerk alone; and now to alter that practice, after twenty years, suddenly and on doubtful reasoning, to the great delay and loss of municipal and political rights, and much expense by many applicants, would, in my view, be hardly justifiable.

In Gordon's Digest, both the old and new editions, the act of 1824 is treated as changing that of 1802 in this respect for the future. P. 435, § 1488. See, also, Conkling's Practice, p. 497.

The rest of the sections in the act of 1824 apply to the future as well as the past, and all laws are to be construed as prospective in their operation even more than retrospective, on the ground, that a law is most legitimately meant to be a guide or rule for future conduct.

I am corroborated in these views by what I understand to be the practice in several other circuits of this court, where I have made inquiries.

Let the applicant be admitted to the final examination.

By the act of February 1, 1876 (19 Stat., 2), it was provided:

That the declaration of intention to become a citizen of the United States, required by section two thousand one hundred and sixty-five of the Revised Statutes of the United States, may be made by an alien before the clerk of any of the courts named in said section two thousand one hundred and sixty-five; and all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section.

From an examination of the debates in Congress bearing upon this act, it would appear that its purpose was merely to supply an omission occurring in the revision of the U. S. statutes.

The following will be found on page 470 of the Congressional Record for the 44th Congress, 1st session:

Mr. Ashe, from the Committee on the Judiciary, reported back without amendment the bill (H. R. No. 626) to amend the Revised Statutes relating to naturalization, with a recommendation that the same do pass.

The bill, which was read, provides that the declaration of intention to become a citizen of the United States, required by section 2165 of the Revised Statutes of the United States, may be made by an alien before the clerk of any of the courts named in said section, and that all such declarations heretofore made before any such clerks shall be legal and valid as if made before one of the courts named in said section.

Mr. Ashe. I will now move the previous question on the bill.

Mr. Page. I would like to hear some explanation of the provisions of this bill. In what way does it propose to amend the Revised Statutes?

Mr. Ashe. In this particular: It authorizes an alien to file his declaration before a clerk of any of the courts named in the section of the Revised Statutes referred to. Before the adoption of the Revised Statutes that was the law, but in the revision of the statutes the word "clerk" was omitted. A number of immigrants in the northwestern States especially, supposing there had been no change in the law, have filed their declarations before the clerks of the courts. This bill is simply to put back the law to where it was before the revision of the statutes was made.

Mr. Holman. I wish to ask the gentleman whether this bill goes to the extent of curing the defect in the declarations already made?

Mr. Ashe. Yes, sir; it cures all such defects.

Again, on page 638, the following is taken from proceedings before the Senate:

Mr. Howe. I am directed by the Committee on the Judiciary, to whom was referred the bill (H. R. No. 626) to amend the Revised Statutes relating to naturalization, to report it without amendment; and inasmuch as the amendment will relieve from great inconvenience at once a large class of people, I ask that the Senate will consider it at the present time.

By unanimous consent, the bill was considered as in Committee of the Whole. It provides that the declaration of intention to become a citizen of the United States,

required by section 2165 of the Revised Statutes of the United States, may be made by an alien before the clerk of any of the courts named in that section; and makes valid all such declarations heretofore made before any such clerk as if made before one of the courts named in that section.

Mr. Whyte. I would like to ask the Senator who reports this bill whether it makes any change except in allowing the clerk to take the affidavit instead of the court?

Mr. Howe. None whatever; it just restores the old law.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

From a review of the matter I am of opinion that the declaration made before the clerk in 1868, which was before the revision, was valid and thereby Neilsen became duly qualified to assert a claim under the settlement law.

The case, *In re* Langtry (12 Sawyer, 467), referred to by counsel for the company has no bearing upon the question in this case.

Your office decision therefore properly held, upon the showing presented by the record, that the claim of Neilsen existing at the date of the attachment of rights under the grant, served to except the land in question from the operation of the grant.

As before stated, your office decision held that Neilsen through his laches had forfeited all rights under his filing, and that any claim now made to the land must be considered as a new claim, from which holding he failed to appeal, so that he is not now before this Department; but the evidence upon this point has been examined and is found to fully sustain your finding.

House never formally applied to purchase under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), although his intervention was evidently for the purpose of protecting such claim in the event that the tract was held to be excepted from the grant.

Your office decision, as hereinbefore set forth, disposed of such claimed right of purchase, holding, in effect, that the sale was not made in good faith because the company well knew when it sold the land that it was excepted from its grant; further that the sale was made after the passage of the act of March 3, 1887, *supra*, and was, for that reason, not protected by said act.

House did not appeal, but, as before stated, he did not have an application pending.

The company in the first ground of error set forth in its appeal, alleges error in holding that it knew or had reason to know when it sold the land and Mr. House purchased it in 1891, that the land was in the possession of a qualified settler when its rights attached.

It must be admitted that the company is interested in the determination of this question, and is entitled to protect its transferees, hence, the question as to the character of the sale as disclosed by the record will be considered upon its appeal.

The question as to whether the company had knowledge of the settlement claim of Neilsen at the date of attachment of rights under its

grant is not a material one. The sole question is, was House apprised of a settlement claim at the time of his purchase.

It will be remembered that Neilsen's filing was made May 14, 1869; that the railroad company's rights under the grant attached by the definite location of its road opposite this tract October 20, 1868, and that the date of Neilsen's settlement named by him in his filing was April 28, 1869.

It was not until, in the affidavit made the basis of the present controversy, which was filed in 1894, that allegation was made of settlement antedating the filing of the company's map of definite location.

It cannot be held, as against House, upon the record in this case, that his purchase was made with a knowledge that the land was in the possession of a qualified settler at the time when the rights under the grant attached, for the record of Neilsen's filing based upon his own allegation, upon which House and all others had a right to rely, fixed the time of his settlement six months subsequent to the definite location of the road and the consequent attachment of rights under the grant.

In so far as the holding of your office affected House's *bona fides*, the same is set aside.

Relative to the fact that the sale was made after the passage of the act of March 3, 1887, your attention is invited to departmental decision of February 21, 1896 (Andrus et al. *v.* Balch, 22 L. D., 238), in which it was held:

> In the exercise of the right to perfect title under section 5, act of March 3, 1887, it is not material whether the purchase from the company was made before or after the passage of said act, if made in good faith believing the title to be good, and before the land purchased was held to be excepted from the grant.

Under the view herein taken the tract under consideration was excepted from the railroad grant, and in the light of the showing made evidencing a sale by the company, you are directed to advise Mr. House of this holding and that application to purchase should be made within a reasonable time, to be fixed by your office, otherwise the land will be disposed of in the usual manner.

Should application be made to purchase, the rights thereunder can be adjudicated upon the proof offered in support thereof. At this time Neilsen or any other party will be permitted to show, if he can, that House is not a purchaser in good faith within the meaning of section 5 of the act in question.

With this modification your office decision is affirmed.

HOMESTEAD ENTRY—DEATH OF ENTRYMAN—MINOR HEIRS.

CURRAN *v.* WILLIAMS' HEIRS.

On the death of a homesteader, leaving minor heirs, the wife having previously died such minors are entitled to patent on due proof of compliance with law on the part of the entryman up to the time of his decease, the fact of minority at such time, and the death of both parents.

Secretary Bliss to the Commissioner of the General Land Office, February (W. V. D.) *24, 1898.* (H. G.)

Hannibal Williams made homestead entry of the N. ½ of the NE. ¼ and the E. ½ of the NW. ¼ of Sec. 18, T. 19 S., R. 3 W., within the land district at Montgomery, Alabama, on December 10, 1882. He died in March, 1885, leaving seven minor children surviving him, his wife having died previous to his decease. The eldest of these minor children was a son, sixteen years of age. The children were then taken care of by relatives and others, and left the premises, with the exception of the eldest son, who remained there about a year afterwards, and who returned, with his wife and younger brother, after the appointment of the guardian, November 23, 1891, remaining on the premises until ordered away by Curran.

Without knowledge, apparently, of the death of Williams, his entry was canceled by your office, March 10, 1890, for the failure of the entryman to make final proof within the statutory period of seven years, and Curran made homestead entry for the tract May 20, 1892.

December 8, 1892, the local office transmitted to your office the petition and affidavit of Moses McCree, reciting the death of Williams and the death of his wife prior thereto, his appointment and qualification as guardian, under the laws of Alabama, of the following surviving children of Williams: Mack, Wesley, James, Sarah, Louisa, Richard, and Mary. The petition further alleged that Williams had resided with his family on the land from the date of his entry until his death, had made considerable improvements thereon, and that his minor children were living on the land at the date of his death, remaining thereon until September, 1892, when they were ordered off by Curran, with which order they complied, without the knowledge of the petitioner, but subsequently returned to the land at his direction. The petitioner prayed for the cancellation of Curran's entry, that Williams's entry be re-instated, and that as guardian of the said minor children he be permitted to make final proof.

January 21, 1893, your office directed the local office to inform Curran that he would be allowed thirty days after notice thereof to show cause why his entry should not be canceled for conflict with the rights of an actual settler with valuable improvements, and in case that the local office should cancel Curran's entry that the entry of Williams would be re-instated and the gaurdian permitted to make final proof.

Upon the report from the local office, that Curran had made no response after due notice, your office held his entry for cancellation.

Curran appealed, and, on February 16, 1895, the Department set aside the decision of your office, evidently on the ground of the lack or insufficiency of the notice to Curran, and directed an inquiry before the local office, for the purpose of ascertaining the facts upon which to base action, in accordance with the views expressed in the departmental opinion.

These views were that, under the provisions of section 2292 of the Revised Statutes, in case of the death of both father and mother leaving an infant child or children, the right and fee of the land covered by the homestead entry of the father enure to the benefit of such infant child or children, and the immediate investiture of such "right and fee" occurred on the death of the surviving parent, and the children in such an event are entitled to patent on due showing of compliance with law on the part of the entryman up to the time of his decease, the death of both parents, and the fact of minority. (Curran *v.* Williams' Heirs, 20 L. D., 109.)

This hearing was had, at which the heirs were represented by their guardian and his counsel, and the contestant appeared in person and by attorney. Thereafter the local office, upon a review of the testimony taken at the hearing, found for the heirs and recommended that the entry of Curran be canceled, that the entry of Williams be re-instated, and that the guardian be allowed to make proof, provided none of the heirs has reached his majority, and in such event that the heir or heirs of lawful age be permitted to complete final proof for the remaining heirs.

Curran appealed from this decision to your office, which, on April 29, 1896, affirmed the decision of the local office and held Curran's entry subject to the right of the heirs of Williams to submit final proof and to have the entry of their deceased father re-instated within ninety days after the decision of your office becomes final.

Curran appeals in person. His specifications of error are, in effect, that the evidence at the hearing failed to show that the entryman complied with the law as to residence and cultivation prior to his death, and did not establish the grounds of contest, or that the heirs of Williams resided on the tract, or that the same was cultivated for them after the death of decedent, but does show that the said heirs left the land and lived elsewhere after the death of their father, and returned to the land only a short time bfore the initiation of the contest proceedings. The other allegations of the appeal are, that the evidence fails to establish that Curran did anything to prevent the heirs from living on the land, but discloses that from the time of the death of Williams (in 1885) until the entry of Curran (1892), no one was in possession of the lands or exercised any control over the same; and, further, that no effort was made on the part of the heirs to secure the tract

until Curran had improved the same and expended about six hundred dollars in improvements thereon.

In reviewing the evidence taken at the hearing, your office decision says:

> The evidence plainly shows compliance by Williams with the requirements of the homestead law from date of entry to date of his death; that the mother died before the father, and that the children were all minors at (the) date of death of the surviving parent; and thus the conditions are all established to entitle the heirs to this land under the law.

These findings of fact and conclusions of law are correct. The evidence establishes without much question that Williams resided with his family on the tract from his entry until the time of his death, which followed that of his wife, and that he had improved and cultivated the premises.

It was not necessary that the heirs should reside upon and cultivate the premises, after the death of their father, under the terms of the statute applicable to the facts in the case. They did so, to a limited extent, and some of them were on the premises before Curran made entry. He was bound to know the state of the record in the land office, and his residence in the neighborhood and the testimony at the hearing show that he knew that Williams lived upon the land, with his family, prior to his death, and the improvements made by Curran were made with full knowledge of the facts and circumstances developed at the inquiry before he made entry of the land. The case does not depend upon such knowledge of Curran, however, but falls within the decision in the case of Bernier *v.* Bernier, 147 U. S., 242, 247, wherein it is held that, where there are no adult heirs, and only minor heirs, and both parents are deceased, the requirements exacted in case the heirs are adults and minors, or adults alone,—viz: of proof of residence upon the property, or its cultivation for the term of five years, non-alienation except in cases specified, and the applicant's citizenship,—are omitted and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants.

Referring to the case where the heirs are minors, it is said, in the course of the opinion:

> The fact of their being infant children and the death of their parents is all that is required to establish their right and title to the premises and to a patent.
>
> Section 2292, was, in our judgment, only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in the previous section, and to allow a sale of the land within a prescribed period for their benefit.

It seems that some of the heirs, although all minors at the time of the death of their surviving parent in 1885, are now adults, but this phase of the case does not alter the situation of the heirs or require them to make further proof than that exacted if the proceedings for their benefit had not been so long delayed in the appointment of the

guardian and the subsequent initiation of the contest. They were immediately vested with the "right and fee" to the premises entered upon the death of their surviving parent, as there had been a compliance with the law at the time of his death, and this only, with the proof of the death of both parents and the fact of minority, is all that need be shown. (Curran *v.* Williams' Heirs, *supra.*)

The proof may, therefore, be made in the manner provided for in your office decision.

The decision of your office is, in all respects, affirmed.

MINING CLAIM—ORDER OF CANCELLATION—REINSTATEMENT.

LILLIAN LODE ET AL.

A mineral entry having been canceled, for failure to comply with certain supplemental requirements, should not be reinstated on the ground that such action was taken without notice, if in fact the entryman had actual knowledge thereof; nor should an order of reinstatement be made, in the presence of an intervening adverse claim, without opportunity given to such claimant to show cause why the application for reinstatement should not be allowed.

Secretary Bliss to the Commissioner of the General Land Office, February 24, 1898.

(W. V. D.) (P. J. C.)

It appears that applications for patent were filed in the Salt Lake, Utah, land office, No. 2370 for the Lillian lode, survey No. 3054, on March 15, 1896, by Frank L. Hines, and No. 2500 for the Little Joint and other lode claims, survey No. 3120, on February 17, 1897, by the Silver Lode Mining and Milling Company.

It is stated by your office that

said surveys are shown by the records of this office to overlie surveys Nos. 13 and 15, lots 49 and 51, the Emery and Mormon Chief lode claims, embraced in mineral entries Nos. 519 and 520.

The Emery was passed to patent April 14, 1897, so no further mention of it need be made at this time.

The entry of the Mormon Chief, No. 520, was made and final receipt issued thereon to Samuel E. Rogers, November 10, 1880. By your office letter of January 27, 1882, the evidence of the applicant's title was held insufficient and he was called upon to furnish additional evidence upon that point. This requirement not being complied with, was repeated in your office letter of November 28, 1890. By letter of March 28, 1891, your office held the Mormon Chief entry for cancellation because of the continued failure to furnish the additional evidence so required, and on August 21, 1891, the entry was formally canceled.

As before stated, the Silver Lode Mining and Milling Company, February 17, 1897, made application for patent to the Little Joint and other lode claims covering the ground embraced in the Mormon Chief, and proceeded with the posting and publishing of notice thereof. During the period of publication of this application, Rogers applied to your

office for a reinstatement of the Mormon Chief entry. With the application for reinstatement he furnished a part of the additional evidence theretofore required by your office letters of January 27, 1882, and November 28, 1890, but other parts thereof were not then and have not since been furnished. From January 27, 1882, to the time of this application for reinstatement, a period of fifteen years, Rogers seems to have taken no action whatever respecting the Mormon Chief entry, and during that time does not seem to have taken a single step toward prosecuting the same to patent. The application for the reinstatement of the Mormon Chief entry and the accompanying papers show that Rogers at the time of making that application knew that your office had required such additional evidence and had canceled his entry because of the non-production thereof, but these papers do not show how or when he obtained this information. Without affording the intervening adverse claimant any opportunity to be heard thereon your office on June 27, 1897, reinstated the Mormon Chief entry, and on July 2, 1897, held the Silver Lode Mining and Milling Company's application for rejection to the extent of the conflict with the Mormon Chief. The ground stated for the reinstatement of the Mormon Chief entry is that the cancellation thereof was made without notice to the entryman and was, therefore, unauthorized. In connection with Rogers' application for reinstatement, the attention of your office is called to the fact that he does not allege that he was without actual notice of the action of your office in requiring additional evidence or in canceling the Mormon Chief entry for failure to furnish such evidence. He makes no statement, sworn or otherwise, respecting such notice, the only reference thereto upon his behalf being the contention of his attorney that the record does not affirmatively show that your office letters were served upon Rogers. Without reference to what appears in the record respecting such service, it may be stated that if Rogers had actual knowledge of the action of your office he was as much bound thereby as if notice had been formally served upon him according to the rules of practice.

The reinstatement of the Mormon Chief entry was erroneous in at least two respects: First, it should not have been made without a proper showing by Rogers respecting his knowledge of the action of your office in requiring additional evidence and in holding his entry for cancellation; and second, the intervening adverse claim being shown by the records of the local office the Mormon Chief entry should not have been reinstated without giving the owner of the intervening claim an opportunity to show cause why the reinstatement should not be allowed.

Under these circumstances, the reinstatement of the Mormon Chief entry and the holding for rejection of the Silver Lode Mining and Milling Company's application to the extent of the conflict with the Mormon Chief, is vacated, and your office is directed to order a hearing (1) to enable Rogers to make such showing as he can respecting his knowledge of the action of your office in requiring additional evidence and

in holding the Mormon Chief entry for cancellation, and (2) to enable the intervening adverse claimant to show cause, if any there be, against the reinstatement of the Mormon Chief entry.

Pending this hearing and a determination of the questions there presented, action upon the application for reinstatement and upon the Silver Lode Mining and Milling Company's application for patent will be suspended.

This case is before the Department upon a purported appeal taken by the mining company from your office decision of July 2, 1897, suspending its application for patent. The appeal was filed five days too late and would be dismissed if the errors in the record hereinbefore shown did not require the exercise of the supervisory authority of the Secretary.

Accompanying this tardy appeal are a number of *ex parte* affidavits tending to show that Rogers has not been in possession of the Mormon Chief ground since about 1883; that from that time until 1892 it was vacant and unoccupied; that in 1892, the cancellation of the Mormon Chief entry being shown by the records of the local office, the appellant's grantors relocated the ground, and that since then the appellant and its grantors have been continuously in the open, notorious and undisputed possession thereof and have made large expenditures in the improvement and development thereof as a mining claim. Rogers has also submitted an affidavit of the expenditures made by him upon the Mormon Chief prior to the entry thereof. These affidavits will not be considered at this time and in so far as any of the matters therein may be material they can be proven in the regular way at the hearing.

HOMESTEAD CONTEST—NOTICE OF SETTLEMENT CLAIM.

BARNES *v.* MAGEE.

A settlement on land not subject thereto does not operate as notice, constructive or otherwise, of a claim to other land in the same quarter section.

Secretary Bliss to the Commissioner of the General Land Office, February 24, 1898.

(W. V. D.) (G. B. G.)

The appeal of Edward L. Barnes from your office decision of March 18, 1897, in the case of said Barnes *v.* David B. Magee, wherein is involved the S. ½ of the NW. ¼ of section 25, township 27, range 1 west, Oklahoma Territory, has been considered.

On the 26th day of September, 1893, one J. W. Shipp made homestead entry for the tract. On December 7th, the defendant, Magee, filed an application to enter said tract, together with the adjoining N. ½ of the SW. ¼ of said section 25 and on the same day filed affidavit of contest against the entry of Shipp, charging prior settlement.

On February 19, 1894, the said Magee filed Shipp's relinquishment, together with his own application to make entry of the said S. ½ of the NW. ¼ and the N. ½ of the SW. ¼.

In the meantime, however, on December 16, 1893, the contestant, Barnes, filed an application by mail to enter the tract in controversy, which was rejected, for the reason that his application also covered the N. ½ of the NW. ¼ of said section 25, which was an Indian allotment not subject to entry, and, on March 5, 1894, he filed an affidavit of contest, alleging prior settlement against both Shipp and Magee.

On March 20, 1894, the local officers canceled Shipp's entry, and allowed Magee's entry for the land embraced in his application.

A hearing was had on December 12, 1895, the local officers recommended that the contest be dismissed, and your office approved that recommendation, and affirmed the decision.

The record shows that Barnes made the race on the day of the opening of said lands to settlement, September 16, 1893, and staked the N. ½ of the NW. ¼ of said section (an Indian allotment) on that day. This stake was afterwards taken up and driven in another place, and on September 20th he moved his family and established residence, at a point which the local officers and your office find was on the allotted land.

This finding is controverted by the contestant, but the evidence so shows. It is submitted that it was the intention of the contestant to settle on the line between the Indian allotment and the S. ½ of the NW. ¼, with a view to asserting a right to the whole quarter section, it being believed by him that said allotment was invalid.

In view of the fact that the record shows that his settlement was made wholly on the allotted land, it is not material what his intentions were. The land embraced in the allotment was not subject to disposition, and a settlement thereon did not operate as notice, constructive or otherwise, that he claimed other land in the same quarter section.

The defendant, Magee, staked the land in controversy on September 16th, after the contestant had driven his stake on the Indian allotment. He established his residence thereon on the 28th of the same month, and has since complied with the law.

Your office decision is affirmed.

RAILROAD GRANT—TERMINAL POINT—ORDER OF SUSPENSION.

NORTHERN PACIFIC R. R. CO.

Directions given for the suspension from entry and patent of lands remaining undisposed of in the odd-numbered sections within that part of the formerly recognized limits of the Northern Pacific grant lying east of Duluth.

Secretary Bliss to the Commissioner of the General Land Office, February 28, 1898.

(W. V. D.) (F. W. C.)

January 20, 1898, a petition was filed on behalf of the Northern Pacific Railroad Company for reconsideration of departmental communication of December 13, 1897 [25 L. D., 501], denying an application

by that company for the suspension from entry and patent of the lands remaining undisposed of in the odd numbered sections within that part of the formerly recognized limits of the grant for said company lying east of the terminus established by departmental decision of August 27, 1896 (23 L. D., 204).

The railroad company declined to acquiesce in the said decision of August 27, 1896, and to secure a judicial determination in the courts of the company's rights in the premises, this Department December 4, 1896, recommended to the Department of Justice the institution of a suit for the recovery of the title to a tract of land theretofore patented to said railroad company under its grant, and lying east of the terminus established by such departmental decision. If the terminus so established is a correct one, then the patenting of this tract was erroneous and the United States is entitled to recover from the railroad the title thereto. Pursuant to this recommendation such a suit was instituted under the direction of the Department of Justice, September 3, 1897, in the circuit court of the United States for the district of Minnesota.

It appears that immediately following the departmental ruling of August 27, 1896, the railroad company requested this Department to cause the institution of a suit which would test the correctness of the ruling establishing such eastern terminus and that being dissatisfied with the delay in the institution of such a suit by the government, the railroad company itself caused such a suit to be instituted January 11, 1897, in one of the State courts of Wisconsin, this latter suit involving the company's right of way over a tract lying east of the terminus so established.

Supplemental to its petition of January 20, 1898, the railroad company has since filed a communication stating that the company will acquiesce in the selection of either the case pending in the State court in Wisconsin or the case pending in the circuit court of the United States, in Minnesota as a test case wherein the question in controversy may be finally determined, and that if the government selects either of these cases as such test case, the company will assist in expediting the same to a final conclusion, and will assent to the other case being held in abeyance during the pendency of the one selected as a test case.

The greater portion of the lands now claimed by the company opposite the line of location of its road east of the terminus as now established, lies within the indemnity limits and it is claimed by the company that if its grant east of that terminus is recognized by the courts, it will need all of the lands which it has heretofore selected within such indemnity limits, to satisfy the losses sustained by it in lands in place.

If the departmental ruling is not sustained by the courts and in the meantime the Department continues to dispose of the lands in dispute, under the general land laws, such action will involve the railroad company and the persons attempting to acquire such lands in expensive

and complicated litigation, resulting in irreparable injury to all concerned.

As a matter of proper administration and of due regard to the interests of settlers and others attempting to acquire these lands, and as a matter of due regard to the possible rights of the railroad company, it is directed that the odd numbered sections available to the company's grant within the primary limits, and those selected within the indemnity limits formerly recognized, to the east of the terminus established by the departmental ruling in question, be suspended from entry pending the judicial determination in the courts of the question in controversy. While entry of these lands will not be allowed during this suspension, yet in all cases where entries have been heretofore allowed, the parties will be permitted to complete the same by making proof thereon, but the issue of patent will be suspended until such judicial determination.

This Department will at once communicate with the Department of Justice respecting the selection of a test case, and urging that it be advanced and expedited in every reasonable way to an early conclusion.

You will advise the local officers of this order.

PRE-EMPTION CLAIM—TRANSMUTATION.

HENRY WILD.

The right to transmute a pre-emption claim to a homestead entry can not be recognized, where the applicant has perfected title to one hundred and sixty acres under the homestead law, and his pre-emption claim was not initiated until after the passage of the act of March 2, 1889.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 25, 1898.* (J. L. McC.)

Henry Wild has applied to transmute to a homestead entry his pre-emption declaratory statement for the W. ½ of the SE. ¼ of Sec. 31, T. 36 N., R. 8 E., Seattle land district, Washington.

From the records of your office it appears that the pre-emption declaratory statement embracing the land in question was filed on August 22, 1893, alleging settlement January 8, 1891; that said Wild, on January 15, 1883, at Huron, South Dakota, made commutation of his homestead entry, made November 17, 1881, for the SE. ¼ of Sec. 23, T. 118, R. 65, containing 160 acres; that patent on said entry issued February 15, 1884; and your office decision of June 29, 1896, holds that,

as Mr. Wild has perfected title to one hundred and sixty acres of land under the homestead law, and as his pre-emption claim to the land now applied for was not initiated until after the passage of the act of March 2, 1889, he is not entitled to transmute said filing to a homestead entry.

From said decison Wild has appealed.

The decision of your office was correct, and is hereby affirmed.

LEAVE OF ABSENCE—ABANDONMENT.

JACOBS *v.* BRIGHAM.

A leave of absence granted a homesteader under the act of March 2, 1889, protects the entry, as against a charge of abandonment, for the period of six months after the expiration of said leave.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 25, 1898.* (J. L. McC.)

Carrie E. Brigham, on April 1, 1893, made homestead entry for the SE. ¼ of Sec. 13, T. 8 S., R. 37 W., Colby land district, Kansas.

Subsequently she applied for, and was granted, leave of absence from December 27, 1894, to December 27, 1895.

On February 17, 1896, William R. Jacobs filed affidavit of contest against her entry, alleging:

That said entryman obtained leave of absence from said land on the 27th day of December, 1894, which leave of absence expired on the 27th day of December, 1895; that said entryman has not re-established her residence since the expiration of said leave of absence.

The local officers rejected the application to contest; thereupon Jacobs appealed to your office, which sustained the action of the local officers, on the ground that the leave of absence "protected the entry against contest for abandonment for six months after the expiration of such leave"—citing in support of your ruling the departmental decision in the case of Hiltner *v.* Wortler (18 L. D., 331).

The departmental decision above cited holds (see syllabus):

Where a leave of absence is granted a homesteader under the act of March 2, 1889, a charge of abandonment will not lie against the entry until the expiration of six months after the time for which the leave of absence was granted.

Said decision is applicable to the case now under consideration. The decision of your office in dismissing the contest was correct, and is hereby affirmed.

PREFERRED RIGHT—ADVERSE CLAIM—REASONABLE TIME.

CHARLES A. PARROTT.

Where by the decision of the General Land Office the right to enter a certain tract is recognized, but no time is fixed in said decision within which such entry shall be made, the right so allowed may be lost if not asserted within a reasonable time.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *February 25, 1898.* (L. L. B.)

The record of the appeal of Charles A. Parrott, from the rejection of his application to make homestead entry for the SW. ¼ of the SW. ¼ Sec. 10, and the E. ½ SE. ¼ and SE. ¼ NE. ¼ Sec. 9, T. 36 N., R. 2 W., Lewiston, Idaho District, shows the following facts.

December 19, 1895, the register and receiver by letter reported favorably upon the application of Lawrence Tippie to make a new entry for the E. ½ SE. ¼ and SE. ¼ NE. ¼ Sec. 9, Tp. 36 N. R. 2 W., under the act of December 29, 1894 (28 Stat., 599) providing for a second entry, when, through certain causes therein mentioned the first entry had been forfeited.

By your office letter "C," of April 8, 1896, his application was granted and the register and receiver were directed to proceed under the circular of March 23, 1895, regulating entries under said act of December 29, 1894. In this letter no time was specified within which the entry should be made.

June 1, 1896, Charles A. Parrott, appellant herein applied to make homestead entry of the land first above described which includes the land in Tippie's application and forty acres in section 10. His application was suspended by the local office to await the action of Tippie on the one hundred and twenty acres embraced in his application for second entry and which had been allowed by your letter "C." of April 8, 1896.

From this action of the local office suspending his application, Parrott appealed, his counsel stating that—

> the principal grievance of this appellant is that forty-four days have now elapsed and the said Tippie has failed and neglected to file on said land or improve the same.

July 24, 1896, your office sustained the action of the register and receiver in suspending the application of Parrott on the ground that the time within which Tippie was to make his entry "was not limited by said letter of this office." No limitation as to time when Tippie should make his entry was designated in *this* letter.

On the 17th day of August, 1896, counsel for Parrott filed with the register a paper designated by him as "An application for review to the Honorable Secretary of the Interior from decision of the Honorable Commissioner," in which he asks for a review of all the proceedings had in the premises appertaining to and affecting the same by the Honorable Commissioner and the register and receiver in passing upon and denying said application. This paper was transmitted by the register to your office August 18, 1896.

September 21, following, the register forwarded a report to the Commissioner of the General Land Office, showing that Tippie "has failed to make entry of the land after due notice from this office," and enclosed a registered return receipt signed by Tippie, June 19, 1896, more than ninety days previous thereto.

On the same day counsel for Parrott filed with the receiver of the local office a protest against allowing Tippie to make entry of the land until Parrott's case "is disposed of on appeal before the Honorable Secretary of the Interior," for the reason that Tippie is acting in bad faith; that he has failed to make his entry within a reasonable time; and that

the "record will disclose the fact that the said Tippie is seeking to defraud the government by speculating in this land."

Parrott's application for review was accompanied by his own affidavit substantially corroborated by that of another witness stating that he had placed improvements upon the land to the value of three hundred dollars; that he is informed and believes that Tippie is not acting in good faith, and that he is now and for some time past has been doing some work and engaged in business in Pierce City, seventy miles away from the land, and that it is not his intention to attempt to file on the land, but he is holding it for the purpose of speculation.

As appears from the foregoing, more than five months elapsed after Tippie was allowed by the Commissioner to make entry and more than ninety days elapsed after he received notice thereof when the receiver reported that he had "failed to make entry of the land."

It is true that in your office letter allowing his entry no time was designated within which the entry should be made, but it is a rule of law that when an act is agreed, or allowed, to be done and the time of performance is not specified it must be done within a reasonable time. What is a reasonable time in this case?

The time allowed for the exercise of a preference right of entry given a successful contestant is thirty days from date of notice. There is nothing in the nature of this case that would seem to require a greater length of time than that awarded to a successful contestant, and by the custom of your office, when a time is limited at the discretion of the Commissioner, more than thirty days is rarely allowed, in which to make entry, and when a homestead claim is initiated on surveyed land by settlement, the claimant is required to make his entry within three months from date of settlement. Certainly no reason appears in this case why Tippie should be allowed more time in which to make his entry than is allowed a homesteader who claims by settlement.

The local office was open to receive Tippie's filing from April until September, and more than three months had elapsed after he had been notified of the right to enter before the protest of Parrott was filed, and still his entry papers were not presented, and for aught that appears in the record he has not yet made entry of the land.

To allow him indefinitely to withhold this land from settlement and entry, at his own caprice, would be contrary to the spirit of the laws relating to the disposal of the public lands.

Your decision of July 24th, 1896, from which this appeal was prosecuted was right in view of the facts then before you, for the record shows that at the time Parrott (the applicant for original entry) made his application, Tippie had not received notice of the allowance of his application by your office letter of April 8th, and the only notice shown to have been received by him was of date June 19, 1896, and even this notice was not before you when said decision was rendered.

By the record here presented, for the first time, however, it appears

that Tippie received notice of his right to enter June 19, 1896, more than thirty days prior to your office decision (July 24,) and, as above stated, it was made known to this Department that his entry had not been made September 21, 1896, more than three months after notice to him of its allowance.

From the record thus presented, it would appear that Tippie has not only neglected his rights but has shown a disregard of his duties and lack of good faith in connection with his claim to the land, and this Department might be justified in reversing your office decision and directing the allowance of Parrott's application to make entry for the land claimed by him.

Inasmuch, however, as Tippie has not had notice of the proceedings on the part of Parrott, this Department, in the exercise of its supervisory authority, directs that you allow Tippie twenty days after notice to show cause, if any he has, why he failed to make his entry within ninety days after receipt of notice of your office letter of April 8, 1896, and in default of such showing, you will direct his application to be rejected and that of Parrott allowed.

The decision of your office is accordingly modified.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

HINKELL *v.* HOWLAND.

A purchase in good faith of patented railroad land, based on a contract entered into after the issuance of patent, entitles the purchaser to a patent under section 4, act of March 3, 1887, if it subsequently appears that the land was erroneously patented under the grant, and the patent is set aside.

Section 3 of said act does not contemplate the recognition of entries made, or claims initiated, after patent has issued under the grant and the land has been sold to a bona fide purchaser, as against the right of such purchaser.

Secretary Bliss to the Commissioner of the General Land Office, February (W. V. D.) *28, 1898.* (F. W. C.)

Joseph Hinkell has appealed from your office decision of June 7, 1897, in which it was held that the claim made by James L. Howland for confirmation of title under the fourth section of the act of March 3, 1887 (24 Stat., 556), to the SE ¼ of Sec. 33, T. 1 N., R. 8 W., S. B. M., Los Angeles land district, California, is superior to the claim set up by Hinkell as a settler upon said tract.

This tract is within the conflicting limits of the grants for the Atlantic and Pacific railroad and the grant for the Southern Pacific railroad, on account of its branch line, which latter grant was made by the act of March 3, 1871 (16 Stat., 573) It was patented to the Southern Pacific Railroad company April 4, 1879, on account of the grant made by the act of 1871, and was involved in the case of the United States *v.* Southern Pacific Railroad Company *et al.* (146 U. S., 570). That suit

was instituted April 21, 1888, and under the decree therein the patent issued to the Southern Pacific Railroad Company was vacated and annulled, and pursuant to instructions issued by your office the tract was restored to the public domain November 28, 1894. After the decision of the court annulling the patent issued to the railroad company, Howland filed an application for patent under the provisions of the fourth section of the act of March 3, 1887, *supra*, and after due notice submitted proof in support of his application, against the allowance of which Hinkel protested, claiming superior rights in himself as a settler upon the land. The local officers dismissed Hinkell's protest, approved Howland's proof and issued him a certificate for the land. Hinkell duly appealed, and by your office letter "F" of April 5, 1895, the local officers were directed to order a hearing in order to determine the respective rights of the parties in the premises. Upon the testimony adduced, the local officers found in favor of Howland, recommending the dismissal of Hinkell's protest. Hinkell again appealed to your office, and by your office decision of June 7, 1897, before referred to, the action of the local officers was sustained and Howland's right as a purchaser from the railroad company was held to be superior to that of Hinkell, under his settlement as shown

From said decision Hinkell has further prosecuted the case by appeal to this Department, and in his appeal contends, in effect, that as the land was excepted from the Southern Pacific grant there could be no *bona fide* purchaser of the land through the company; and further, that his claim as a settler is protected by the third section of the act of March 3, 1887, *supra*, and that it has preference over the claim made by Howland under the fourth section.

Howland's claim is based upon a contract of purchase entered into with the company July 30, 1883, by one Cyrus T. Mills, on account of which part payment was made to the company. This contract was afterwards transferred by Mills, or his legal representatives, and was finally completed and deed issued thereon to Cassie L. Foss on June 20, 1887. The land has since been conveyed to Howland.

Hinkell's connection with the land dates back to settlement alleged to have been made April 22, 1886. He first tendered a pre-emption declaratory statement for the land on June 10, 1887, more than three months after the passage of the act of March 3, 1887, *supra*, and more than eight years after the tract had been patented on account of the railroad grant. Said application was rejected by the local officers on account of the outstanding patent to the railroad company, from which action he duly appealed, and the action of the local officers being sustained by your office, he again appealed to this Department, resulting in the decision of December 23, 1890, in which your office decision was affirmed. He claims to have continued his residence upon the land until ejected under a judgment of the supreme court of the State, made September 14, 1891, upon a suit brought by Cassie L. Foss and her husband.

The suit brought for the recovery of title erroneously conveyed by the patent issued on account of the railroad grant was instituted, as before stated, April 21, 1888, nearly five years after the contract entered into between Mills and the railroad company for the purchase of this land from the company. This contract of purchase was duly completed and the land deeded by the company, Howland's claim being based upon mesne conveyances through said contract of purchase, and there is nothing in the record to show that the entire transaction looking to the purchase of this land was made otherwise than in good faith.

In the case of the United States *v.* Winona and St. Peter R. R. Co., 165 U. S., 463, the supreme court, in referring to the fourth section of the act of March 3, 1887, *supra*, under which Howland's application was made, say:

> Section 4 of the same act, expressly referring to all other lands erroneously certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the land so purchased and to patents therefor issuing directly from the United States, and that the only remedy of the government should be an action against the railroad company for the government price of similar lands. It will be observed that this protection is not granted to simply *bona fide* purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a bonda fide purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government a simple claim for money against the railroad company. It will be observed that the technical term "*bona fide* purchaser" is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent.

The showing made by Howland in support of his application is sufficient to warrant the allowance of the same, unless Hinkell's claim is shown to be superior thereto. Hinkell claims, as before stated, that he is duly protected by the third section of the act of March 3, 1887, which provides:

> Sec. 3. That if, in the adjustments of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided,* That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also,* That he did not voluntarily abandon said original entry: *And provided further,* That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

As before stated, Hinkell's original application to file pre-emption declaratory statement for this land was not presented until June 10, 1887, more than three months after the passage of the act of March 3, 1887, and nearly eight years after the patenting of the tract on account of the railroad grant. His settlement was only made a year previous to his application, to wit: April 22, 1886.

The purpose of the third section of the act of March 3, 1887, was to reinstate homestead and pre-emption entries made by bona fide settlers, which had been erroneously canceled on account of a railroad grant or withdrawal, and it provided that if the settler did not renew his application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior,

> then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

The second section of the act directs suits to recover the title to lands erroneously conveyed on account of a grant made to aid in the construction of a railroad; and the third section, in its proviso before referred to, leaves it to the Secretary to fix a time after the recovery of title, where the lands had been patented, within which a settler whose entry has been previously canceled for conflict with the railroad grant, if any there was shown to be, should apply for the reinstatement of the same. Such entries must of necessity have been entries made and canceled prior to the patenting of the land on account of the railroad grant; for, independent of the claim under the grant, by the issue of the patent the Land Department was divested of jurisdiction over the land, and it could not have been within the contemplation of Congress to give recognition to entries made or claims initiated after the patenting of the land and its sale to a bona fide purchaser, to the preference of such purchaser who relied upon the patent issued.

Hinkell never had an entry upon this tract. Indeed, his whole connection with the tract was predicated upon the settlement made many years after it had been patented on account of the railroad grant; and for the reasons before stated he is clearly not within the contemplation of said section three.

In the argument of the case reference is made to the provisos contained in section five of the act of March 3, 1887, *supra;* but this can have no influence or bearing in determining Howland's rights under the fourth section of the act, for the fifth section of the act is limited to "lands not conveyed to or for the use of such company," thus having reference to unpatented lands.

After careful review of the entire matter, I am of opinion that the showing made by Howland clearly evidences his right to a patent under the fourth section of the act of March 3, 1887, and your office decision is accordingly affirmed, and Hinkell's protest will stand rejected.

INDIAN LANDS—ALLOTMENT—ACT OF JANUARY 14, 1889.

ONAB OGAMAYBECK.

There is no provision made in the act of January 14, 1889, whereby an allotment of lands, within the ceded portion of the Red Lake Indian reservation in Minnesota, can be allowed, even though the claimant may have made improvements on said lands prior to the passage of said act.

Prior to the act of January 14, 1889, the lands embraced in the ceded portion of the Red Lake reservation were appropriated to use as an Indian reservation, and were therefore not subject to allotment under section 4, act of February 8, 1887; and the special provisions for the disposal of said lands made by the act of 1889 take them out of the class of lands open to allotment under said section.

Assistant Attorney General Van Devanter to the Secretary of the Interior, February 28, 1898. (W. C. P.)

I am in receipt, by reference of First Assistant Secretary Ryan, of the letter of the Commissioner of Indian Affairs, dated March 20, 1897, and accompanying papers, relating to the right of Onab Ogamaybeck, a Chippewa Indian, to certain lands within the ceded portion of the Red Lake Indian reservation, in Minnesota. The matter is referred to me

for an opinion as to the right of Onab Ogamaybeck to the land in question under section 1 of the act of January 14, 1889 (25 Stat., 642), by virtue of the improvements and occupation thereof, it appearing that she did not make formal application for allotment until after the cession of the land and the passage of the act aforesaid.

The Commissioner of Indian Affairs mentions the receipt of a letter from chairman Baldwin of the Chippewa commission, stating that Onab Ogamaybeck, a Chippewa Indian of the Red Lake band, has for more than twenty years occupied the NE. ¼ of the SW. ¼, the SE. ¼ of the SW. ¼, and the NW. ¼ of the SE. ¼ of Sec. 12, T. 149, R. 36, and made valuable improvements thereon, that this land is within the ceded portion of the Red Lake reservation, that on October 27, 1893, she applied at the local land office for an allotment of said lands, and expressing the hope that she may be protected in the use and occupancy of said lands as her home. The Commissioner of Indian Affairs then goes on to say, that on November 7, 1895, the General Land Office transmitted to his office an allotment application made by this woman on October 18, 1893, under the fourth section of the general allotment act, for said land, that his office reached the conclusion that the applicant was not entitled to an allotment of these lands, on the theory that the Indians had ceded all their right to all lands not included in the diminished reservation and Congress had directed that such ceded lands be disposed of in a specified manner. In support of this conclusion reference is made to an opinion of this office of August 26, 1891, approved by the Department, holding that lands which are to be disposed of at a certain rate per acre are not subject to allotment. He suggests that the only

way to protect this Indian is by reserving these tracts from sale until congressional action can be had authorizing an allotment of them to her, and recommends that this course be pursued.

It seems that one Oliver A. Lee was permitted to make homestead entry for said land on May 15, 1896, and on December 7, 1897, his attorneys addressed a communication to this Department insisting that said land was not and is not subject to allotment, and that any question as to this Indian's right to said land under the homestead law can arise only when she shall make formal application thereunder. With this letter are several affidavits, one of which is by S. C. Bagley, who states that he has known this land and the Indian claimant since 1883, and that she never lived on the land prior to 1892, and that about that time she or her husband, one Nevins, built a house on this land, that prior to that time there was no evidence of any kind of residence by them and no claim made by them of residence on the land, and that a large portion of the improvements made there by Nevins were made after Lee's homestead entry.

From this statement it will be seen that the assumption in the note of reference, that there were improvements and occupation by the Indian claimant prior to the cession of these lands, is disputed, and a further investigation would seem to be necessary to decide as to the facts. If, however, such improvement and occupation would not have vested in this claimant a right to these lands as an allotment, then it would be unjust to impose upon these parties, at this time, the burden of a hearing to determine whether, in fact, she had occupied and improved the lands as claimed. For the purposes of this opinion the hypothesis that she occupied and improved these lands prior to the cession to the United States will be accepted as correct.

By the treaty of October 2, 1863 (13 Stat., 667), the Red Lake and Pembina bands of Chippewa Indians ceded to the United States all their lands in the State of Minnesota and Territory of Dakota within certain described boundaries. There was left to them a tract of land within certain well-defined boundaries which was thereafter recognized as set apart for their use and occupancy and designated as the Red Lake reservation. Neither in this treaty nor in that of April 12, 1864 (13 Stat., 689), supplementary thereto, is there any provision by which individual Indians might take and hold land in severalty. The act of January 14, 1889 (25 Stat., 642), mentioned in the note of reference to me, provided for a commission to negotiate with the Chippewa Indians of Minnesota for the cession of all their interest in all their reservations in Minnesota except the White Earth and Red Lake reservations, and so much of those reservations as should not, in the judgment of the commissioners, be required to make allotments required by that and other existing acts. It is provided in the first section, that where an allotment had theretofore been made to any Indian upon any of said reservations, he should not be deprived of it except upon his individual

consent, and in other sections, that all Chippewa Indians in Minnesota except those on the Red Lake reservation should be removed to the White Earth reservation, that allotments should be made to the Red Lake Indians on the Red Lake reservation and to all others upon the White Earth reservation, and that all allotments theretofore made to any Indians upon the White Earth reservation should be ratified and confirmed, with a further proviso that any Indian residing upon any of said reservations might, in his discretion, take his allotment under said act on the reservation where he lived at the time the removal therein provided for should be effected, instead of being removed to, and taking his allotment on, the White Earth reservation.

The foregoing statement contains all the provisions of said act affecting the question under consideration, and it will be seen that none of them provides for allotments to be thereafter made to Indians of the Red Lake reservation of land within the portion that might be ceded. Section 1, to which reference is made in the note of reference, relates only to allotments theretofore made.

A commission was appointed, as directed in said act, and secured agreements with the various bands of the Chippewa Indians. The report of this commission, giving in detail their proceedings and the agreements made, is found in H. R. Ex. Doc. No. 247, 51st Congress, 1st session.

The Red Lake Indians ceded all their interest in so much of the Red Lake reservation as was not included within certain described boundaries,

> which said lands embraced within the foregoing boundaries have been reserved by the commissioners appointed under said act, and as therein authorized, for the purpose of making and filling the allotments therein provided for.

This cession was made without reservation of any kind as to the ceded lands, and there is no provision in the formal agreement for the protection of any Indian who might have made settlement or improvements upon these ceded lands. I find nothing in the first section of said act, or elsewhere in it, that authorizes this Department to allot the land in question to the Indian claimant, even though she may have made improvements thereon prior to the date of said act.

The allotment application is, however, made under the fourth section of the act of February 8, 1887 (24 Stat., 388), as amended by the act of February 21, 1891 (26 Stat., 794). The Commissioner of Indian Affairs discusses the applicant's right under that law, and I have deemed it proper to examine that question, although the question submitted to me is limited in the note of reference to her rights under the act of 1889. The act under which the allotment application was made, commonly known as the "general allotment act," provides that when any Indian not residing upon a reservation, or for whose tribe no reservation has been provided, "shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated," he

shall be entitled to have the same alloted to him. Prior to the cession under the act of 1889, these lands were appropriated to use as an Indian reservation, and were not therefore of the class contemplated by said fourth section of the act of 1887, under which this application is made. Whether this Indian applicant is within the terms of said section, I have not discussed, because no facts are presented in the papers now before me upon which a conclusion as to that question could be based.

Said act of 1889 not only provided for procuring the cession of land, but also directed the manner in which the lands thus ceded should be disposed of. It was directed that they should be surveyed and classified as "pine lands" and "agricultural lands," that the pine lands should be appraised and sold at public auction to the highest bidder, and that the agricultural lands should be disposed of to actual settlers under the provisions of the homestead law, with the added proviso that such settler should pay therefor the sum of one dollar and twenty-five cents per acre. The money realized from the sale of said lands, after the payment of expenses, was to be placed in the United States Treasury to the credit of said Indians.

Soon after this cession was made the State of Minnesota claimed the swamp lands within the ceded portion of the Red Lake reservation as inuring to her under the grant of swamp and overflowed lands, but the decision of this Department was adverse to the claim thus made. (State of Minnesota, 22 L. D., 388.) It was there held that the ceded lands did not become public lands of the United States in the sense that they might be taken for any other purpose than that specified in said act of January 14, 1889. The decision of the Department referred to by the Commissioner of Indian Affairs as sustaining his conclusion that these lands are not subject to allotment, is evidently one made in a case which arose in connection with the ceded lands of the Pottawatomie Indians, in Oklahoma. It was directed by act of Congress that those ceded lands should be disposed of to actual settlers under the homestead and townsite laws, with the added proviso that each settler should pay for said lands one dollar and fifty cents per acre in addition to the fees provided by law. It was held that those lands were not subject to allotment to non-reservation Indians under the fourth section of the act of 1887 (David Trenkle, 13 L. D., 310).

After careful consideration of the matter, I am of the opinion that this land can not, under existing law, be allotted to this Indian claimant either under the act of January 14, 1889, or under the allotment act of 1887, under which her application was made.

Approved, February 28, 1898.

C. N. BLISS, *Secretary.*

RAILROAD GRANT—STATUTORY WITHDRAWAL—ORDER OF RESTORATION.

PERRIN ET AL. *v.* NORTHERN PACIFIC R. R. CO.

The withdrawal on general route, under the grant to the Northern Pacific, is not defeated by an erroneous order of restoration made by the General Land Office.

Secretary Bliss to the Commissioner of the General Land Office, February 28, 1898.

(W. V. D.) (L. L. B.)

The record in this case shows that on November 27, 1895, Marie Perrin made homestead entry No. 967, for lots 5, 6 and 7, Sec. 16, and lots 7, 8 and NE. ¼ of NE. ¼ of Sec. 17, T. 46 N., R. 1 W., alleging settlement in September, 1885.

December 2, 1895, Henry Rochat made homestead entry No. 983, for lot No. 2, Sec. 22 and lots 5, 6 and W. ½ SE. ¼ Sec. 15, T. 46 N., R. 1 W., alleging settlement June 16, 1885. On the same day Cæsar H. Stauffer made homestead entry No. 981 for lots 9, 10, 11, 12, Sec. 17, T. 46 N., R. 1 W., alleging settlement June 15, 1887. All the tracts are situated in the Cœur d'Alene land district, Idaho.

These lands are within the primary limits of the grant to the Northern Pacific Railroad Company and were included in the limits of the withdrawal upon the map of general route of said road filed February 21, 1872, and also within the withdrawal on definite location, the order for which was not made until January 7, 1888. In the interim, to wit, on the 22d of March, 1886, a diagram prepared in your office and erroneously purporting to show an amended forty-mile limit to the railroad grant was forwarded to the local office at Coeur d'Alene, Idaho. By this diagram all these tracts fall without the limit of the grant, and the local officers were directed by your office to be governed by said diagram in allowing entries.

Counsel for the entrymen claim that they are entitled to the land by reason of the amended diagram of the forty-mile limit forwarded March 2, 1886, and the order of the Commissioner directing the local office to restore to settlement, accept filings, etc., for all lands shown by said diagram to be beyond the limits of the grant. Your office decision awards the land to the company.

The questions necessary to a determination of this case were settled in the case of Pritchard *v.* Northern Pacific Railroad Company (20 L. D., 498), in which it was held that:

> For such restoration there was clearly no authority of law and the rights of the company in the premises can not be avoided by reason of said error on the part of your office.

Counsel for homestead claimant says that:

> In the case of Bernard *et al. v.* Northern Pacific Railroad Company (departmental decision September 3rd, 1895), the land there involved was in this district, and in precisely the same situation as this land in reference to diagrams, withdrawals, etc.

In that case the land was awarded to the homestead claimant.

It is sufficient to say that the attention of this Department was not called to the withdrawal on general route of February 21, 1872, in the Bernard case, your office decision in said case being based on the withdrawal on definite location, January 7, 1888. This would seem to be a case in which the company might be requested to relinquish, under the provisions of the act of June 22, 1874 (18 Stat., 194), upon the filing of which they would be entitled to select other lands within the limits of their grant. Upon the refusal of the company to so relinquish, however, your office decision cancelling the entries as to the lands embraced in the odd-numbered sections must be affirmed.

INDIAN LANDS—ADDITIONAL STATION GROUNDS.

GULF, COLORADO AND SANTA FE R. R. CO.

In the disposition of applications for additional station grounds under the act of April 25, 1896, the Secretary of the Interior must first determine the question as to the necessity for taking such ground, and, thereafter, if the company's maps of definite location are approved, proceed as provided by said statute to settle the question of compensation.

A statute that provides for action on the part of the Secretary of the Interior "after allowing opportunity for all parties in interest to be heard before him," does not require such officer to personally hear the witnesses testify and listen to oral arguments, if all parties have notice, and are permitted to submit evidence and written arguments that are considered by him.

Assistant Attorney-General Van Devanter to the Secretary of the Interior
March 2, 1898. (F. W. C.)

I am in receipt, through reference of the Honorable Acting Secretary, under date of February 12, 1898, for opinion, of a letter from resident counsel for the Gulf, Colorado and Santa Fe Railroad Company, relative to the application made by said company, under the provisions of the act of April 25, 1896 (29 Stat., 109), for additional station grounds at Dougherty and Ardmore, in the Chickasaw Nation, Indian Territory.

In connection with said letter I have considered reports made by the Commissioner of Indian Affairs under date of January 17, and February 4, 1898, relative to said application for additional grounds. From these papers it appears that upon the applications in question hearings were ordered by the Indian Office before the United States Indian agent of the Union agency, in order to ascertain the necessity for the use of such additional grounds by the company; whether public interests would be promoted by the use of the additional lands, and the question of compensation to be paid both to the tribe for the lands applied for and the damage sustained by the individual occupant of such lands.

At the hearings the tribe does not appear to have been represented.

The company it would appear has made a satisfactory adjustment

with the individual occupants; but the tribe protests against the use of further lands by the company.

It is claimed on behalf of the tribe that the location of the road in the first instance was in violation of treaty rights with the Nation and that the granting of additional lands would be a further violation; that there is no necessity for the use of additional lands by the company, and if authority should be granted that the tribe should receive at least $100.00 per acre.

The question as to the necessity for the use of the additional lands applied for by the company is not passed upon by the Indian Office, but the entire record made in each case is forwarded with a statement that—

> Said act of April 25, 1896, provides that if the tribe shall not be satisfied with the compensation therein provided, and the same cannot be amicably determined, the amount to be paid by the company to the tribe *and the necessity for the taking of the lands* shall be ascertained in the same manner as is prescribed by section three of the act with respect to the compensation that shall be paid to the individual occupants of the land.
>
> Section 3 provides that where the compensation cannot be agreed upon between the company and the individual occupants, the company may apply to the Secretary of the Interior, who shall thereupon appoint three disinterested referees who shall determine the matter. In case the referees cannot agree, then any two of them may make the award.
>
> In view of these provisions of the act, it seems to be necessary for you to appoint three disinterested referees, who shall determine the *necessity of the company for the taking,* and the amount that shall be paid the tribe for the lands involved, and I accordingly recommend that such action be taken.

It is in this condition that the matter is referred to me for opinion, without specification of the particular points upon which my opinion is desired.

It would seem from the letter bearing the reference that the question first to be determined is one of procedure.

By the first section of the act of April 25, 1896, it is provided:

> That any railroad company operating a railroad in the Indian Territory may acquire the right to use such additional ground as may be necessary for railway purposes at stations now existing, or for the establishment of new stations or depots, by making it appear to the Secretary of the Interior that such additional ground is necessary for railway purposes, and that the convenience of the people and the public interests will be promoted thereby.

This section clearly makes it your duty in the first instance to determine the question as to the necessity for the taking of such additional ground.

The second section provides:

> That the Secretary of the Interior may, when convinced that such application is proper, and after allowing opportunity for all parties in interest to be heard before him, grant the use of such additional lands held by the Indians in common as may be necessary for depot purposes; but before taking possession of and using such lands the railroad company shall deposit with the treasury of the tribe to which the lands belong compensation in cash at the rate of twenty-five dollars per acre: *Provided,* That if such tribe shall not be satisfied with the compensation herein provided, and the same can not be amicably determined, the amount to be paid by such railroad company to such tribe and the necessity for such taking shall be ascertained in the same manner

as is prescribed by section three of this act with respect to compensation to be paid individual occupants on any land so taken. *Provided further*, That before taking possession of and using such additional lands the railroad company in interest shall file a map of definite location of the same with the Secretary of the Interior, which map shall be subject to the approval of such Secretary.

It will be seen that this section provides for compensation to the tribe for the additional lands taken and makes provision for the filing of a map showing the location of the lands, which map is subject to your approval.

Relative to the compensation to the tribe, it provides:

That if such tribe shall not be satisfied with the compensation herein provided, and the same can not be amicably determined, the amount to be paid by such railroad company to such tribe and the necessity for such taking shall be ascertained in the same manner as is prescribed by section three of this act with respect to compensation to be paid individual occupants on any land so taken.

The third section of the act provides:

That when lands desired by a railroad company under the provisions of this act are held by individual occupants according to the laws, customs, and usages of any of the nations or tribes through whose lands the road is constructed, full compensation, in addition to the compensation to be paid the nation or tribe herein provided for, shall be paid to such occupant for all property taken and damage done by reason of the occupancy of the lands by the company for station purposes; and where the compensation can not be agreed upon between the company and the occupant, the company may apply to the Secretary of the Interior, who shall thereupon appoint three disinterested referees, who, before entering upon the duties of their appointment, shall take and subscribe, before competent authority, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award. In case the referees can not agree, then any two of them are authorized to make the award. Either party dissatisfied with the finding of the referees shall have the right, within ninety days after the making of the award and notice of the same, to appeal by original petition to the United States court for the Indian Territory in and for the district wherein the land sought to be so taken may be situate, where the case, both as to the necessity for the taking as well as the amount of damages, shall be tried *de novo*. When proceedings have been commenced in court and the court has determined the necessity for such taking, the railroad company shall pay double the amount of the award into court to abide the judgment thereof, and then to have the right to enter upon the property sought to be condemned and proceed with the construction of such depot with the necessary tracks. Each of said referees shall receive for his services the sum of four dollars per day for each day they are engaged in the trial of any case submitted to them under this act, with mileage of five cents per mile for each mile actually traveled. Witnesses shall receive the usual fees allowed by the court, and all costs, including compensation of the referees, shall be made a part of the award and be paid by such railroad company.

It will be seen that, under this section, when the compensation can not be agreed upon, the company may apply to you for the appointment of three disinterested referees, who shall make the award. From such award appeal is allowed to the United States court for the Indian Territory in and for the district wherein the land sought to be taken is situated, and in the event of appeal the case may be tried *de novo* both as to the necessity for the taking as well as the question of compensation to the tribe or damages to the occupant.

The duty of the referees is, however, limited to the question of compensation. In my opinion, therefore, it becomes your duty first to determine the necessity for the taking before referring the question of compensation to referees to be appointed by you.

I therefore advise that the Commissioner of Indian Affairs be instructed to report, after due consideration of the showing made, whether the additional ground applied for is necessary for the railway purposes named and whether the convenience of the people and the public interests will be promoted thereby. If upon the receipt of the Commissioner's report it appears to you that such additional ground is necessary for railway purposes and that the convenience of the people and the public interests will be promoted thereby, you should grant the railroad company's application for the use of such additional ground for the railway purposes named, and should approve the railroad company's maps of definite location of such additional ground, if they properly represent the lands applied for.

If the showing made of the necessity for taking such additional ground is not convincing to you or is not found to be satisfactory, no question as to compensation need be considered, but if the necessity for the taking is established, then upon the approval of the maps of location, the question of compensation may be proceeded with as under the law directed.

As before stated, the question as to the necessity of the taking may be subject to re-adjudication, in the event of appeal to the court, but this matter must be previously determined by you.

The statute provides that the Secretary's finding of the necessity for the taking shall be "after allowing opportunity for all parties in interest to be heard before him." When all parties have notice and are permitted to submit evidence and written arguments all of which are transmitted to and considered by you, that constitutes an opportunity to be heard and a hearing within the meaning of the law and it is not necessary that you should personally hear the witnesses testify or listen to oral arguments on behalf of the parties.

Approved, March 2, 1898,

C. N. BLISS, *Secretary.*

REPAYMENT—DESERT LAND ENTRY.

LAFAYETTE D. MCDOW.

The right of repayment can not be recognized on the cancellation of a desert land entry for failure to submit final proof within the statutory period, when it appears that the entry was not erroneously allowed.

Secretary Bliss to the Commissioner of the General Land Office, March 2, 1898.

(W. V. D.) (F. W. C.)

Under date of November 10, 1897, there was filed in this Department an application for repayment of the fees, commissions and purchase

money paid upon the desert land entry No. 136, Susanville, California, series 1879, made by Lafayette D. McDow, covering the SW. ¼ of the SW. ¼ of Sec. 28, the NE. ¼ of the SW. ¼, and the NW. ¼ of Sec. 33, T. 30 N., R. 12 E.

This application was duly referred to your office, and by your office letter "M" of December 9, 1897, the same was returned with the recommendation that it be denied. In said report it is said:

> I have to inform you that the records of this office show that the above-described entry was canceled by office letter "C" September 22, 1885, because the entryman failed to submit proof within the statutory period, and that this land was subject to desert land entry at date of entry, and was vacant land, except for the Lassen county D. S., 369, of Lafayette D. McDow, made on January 13, 1877, for the above-described land, under the act of March 3, 1875, 18 Stat., 497.

Under these circumstances, it is clear that the entry on account of which application is made for repayment was not erroneously allowed within the meaning of the act of June 16, 1880 (21 Stat., 287), and the application is accordingly denied and the papers herewith returned for the files of your office. You will advise the party accordingly.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

GEORGE M. DYER.

An entry is "erroneously allowed" within the meaning of the statute providing for repayment, if the General Land Office, in acting on the proofs accepted by the local office, finds said proof insufficient, and cancels the entry for such reason.

Secretary Bliss to the Commissioner of the General Land Office, March 2, 1898.
(W. V. D.) (J. L. McC.)

George M. Dyer has appealed from the decision of your office, dated July 22, 1896, rejecting his application for repayment of four hundred and fifty dollars, paid upon his desert land entry, embracing three hundred and sixty acres, to wit: the SE¼ of the SE¼ of Sec. 18; the NE¼ and the S½ of the NW¼, and the NE¼ of the NW¼ of Sec. 19, T. 16 N., R. 42 E.; and the SE¼ of the NE¼ of Sec. 24, T. 16 N., R. 41 E., Eureka land district, Nevada.

Said decision was but a formal affirmance of your office decision of January 27, 1886, in which the facts of the case are set forth, in substance, as follows:

Dyer filed desert-land declaration as above, on August 30, 1877. On August 28, 1880, he made proof before a clerk of a court, and transmitted the same, with $360—which, with the $90 paid upon filing his declaration, amounted to $450, the full price of the land under the desert-land act. Final certificate issued September 9, 1880.

Inasmuch as the proof was not made before the register and receiver, as required by law, and as it showed the reclamation of only eighty-five or ninety acres of the three hundred and sixty acres embraced in

his entry, Dyer was advised that the certificate of purchase had been issued without warrant of law; but that upon further compliance with the law as to the reclamation of the land, and upon making proof to that effect before the proper officers, he might acquire title thereto. Dyer declined to take any further action in the matter, and after considerable correspondence relative thereto, the entry was canceled July 3, 1885.

He applied for repayment, which your office refused, for the reason, as set forth in said letter of your office of January 27, 1886 (*supra*):

> That he did not afterward comply with the law is a matter of his own concern. There was no adverse claimant, and no legal reason why he should not have perfected his entry by further compliance with law in the matter of reclamation and proof; and he was so advised, but absolutely declined to fulfill the requirements of the law.

An examination of the correspondence between your office and the applicant discloses strong equities in behalf of the latter. In his letter of April 16, 1883, to the register at Eureka, he says:

> It is impossible for me to irrigate and reclaim any more land than I have already done. There is not sufficient water in the river, nor has there been for many years.

The register, under date of April 19, 1883, sends your office a statement of the facts in the cases of Dyer and certain others named who had made desert land entries in the same vicinity. He says:

> I will state in behalf of the parties who have made such entries that I believe they have acted in good faith, and have done all they could to irrigate and reclaim their lands, and that they have labored hard and expended large sums of money to meet the requirements of the law; that owing to the manner in which these lands have been subdivided by the official surveys, they have been obliged to embrace land in their entries which it is not possible to conduct water upon or cultivate—portions of the same being elevated and above the source of the water used for irrigation, other portions being so rocky as to render reclamation impossible, and other portions still being sandy or gravelly, and will not produce crops though watered continually. These parties being required to enter lands in legal subdivisions, have to enter eighty, or one hundred and sixty, or three hundred and twenty acres, when perhaps not more than one-half, or one-third, or one-fourth, of the lands embraced in their entries can be irrigated and rendered arable. . . . Other parties have sufficient water to irrigate only ten or twenty acres, the eighty, or one hundred and sixty acres, as the case may be, embraced in their entries; yet they had to enter the eighty or one hundred and sixty acres in order to secure the ten or twenty acres, owing to the subdivision of the lands by the surveys. Must patent be denied these applicants, must their claims be forfeited and their entries canceled, because the lines of the surveys happened to fall to their disadvantage, and because of natural obstacles that can not be overcome? If patents can not issue to the applicants who made these entries in good faith, and who have labored and expended money in improving and conducting water upon their lands in order to reclaim them from their desert character, it seems to me no more than right that the purchase money paid by them when they made their entries and final proofs should be repaid.

The equities in this case are far superior to those in some other cases of a somewhat similar character in which repayment has been allowed. In the case of W. W. Wishart (13 L. D., 211), the claimant was a lawyer, engaged in the practice of his profession at Devil's Lake, about ten

miles from his pre-emption claim. The local officers allowed him to make entry upon his final proof, although it was very defective, in that it showed upon its face that his so-called "residence" consisted of periodical visits to his claim. Your office found the proof insufficient, and directed that he be called upon to submit supplementary proof within a reasonable time. This he refused to do. Thereupon your office held his entry for cancellation. He appealed to the Department, which on December 11, 1890, affirmed the judgment of your office; and on August 27, 1891, reaffirmed it on review. Wishart applied for repayment of the purchase money; this your office denied; he appealed to the Department, which overruled the judgment of your office and directed such repayment, saying (17 L. D., 489):

> When the local officers decide that the proofs presented show a sufficient compliance with the land laws, and a certificate is issued to that effect, and the money is paid for the land, and a receipt is given therefor, and when a further examination of the same proofs by your office or this Department results in a different judgment, showing that the local officers were in error in admitting the sufficiency thereof and allowing the entry, the same has been "erroneously allowed" within the meaning of the 2nd section of the act of June 16, 1880 (21 Stat., 287), and repayment in such case is authorized. (Hudson Mining Co., 14 L. D., 544; Oscar T. Roberts, 8 L. D., 423).

The case at bar clearly falls within the above ruling.

The decision of your office is therefore reversed; and the application for repayment will be allowed.

PRACTICE—CONTEST—SERVICE OF NOTICE.

COUNTRYMAN *v.* HERBERT.

Rule 60 of the Rules of Practice requires contestants to serve their own notices, and one who fails to comply with this requirement will not be heard to complain if his application for a hearing is dismissed.

Secretary Bliss to the Commissioner of the General Land Office, March 2, 1898.

(W. V. D.) (E. F. B.)

On September 13, 1887, Albert J. Herbert, filed pre-emption declaratory statement for lot 1, Sec. 1, T. 88 N., R. 45 W., 5th P. M., Des Moines, Iowa. On the same day Lewis Countryman made timber culture entry for the same land, and shortly afterwards filed a protest against the declaratory statement of Herbert, asking that it be canceled. The local officers rejected said protest, but on July 16, 1888, upon the appeal of Countryman they were advised that when Herbert offered to make final proof Countryman should have an opportunity to contest Herbert's right of entry, and having an entry of record he should be given special notice.

It appears that Herbert was allowed to make final proof July 5, 1888, and final certificate issued thereon, although no notice was taken by

the local officers of Countryman's protest, nor was he specially cited to appear.

On May 26, 1891, your office instructed the local office to order a hearing upon Countryman's protest in which he alleged priority of right and that Herbert was not a settler on the land at the time of the filing of his declaratory statement. In conformity to such instructions the local officers on June 19, 1893, ordered a hearing and notice of such hearing was sent by them to Countryman with instructions to serve said notice on Herbert in accordance with the Rules of Practice.

It is not denied that said notice was received by Countryman, but he failed to take notice of it and thereupon the local officers dismissed his protest and recommended the cancellation of his timber culture entry, from which he appealed. Your office on March 18, 1897, affirmed the action of the local officers, and held the timber culture entry of Countryman for cancellation, from which decision Countryman has appealed to the Department.

The substance of his appeal is that your office erred (1) in not finding from the evidence submitted by Countryman at the time of his protest that Herbert was not residing on the land at the time of the filing of his declaratory statement. (2) In not holding that special notice should have been given to Countryman as directed in the letter of your office of July 16, 1888, and (3) In not holding that it was not the duty of Countryman to serve Herbert with notice of the hearing but that such duty devolved upon the local officers.

This entire proceeding has been long delayed by a series of gross irregularities in the local office. While the local officers properly rejected the protests of Countryman filed before Herbert offered to make final proof, they should not have allowed him to make his final proof without issuing special notice to Countryman. The letter of your office of July 16, 1888, conveying such instructions to the local officers, was written after the final proof had been allowed and hence they could not comply with the instructions of that date, but the rights of Countryman were not prejudiced thereby for the reason that no action was taken on Herbert's entry, until Countryman had been given an opportunity to submit proof showing that Herbert was not a settler on the land at the time of the filing of his declaratory statement or any other fact in support of his alleged claim of priority.

All acts of the local officers in this case, prior to May 26, 1891, whether of omission or commission, so far as they affected the rights of Countryman may therefore be eliminated from the case, as his rights were fully protected by the proceedings taken under your letter of that date.

Rule 60 of Rules of Practice, provide that "contestants must give their own notices and pay the expenses thereof." The letter of the local officers of June 19, 1893, ordering that the hearing be had before the clerk of the district court of Woodbury county, Iowa, to take place

August 1, 1893, and final hearing before the local office August 8, 1893, was received by Countryman June 22, 1893, as shown by the registry return receipt. In this letter he was instructed as follows:

> You are expected to serve the notice according to the rules laid down in the Rules of Practice. We shall expect proof of service of notice with the return of papers.

The disregard of these instructions was at his own risk. He offers no defence, or excuse for it except that such duty was not incumbent upon him, but upon the local officers. The pre-emption claim of Herbert was not subject to contest until he offered to make his final proof, and there was no error in not finding from the evidence filed by Countryman with his protest that Herbert was not residing on the land at the date of the filing of his declaratory statement. His duty was to have presented his testimony at the hearing, so that Herbert might have had the opportunity of cross-examining the witnesses, and of introducing testimony in his own behalf. The final proof of Herbert shows that he was a settler on the land at the date of the filing of his declaratory statement and long prior thereto.

Your decision dismissing the contest of Countryman and holding his entry for cancellation is affirmed.

RAILROAD GRANT—FORFEITURE ACT—SETTLEMENT RIGHT.

CURTIS *v.* GREELY.

A settlement on railroad lands restored to the public domain by the forfeiture act of March 2, 1889, after the passage of said act, and prior to the time when such lands were opened to entry, is protected as against the intervening entry of another, if the right of such settler is asserted within the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, March 2, 1898.

(W. V. D.) (C. J. G.)

The land involved in this controversy, namely, the S. ½ of the NW. ¼ of Sec. 29, T. 50 N., R. 38 W., Marquette land district, Michigan, was granted to the State of Michigan to aid in the construction of certain railroads; but the grant was forfeited by the act of March 2, 1889 (25 Stat., 1008).

This forfeiture act provides:

> That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan . . . which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain.

October 18, 1894, 19 L. D., 307, the Department gave directions to your office

> that the lands in the common limits of the two grants referred to and not embraced in the selection of the Onatonagon and Brule River Railroad Company on account of its moiety, be restored to entry after due notice by advertisement.

October 22, 1894, your office directed the local office to

> cause to be published . . . . a notice that said lands . . . . are restored to the public domain, and will be subject to entry on a day to be fixed by the notice.

January 10, 1895, in pursuance of the above directions, this land was thrown open to entry, and on that date John Greely filed application to make homestead entry therefor, which was allowed January 14, 1895, and placed of record.

January 11, 1895, the local office received by mail an application of Del Ray Curtis to make homestead entry for said land, which was rejected for conflict with the prior application of Greely.

Subsequently, the exact date not appearing, Curtis filed an affidavit of contest, alleging that he was residing on this land when Greely made his entry. This affidavit was executed February 6, 1895, and citation issued thereon February 8, 1895, summoning the parties to appear for hearing April 12, 1895. Upon the testimony submitted at this hearing, at which both parties were present, the local office rendered decision recommending that Greely's entry be canceled and that Curtis be allowed to enter. Greely thereupon appealed to your office, where, under date of July 30, 1896, the decision of the local office was affirmed. Greely has prosecuted a further appeal to this Department.

It is contended in said appeal that defendant's entry is entitled to precedence over plaintiff's settlement; that the land in question was in a state of reservation and was exempt from legal settlement until January 10, 1895; and that plaintiff's entrance upon this land was a trespass and could not give him an advantage over defendant, who made his entry in accordance with instructions from the Department. In support of these contentions the cases of Smith *v.* Malone, 18 L. D., 482, and Crowley *v.* Ritchie *et al.*, 22 L. D., 276, are cited.

The facts in this case are fully set forth in your office decision, showing that Curtis settled on the land in question November 4, 1894; and that he promptly followed up his settlement by building a house into which he soon moved his family.

It will be observed that there is nothing either in the act of March 2, 1889, *supra*, or in the departmental order opening the land in question to entry, expressly prohibiting settlement thereon. On the contrary, it was held in the case of Dillon *et al. v.* Hefferman, 19 L. D., 170, that (syllabus):

> The railroad lands declared forfeited by the act of March 2, 1889, and restored thereby to the public domain, became subject to entry immediately upon the passage of said act.

As was stated in that case, the local office was not directed to advertise that the lands embraced within the forfeiture "would be," but "are," restored to the public domain, and "will be" subject to entry. In view of this fact the evident and only purpose of the departmental order was to fix a time when claims to these lands could be made of record and rights of claimants determined.

In both the cases cited by appellant, the lands were not supposed to be a part of the lands forfeited under the act of September 29, 1890, but rather a part of the surplus Omaha lands; further, in those cases

the specific instructions of the Department were to the effect that no rights to any of those lands, either by settlement or otherwise, could be acquired or would be recognized as existing prior to the day on which they were thrown open to entry.

Notwithstanding the existence of this express prohibition, the Department, on October 3, 1896, 23 L. D., 346, after ascertaining that the lands were a part of those forfeited by the act of 1890, revoked the decision in the case of Crowley *v.* Ritchie *et al.*, one of the cases cited, and awarded the land to the occupant, prior to the date of the opening, as against the entry of record made thereafter, on the ground that (syllabus):

Lands restored to the public domain by the forfeiture act of September 29, 1890, are subject to settlement from the date of the passage of said act.

In the case of Mills *v.* Daly, 17 L. D., 345, which also has reference to lands forfeited under the act of September 29, 1890, it was held (syllabus):

A settlement on such lands, after the passage of said act, and prior to the time when the lands were open to entry, is protected as against the intervening entry of another, if asserted within three months from the time when said land is subject to entry.

This ruling may very properly be applied to the case under consideration, and as Curtis filed his application immediately after the land in question was opened to entry, he will be allowed to perfect his said application.

Your office decision is hereby affirmed.

REPAYMENT—RIGHT OF WAY PURCHASE.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

Money paid to the Secretary of the Interior by a railroad company to secure a right of way across an Indian reservation, under an agreement which thereafter appeared could not be carried into execution without the ratification of Congress, should be returned when Congress subsequently provides for the recognition of a preferred right of purchase on behalf of the company on the performance of certain specified conditions, and such right is thereafter forfeited on account of the failure of said company to perform said conditions.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, March 3, 1898. (E. F. B.)

The Chicago, Milwaukee and St. Paul Railway Company has filed an application for the return of a sum of money which was deposited by said company, with the Secretary of the Interior, amounting to $15,335.76, to be applied in payment for certain lands in the Sioux Indian reservation under agreements made by said company with the Sioux Indians

of Dakota, in 1881, which has been referred to me for an opinion as to whether said application should be granted.

This is a renewal of a former application for the return of said sum which was rejected by the Department October 21, 1895 (21 L. D., 324), the company now insisting that the law and facts controlling this application were misconstrued in the decision of October 21, 1895, and as this is a matter solely between the government and the company, it asks that the application may be reconsidered.

The history of the initiation of this transaction will be found in the records of the Indian Division, part of which is embraced in Senate executive document No. 20– 48th Congress, 1st session, from which it appears, that in 1880, the Sioux Indians in Dakota entered into four several agreements with the Chicago, Milwaukee and St. Paul Railway Company, granting to said company the right of way across their lands, and the right to hold and occupy certain lands for railway purposes, which were approved by the Secretary of the Interior, January 3, 1881, with certain modifications, and on January 18, 1881, the company filed in the Department a bond for the faithful performance of the agreements which was approved by the Secretary of the Interior January 20, 1881.

These agreements were evidently entered into between the railroad company and the Sioux Indians and were approved by the Secretery of the Interior under the belief that the right and privilege therein bargained for could be acquired under the stipulations contained in the second article of the treaty or agreement made with the Sioux Indians September 26, 1876, by Commissioners on the part of the United States, and ratified by the act of Congress approved February 28, 1877 (19 Stat., 255) by which the Indians consented to the construction of roads from accessible points on the Missouri river through their reservation to the country lying immediately west, not to exceed three in number. If these agreements had been authorized by that stipulation, the ratification of them by Congress would not have been necessary, in order to authorize the railway company to enter upon said reservation and to construct and operate its road, but the right would have become vested and complete upon the payment of the amount stipulated in the agreements. That this view was entertained by the company and the Secretary of the Interior, at the time the money was paid is shown by the following correspondence between General John Lawler, the agent of the company, and the Secretary of the Interior.

WASHINGTON, D. C., *Oct. 3d, A. D. 1881.*

Hon. S. J. KIRKWOOD,

Secy. of Interior.

I have the honor to direct your attention to certain agreements, approved by the Secretary of the Interior, on the third day of Jany., A. D. 1881, granting to the Chicago, Milwaukee, and Saint Paul Railway Company, in consideration of certain payments to be made, sundry specified rights upon the Great Sioux Indian Reservation in the Territory of Dakota. These rights may be summarized as follows: the right to hold and occupy lands, for railway purposes, on the Missouri river, and at

intervals along the line of the proposed railway; the right of way for the proposed railway, of said company; and the right to open and control a wagon road, upon, or, as near, as it shall be convenient and practicable, to said railway line, as surveyed and located, and to use said right of way and wagon road, in the interest of the Chicago, Milwaukee and Saint Paul Railway Company; for the transportation of persons and property, to and from said railway, over and across the Great Sioux reservation. I beg leave to state, on behalf of the railway company aforesaid, that it now desires to enter upon said Indian reservation for the purpose of using and enjoying the rights granted on said agreement, and it is now ready to pay for such rights the sum of money required to be paid by said 'agreement before the commencement of the work of construction,' to wit, 'one half of the full amount to be paid for the use and benefit of said Indians,' being the sum, as it seems, from the agreement, of eleven thousand five hundred and eleven dollars, the amount resulting from a calculation based on a distance of one hundred and eighty and two tenths miles, that said right of way and wagon road extends over and across said Indian reservation as shown and located upon map of line filed with the Secy. of the Interior and upon the cost of six hundred and forty acres of land on the Missouri at the rate of five dollars per acre. Wherefore, I respectfully request the Secretary of the Interior to receive said payment, or such other, as in his judgment, the agreement requires, or, direct how the same shall be made, and thereupon to grant permission to the Chicago, Milwaukee and Saint Paul Railway Company, its agents and servants, contractors and laborers, its connecting transportation lines, and all whomsoever it may designate as being or operating in the interest of said company to enter upon the said reservation for the purpose of exercising and enjoying the rights set forth.

I have the honor to remain, Your Obt. Servt.,

J. LAWLER,

for the Chicago, Milwaukee and Saint Paul Railway Company.

Files. I. D., 2577—1881.

To this the Secretary of the Interior replied as follows:

OCTOBER 7, 1881.

Genl. JOHN LAWLER,

Genl. Agent of the Chicago, Mil. & St. Paul Ry. Co.,

Washington, D. C.

SIR: In reply to your letter of the 3rd inst., asking that the first payment from your company under its several agreements with the Sioux Indians for the right of way and occupation of lands for railway purposes across the Great Sioux reservation in Dakota (which agreements four in number were approved by the Department under date of 3rd January 1881) you are respectfully informed that, calculating the section of land on the west bank of the Missouri River 640 acres at $5 per acre $3200.00

ten stations at 20 acres ea. 200 acres at $4 per acre 800.00

90 1/10 (half length) of railway tract at $110.00 per mile 9911.00

$13911.00

the amount found due as first payment by your company upon the basis presented is $13,911.00 taking your verbal statement of the averaged quantity of lands required for way stations calculating ten stations at twenty acres to the station for the first half of the road.

Upon the subject of the section of land on the west bank of the Missouri River it is understood between your company and this Department that said section shall be located immediately opposite to the section line between sections 29 and 30, township 104 N., R. 74 W., on the east side of the said Missouri River and that your company will within sixty days from this date file a map of the location of the said section, so taken to be occupied under the modified agreement with the Sioux, giving the description and boundaries of said section to be in conformity to the public surveys.

With this understanding, upon the payment of the sum of 1$3,911.00 before noted the Chicago, Milwaukee and St. Paul Railway Company will be allowed to enter upon the Great Sioux reservation and construct and operate its wagon road and railway under the provisions of the agreements noted.

The use of the temporary wagon road and railway, granted is permitted to your company in accordance with the provisions of the agreement referred to, and is intended to cover all legitimate privileges for traffic and travel consistent with such agreements and the provisions and limitations of the intercourse laws.

Rules and regulations for the guidance of the said company will be duly prepared and transmitted to you.

It is further understood that any default in the stipulations governing the authority granted will be considered sufficient cause by the Department for the revocation of this authority.

Very respectfully,

S. J. KIRKWOOD, *Secretary.*

1954–I. O., 1881. Ind. Mis., No. 26—1881—page 422.

Subsequently the company made an additional deposit of $1,424.76—part payment for the right of way through the Crow Creek reservation and for the 188 acres east of the Missouri river, making in all the sum of $15,335.76. Sen. Ex. Doc., 20.

The circumstances under which the money was deposited by the company and received by the government is shown by this correspondence. It was not a deposit as earnest money, nor a payment conditioned, upon ratification by Congress, but it was made in fulfillment of its obligation under the terms of the agreements upon the express promise of the Secretary of the Interior that upon the payment of such sum, the company would be permitted to enter upon said reservation and construct and operate its wagon road and railway under the provision of said agreements.

Prior to the approval of the agreements entered into between the railway company and the Indians, three wagon roads or routes, as authorized by the second article of the agreement or treaty of September 26, 1876, had been designated by the War Department to be constructed and maintained through said reservation. In reporting upon a letter addressed to the Secretary of War, relative to these wagon roads, which had been referred to this Department, the Commissioner of Indian Affairs on March 1, 1882, called attention to the agreements with the railway company, which had been approved by the Department, and in submitting the inquiry as to whether the Indians in making said agreements understood that they were only carrying out the obligation imposed by the second article of the agreement or treaty of 1876, stated that it was certain the railway company based its application for right of way upon that provision, although it was not referred to in their agreements.

In transmitting this report, the Secretary of the Interior said:

Upon full consideration of the subject I am of opinion that the three routes indicated for wagon roads westward from the Missouri River from Bismarck, at or near Fort Pierre, and from the Yankton crossing of the Missouri are matters arising under the second article of the agreement referred to and that the stipulations set forth

in the treaty are a consideration for such concession. Further, that any subsequent agreements for roads across said reserve wherein a valuable consideration is obtained, is in addition to any former existing rights.

Ind. Mis., No. 29, 1882. P. 151.

From this time it was understood that the agreements could not be carried into execution without ratification by Congress, and a bill for that purpose was prepared and submitted, but it failed to become a law.

As soon as it was ascertained that the government could not fulfill its promise to the railway company, upon the faith of which the payment was made, the money, was then held by the government for the use and benefit of the railway company and could have been withdrawn, without violating any agreement with the Indians or obligation to the government. Such was the condition of this deposit when the act of March 2, 1889 (25 Stat., 888), was passed, which provided for the creation of smaller and separate reservations out of a portion of this reservation and for the restoration of the remainder to the public domain. The act took effect February 10, 1890, having been accepted and consented to by the Indians and said acceptance and consent having been made known by proclamation of the President, as therein provided.

The 16th section of the act, declared that the acceptance of the provisions of the act by the Indians should not affect any agreement theretofore made with the Chicago, Milwaukee and St. Paul Railway Company, for right of way through said reservation, or for any lands acquired by any such agreement to be used in connection therewith, except as therein provided:

But the Chicago Milwaukee and Saint Paul Railway Company and the Dakota Central Railroad Company, shall, respectively, have the right to take and use, prior to any white person, and to any corporation, the right of way provided for in said agreements, with not to exceed twenty acres of land in addition to the right of way, for stations for every ten miles of road; and said companies shall also, respectively have the right to take and use for right of way, side-track, depot and station privileges, machine shop, 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; also, the former company so much of the one hundred and eighty-eight acres, and the latter company so much of the seventy-five acres, on the east side of the Missouri River, likewise embraced in said agreements, as the Secretary of the Interior shall decide to have been agreed upon and paid for by said railroad, and to be reasonably necessary upon each side of said river for approaches to the bridge of each of said companies to be constructed across the river, for right of way, side-track, depot and station privileges, machine-shop, freight house, round-house, and yard facilities, and no more:

with the following proviso (1) That payment shall be made by the company according to the agreements for each mile of road and each acre of land which the company may take and use for railway purposes. (2) That the land, shall only be used for railway purposes. (3) That payment shall be made and the conditions performed within six months after the act takes effect, and (4) That the company shall within nine months after the act takes effect definitely locate its line of road including station grounds and terminals and within such time file with the

Secretary of the Interior, a map of such definite location specifying clearly the line of road, the several station grounds, and the amount of land required for railroad purposes, and the Secretary of the Interior shall within three months after the filing of such map, designate the particular portion of said sections and of said tracts of land which said railway companies may take and hold under the provision of said act, and the company shall within three years after the act takes effect construct, complete, and put in operation its line of road, and upon failure to locate, construct, and operate the same within the time required by the act, the lands granted for right of way, station grounds and other railway purposes shall be forfeited and shall without further 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 the act.

After providing for the creation of certain separate reservations the act (section 21), restored all other portions of the reservation, except three islands therein named, to the public domain to be disposed of by the United States to actual settlers only under the provisions of the homestead law—but provided that the land so entered should be paid for at the rate of one dollar and twenty-five cents per acre for all lands disposed of within the first three years after the act takes effect, at seventy-five cents per acre for all lands disposed of within the next two years thereafter, and at fifty cents per acre for the residue of the lands then undisposed of, also that such of said lands remaining undisposed of at the end of ten years from the taking effect of the act shall be taken by the United States at fifty cents per acre, which amount shall be credited to said Indians as part of their permanent fund, and shall thereafter be a part of the public domain to be disposed of under the homestead laws and the provisions of said act.

The 22d section of the act provided,

that all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States to be applied solely as follows:

First, to the reimbursement of the United States for all necessary actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes hereinbefore provided.

Within the time required by the act, the company filed with the Secretary of the Interior a map of definite location which was approved subject to the conditions contained in the 16th section of the act, and the $15,335.76 still being on deposit with the Secretary of the Interior, its right to take and use prior to any white person the land, specified in the agreement and designated by the maps, for the purposes contemplated by the act, became complete, subject only to forfeiture upon failure to construct, complete, and put in operation, the road, within three years from February 10, 1890. See King *v.* Chicago, Milwaukee and Saint Paul Ry. Company 14 L. D. 167.

The company having failed to complete the road within the time prescribed by the act, caused a forfeiture of the lands reserved to it under the 16th section of the act of March 2, 1889, and they were declared

by proclamation of the President to be restored to the public domain, subject to the provisions of said act. See Chicago, Milwaukee and Saint Paul Railway Company 19 L. D., 429.

Its right to take and use the said lands for railway purposes prior to any white person being thus forfeited, all lands covered by the agreements, thereupon became subject to entry under the provisions of the 21st section of said act, and the money accruing from the disposal of said lands after reimbursing the United States for the actual necessary expenses in carrying out the provisions of the act, has been placed or is subject to be placed, to the credit of said Indians as a part of their permanent fund.

By the decision of October 21, 1895, it was held that while the payment was originally in the nature of a deposit, when Congress ratified the agreement, and the company accepted the conditions imposed by the act, it became an executed contract, and the deposit was converted into a payment. In other words it was considered as a purchase under the agreement which was completed upon the filing of the maps designating the land, and the payment of the money, subject to forfeiture of the land so purchased upon failure to build the road within the time prescribed by the act, and as the failure to build the road within the time prescribed was solely the default of the company, it cannot recover the money as the government was not in default.

The plain purpose of the act was to confer upon the company the right to purchase so much of the land covered by the agreements as they might designate by maps of definite location subject to the approval of the Secretary of the Interior upon performing certain conditions, but it would not have been compelled to purchase any part of land that was not used and occupied by it, even if the conditions had been performed. It was an option or privilege that it might have exercised or not at its pleasure. The express language of the act is that the company shall

> have the right to take and use, prior to any white person, and to any corporation, the right of way provided for in said agreements, with not to exceed twenty acres of land in addition to the right of way, for stations for every ten miles of road; and said companies shall also, repectively, have the right to take and use for right of way, side track, depot and station privileges, machine shop, 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.

The conditions upon which the right of purchase could be exercised, are that the company should within six months after the act takes effect make payment for each mile of road and each acre of ground taken under the agreement; that within nine months it shall locate its line of road and designate the land it intended to purchase; and within three years it shall construct, complete, and put it in operation. Upon the performance of these conditions, the company would have been entitled to purchase the land designated and not until then. If it failed to perform any of the conditions within the time prescribed, the

privilege to purchase was forfeited and the land which had been held in reservation was restored to the public domain. This is the plain and obvious meaning of the act.

It will be observed that the company was required to make payment within *six* months after the act took effect, and yet it was allowed *nine* months after the act took effect to designate the tracts it might have the privilege of purchasing. If a deposit had been made sufficient to cover the whole amount that would have been required in the event that the company elected to purchase all the land covered by the agreements, can it be pretended that it could not have withdrawn the surplus, if within the nine months it should have designated a less area. So it might within the three years have refused to purchase any land except what it actually used in the construction and operation of the road embracing the right of way as stipulated in the agreements. The building of the road would have been a performance of the conditions, and while the company would have been compelled to pay for every mile of right of way taken and used for that purpose which could have been appropriated from the sum deposited, to the extent of the obligation thus incurred, it was under no obligation to purchase the ground for station purpose, (unless used) or the one hundred and eighty-eight acres on the east bank of the river, or the six hundred and forty acres on the west bank of the river, but it would have had an absolute right to withdraw all the surplus after paying for the right of way.

No appropriation of payment has ever been made upon this contract or agreement, and the money deposited by the company to be appropriated in payment for the land whenever it had performed the conditions upon which it could alone have obtained title was not subject to be so appropriated until the company had performed the conditions, and applied to purchase so much of the land embraced in their maps of definite location as it might have desired to purchase. As before stated, it was not bound to purchase any of the land, but if it had constructed, completed and put in operation its road within the time prescribed by the act, it would have been entitled to purchase so much of the land designated by its maps of definite location as it desired. As it failed to construct, complete and put in operation, its line of road within the three years, its right to purchase the same, prior to any white person was forfeited, and the lands were by the very terms of the act restored to the public domain to be disposed of under the provisions of said act for the benefit of the Indians and the proceeds of sale to be credited to the permanent fund.

The language of the act that

> the lands granted for right of way, station grounds or other railway purposes . . . . shall revert to the United States and be subject to entry under the other provisions of this act,

upon failure to perform the conditions, does not indicate that definite location of the line of road, and the designation of the lands it intended

to purchase was the completion of a right or that the contract was thereby executed, because the complete construction and operation of the road through the reservation was a condition precedent to the company's right of purchase.

The two preliminary conditions were that the company should make payment as a guarantee of the fulfillment of its obligation to pay for every mile of right of way and every acre of ground taken under the terms of the agreement, and that it should designate the lands it intended to purchase. The performance of these two conditions within the time required by the act reserved the land from the operation of the other provisions of the act, or from any other disposition for the period of time in which the company might perform all the conditions, essential to its right of purchase.

I have therefore to advise that the government has no right to retain this money, and that it should be returned to the company, if it is still under the control of the Secretary of the Interior and subject to be withdrawn from the Treasury and disbursed by his direction without the action of Congress.

Approved: March 3, 1898,

C. N. BLISS,

Secretary.

DESERT LAND ENTRY—ACT OF AUGUST 4, 1894.

EAGAN *v.* PAULHAMUS.

The act of August 4, 1894, relieving desert entrymen from annual expenditure during the year of 1894, is applicable to entries made in said year, and prior to the passage of said act; and the year so given should be computed from the date of the entry.

Secretary Bliss to the Commissioner of the General Land Office, March 3, 1898.

(W. V. D.) (P. J. C.)

The record shows that William H. Paulhamus made desert land entry for the S½ of Sec. 22, T. 10 N., R. 22 E., North Yakima, Washington, land district, March 30, 1894.

On November 20, 1895, John C. Eagan filed an affidavit of contest against the same, alleging, among other things, that the entryman had failed to expend one dollar per acre toward the reclamation of the tract, prior to the date thereof.

A hearing was ordered and had before the local officers. The entryman admitted that no yearly proof had been made or filed since the entry was made. The contestant offered testimony showing that nothing had been done by the entryman toward reclamation; whereupon the entryman moved to dismiss the contest for the reason, among others, that the same was prematurely brought, as he had until January 1, 1896, in which to make proof of annual expenditure.

This motion was sustained by the local officers, in the following language:

Following the instructions in circular of October 11, 1894, "G" of Acting Commissioner of the General Land Office, and approved by the Honorable Secretary of the Interior, the motion is sustained and the contest dismissed. The above motion contains our finding of facts in the case.

The contestant appealed, and your office, by letter of June 12, 1896, reversed the action of the local officers and held the entry for cancellation, whereupon the entryman prosecutes this appeal, assigning error as follows:

1st: Error in holding that the contest herein was not premature.

2nd: Error in not holding that the proof failed to sustain the allegations of the affidavit of contest.

3rd: Error in not holding that the affidavit of contest failed to state any sufficient grounds for contest.

4th: Error in holding the entry of the contestee for cancellation upon the case as made without giving contestee an opportunity to submit testimony.

5th: Error in not dismissing the contest herein and holding the entry intact.

The entry in question was made under the amendatory act of March 3, 1891 (Sec. 2, 26 Stat., 1095), requiring an annual expenditure of one dollar per acre toward the reclamation of the land. The entry was made March 30, 1894, and as the law then stood proof of the expenditure of one dollar per acre should have been made on or before the corresponding date in 1895.

On August 4, 1894, Congress passed the following act:

That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each such case is hereby extended to five years from the date of filing the declaration; and the requirement that the persons filing such declarations shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: *Provided*, That within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and in the manner provided by existing law, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as therein provided.

Under the terms of this act the entryman claims that he was not required to do any work on the land for the year 1894, but that time began to run against him on January 1, 1895, and he had all that year in which to comply with the law. Your office held, however, that this act was intended for the relief of those "who were in default at the date of its passage, or who would be in default during the year 1894"; that this entry having been made in March 1894, it would not be in default till March, 1895, and the entryman was therefore not entitled to relief under the act.

This conclusion of your office seems to be in direct opposition to the

circular of your office of October 11, 1894 (19 L. D., 298), which was approved by the Secretary of the Interior. In relation to the entries made in 1894, it was said:

> Under the terms of the act the annual expenditures for the year 1894, and proof thereof are dispensed with, consequently parties who made desert land entries during 1894, prior to the passage of said act are not required to make any expenditure during the present year, but the year within which they will be required to make such expenditures and proof will begin January 1, 1895.

This circular was in full force at the date of your office decision, yet it is not referred to, although attention was directed to it, and the local officers in sustaining the motion to dismiss the contest, did so on the authority of the same.

While there may be some doubt as to the correctness of the construction of this statute, yet it is a well settled rule that the contemporaneous construction of a doubtful or ambiguous law by those who are called upon to act under the law is entitled to great respect. The construction thus given is of greater consideration when under it parties have been induced to act in matters affecting property rights. Desert land entrymen under circumstances similar to the one at bar were justified under this circular in refraining from doing anything relating to reclamation for the year 1894, and doubtless many of them are in the same condition as the one now under consideration.

Since the promulgation of this circular the Department has had occasion to pass upon the question as to whether the act intended to simply include the calendar year, or whether by its terms it meant the entry year, and it was determined that Congress intended to relieve the entrymen "for one year, and the entry year, and not the calendar year, was meant." (Hodgson *v.* Epley, 23 L. D., 293; Randall *et al. v.* Morton, 25 Id., 150.) To this extent therefore the circular has been modified: that is, instead of the time beginning in every case arbitrarily to run from January 1, 1895, it will commence to run one year from the entry year beginning in 1894. For instance, in the case at bar the entry having been made in March, 1894, time would begin to run in March, 1895, and the entryman would have one year from the latter date, or until March, 1896, to comply with the law.

Your office judgment is therefore reversed.

WIGHT *v.* CENTRAL PACIFIC R. R. CO.

Motion for review of departmental decision of January 13, 1898, 26 L. D., 28, denied by Secretary Bliss, March 3, 1898.

HOMESTEAD CONTEST—CITIZENSHIP—SETTLEMENT RIGHT.

WEISNER *v.* CLEM.

An alien who for the last three years of his minority resides in this country is qualified, in the matter of citizenship, as a homestead settler, without previous declaration of intention to become a citizen.

The minor child of an alien, who, during the minority of such child declares his intention to become a citizen, but does not complete his naturalization before the child attains his majority, or thereafter, occupies under the homestead law the status of one who has filed his declaration of intention to become a citizen.

A homestead entry must be canceled on due showing of a prior adverse settlement right.

Secretary Bliss to the Commissioner of the General Land Office, March 3, 1898.

(W. V. D.) (C. J. W.)

Hiram Clem made homestead entry, No. 3713, for the SE. ¼ of Sec. 23, T. 22 N., R. 3 W., at Enid, Oklahoma, on November 4, 1893.

On November 6, 1893, George Weisner filed affidavit of contest against the entry, alleging prior settlement.

A hearing was had, and on June 20, 1895, the local officers rendered a decision, in which they found, in substance, that while plaintiff was the prior settler, he did not follow up his initial acts of settlement in good faith by improvements and the establishment of residence as required by law.

From this decision Weisner appealed, and, on May 19, 1896, your office reversed the local office, hol ding that Weisner was the first settle and followed up his initial acts of settlement in good faith, and that the entry of Clem was subject to the superior right of Weisner.

The case is before the Department on the appeal of Clem from your office decision.

The error alleged is, substantially, that your office erred in the conclusions drawn from the facts.

One question is raised, and insisted upon now, which does not appear to have been insisted upon either before the local officers or your office, and that is, that Weisner's first acts of settlement were void, because his status was, at the time of such acts, that of an alien, who had made no declaration of intention to become a citizen. As this may be regarded as a preliminary question, it will be considered and disposed of before the facts are stated in reference to acts of settlement and improvement performed by the parties.

It appears that the plaintiff is foreign born. He was brought to this country by his father at the age of twelve years, since which time both father and son have been domiciled in this country. At the date of the hearing the son was thirty-seven years of age.

They came to the United States in 1870. On April 27, 1870, John Weisner, the father of plaintiff, made in the district court, which embraced Pottawatomie county, State of Kansas, his declaration of intention to become a citizen of the United States, in due form, which was filed. It appears that the father, though continuing his residence in the country, has not taken out second papers. The plaintiff states that he has voted and exercised the rights of a citizen since his majority, on the supposition that his father's naturalization had been completed during his minority. By advice of his counsel, when he learned

his father had not taken out second papers, he declared his intention to become a citizen of the United States, which was sworn to and filed before the clerk of the district court for O county, Oklahoma, on October 27, 1893.

The contention of counsel for Clem is, that up to said 27th of October, 1893, the status of George Weisner was that of an alien, and that he took no benefit from the declaration made by his father, filed in April, 1870.

The contention of counsel for Weisner is, that his status with reference to citizenship is not changed by his declaration of intention to become a citizen, made and filed in October, 1893, but his status is the same as that of his father, whose declaration of intention was made and filed in 1870, and that the homestead law does not require that one alien born, shall have been fully naturalized in order to make an original homestead entry, the qualification for such entry being the same as for pre-emption filing—viz., a declaration of intention to become a citizen. It is conceded that such person must complete his naturalization before completing entry; but one in a position to entitle him to full naturalization before a proper court may make homestead entry.

In the case of Meriam *v.* Poggi, 17 L. D., 579, it was held (syllabus) that:

> The residence of an alien in this country for the last three years of his minority qualifies such person, in the matter of citizenship, as a pre-emptor, without previous filing of declaration of intention to become a citizen.
>
> The minor child of an alien, who has declared his intention to become a citizen but does not complete his naturalization before the child attains his majority, occupies under the pre-emption law the status of a person who has filed his declaration of intention to become a citizen.

George Weisner comes within the same rule, and it follows that his acts of settlement, whatever they were, are entitled to just the same consideration as if they had followed, instead of preceded, his personal declaration of intention to become a citizen. Having settled that plaintiff and defendant are upon terms of equality as to the right to make settlement and entry of the public lands under the homestead laws, it remains to consider what acts were performed by each, and in what order.

The land in question is in the Cherokee Outlet, and was opened to settlement, at noon, on September 16, 1893. George Weisner started into the race on that day from the south line of the strip, at a point six miles west of Orlando, and ran to this land, stopping on it about one o'clock; jumped off his horse, and stuck a flag and stake, his name being printed on the flag; hunted corners that day and slept there that night; next day (Sunday) carried some dry poles to stake, and started to Mulhall for his wagon; got the wagon, with some tools and provisions, and got back to the land on the following Tuesday; got four logs and drew them out on the claim about ten rods from the creek; notched them and laid them in a square; dug a hole a foot deep, and about a foot and a half wide, and set two posts—one large one about seven

feet long, and a smaller one about four feet long; on Wednesday he helped Mr. Boyle on the adjoining claim; got the number of his claim, and started to Perry, Wednesday evening, to file; when he reached there, found the land was in the Enid district; he then went to Orlando to meet John Boyle who gave him a letter from his wife calling him home; he arranged with Boyle to take his team and go to Enid and see about filing, and then go to the claim and do some breaking; went home and returned between the 15th and 20th of October; found that his logs had been removed and he laid some two by four lumber on the ground and plowed around it; went to Enid, and remained until he found his claim had been filed on, when he immediately filed his contest and returned to the claim; remained there four or five days, eating and sleeping on it; procured more lumber and built a dugout; went back to Kansas to make preparation to move; husked his corn, hauled it to market and sold what effects he could not move and prepared to move early in February, 1894, but on account of a snow storm did not start until the 25th of February. Had a car loaded with stock, implements, household effects and corn, which reached Perry the 28th of February; carried two loads to the claim on that day, and two each day for two succeeding days. Plowed a half acre for a garden, and commenced a frame house, which was completed the latter part of March. When he left Kansas, in February, his wife went to stop with her parents, until he reached the claim and prepared for her. The latter part of March he received notice that his wife and child were sick, and went to look after them. Found his wife and little boy confined to the bed. Remained with them two weeks, and as soon as they were able to travel carried them to the claim, reaching it April 24, 1894, where they have since remained. Has a house, cellar, well, chicken house, unfinished stable, pair of mules, two cows, two shoats, wagon and harness, and two plows.

Clem was not in the race for land, but went upon this land, in company with A. J. Ferguson, the first time on October 3, 1893. On that day he stuck three stakes, on which he nailed boards, with the words written thereon: "Taken by H. Clem, October 3, 1893." He claims to have found no evidence of settlement upon it at that time. He remained that night upon it, and returned to Enid next day. Came back the 5th, with two of his boys and Ferguson, and remained there in a tent until the 11th or 13th of October. While there he commenced a cellar, sixteen by eighteen feet, and dug it to the depth of about two feet. Went to Pond Creek for provisions, and returned to the claim October 27th, and up to that time found no improvements, except his own, on the land. Was on the land again November 2, 1893, and remained until next day, when he saw a small plat of ground with two furrows plowed around it. Mr. Ferguson told him the man who did the plowing claimed the land. Saw a small hole dug. He returned to Enid, and filed on the 4th of November. Did not come back till March 26, 1894, when he found a dugout had been built, and some breaking was

being done by a man by the name of Leathers. He (Clem) then commenced a dugout, which he completed and moved into himself April 14, and moved his family in April 18, 1894, where he has since resided. He explains his absence from November 2, 1893, to March 26, 1894, by the sickness and death of his daughter during this interval, and his want of means. He established residence April 18, 1894, a few days before expiration of six months from his entry.

Weisner broke up his former home, and moved his effects into his dugout about March 4, 1894, and his residence was established at that date, although his wife and child did not get there until April 24, 1894, on account of their detention by sickness on the way. It appears, therefore, from the record that he was the first to initiate a claim to the land by acts of settlement and the first to establish residence upon it, and that Clem had notice of a claim by some one else before he made his entry and before he made any improvements of value.

Looking to the group of facts, which show Weisner's acts and conduct in reference to the land from the time he started into the race to the time he established residence, nothing is found which manifests an intention to abandon the claim, or justifies the conclusion that he was acting in bad faith. His longest absence at any time was no longer than that of Clem, and each accounts for such absence by showing providential cause.

It may be said of the charge of laches in this case, that the facts place the parties upon terms of equality, and neither can obtain advantage over the other on this ground.

Your office decision holding Clem's entry subject to Weisner's superior right to enter, upon proper application, is affirmed.

MADSEN *v.* CENTRAL PACIFIC R. R. CO.

Motion for review of departmental decision of January 7, 1898, 26 L. D., 15, denied by Secretary Bliss, March 3, 1898.

PRACTICE—ORDER FOR HEARING—MOTION FOR REVIEW.

HACKNEY ET AL. *v.* THOMAS.

There is no authority in the Rules of Practice for the review of an order of the Secretary directing a hearing; if a revocation of such order is sought, an application therefor must be addressed to the supervisory authority of the Secretary.

Secretary Bliss to the Commissioner of the General Land Office, March 4, 1898.

(W. V. D.) (C. J. W.)

On September 25, 1893, W. M. Thomas made homestead entry for the SE. ¼ of Sec. 32, T. 27 N., R. 2 E., at Perry, Oklahoma. Council G. Crawford made application to enter the same land, by mail, which was received at the local office September 23, 1893, but was not acted upon

until after the entry of Thomas was allowed of record, when it was rejected for conflict therewith.

On October 21, 1893, William M. Hackney filed affidavit of contest against the entry, alleging prior settlement.

October 24, 1893, Council G. Crawford filed affidavit of contest against said entry, alleging both prior application to enter and settlement prior to that of any other person.

A hearing was ordered, at which Thomas failed to appear and was adjudged in default, and hearing proceeded between Hackney and Crawford. The register and receiver, without a finding as to which party settled first, recommended a division of the land between the parties. Both parties appealed, and, on April 4, 1896, your office considered the case and expressed the opinion that it could not be determined who was the prior settler as between Hackney and Crawford, and awarded a division of the land between them. Both parties again appealed, and, on January 6, 1898, the Department, without final action on the appeals, remanded the case for further hearing.

Counsel for William N. Hackney has filed a motion for review of said departmental order, which is an interlocutory order, and makes no final disposition of the case.

It was decided in the case of Lee *v.* Kuhlman (24 L. D., 400), that there is no authority in the Rules of Practice for the review of an order of the Secretary of the Interior directing a hearing. If a revocation of such order is sought, it must be addressed to the supervisory authority of the Secretary.

Even if the present motion be treated as an application to the supervisory authority of the Secretary, no satisfactory reason is shown for the revocation of the order.

The motion is denied.

ALASKAN LANDS—CHARACTER OF OCCUPANCY—PAYMENT.

JOHN G. BRADY.

An entry of land in Alaska for purposes of trade and manufacture must be limited to the land possessed and occupied for such purposes alone, when taken in the form prescribed by the statute, and not include lands used for agricultural purposes incidental to the business of the purchaser.

Sections 2339 and 2340 of the Revised Statutes are part of the general land laws, and are not operative in Alaska, except in so far as they relate to mining claims and the rights incident thereto.

There is no statutory authority for accepting in payment, for lands purchased for trade and manufacture, the certificates issued on account of the deposit made to secure the survey of said land.

Paragraph 5, of the circular regulations of June 3, 1891, 12 L. D., 583, revoked.

Secretary Bliss to the Commissioner of the General Land Office, March 4, 1898.

(W. V. D.) (E. B., Jr.)

This is an appeal by John G. Brady from your office decision of February 19, 1896, in the matter of his cash entry No. 10, made May 2,

1894, survey No. 6½, of one hundred and sixty acres of land in the district of Alaska, under sections 12 to 14, act of March 3, 1891 (26 Stat., 1095), which provide for the sale of lands in Alaska, then or thereafter possessed and occupied "for the purpose of trade or manufactures."

Your office decision holds, that, as construed by the Department (Instructions of May 4, 1895, 20 L. D., 434), the legislation above indicated authorizes the sale of only such public lands in Alaska, as are actually occupied for purposes of trade or manufacture; that the land so occupied by Mr. Brady is only a small portion—about twenty acres—of that entered; that he must limit the area of his entry to land covered by his improvements and essential to the conduct of his business; and that in default of the necessary steps to secure a re survey and restrict his claim to such area within sixty days from notice, his entry will be canceled. It is conceded in the appeal that the land actually occupied by Brady's improvements does not exceed twenty acres; but it is represented that he needs the balance of the land entered for pasturage and the growing of hay for the horses and cattle employed in his business; and it is therefore contended that he is entitled under the law to enter and receive patent for the entire one hundred and sixty acres.

The land claimed by Brady lies about one half mile northwest of the village of Sitka, Alaska, and fronts immediately on Sitka harbor for a distance of nearly one half mile. Its shape is quite irregular, not only by reason of the indentations of the coast line, but of an indentation on the northwest corner caused by the claim of Hugh Patton, which separates the northern portion of the Brady tract from the immediate coast line, and of a very extensive indentation due to Swan Lake, a meandered body of fresh water covering an area of between fifteen and twenty acres, which penetrates the tract from the south for three-fourths of the distance thence toward the north line.

The improvements of Brady at the date of the entry, except the fences which enclose most of the land, consisted of a steam sawmill, a lumber yard, boat house, blacksmith shop, the dwelling house occupied by him and his family, houses for his foreman, head sawyer, and other employees, stables for stock, and other small outbuildings. These were valued in the final proof at $12,000, and the business done upon the land, consisting of the manufacture and sale of lumber, was estimated to amount to about $6,000 per annum. In a supplemental, corroborated affidavit, filed here April 27, 1897, claimant states that he

> has constructed at a great expense, a stone roadway, extending from his steam sawmill to the southwest corner of his claim, and to within a short distance of the town of Sitka. He has also, by much hard labor, cleared much of the land from the stumps, to enable him to fit up a meadow for the raising of hay, for the feeding of his horses and cattle during the winter months. Much of the land embraced by his claim, especially that portion lying immediately west of the artificial lake, known as Swan Lake, is boggy with a heavy clay subsoil covered by a layer of peat, and, since the heavy timber was cleared away many years ago, by the Russians, has become a vast cranberry marsh yielding affiant, and the natives, a considerable

revenue, the berries though small, being of the most excellent quality. Affiant is now engaged in clearing the stumps from the dryest portions of the boggy land and draining it for the purpose of converting it into meadow land. The other portions of the claim which are not boggy or marshy and which are not used for manufacturing purposes, affiant uses for grazing his animals, which he uses for hauling lumber and timber from his steam sawmill to the wharves which he has constructed.

Affiant is enlarging his business by adding that of curing and packing cod, herring, and halibut and the canning of salmon, all of which fish are very abundant in the bay during the proper season, and affiant intends, in time, and as soon as he can raise sufficient capital, to engage wholly in the business of curing, packing, and canning fish, conducting the business upon the land embraced by said cash entry No. 10. It will be, and now has become absolutely necessary for him to have the use of the water supply upon the 160 acres to successfully carry on his business, and he has made arrangements for piping the water from the creek (which flows through the northern part of his claim) to his mills, and packing and canning factories for the proper cleansing of the fish, and for steam purposes, as well as for the purpose of protection against fires and conflagrations.

It does not appear, however, that claimant has actually engaged in the packing or canning of fish on the tract he claims, nor that he has made any expenditure of money or labor in that direction. In claimant's own testimony, taken December 8, 1893, being part of the final proof upon which his entry was allowed, there appears the following:

Quest. 4: State what actual use and occupancy of said lands as a trading post or for manufacturing purposes or a cannery or fishing station has existed since you have known it and by whom?

Ans. 4: The only use of said lands known to the applicant has been for the purpose of a steam sawmill owned and operated by myself.

The same question was answered in substantially the same language, at the same time, by claimant's other witnesses. The evidence shows that all of claimant's improvements, except portions of his fence, are near the meandered coast line of Sitka harbor and are embraced within a distance of about one quarter of a mile along such line; that is, within but little more than one half the coast line included in his claim.

The law immediately in point is that part of section 12 of said act which reads:

That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre.

The question at issue therefore, under the appeal, is whether claimant's possession and occupancy are such as to entitle him to purchase and receive patent for all the land claimed, or, in other words, whether, for the purpose of manufacturing lumber and trading in lumber—for these are the only manufacturing and trading shown to have been carried on upon the land—claimant has been in actual possession and occupation of the entire one hundred and sixty acres.

That Congress intended to limit the amount of land which might be

acquired in Alaska by a claimant under sections 12 to 14 of said act, to the area actually occupied, when taken in a square form or as nearly so as practicable, seems to be clearly expressed by the language used in section 12, and hereinbefore set out. This legislation was evidently adopted to meet the exigencies of the then prevailing conditions in Alaska—to enable parties engaged in trade or manufacture to acquire the lands possessed and occupied by them for such purposes. This legislation was unique in the history of legislation relative to the disposal of the public lands. Although the limitation as to the maximum quantity of land which can be acquired thereunder is sufficiently liberal to meet the largest reasonable requirement of trade or manufacture likely to arise, still, it is evident from the language employed that the extent of the purchase is in every case to be limited to the land which is possessed and occupied by claimant for these purposes. (Catholic Bishop of Nesqually *v.* Gibbon, 158 U. S., 155.) The disposition of Congress has been to restrict legislation relative to the disposal of the public lands in Alaska to lands of a specific character, or used for specific purposes. The laws relative to the possession, incident rights, and disposal of mining lands, were made operative in that district in 1884, but none of the numerous other laws relating to the disposal of the public lands elsewhere were put in force there (section 8, act of May 17, 1884, 23, Stat., 24). In the judgment of Congress the conditions did not require the extension of the agricultural and other public land laws to that district.

There is no provision of law whereby title may be acquired to public lands in Alaska for the purpose of growing fruit, wild or domestic, or of raising any agricultural crop, such as grain, or hay, or of grazing thereon horses or cattle. Such pursuits are horticultural and agricultural in their nature and are not within the meaning of the words "trade or manufactures." The horticulturist or agriculturist is not regarded as a tradesman, nor does his pursuit class him with the trader or manufacturer in the general and ordinary acceptation of these words. Neither does the language of the act of 1891 warrant the conclusion that it was the intention of Congress to authorize the trader or manufacturer in Alaska to acquire, as incident to his business, any land in that district for raising hay, grazing, or fruit-growing purposes, for which purposes, as it would appear, claimant has entered, and now asks patent to the major part of the land he claims. Claimant's entry must therefore be limited to the land possessed and occupied by him for the purposes of trade or manufacture, when taken in the form prescribed by the statute. In harmony with these views, see paragraph 20 of circular regulations of June 3, 1891 (12 L. D., 583); Instructions of May 4, 1895, *supra*; McCollom Fishing and Trading Co. (23 L. D., 7); Charles A. Johnson *et al.* (ibid., 283); South Olga Fishing Station (24 L. D., 314); and Alfred Packennen (26 L. D., 232).

To limit the entry, however, to twenty acres of the land claimed, as

your office decision proposes, and at the same time include all the buildings claimant uses for the purposes allowed would not meet that provision of section 12 which requires the land "to be taken as near as practicable in a square form." No sufficient reason appears why claimant should not be allowed to take enough land to include all his buildings, in an approximately square form. This can be accomplished by permitting him to take the land bounded substantially as follows: commencing at corner No. 1, thence following the meandered coast line on the southwest to corner No. 6, thence by a line to be run to a point on the meander line of Swan Lake about 135 feet north of corner No. 16, thence southeasterly following the meander line of Swan Lake to Corner No. 19, and thence southwesterly, by a line to be run, to corner No. 1, the place of beginning. This will give claimant about fifty acres of land and will also afford him access to the water supply of Swan Lake. It will be necessary, of course, for him to have his survey amended accordingly.

As this limitation of the entry of Mr. Brady will leave the source of supply of Swan Lake unobstructed and will not, so far as appears, interfere with the use of the water of the lake by any other person, it is only deemed necessary to refer to that part of your office decision concerning the right to the use of such water claimed by Messrs W. R. and W. P. Mills, for milling purposes (as set out in said decision and in their letter of July 27, 1895), for the purpose of correcting error therein. It is there held that "whatever rights Messrs Mills have may, it seems, be insisted upon under the provisions of sections 2339 and 2340 U. S. R. S." These sections are part of the general land laws of the United States and are not in operation in Alaska except in so far as they relate "to mining claims and the rights incident thereto." To that extent, only, they were made applicable to public lands in Alaska by section 8 of the act of May 17, 1884, *supra*. In that section Congress expressly declined to further extend their application. The legislation contained in the act of March 3, 1891, *supra*, affords no warrant for any extension of the application of sections 2339 and 2340 Revised Statutes, to public lands in Alaska. These two acts contain all the legislation relative to public lands in that district.

The papers in this case disclose the fact that there were accepted by the local office, in part payment for the land entered, certificates of deposit amounting to $358, issued by the Assistant Treasurer of the United States at San Francisco, for money deposited, as required by section 13 of the act of March 3, 1891, *supra*, to defray the cost of survey. The balance of the $400 necessary to pay for the land, that is, $42.00, was paid in cash. These certificates were accepted and applied in part payment for the land in pursuance of paragraph numbered 5 of the regulations of June 3, 1891, *supra*, which reads:

> The triplicate certificate of deposit will be receivable in payment to the extent of the amount of such certificate, for the land purchased, the surveying of which is paid for out of such deposit, as provided in section 2403 of the Revised Statutes.

As the result of a very careful consideration of the subject, the Department is well convinced that there is nothing in the act of March 3, 1891, or in any other legislation by Congress, to authorize the foregoing regulation, or the acceptance of said certificates as part payment for the land. Section 13, after providing, in effect, that upon due application the United States Marshal, *ex officio* surveyor general of Alaska, shall make an estimate of the cost of survey of the land claimed and of the cost of the clerical work necessary to be done in his office, further provides that on the receipt of the estimate the applicant—

shall deposit the amount in the United States depository, as is required by section numbered twenty-four hundred and one, relating to deposits for surveys.

Continuing, the next paragraph of the same section provides for the making of the survey, after the receipt by the *ex officio* surveyor general of the certificates of deposit, and for the transmittal of the approved field notes and plats thereof to the Commissioner of the General Land Office. Upon the approval of the field notes and plats by such Commissioner, and within six months after notice thereof, as provided in the third paragraph of the same section, the applicant must pay for the land "to the said United States marshal, *ex officio* surveyor general."

The foregoing statement comprises, in brief, the provisions of section 13 relative to the survey of the land and payment, separately, of the cost of survey and the price of the land. The price, as hereinbefore appears, is fixed by section 12.

These provisions do not contain any authority for crediting the applicant, toward the payment for the land itself, with any part of the fund deposited by him to pay for the survey. In the order laid down by the statute, the applicant must first pay for the survey, and, finally, upon completion of the survey and within the time indicated, must pay for the land. In the absence of a plain provision of law to the contrary, it would seem too clear to admit of cavil that Congress intended that both the expense of the survey and the price of the land should be paid by the applicant. The reference in section 13 to section 2401, Revised Statutes, and the connection between the latter section and section 2403, Revised Statutes, upon which the regulation in question would seem to be founded, do not warrant a different conclusion.

Section 2401 as it stood when the act of 1891 was passed, and thence until August 20, 1894, reads:

When the settlers in any township, not mineral or reserved by government, desire a survey made of the same, under the authority of the surveyor general, and file an application therefor in writing, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, it may be lawful for the 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 and make return thereof to the general and proper local land office, provided 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.

So much of section 2403 as is in point, and as it stood during the same period, reads:

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

These provisions are part of the general land laws of the United States. They present a general plan of operation which has never been put in force in Alaska. The conditions there are still such—and these conditions were known to Congress when the act of 1891 was passed—as to absolutely preclude the application of such plan to Alaska. There are in Alaska no "existing standard lines or bases for the township and subdivisional surveys." Without these, township lines could not be run. There are hence no townships there. No such survey as is contemplated by section 2401 can now be made in Alaska. It is to "deposits" made by "settlers . . . . in accordance with the provisions of section twenty-four hundred and one," and to such deposits, only, that the provision of section 2403, authorizing their acceptance "in part payment," etc., applies.

Again, the provisions of these sections (2401 and 2403), both as to surveys and deposits, as is also true of the amendments to them by the act of August 20, 1894 (28 Stat., 423), relate only to lands taken, or to be taken, by legal subdivisions, and not, therefore, to lands in Alaska, where there are no legal subdivisions, and where lands can not be so taken.

The extension of the regular system of the public surveys over the public domain has long been regarded as a function of the government and to be performed at the public expense, and appropriations therefor are annually made by Congress. When these public surveys are extended at private expense, as is permitted to be done by section 2401, it is recognized as only just and proper that the expense should be repaid by the government, as is provided in section 2403. Differing from the survey contemplated by section 2401, a survey under section 13 is no part of the regular survey, but is special and isolated and serves no purpose except that of identifying the particular land desired to be purchased. It does not assist the government by diminishing either the labor or the expense of making or extending the regular surveys in that vicinity. In such case, as in the instance of a mining claim not taken according to legal subdivisions, the expense is to be borne by the applicant for the survey, and there is no authority for reimbursement by the government.

The provision in section 13 directing the deposit is a requirement made upon the applicant for the survey, and at the same time is an authority under which the depositary must receive the deposit, and it is nothing more. Stated fully, in view of the reference to section 2401,

the requirement upon the applicant is that he "shall deposit in a proper United States depository the estimated 'cost of making a survey of the lands occupied . . and the cost of the clerical work necessary to be done in the office of the . . . *ex officio* surveyor-general,' without cost or claim for indemnity on the United States." No reference, even by remote implication, is anywhere made in the legislation under which this entry was made, to section 2403, nor is there any other legislation making any of the provisions of that section applicable to Alaska.

The regulation in question is accordingly revoked. You will require claimant to have his survey and entry amended and to make payment for the land in accordance with the views herein expressed, or, in default of compliance herewith within a reasonable time after notice, you will cancel his entry. The decision of your office is modified accordingly.

RAILROAD GRANT—INDEMNITY SELECTIONS—SPECIFICATION OF LOSS.

HAGEN *v.* NORTHERN PACIFIC R. R. CO.

A list of indemnity selections made under the order of May 28, 1883, waiving specifications of loss, subsequently amended by designation of loss in bulk, under the circular requirements of August 4, 1885; and thereafter rearranged, in accordance with departmental decisions, tract for tract, with the losses specified, is protected as against a settlement made after the designation in bulk and prior to said rearrangement.

The filing of a list of indemnity selections initiates a claim on behalf of the company that can only be defeated on due cause shown why such selections should not be approved.

Odd numbered sections embraced within the Yakima Indian reservation afford legal bases for indemnity selections by the Northern Pacific.

The Northern Pacific may take indemnity lands in one State for losses sustained in another, notwithstanding such losses might be satisfied from lands within the State where the losses occurred.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 5, 1898.* (L. L. B.)

The case of Nels H. Hagen *v.* Northern Pacific Railroad Company, involving the NW. ¼ of Sec. 5, T. 26 N., R. 33 E., Spokane, Washington, is here on the appeal of Hagen from the decision of your office of June 6, 1896, rejecting his claim to the land in question. The following facts appear in the record:

The company included this land in its list of selections No. 5, presented May 14, 1885. This list contained no designation of losses.

October 21, 1887, an amended list was filed in which the losses for which indemnity was claimed were designated in the aggregate.

September 2, 1892, a rearranged list was presented in which the losses were specified tract for tract with the lands claimed as indemnity therefor. The land in controversy was embraced in all these lists. This was the status of the land on August 30, 1895, when Nels H. Hagen

filed his affidavit of contest against the company's selection alleging his settlement in June 1888, and

That the Northern Pacific Railroad Company did not file any objections to the allowance of his said application within thirty days after he made the same, nor any other time, but claimed the land under a selection made May 14, 1885;

That said selection was not valid, and was of no effect to bar this contestant from entering said land for the reason that it did not designate the losses named, tract for tract, with the selections in place, and was not protected by office circular of May 28, 1883; and for the further reason that it designated losses in Idaho, while the selections were made in Washington;

That said company, on the 2nd day of Sept. 1892, abandoned said former list of 1885, and filed another list, selecting this same land, but designating different losses and amounts from those named in the former list, and still not designating the losses and selections in place tract for tract,—designating the selections by forty acre tracts, while the losses were designated in bulk by entire sectional tracts of unsurveyed land in the Yakima Indian reservation, and not adjacent to said selections;

That said land was excepted from the operation of the withdrawal formerly recognized, (that of Nov. 17, 1880), for the reason that it was not covered by approved selections when said withdrawal was revoked, and because said withdrawal was unauthorized, and of no legal effect;

That this contestant has a prior right to said land, under his said settlement and application therefor;

That since his said settlement he has continued to occupy, improve, and cultivate said land, with the intention, and expectation of obtaining title to said land under the United States land laws.

As the settlement of Hagen was alleged to have been made in June 1888, and the original selection of the land by the company was made in May 1885, the register and receiver refused to order a hearing; but on appeal by Hagen your office by letter of November 21, 1895, directed a hearing to be had, holding then that the filing of the re-arranged list by the company, September 2, 1892, was an

abandonment by the company of its original list, and hence any rights which the company may have had to the land involved herein, must also in the face of the adverse claim of Hagen be held to have attached at the date of the filing of the said re-arranged list on September 2, 1892.

This hearing was to determine the date and *bona fides* of Hagen's settlement.

December 19, 1885, counsel for the company filed a motion for review of your said office decision ordering a hearing, which motion was sustained by your office letter of June 6, 1896, where it was held that the alleged settlement of Hagen in 1888, if established, at the hearing would not defeat the claim of the road for the land, and Hagen's application to contest was denied.

In the mean time (the Commissioner not having suspended the order of hearing, pending the motion for review) the hearing was had before the local office, in which Hagen fairly established his settlement in 1888, and the company presented its claims, under the selection of 1885, and subsequent amended and re-arranged lists as heretofore indicated.

On this showing the register and receiver found, in favor of the company and recommended "that the contest initiated by Nels H. Hagen

should be dismissed and that the selection of the company should remain intact."

From this action of the local office, Hagen also appealed and, by your office letter of June 6, 1896, sustaining the motion to review your former decision granting a hearing, the action of the register and receiver rejecting the claim of Hagen was affirmed, so that all the questions involved in the motion for review and on the appeal of Hagen are here presented for consideration.

Counsel for Hagen, in his appeal specifies error in not holding that the original selection was invalid for failing to specify losses; that it was not approved by the register and receiver, before appellant's rights attached nor before the company was required to specify particular deficiencies, nor was it approved by the Commissioner or Secretary before appellant's rights attached; for that the losses designated in the list of October 31, 1887, described lands in Idaho, for which selections were made in Washington and that the list of 1887, did not designate losses tract for tract with the indemnities claimed therefor.

That it was error to hold that the selection of 1885, was protected by the order of May 28, 1883.

That it was error not to hold that the amendatory list filed September 2, 1892, worked an abandonment of the list filed in 1885, because it specified different losses from those named in the former list.

That said list of 1892, was invalid because it designated losses in unsurveyed lands and lands in the Yakima Indian reservation, and for that said list did not specify losses tract for tract with the indemnity selected, and that they were not selected from lands nearest the granted sections in which the losses occurred and that neither of the lists had ever been examined and approved by the Commissioner or the Secretary.

Hagen's claim to the land is based on his settlement alleged in his contest affidavit to have been made in June 1888, and inasmuch as the company selected the land May 14, 1885, and filed an amended list in October 1887, these selections, must be declared invalid before his claim can attach, unless by the filing of its re-arranged list of September 2, 1892, the company abandoned their former selection or unless second, the land is not subject to selection by reason of its remoteness from the land lost in place.

By circular of May 28, 1883, 12 L. D., 196, in order to expedite the adjustment of the grant to this road, the company was allowed to select indemnity without designating the losses for which the indemnity was claimed, and it was under the provisions of this circular that the company selected this land May 14, 1885.

August 4, 1885, your office by circular instructions, approved by Secretary Lamar, directed local officers to "require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed," before admitting selections, which circular also directed that

"when indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed," and required that the lieu selections should be made from land within indemnity limits nearest the granted section in which the loss occurred (4 L. D., 90.)

It was to comply with this circular that the company, October 21, 1887, presented an amended list of selections designating the losses in bulk for which the indemnity was claimed, this circular not requiring the lost lands to be designated tract for tract with the selections made therefor.

At the time this amended list was presented the land was clear, Hagen's settlement not having been made until June, 1888.

June 10, 1891, this Department in the case of the St. Paul Minneapolis and Manitoba and St. Paul and Northern Pacific companies (13 L. D., 349), required that lists presented for lost lands, should specify each loss separately and designate the selection for each such specific loss, which is otherwise and ordinarily described as a "specification tract for tract."

It was to comply with this requirement that the company presented its re-arranged list September 2, 1892.

This was the status of the land on August 30, 1895, when Hagen filed his contest.

The original selection of the land by the company, having been made in conformity with the circular of May 28, 1883, which was then in force, it was a legal selection and reserved the land from individual claimants. Sawyer *v.* Northern Pacific Railroad Company, 12 L. D., 448, and as was said in that case:

> The subsequent circular of Secretary Lamar of August 4, 1885 (4 L. D. 90), requiring a basis of loss for such selection, was not designed to invalidate selections theretofore made, but required the company to designate the losses in lieu of which such prior selections had been made, and directed the district officers not to receive any further selections until such order had been complied with.

As we have seen, this order was complied with by the presentation of the amended list, filed October 21, 1887, some months before the alleged settlement of Hagen. Hagen's settlement then was made, subject to the rights of the company.

But it is insisted by counsel for Hagen that the rearranged list of September 2, 1892, having been filed after Hagen's settlement rights attached, his rights have priority to those of the company and he cites the case of Hoefft *v.* St. Paul and Duluth Railroad Company, 15 L. D., 101, as sustaining his position.

The facts in that case are different from those presented by the record here. The selections in the case cited, contained no specification of losses and were made while the circular of November 7, 1879, was in force, requiring a specification of losses for which the indemnity was

claimed, and were therefore not in accordance with the departmental requirements then in force.

The language in said decision, quoted from John O. Miller on review (11 L. D., 428), to the effect that the circular of May 28, 1883, would not avail to protect the company, even if the selection had been made under said circular, is *obiter dictum* for it was not necessary to determine the issue involved; moreover, it is contrary to the rule in Sawyer *v.* the Company, *supra*, Darland *v.* Northern Pac. R. R. Co. (12 L. D., 195), and Clancey *v.* Hastings and Dakota Railroad Company (17 L. D., 592), and which has been adhered to ever since. Any other rule would seem to be unfair for, by the terms of the grant the selection of lands in lieu of lands lost to the grant was left to the direction of the Secretary of the Interior; his directions in this respect have the force of law, and the beneficiaries under the grant are compelled to comply with them so long as they are in force.

These directions and regulations may be changed when, in the opinion of the Secretary, a change is required to more effectually, or promptly carry out the purposes of the grant or protect the interests of settlers within the indemnity limits, and these new regulations are equally obligatory on the companies. To hold therefore that after a full compliance with these regulations, their rights could be defeated, because the requirements under the circulars in force at the date of compliance, were different from or even repugnant to those imposed at a later date would be unreasonable and unjust.

In the case at bar the original list embracing this land was filed in conformity with the regulations in force at the time, and afterwards changed and re-arranged to suit the later directions of the Secretary.

The settlement of Hagen was made at a time when the company was not in default as to any of the requirements of the Department. His settlement, then, was in clear violation of the rights of the company, and the rights of the company so acquired could only thereafter be forfeited by an abandonment of its selection; and the filing of a new list under direction of the Secretary, designating the lost and lieu lands "tract for tract" and embracing only the lands included in the former list, is clearly not an abandonment of its former selection.

There is no force in the objection that "said selections had never been approved by the Commissioner or the Secretary before the appellants rights attached," for the filing of the list of selections with the local office is the initiation of the claim of the company, and it can only be defeated, by a subsequent settler, by showing cause why it should not be approved.

It is also urged, by counsel for Hagen, that the selection was invalid for the reason that lands in the Yakima Indian reservation were designated "as the losses for which indemnity was claimed." This question was decided adversely to this contention in Dellone *v.* Northern Pacific Railroad Company (16 L. D., 229), overruling the Northern Pacific

Railroad Company *v.* Miller (7 L. D., 100), cited by counsel in support of his position.

His objection that lands in Washington were selected in lieu of lands lost in Idaho, is answered in Northern Pacific Railroad Co., on review (20 L. D., 187), in which this question was discussed at some length and it was held that indemnity may be taken in one state for losses sustained in another, notwithstanding such losses might be satisfied from lands within the limits of the state in which the losses occurred.

In the same case it is also held that the fact that such reservation was unsurveyed land, did not preclude the company from selecting indemnity for its loss; that the surveys could readily be extended by calculation over the reservation and the tracts lost thus specifically designated.

The objection that the land selected is not nearest to the corresponding tract lost in place is not supported by any showing upon the part of counsel for Hagen, and it is not considered incumbent upon this department to re-examine a list, which has received the approval of your office, upon the bare assertion of counsel in his argument that the and selected is remote from the land lost, unsupported by any showing to the contrary.

The decision of your office is affirmed.

HOMESTEAD ENTRY—ALIEN HEIRS.

PATTEN *v.* KATZ (ON REVIEW).

The right of an alien heir to perfect a homestead entry, where the entryman dies without having earned title to the land involved, is not protected under a treaty that makes provision for the protection of alien heirs on the death of a person "holding" real property.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 5, 1898.* (G. B. G.)

D. Buchanan, administrator of the estate of Christian Katz, deceased, and agent for the heirs of said Katz, has filed a motion for review of departmental decision of December 4, 1897 (25 L. D., 453), in the case of Wallace E. Patten *v.* The Heirs of Christian Katz, wherein is involved the NW. ¼ of Sec. 34, T. 19 N., R. 34 E., Spokane land district, Washington, which motion has been this day considered.

The case is one of contest by Patten against the heirs of Christian Katz, and it appearing that the said Katz had entered the said land and died before earning title thereto, and it further appearing that his heirs were aliens, it was held that no authority of law existed for permitting such heirs to perfect said claim.

The concluding paragraph in said decision is as follows:

The further contention that the alien heirs are entitled to the right of purchase under the second section of the act of June 15, 1880 (21 Stat., 237), is without

force. It relates alone to entries made prior to the passage of the act, and if it were prospective in its operation, its application to this case does not appear.

The specifications of error in the motion for review entitled to consideration are as follows:

1st. The Honorable Secretary errs in his decision that alien heirs are not entitled to purchase under the general laws in relation to purchase of homestead by heirs of deceased entryman.

2d. The Honorable Secretary errs in his decision in deciding that alien heirs are not entitled to purchase the homestead of deceased entryman, except by the provisions of the act of Congress approved June 15, 1880, and that if said act were prospective in its operation, its application to this case does not appear.

In argumentative elaboration of these specifications, it is submitted that the grounds upon which it was and is now contended that the heirs of the deceased, Christian Katz, are entitled to purchase the land, have been misapprehended, it being conceded, however, that such alleged misapprehension is probably the fault of counsel. It is now contended that the homestead law confers two certain, well-defined rights—namely, (1) the right to enter upon and possess land covered by an entry, and at the end of five years' lawful residence thereon, make final proof and get title to the land, and (2) the right to commute or acquire title to said lands by purchase in accordance with the provisions of section 2301 of the Revised Statutes; that these two rights are both heritable rights, and while admitting that alien heirs of a deceased entryman can not make final proof, and perfect title to their deceased kinsman's homestead entry, it is insisted that under the well-settled rulings of the Department, under the law, and according to all equity, alien heirs have a right to commute and so acquire the fruits of their deceased kinsman's entry.

In support of this insistence no decision of the Department is cited, but reference is made to a letter of May 21, 1883 (2 L. D., 98), from Commissioner Harrison to the local officers at Taylor's Falls, Minnesota, wherein those officers are advised that:

There is nothing in the statutes prohibiting aliens from purchasing lands subject to private entry, and the effect of the second section of the act of June 15, 1880, is to render lands affected by it subject to private entry by the persons entitled to its provisions.

Without stopping to inquire whether this was a correct exposition of the law at that time, there are two apparent reasons why it has no application—1st, the act of June 15, 1880, as was held in the decision under review, relates alone to entries made prior to the passage of the act, the entry here in question having been made on November 15, 1887, and 2d, the act of March 2, 1889 (25 Stat., 854), withdrew all public lands from private entry, except those in the State of Missouri. Hence, if it be true that at the time said letter was written aliens had the right to purchase lands subject to private entry, the land here in question is not subject to private entry, and aliens are not entitled to this alleged liberality of the private entry laws.

It is said that our treaties with all European nations, and especially

with the Kingdom of Wurtemburg, of which country the heirs of Christian Katz are subjects, recognize the heritable rights of all such heirs.

Article II of the treaty of April 10, 1844, between the United States and the King of Wurtemburg is as follows:

> Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same,—which term may be reasonably prolonged, according to circumstances,—and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction.

The terms of this treaty do not cover the present case. The right guaranteed thereby is one of inheritance freed from the disability of alienage. Prerequisite to an appropriation of the privilege conferred, there must have died a person "holding real property."

"'Holding,' relating to ownership in property, embraces two ideas: actual possession of some subject of property, and being invested with the legal title." (Anderson's Law Dictionary, and cases cited, page 511.)

The legal title to the land in controversy was not in Christian Katz. He had not earned the same when he died. It did not belong to him, but to the United States. If the legal title had been earned, it might be held to be a case coming within the spirit of the treaty, but such is not this case.

The law provides a manner whereby title may be earned after the death of an entryman, but such a right is a privilege conferred by the United States on its own citizens.

Section 2301 of the Revised Statutes confers the right to commute a homestead entry to cash upon any person who has availed himself of the benefits of section 2289 of the Revised Statutes. The benefit conferred by said section is the right to complete entry. This right is only given to a citizen of the United States, or one who has filed his declaration of intention to become such.

On a careful examination of the whole subject, no statutory or treaty right has been found whereby aliens may acquire title to the public lands of the United States in such a case as is here presented.

The motion for review is denied.

PUBLIC SURVEYS—MEANDER LINE—RIPARIAN OWNER.

W. L. HEMPHILL ET AL.

> Purchasers of lands bounded by an alleged meander line, have no vested rights that will prevent the government from taking action to ascertain whether there was in fact a body of water existing upon which to base said line.

Secretary Bliss to the Commissioner of the General Land Office, March 8, 1898.

(W. V. D.) (C. W. P.)

By your office letter, dated January 26, 1898, you transmit for departmental consideration the application, and accompanying papers, of

Edward Beatty, William Beatty, W. L. Hemphill and Alex. Hemphill, citizens of Palo Alto county, Iowa, for the survey of certain land situate in sections 19, 20, 29 and 30, in township 97 north, range 34 west, 5th P. M., in said State of Iowa, which, it is alleged in said application, is more than five hundred acres, and has never been surveyed by the United States government.

The application appears to have been served upon the owners of the lots bordering upon the lake described in the official plat of the survey of the land in question, and no protests appear.

The applicants allege that the meander lines of said lake, as shown by the official survey, are wholly wrong, and that, at the time the survey was made and the meander lines established, the line established as the meander line of said lake running through sections 19 and 30 was from sixteen to forty-nine feet above high water mark of said lake and above the true banks of said lake, and that the meander line of said lake running through sections 20 and 29 was from thirteen to twenty-nine feet above high water mark and the true banks of said lake; that the land embraced between the true banks of said lake and the meander lines, as shown by the official survey, is high rolling land; and the applicants call particular attention to a plat of a private survey accompanying their application, wherein it is shown that this land is from seventeen to thirty-six feet above high water mark. It is further alleged that from the configuration of said land there is not now and was not at the time of the official survey any reason or facts that could possibly be construed as justifying the meander lines, as established by said official survey, but that said survey is so wholly wrong as

to leave no doubt but what the parties who established said lines were, for some reason, at that time wholly disqualified from establishing correct lines, or a very grave unintentional mistake has been made.

Accompanying the application is the affidavit of I. T. Painter, the surveyor who made the private survey of said land, to the effect that the land over which the meander lines of the official survey run is hilly, rolling land, and that the lakes in said sections 19, 20, 29 and 30 do not and never did cover the land, as indicated by the official plat; and that the land between the meander lines of the official survey and the true meander lines, as shown by the private survey, is "about 1/5 low dry agricultural land, 1/20 low wet agricultural land, and 3/4 high dry agricultural land, except about 3½ acres pond water;" that "it is an utter impossibility that the lakes covering portions of the aforesaid section of land ever could have covered the land between the aforesaid meander lines."

Attached to Mr. Painter's affidavit are the affidavits of eleven persons, who swear that they have known the land in question from twenty-four to forty years, and who corroborate the statements of Mr. Painter and the applicants.

The applicants in their affidavits attached to the applications swear

that they are residing on portions of the land in question, have valuable improvements thereon, and have the land under cultivation, with the exception of a very few acres of pond water, and that "all of said land can be cultivated to crops in any ordinary season."

With your office letter are photolithographic copies of the official plats of said township and a connected diagram taken therefrom, prepared by your office, from which it appears that

the lake extends into part of four townships, viz: Tps. 96 and 97 N., Rs. 34 and 35 W., 5th P. M., Iowa, and is about five and one-half miles long, ranging in width from about a half mile to about a mile and one-half at its widest part, and was duly meandered, except a narrow portion denominated as "slough" in section 18, T. 97 N., R. 34 W., and that narrow part in sections 26, 27, 28, 35 and 36 of said township, and where the lake was meandered the surveys were duly closed thereon.

This township was surveyed in 1855 and the subdivisions in 1857.

The records of your office show that all the lots bordering upon the lake in sections 19 and 20, except eighty-eight one hundredth acres in section 20, and all the lots in section 29, bordering upon the lake, except lot 7, were patented to the State as swamp land, on May 15, 1862, patent No. 2, and that this action was taken, based upon list 5, received with surveyor-general's letter of March 27, 1860, approved by the Secretary of the Interior, June 10, 1861, of lands selected by the State by its agents, at the end of which list is the following certificate by the surveyor-general:

SURVEYOR GENERAL'S OFFICE,
Dubuque, March 27, 1860.

I, Warner Lewis, surveyor general of the State of Iowa, do hereby certify that the foregoing list is a correct transcript of the original lists of selections made by county surveyors or State locating agents; that the same has been carefully compared with the field notes, plats and other evidences on file in this office, and by the affidavits of said county surveyors or State locating agents it appears that the greater part of each smallest legal subdivision of the lands embraced in said lists is swampy or subject to such overflow as to render the same unfit for cultivation, and it is therefore of the character contemplated by the act of 28th September, 1850.

WARNER LEWIS,
Surveyor General.

From which it appears, as stated in your office letter, that

the county surveyors and State selecting agents, as far back as 1860, found that the greater part of each smallest legal subdivision of lands *bordering on the lake as represented upon the official plat,* in sections 19, 20 and 29, T. 97 N., R. 34 W., was subject to overflow to such an extent as to render them unfit for cultivation,

and the inference is drawn by your office that

the lake was where it is represented by the official plats, and that the meander lines established by the deputy surveyor in 1857, as shown upon the plat, are approximately correct,

and after an extended consideration of the case, your office submits it to the Department without recommendation.

It appears that from 1890 to 1894 these applicants have, at different times, applied to your office for a survey of the land in question, and

that they have also applied to Congress for the passage of an act to authorize a survey thereof; and that your office has refused to recommend the survey of said land, or to recommend legislation looking to its survey. But this action does not preclude favorable action upon the present application, if a proper showing is made thereunder. Timothy B. Case, 9 L. D., 625.

The case of Grant *v.* Hemphill, 92 Iowa, 218, is cited in the brief of the counsel for the applicants, which involves the greater part of what was claimed to be said section 19—wherein it is held by the supreme court of the State of Iowa, that the land therein in controversy "is not now and probably never was, any part of a lake;" that there is no evidence in the case "that, at or near the time of the survey, or since, there has been any body of water anywhere on the land upon which to base a meandered line;" that "some of the land, like all bodies of land in that country, is low, flat, and marsh land, but the evidence shows that a greater part of the land . . . . is dry, tillable land, and that if it had been surveyed it would not have passed to the State under the swamp-land grant;" that "all the land" therein "in dispute is part of the unsurveyed domain of the United States to which no one can obtain title," except through the methods adopted by the general government for the disposition of the public lands.

In the case of Hardin *v.* Jordan, 140 U. S., 371, it is held that

> grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie;

and in the case of Noyes *v.* Collins, 92 Iowa, 566, the supreme court of Iowa held that the title of the riparian owners upon a natural lake or pond, not navigable, does not extend beyond the natural shore. So that if it should be found in the present case that there was no body of water outside of the line of the public survey as made in 1855–1857, upon which a meandered line could properly be based, the so-called riparian owners could have no vested claim to the land outside of said line, by accretion or reliction, or in any other manner.

In view of the showing made in the affidavits presented by the applicants and the decision of the supreme court of Iowa in the case of Grant *v.* Hemphill, *supra*, it is deemed proper to institute an inquiry into the facts. You are therefore directed to send a special agent to the locality to make a careful examination of the lands in question, and the position of the lake, past and present, and to obtain all the information attainable, relating to the question at issue, and you will submit his report when made to the Department, together with your recommendations thereon.

TOWNSITE ENTRY—ACTUAL OCCUPANCY—ADDITIONAL TOWNSITE.

TOWNSITE OF GLADSTONE *v.* GERIN ET AL.

Actual occupancy of land for townsite purposes is a prerequisite to the right to make an additional townsite entry thereof.

In all cases, either of application to make original, or additional townsite entry, where the inhabitants of the land are less than one hundred in number, it is a matter of executive discretion whether such entry will be allowed.

Secretary Bliss to the Commissioner of the General Land Office, March 8, 1898.
(W. V. D.) (C. J. W.)

On April 15, 1895, at nine o'clock a. m., Patrick J. Gerin applied to make homestead entry for lot 4 in the SE. ¼ of Sec. 23, lots 5 and 6 in the SW. ¼ of Sec. 24, the SE. ¼ of the SW. ¼ of Sec. 24, and lot 6 in the NW. ¼ of Sec. 25, T. 104 N., R. 72 W., containing 139.56 acres, in the Chamberlain land district, South Dakota.

At 9:05 a. m. of that day Isaac N. Auld applied to enter as a homestead lots 7 and 8 in the SE. ¼ of Sec. 24, the SW. ¼ of the SE. ¼ and the SE. ¼ of the SE. ¼ of Sec. 24, and lot 5 in the NE. ¼ of Sec. 25, T. 104 N., R. 72 W., containing 163.62 acres.

On April 26, 1895, Lewis E. Church, county judge, applied to enter lots 5, 6 and 7, the SE. ¼ of SW. ¼ and the SW. ¼ of SE. ¼ of Sec. 24, and lots 5 and 6 of Sec. 25, T. 104 N., R. 72 W., containing 231.25 acres, as a townsite addition.

Immediately after the applications of Gerin and Auld, on April 15, 1895, John G. Bartine offered to file a townsite declaratory statement in behalf of some townsite settlers, which had the effect of delaying action on the applications of Gerin and Auld, but said application of Bartine was rejected on April 23, 1895, and on April 26, 1895, the application of Lewis E. Church, as county judge, was substituted for that of Bartine. As the latter application was in conflict with the applications of Gerin and Auld, and charged priority of right over them, notice was issued for a hearing between the respective parties, which hearing closed July 31, 1895.

On September 7, 1895, based upon evidence taken at the hearing, the register and receiver rendered a decision adverse to the application of Church. An appeal was taken in the name of Church, county judge, and a motion was filed by counsel for Gerin and Auld to dismiss it, supported by an affidavit from the county judge showing that said appeal was unauthorized by him.

On April 23, 1896, your office, by letter "G," sustained the motion to dismiss the appeal, and passed upon and approved the rulings and decision of the local office in the case.

Counsel for the townsite claimants moved for review of your said office decision and for leave to amend the appeal.

On October 31, 1896, your office finally denied the motion and adhered to the former decision.

A petition for certiorari was filed and considered by the Department January 18, 1897, and denied.

A petition under Rule 114 of Practice has since been filed by John G. Bartine, claiming to represent both the townsite claimants and the county judge as attorney, invoking the exercise of the supervisory authority of the Secretary, and praying for the consideration of the case on its merits. The homestead applicants have filed a motion to dismiss this petition, chiefly on the ground that it is a second petition for the exercise of supervisory authority and is filed out of time, and is without merit, the petition for certiorari having invoked the exercise of the same authority.

The petition is open to some of the objections made, but it has been found necessary to go through the record, including the evidence taken at the hearing, in order to comprehend the present complaint, and it is now deemed best to consider and dispose of the case on the whole record as presented.

The lands in question are a part of those described in the proclamation of the President of December 5, 1894 (19 L. D., 431), and declared open to entry under homestead laws, as provided by act of March 2, 1889, "whenever the Secretary of the Interior shall give due notice to the local officers of this declaration of forfeiture." This notice took effect on April 15, 1895, and at that date the lands were first subject both to settlement and entry: They were a part of the ceded Sioux Indian lands, claimed by the Chicago, Milwaukee and St. Paul Railway Company under section 16 of said act of March 2, 1889 (25 Stat., 888), and were by its terms withheld from any sort of use or appropriation under townsite laws. Whatever steps may have been taken prior to April 15, 1895, looking to its ultimate appropriation to townsite purposes, were of no effect, and could in no way become the predicate of a future right. The contention that there was a townsite settlement and survey upon the land on April 15, 1895, which served to appropriate and except it from homestead entry, is not tenable. There was no survey and no settlement which the law recognized.

The application of the county judge to enter the lands described as an addition to the townsite of Gladstone, rests then upon the theory of its actual occupancy for trade and business on and after April 15, 1895, and upon the assumption that Gladstone had not less than one hundred inhabitants. The record has been carefully examined as to the status and condition of the original townsite of Gladstone. The land applied for is contiguous to it. The original townsite contains an area of only 55.15 acres, but this seems to be more space than is actually used and needed by it. There was some discrepancy in the estimates made by the witnesses as to the number of its inhabitants. The estimates of those having the best opportunities to judge, and who were apparently freest from interest in the result of this litigation, placed the number at from forty-one to fifty-four. The local office found the

number to be less than one hundred. It is true an affidavit filed by some townsite claimants, and which is part of the record, states in general terms that Gladstone has more than one hundred inhabitants, but when the persons who signed the affidavit came to be examined on the stand, and to explain, it appears that many persons were considered as inhabitants who were in fact not so, and they were unable to make out the one hundred. There is no reasonable basis anywhere in the testimony upon which the conclusion that it had one hundred actual inhabitants can rest, and the conclusion reached by the local office, that the number was less than one hundred, is supported by the record and approved as a finding of fact. Of its buildings, sixteen were occupied and twelve unoccupied. This is not evidence of a town the growth of which is restricted for want of space to accommodate the growing population and increasing business. There appears to have been some lots left over, for which no purchasers were found. The conclusion is irresistible that the additional territory applied for is not needed by said townsite for any purpose connected with the legitimate pursuits of its inhabitants. But it is insisted that if the townsite applicants are not entitled to have this land entered as an addition to the townsite of Gladstone, then they may enter it as an original townsite, or so many subdivisions thereof as are occupied for trade and business, there being no express statutory provision as to the number less than one hundred who may make entry for this purpose.

Section 2387 of the Revised Statutes has reference to public lands "settled upon and occupied as a townsite," and section 2388 declares that an entry under section 2387 "shall include only such land as is actually occupied by the town." The question of the settlement and occupancy of this land for townsite purposes will be considered in connection with other townsite statutes.

Section 2389 of the Revised Statutes, and the act of March 3, 1877 (19 Stat., 392), furnish authority for, and indicate the method by which towns already founded may be added to on the basis of population. The fourth section of the act of March 3, 1877, *supra*, is as follows:

> It shall be lawful for any town which has made, or may hereafter make, entry of less than the maximum quantity of land named in section twenty-three hundred and eighty-nine of the Revised Statutes to make such additional entry, or entries, of contiguous tracts, which may be occupied for town purposes, as when added to the entry or entries theretofore made will not exceed twenty-five hundred and sixty acres: *Provided*, That such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population, as prescribed in said section twenty-three hundred and eighty-nine.

It is apparent that actual occupancy for town purposes is a prerequisite to the right to add the land so occupied to the original town. In all cases, however, where the inhabitants of a town applying to make additional entry, or the inhabitants of land of which original townsite entry is sought to be made, are less than one hundred in num-

ber, it becomes a matter of executive discretion whether such original or additional entry will be allowed.

In the present case it is necessary to look to the showing made by the townsite applicants to ascertain what claims they have, and with what purpose the application is made. It appears that there are eighty-seven lot claimants, and that most of them have contributed about two dollars each, ostensibly for the purpose of paying the expenses of a survey. Four of the eighty-seven were residents on the land applied for on April 15, 1895, and five, according to some of the witnesses, at the date of the hearing. Where the others were does not appear. The townsite claimants were permitted to place their own estimate upon the value of improvements. J. Wellman, who seems to have managed most of their affairs, estimates all improvements at $3000. Included in this estimate is a lumber office, near the river, with the good-will of its business, estimated at $1000. The cost of the surveys and of a race-track, which had been graded across the land applied for, but which was grown up in weeds and grass at the date of the hearing, was also included. Most of the buildings were such as had been removed from the original townsite of Gladstone. J. Wellman, the chief promoter of the new settlement, was a resident of Gladstone and the owner of one of the blocks in that town. One resident in the proposed addition sold lumber, near the river, one had a photograph-car, or building in the shape of a car which could be loaded upon a wagon, and there was a rough stable where stage horses were housed and fed. It was claimed that many of the lot owners had dug foundations, and in some instances had enclosed the lots claimed with wire fencing, all of which was estimated as improvements.

As to eighty-two or eighty-three of the lot claimants, they were not actual occupants, but claimed lots by virtue of having contributed to defraying the expenses of the survey and having made selection of lots. These lots were not resided upon or used for business.

It appears from the affidavit of Judge Church, filed with the answer of the homestead applicants to the petition now under consideration, with the record, that at the time it was filed there were but two actual occupants remaining on the proposed addition.

There is no such showing of actual occupancy for townsite purposes as will authorize the entry to be made either as an original or as an additional entry for the benefit of the occupants.

It appears that Auld made settlement on the land claimed by him as a homestead on February 10, 1893, and that Gerin commenced building on the land claimed by him as a homestead in the month of February, 1893. The first survey for the addition to the townsite of Gladstone was commenced in May, 1893, and the last one in February, 1895. The alleged acts of improvement by townsite claimants cover the period between March 1, 1893, and April 15, 1895, and if settlement prior to the latter date has any legal significance in the case, then the homestead claimants are entitled to priority.

It is urged that the local officers erred in treating the applications of Auld and Gerin as those of qualified homestead applicants, and that your office erred in not finding that there was no affirmative proof of their qualification.

Accompanying the record, and forming part of it, are the applications of the homestead claimants with the affidavits required by law as to their qualification. These *prima facie* show them to be qualified, and this *prima facie* showing was not overcome by any proof offered at the hearing. It was not error therefore to treat their applications as those of qualified entrymen.

It is now insisted that Auld and Gerin are seeking to enter for speculative purposes and are not qualified. It is sufficient to say, however, that this matter is not presented by corroborated affidavit, or specific allegation, such as could properly be made the basis of a hearing on that subject.

It is further complained that the local officers failed to cover the issues in the case in their report, and that your office ignored them. That report has been carefully examined and it contains a very complete and comprehensive summary of the facts, fairly and impartially stated, followed by the statement of the conclusions reached based on these facts. The report covers sixteen type-written pages and embraces the material questions in the case. The local officers were not required to pass upon irrelevant and immaterial matters, either of law or fact, which found their way into the record. The report seems to have presented the record and the facts fairly and fully to your office.

It is charged that the county judge whose name is used as the representative of the townsite claimants both in the application and subsequent litigation, has sought to surrender the rights of those he represents and is in collusion with the homestead claimants. The Department declines to consider the personal controversy between counsel for townsite claimants and the county judge, and has instead considered the case on the whole record as though such consideration was desired by said county judge, who at least nominally represents townsite claimants.

The application of Lewis E. Church, county judge of Lyman County, to enter an addition to the townsite of Gladstone, is rejected, and in the absence of further proceedings the applications of Patrick J. Gerin and Isaac N. Auld will be, respectively, allowed.

Your office decisions referred to in the petition, and departmental decision of January 18, 1897, are modified to conform hereto.

REPAYMENT—CANCELLATION—JUDICIAL DECREE.

JOHN C. HOLLISTER.

The purpose of the act of June 16, 1880, in requiring the relinquishment of all claim under the entry, and the cancellation thereof, prior to the allowance of repayment, is to prevent any assertion of right under such entry after repayment; and such purpose is fully satisfied where the applicant, who has received patent for the land, in obedience to a judicial decree executes a deed for the land to another, who by such decree is adjudged to be entitled to receive the government title.

Secretary Bliss to the Secretary of the Treasury, March 8, 1898.
(W. V. D.)

May 27, 1897, the Commissioner of the General Land Office submitted to this Department the application of John C. Hollister for repayment of $412.70, purchase money and fees paid by him February 26, 1892, on Seattle, Washington, timber and stone entry No. 16128, for the NE. ¼ of Sec. 24, T. 37 N., R. 4 E.

August 21, 1897, the application was allowed and referred back to the Commissioner for settlement, and was subsequently submitted by him to the Auditor for this Department to be certified for payment.

September 28, 1897, the Acting Auditor for this Department, by letter of that date, returned the claim to this Department with the statement that its allowance does not appear to be authorized by the act of June 16, 1880 (21 Stat., 287), because there is no evidence that the Commissioner of the General Land Office has canceled the entry. The Acting Auditor's letter submits that such cancellation is essential to give the Secretary of the Interior lawful authority to cause repayment to be made.

October 4, 1897, the General Land Office reported at length all of the facts bearing upon the case. It appears therefrom that the land was first entered July 5, 1884, by George W. Smith, who made timber land entry No. 8677 therefor; that March 20, 1889, Smith's entry was canceled; that February 26, 1892, John C. Hollister made timber land entry for the tract and the same was patented to him thereunder August 8, 1892; that subsequent to the patenting of the tract to Hollister the Stimson Land Company, as the grantee of Smith, the first entryman, brought suit against Hollister to quiet the title to said land, and to have it declared that Hollister held the legal title thereto in trust for said company; and that March 16, 1896, in the United States circuit court, sitting at Seattle, Washington, a decree was entered in said suit holding, among other things:

that the plaintiff, the Stimson Land Company, is the equitable owner in fee and entitled to the legal title of all the lands described in its bill of complaint, to wit: The north east quarter of section twenty-four in township thirty-seven north, range four east, Willamette meridian; that the patent of the United States of America issued to said defendant, John C. Hollister, for said above described land was improvidently issued, and was issued without authority of law, and that said patent

is a cloud upon the title of said plaintiff to the lands therein described and that said cloud should be removed, and whatsoever title may have accrued to said defendant under or through said patent is, by said defendant, John C. Hollister, held in trust for the use and benefit of said plaintiff, the Stimson Land Company;

It also appears that this decree further directed that Hollister should convey said tract to the Stimson Land Company within a time stated, and that in pursuance thereof Hollister made the conveyance as commanded.

By this decree it was determined in effect that under his entry and purchase Smith acquired an equitable title to the land and became entitled to a patent thereto; that the cancellation of that entry was unlawful; that the subsequent entry of the same land by Hollister and the patenting thereof to him were unlawful and erroneous by reason of the previous entry and purchase by Smith, and that the right and title of Smith had passed to the Stimson Land Company.

The act of June 16, 1880 (21 Stat., 287), relating to repayments, provides:

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

This statute authorizes repayment where from any cause the entry has been erroneously allowed and can not be confirmed. Here the judgment of the court determined that the entry of Hollister was erroneously allowed because of the prior and existing lawful entry and purchase of Smith and that by reason thereof the entry of Hollister could not be confirmed in him. The statute, however, makes the repayment conditional upon the surrender of the duplicate receipt, the execution of a proper relinquishment of all claims to the land and the cancellation of the entry by the Commissioner of the General Land Office. Here the decree of the court and the conveyance of Hollister thereunder operate as a surrender and relinquishment to Smith of all claims by Hollister to the land.

According to the decree of the court Smith was entitled to the government title, and a surrender and relinquishment to him of Hollister's claim was as effective as would be a surrender and relinquishment to the government itself, in a case where it had not otherwise disposed of the land. By the decree of the court Hollister's entry and title, with all the rights resulting therefrom, were effectually transferred to and invested in Smith, so that no entry by Hollister remains to be canceled.

The purpose in requiring the surrender of the duplicate receipt, the relinquishment of all claims to the land and the cancellation of the entry was to prevent any assertion of claim or right under the entry

after such repayment. In other words, any possible cloud cast upon the title by reason of the entry must be removed before the purchase money and commissions can be returned. Here the purpose of the statute has been fully satisfied by the complete transfer of all possible rights under the Hollister entry to one who has been decreed to have succeeded to all of the rights of the government in the land.

I must, therefore, hold that Hollister's application for repayment comes within the act of June 16, 1880, and that he is entitled to repayment.

I trust that the objections presented by the Acting Auditor will be obviated by a consideration of the matters herein presented.

HOMESTEAD ENTRY—EFFECT OF REPEAL—SUIT TO VACATE PATENT.

JOSEPH W. BILBIE ET AL.

Rights lawfully acquired by homestead entry, under proceedings in the land office authorized by existing law, may properly be perfected, though the law authorizing such entry is subsequently repealed.

An application for suit to set aside a patent, based on a charge of fraud in securing the entry, will not be entertained, where said charge was fully considered by the Department, prior to the issuance of patent, and the alleged facts on which said charge was made were found not to exist.

Suit to vacate a patent will not be advised on the request of a party, where it does not appear that the government is under any obligation to him to take such action, or that any rights, legal or equitable, of the applicant have been prejudiced in the disposition of the land.

A patent will not be set aside by the courts on the ground of fraud in its issuance, if by such fraud the entry is only voidable, not void, and the land so patented has been sold to innocent purchasers without notice of any defect in the title of the patentee.

Secretary Bliss to the Commissioner of the General Land Office, March 8, 1898.

(W. V. D.) (G. B. G.)

Joseph W. Bilbie and numerous other citizens of Hillsborough county, Florida, and alleged residents upon lands in said county which were formerly part of the Fort Brooke military reservation in said State, have filed in this Department a petition, asking that suit be instituted to set aside certain patents heretofore issued for said lands.

Said petition was duly entertained, returned for service, and the parties in interest have filed their respective answers.

By departmental decision of July 24, 1894 (on review), 19 L. D., 48, certain lands in said reservation were awarded to the parties in interest, and patents issued in due course, as follows:

To the heirs of Lewis Bell, deceased, lot 8, Sec. 24, T. 29 S.

To the widow of Edward S. Carew, deceased, lots 9 and 10, same section, township and range.

To Frank Jones, lot 16, Sec. 18, same township and range.

To Martha Stillings (now Turner), widow and heir of Andrew Stillings, deceased, lot 12, Sec. 19, same township and range.

To Julius Caesar, lot 13, Sec. 19, same township and range.

To E. B. Chamberlain, lot 14, same section, township and range.

These are the patents which the petitioners seek to vacate.

The history of the litigation and administrative procedure in the Interior Department, which was finally closed, so far as lies within this jurisdiction, by the issuance of the aforesaid patents, is briefly as follows.

Under instructions from the War Department in March, 1824, certain lands in the State of Florida were occupied by the United States troops in cantonment, and on December 10, 1830, the Fort Brooke military reservation, covering an area of sixteen miles square, was established by executive order. After various restrictions and modifications, the remainder, containing 148.11 acres, was on January 4, 1883, duly relinquished, in writing, by the Secretary of War, and, on the 17th of March, 1883, a plat of the tract so relinquished was sent to the local office at Gainesville, Florida, with Commissioner McFarland's letter of that date, as follows:

> Herewith inclosed I transmit for the files of your office an approved diagram of the subdivision into lots of the late Fort Brooke military reservation in Florida, in Secs. 18 and 19, T. 29 S., R. 19 E., and Sec. 24, T. 29 S., R. 18 E., relinquished by the Secretary of War to this Department in writing under date January 4, 1883.

The plat referred to was received at the local office at 4:45 o'clock P. M., March 22, 1883. On that day, at 4:50 o'clock P. M., Edward S. Carew made homestead entry, covering the whole tract.

On April 2, 1883, the Commissioner of the General Land Office instructed the local officers, by telegram, to allow no entries upon any land within said reservation.

On December 17, 1883, Commissioner McFarland, considering the status of said land and the law applicable thereto, held that the land released from reservation was, by the act of August 18, 1856 (11 Stat., 87), placed under the control of the General Land Office for disposal, that the manner of disposition therein provided for was modified by the act of July 2, 1864 (R. S. 2364), and the act of August 3, 1846 (R. S. 2455), and that it was not subject to entry under the homestead and pre-emption laws, nor scrip location.

Pursuant to said decision, on January 22, 1884, said Commissioner held for cancellation the homestead entry of Carew and the pre emption declaratory statements of Clifford Herrick and Lewis Bell.

On appeal to the Department, Mr. Secretary Teller, on May 16, 1884 (2 L. D., 606), affirmed the Commissioner's decision, holding that the entries and filings upon the tracts in question were premature, and did not foreclose further action by the Commissioner under the provisions of section 2364 of the Revised Statutes, and said:

> I am further of opinion that section 2364 of the Revised Statutes is not inconsistent with said act of August 18, 1856, and that, as it is a general statute, without restriction, it applies to the disposition and sale of reservations in Florida as elsewhere. . . . .
>
> You sent the plat to the local office to be filed, but you neither instructed the officers to open the land for settlement nor to withhold them. Perhaps, you might have

disregarded the provisions of section 2364 (considering them only as directory), and instructed the local officers to receive entries and filings for the tracts. In the absence of any instructions, I do not think the filing of the plat of itself foreclosed any further action on your part, and precluded you from applying to the lands the provisions of that section intrusted to your office.

The act of 1856 and section 2364 must be read together. Together they make the general law for the disposition by you of these Florida military reservations, and claimants are charged with notice of the whole law upon the subject.

On May 10, 1887 (5 L. D., 632), Acting Secretary Muldrow considered the application of Daniel Mather to make pre-emption entry of lots 8, 9 and 10, on said reservation, on the said Mather's appeal from the rejection thereof, and held that the disposition of lands in said reservation was governed by the act of July 5, 1884 (23 Stat., 103), and that said act protected the rights of settlers prior to January 1, 1884, who were qualified to make homestead entry.

On June 4, 1887, the Honorable Wilkinson Call, a United States Senator, from Florida, filed in the Department a request that the said case of Daniel Mather be reconsidered, for two reasons—one of which was that a bill had been favorably reported by the committee on public lands to donate said reservation to the town of Tampa.

The attention of Mr. Secretary Vilas was called to this report, whereupon he ordered a hearing

for the purpose of determining whether said land is included within the limits of an incorporated town, or occupied for the purposes of trade and business, and to determine the character of Mather's settlement, and whether it was simply as an occupant by permission of the military authorities,

and to this end, all the papers before the Department in the case of Mather, and also in the case of Lizzie W. Carew, were returned.

A hearing was had, at which all the conflicting alleged interests were heard, and, on November 25, 1892 (15 L. D. 487), Mr. Secretary Noble rendered a final decision on the record, rejecting all of the claims to the land, among which were the claims of E. S. Carew, Daniel Mather, Andrew Stillings, Julius Caesar, Louis Bell, E. B. Chamberlain, the Heirs of R. J. Hackley, deceased, and also the Mayor and City Council of Tampa. It was held that the land had never been thrown open to settlement and entry, and said:

Under the law as it now stands said reservation will be disposed of whenever the Secretary of the Interior is of the opinion the public interests so require, under the provisions of said act of 1884. . . . . Action looking to the disposal of said land will be deferred until you are further advised by this Department.

Motions for review of this decision were filed, upon the consideration of which the aforesaid decision of Secretary Smith of July 24, 1894, was rendered, wherein it was held that from the time the aforesaid plat was received in the local office, on March 22, 1883, until April 2, 1883, when the telegram was received directing that no entries be allowed, said land was subject to entry as other public lands, of the United States; that the entry of Carew was a valid appropriation of the land,

except as to prior adverse and subsisting settlement rights, which settlement rights were recognized and award made, as heretofore appears, and it was specifically held that there was no competent evidence in the record tending to show that the entry of Carew was made in bad faith.

The pertinent legal conclusions are set forth in the syllabus of said decision, as follows:

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

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

It is submitted by the petitioners that these lands have been disposed of without authorization of law, and the various claims, especially the Carew claim, conceived and initiated in fraud, and perfected by false pretense and perjury.

The act of August 18, 1856 (*supra*), provided:

That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purpose, or so much thereof as said Secretary may designate, shall be, and are hereby placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States.

The sixth section of the act of June 12, 1858 (11 Stat., 336), provided:

That all the existing laws or parts of laws which authorize the sale of military sites, which are or may become useless for military purposes, be, and the same are hereby repealed, and said lands shall not be subject to sale or pre-emption under any of the laws of the United States: *Provided further*, That the provisions of the act of August eighteenth, eighteen hundred and fifty-six, relative to certain reservations in the State of Florida, shall continue in force.

The act of July 2, 1864 (*supra*), provided:

That whenever any reservation of public lands shall be brought into market under existing laws, it shall be lawful for the Commissioner of the General Land Office to fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

This act was carried into section 2304 of the Revised Statutes, but there made to read, not that "it shall be lawful for the Commissioner," &c., but the Commissioner "*shall* fix a minimum price, not less than one dollar and twenty-five cents per acre below which such lands shall not be sold."

The act of July 5, 1884 (23 Stat., 103), provides:

That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under

the control of the Secretary of the Interior, for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

Section 2 of this act provides for the manner of disposition, which is "at public sale to the highest bidder for cash:"

Provided, That any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith, for the purpose of securing a home and of entering the same under the general land laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres, in a body, according to the government surveys and subdivisions: *Provided further*, That said lands were subject to entry under the public land laws at the time of their withdrawal.

Section 4 provides:

That the provisions of the act of August eighteenth, eighteen hundred and fifty-six, relative to military reservations in the State of Florida, and the sixth section of the act of June twelfth, eighteen hundred and fifty-eight, relative to the sale of military sites, be, and the same are hereby, repealed.

This legislation may be summarized as follows:

The act of 1856 provided that military reservations in the State of Florida, no longer useful for that purpose, should be placed under the control of the General Land Office to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States.

The act of 1858 did not change or modify the act of 1856.

The act of 1864 (Sec. 2304 R. S.) made it lawful for the Commissioner of the General Land Office to fix a minimum price, not less than one dollar and twenty-five cents per acre, below which any reservation of public lands brought into market should not be disposed of, and the revision (Sec. 2304) made mandatory what was by the original act permissive and discretionary.

The act of 1884 provided for the disposition of all such lands at public sale to the highest bidder for cash, but protected the rights of settlers in actual occupation prior to the location thereof, or who settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home and of entering the same under the general laws, and had continued in such occupation to the date of the act: *Provided further*, "That said lands were subject to entry under the public land laws at the time of their withdrawal," and the fourth section of said act specifically repealed the aforesaid act of 1856.

Departmental decision of July 24, 1894, does not refer to the fact that the act of 1884 repealed the act of 1856, but whether such fact was overlooked or considered and not thought material, it is not now believed that the fact of such repeal rendered the disposition of the lands, as directed by said decision, unlawful or erroneous.

It is reasonably clear that prior to the passage of the act of 1884, the act of 1856 was the only legislation governing the disposition of lands

occupying the status of those here involved. It was a special act providing for the disposition of lands theretofore reserved for military purposes in the State of Florida, and that disposition was to be in the same manner and under the same regulations as other public lands of the United States. This included, at the date the lands in the Fort Brooke military reservation were placed under the control of the General Land Office, homestead entries and pre-emption filings.

The same purpose was again expressed by Congress in the act of 1858, continuing in force the provisions of the act of 1856.

The act of 1864 was a general act, and whether it be considered as permissive or mandatory, did not repeal or modify the act of 1856.

General statutes do not affect special ones, unless such is clearly the legislative intention, and no such intention here appears, either express or implied. Moreover, the fact that Congress saw fit to repeal the act of 1856, in 1884, is legislative recognition of the act at that time as existing law. If, therefore, rights had been lawfully acquired by homestead entry, and the proceedings of the land office had by virtue of authority of the act of 1856, it was not unlawful to allow those rights to be perfected under the homestead law, even though the act which authorized the disposition of the land under the homestead law, had been repealed.

At the time of the filing of the township plat aforesaid, at the local office, the Land Department had full jurisdiction of the land, and was authorized, as has been seen, to dispose of the same under the homestead and pre-emption laws. Under the practice at that time, a township plat was treated as officially received and filed at the moment of time it reached the local office, and homestead entries and pre-emption filings were recognized as valid made immediately thereafter. This practice was changed in October 1885 (4 L. D., 202), but it was the practice in force March 22, 1883. It results that, at that time the General Land Office having full authority to dispose of said lands under the homestead law, the entry of Carew was such an appropriation thereunder that subsequent legislation relating to the disposition of like lands would not operate upon it, and this is true regardless of the fact that part of the land was afterwards awarded to other parties in the adjustment of equitable priorities.

On the question of the alleged fraud in making the entry, it may be said that, conceding the United States to be under such obligations to the petitioners as would authorize it to institute a suit for their benefit, it is not believed that such suit could be successfully maintained even though the fraud was perpetrated, as alleged.

It appears that the charge now made, that Carew and other parties entered into a conspiracy to defraud the government of this land, was specifically considered by the Department in its decision of July 24, 1894 (*supra*), and it was therein found that said entry was made in good faith, and that the evidence did not establish the charge of conspiracy.

Whatever difference of opinion might exist as to the correctness of that finding, it is now conclusive of that issue, the land having been patented in pursuance of that decision. The Department is without jurisdiction to reverse it, and inasmuch as it is a finding on a question of fact, the courts will not review it. Fraud is a mixed question of law and fact, but the Department has here found that the claimed facts upon which the alleged fraud rested did not exist.

The general allegation by the petitioners of fraud in the submission of final proof is not sustained by the record.

Moreover, it does not appear that the United States is under any such obligation to the petitioners as would enable it to maintain a suit for their benefit.

The supreme court of the United States, in the case of the United States *v.* San Jacinto Tin Company (125 U. S., 285), says:

> We are of opinion that since the right of the government of the United States to institute such 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 other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

There is nothing in connection with the proceedings had in the disposition of the land involved which has operated prejudicially on any legal or equitable right of the petitioners. They are mere squatters, and even if these patents were vacated, it does not appear how they are to be benefited. In that event, the lands would have to be disposed of under the act of 1884, *supra*, which is at public sale to the highest bidder for cash.

Conceding for the sake of argument that the petitioners settled on said land prior to January first, eighteen hundred and eighty-four, in good faith, for the purpose of securing a home and of entering the same under the general land laws, and had continued such occupation to the date of said act of 1884, they would not be protected by the proviso to said act, for the reason that said lands were not subject to entry under the public land laws at the time of their withdrawal, hence the provision in that act for the benefit of settlers has no application in the disposition of these lands.

Another obstacle in the way of a successful maintenance of a suit to vacate these patents lies in the fact, made to appear by affidavits and exhibits, that all or nearly all of the land so patented has been sold

and conveyed to third parties. The presumption is that such parties are innocent purchasers for value and without notice of any defect in the title of the patentees, on account of fraud or other infirmity. Even if the patents were procured through fraud, unless they were absolutely void on that account, such purchasers would be protected by the courts.

The fraud here alleged, even if permitted to be shown in the courts after the proceedings had thereon in the Land Department, is not of the character that would authorize a vacation of the patents as against such purchasers. If the fraud as alleged were established, it would render the patents voidable only, and under such a patent innocent purchasers for value and without notice would take a perfect title.

It is not believed that the suit prayed for could be maintained.

The petition is dismissed, and the papers are herewith transmitted for the files of your office.

PROCEEDINGS BY THE GOVERNMENT—RELINQUISHMENT.

ALFRED A. ANSCOMB.

A relinquishment filed pending proceedings by the government takes effect at once, and the land is thereafter open to the first legal applicant, subject only to valid adverse claims.

Secretary Bliss to the Commissioner of the General Land Office, March 8, 1898.

(W. V. D.) (C. J. G.)

December 11, 1893, James Malone made pre-emption cash entry for the NE. ¼ SE. ¼, E. ½ NE. ¼ and SW. ¼ NE. ¼ Sec. 12, T. 67 N., R. 20 W., Duluth land district, Minnesota.

August 25, 1894, on the report of a special agent, the above entry was held for cancellation, it being charged that the entry was fraudulent in that the entryman did not settle on this land until after the repeal of the pre-emption law; that the said entry was made for the purpose of obtaining the timber on said land; and that January 4, 1894, the entryman entered into a contract with one Herbert Armstrong to convey the land to him for a consideration of $1500.

January 11, 1895, your office, upon the application of the entryman, directed that hearing be had on the above charges, which said hearing was fixed for August 14, 1895.

July 31, 1895, Alfred A. Anscomb made timber and stone application for the same land, and filed with said application a properly executed deed of conveyance from said James Malone to Herbert Armstrong, quit-claiming all right, title and interest in and to said land; also quit-claim deed from Herbert Armstrong and wife, Mary L. Armstrong, conveying all right, title and interest in and to said land to the United States of America; also an abstract of title, properly certified to, showing non-incumbrance of said land.

On the last mentioned date the local office transmitted this application to your office, together with an application by one Thomas M.

McConnell, dated December 10, 1894, to purchase the land in question under the timber and stone act, and recommended that Anscomb be allowed to enter said land.

Your office took no action at the time on the applications referred to on the ground that they were filed after action had been taken by the government looking to the cancellation of Malone's entry, and prior to final action thereon. Instructions, however, were telegraphed to the special agent to proceed with the hearing.

The hearing was duly had at the time fixed therefor, and testimony was submitted by the government, no appearance being made on the part of the defense. The local office rendered decision holding that the charges had been sustained and recommending cancellation of the entry. Both the entrymen and transferee were duly notified of said decision, but no appeal was filed.

April 25, 1896, your office, the record in this case having been sent up, affirmed the decision of the local office and canceled the entry. The local office was advised in regard to the applications of Anscomb and McConnell that

> inasmuch as proceedings had been instituted by the government, looking to the cancellation of said entry for fraud, any other action concerning the land involved, pending such proceedings, would be irregular and unauthorized.

April 29, 1896, the local office transmitted an application by Thomas M. McConnell, filed on that date, to make timber land cash entry for the land in question. At the same time attention was called to the former application of McConnell and that of Anscomb, both of which were then pending in your office.

May 21, 1896, your office rendered decision in which it was asserted that the language employed in your office decision of April 25, 1896, heretofore quoted, was in effect a rejection of the applications referred to. The local office was further advised that

> an application to enter lands included within the entry of another is not recognized as the initiation of a contest; and where the application is rejected, and an appeal is taken therefrom, a subsequent relinquishment, (or final cancellation of the entry of record,) will not inure to the benefit of the applicant.

In support of this holding the case of Swanson *v.* Simmons, 16 L. D., 44, was cited. The local office was instructed to advise the parties that "they acquired no preference right of entry to the land should it again become subject to entry, by the filing of said applications." The application of McConnell, filed April 29, 1896, was returned without action.

Anscomb has now appealed from your said office decision of May 21, 1896, to this Department, the errors assigned being as follows:

> 1. In not finding that the relinquishment of the Malone entry took effect as soon as filed, and at once opened the land to settlement and entry without further action on the part of the Commissioner.
>
> 2. In not finding that Anscomb made the first legal application to enter said land after the filing of said relinquishment, and in not applying to the case at bar the principles laid down in the case of Hertzog *v.* Demmer (13 L. D., 590).

3. In applying the principles laid down in Swanson *v.* Simmons (16 L. D., 44) as having any bearing in this case, as a relinquishment always takes effect as soon as filed no matter what the status or condition of the entry may be.

It appears from the record that McConnell's first application was not formally rejected until your office decision of May 21, 1896, and then on the ground that government proceedings had been instituted looking to the cancellation of Malone's entry. The said application should have been rejected when presented, for the reason that the land was not subject to entry, the same being embraced in Malone's entry of record. But even if it had been so rejected and McConnell had appealed from such action, it would not have been a pending application that would have attached on the cancellation of Malone's entry. Maggie Laird, 13 L. D., 502.

Your office rejected Anscomb's application also because the government had already instituted proceedings against Malone's entry. There is no doubt as to the authority of the Department to proceed with an investigation of an entryman's good faith, or to take advantage of the evidence submitted at a hearing, even after the withdrawal of a contest or the filing of a relinquishment. But in this case, under the first section of the act of May 14, 1880 (21 Stat., 140), Malone's relinquishment took effect *eo instanti*, and the land thus released became subject to the entry of the first legal applicant. As hereinbefore stated McConnell's application did not have the effect to initiate a contest or create an adverse claim; hence there was no reason why Anscomb's application, Malone having relinquished, should have been held to await the proceedings instituted by the government. These proceedings looking to the cancellation of Malone's entry for fraud, could not operate to defeat the application of Anscomb, who was not a party to the fraud. The failure of the local office, therefore, to immediately act upon Malone's relinquishment does not prejudice Anscomb's rights. The latter's application, when acted upon, will relate back to the time it was filed. The case of Swanson *v.* Simmons, *supra*, is applicable to the case under consideration so far as the first application of McConnell is concerned, but it does not affect the application of Anscomb which was made after Malone had relinquished.

It may be remarked in this connection that an affidavit of contest is in the nature of an information, and where the charges contained therein are sustained the land becomes subject to the preferred right of the contestant. If a relinquishment be filed pending the contest proceedings it takes effect at once and the land becomes open to the entry of the first legal applicant subject to any rights the contestant may have. There would seem to be no good reason for the application of a different rule where the government itself has instituted proceedings looking to the cancellation of an entry. As the land in question was not subject to any preference right or other adverse claim at the time Anscomb filed his application to enter, his said application will now be favorably acted upon, if he is found to be otherwise qualified.

McConnell's application being subsequent to Anscomb's, is subject thereto.

It is sufficient to say that Anscomb is entitled to perfect his entry for his land because he is shown to have been the first legal applicant therefor after Malone's relinquishment, without specifically discussing the applicant's specifications of error.

Your office decision of May 21, 1896, is modified in accordance with the views expressed herein.

WRIGHT *v.* GOODE.

Motion for review of departmental decision of January 6, 1898, 26 L. D., 1, denied by Secretary Bliss, March 8, 1898.

RAILROAD GRANT—INDEMNITY SELECTION—TRANSMUTATION.

NORTHERN PACIFIC R. R. CO. *v.* GUNTHER.

An indemnity selection made for land included in a pre-emption filing, under which residence has been duly established and maintained, will not defeat the right of the pre-emptor to subsequently transmute his claim to a homestead entry.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) *8, 1898.* (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of May 27, 1896, holding for cancellation its indemnity selection covering the E½ of the NE¼ and the E½ of the SE¼ of Sec. 9, T. 146 N., R. 85 W., Bismarck land district, North Dakota, with a view to the allowance of homestead application of Jacob Gunther presented therefor.

The above described tract is within the indemnity limits of the grant to the Northern Pacific Railroad Company, and was included in its list of selections No. 50, filed July 14, 1890. It appears that prior to the filing of said list of selections, to wit: on May 14, 1890, Jacob Gunther had been permitted to file pre-emption declaratory statement covering said land. On May 24, 1894, not having made proof upon his pre-emption filing, he tendered a homestead application for the land, and in his homestead affidavit alleged continuous residence and improvements upon the land since the spring of 1887. Upon said allegation of settlement hearing was ordered and had, after due notice, and upon the record made at said hearing, both your office and the local officers agree in finding that Gunther's allegation of settlement, residence and improvements was fully sustained as alleged; and your office decision therefore holds that the tract was not subject to the company's selection on July 14, 1890, and said selection is held for cancellation with a view of allowing Gunther's application, as before stated.

It is contended on behalf of the company that Gunther's claim to

the land at the date of its selection rested solely upon his occupation of the land, and that such occupation without a record claim was not sufficient to bar the company's right of selection. This allegation is not sustained by the record for, as before stated, on May 14, 1890, just two months prior to the selection by the company Gunther had been permitted to file pre-emption declaratory statement for this land. This declaratory statement was regularly and properly allowed, and the right of transmutation is an incident to every valid pre-emption filing. The application by Gunther to make homestead entry of this land is, in effect, a transmutation of his filing, as he claims credit for his residence and improvements antedating the filing of his pre-emption declaratory statement. Having established his allegation of continuous residence since prior to the filing of his pre-emption declaratory statement, it must be held that no such right was secured by the company under its selection made subsequent to Gunther's pre-emption filing as would bar his right of transmutation as applied for.

Your office decision is accordingly affirmed; and upon completion of entry by Gunther the company's selection will be canceled.

HOMESTEAD—SETTLEMENT RIGHTS—PRACTICE—REHEARING.

ROWAN *v.* KANE.

If a contestant, who bases his claim on priority of settlement, fails to maintain his residence on the land during the pendency of the contest, an intervening adverse settlement will defeat his right to the land.

The remedy of a party who is not ready for trial is by way of motion for continuance, and not by application for rehearing filed after default and judgment.

Secretary Bliss to the Commissioner of the General Land Office, March 10, 1898.

(W. V. D.) (P. J. C.)

The land involved in this controversy is the SW. ¼ of Sec. 20, T. 48 N., R. 9 W., Ashland, Wisconsin, land district, and was formerly embraced in a railroad grant that was forfeited by act of September 29, 1890 (26 Stat., 496). By section 2 of said act it was provided that all settlers in good faith on the lands forfeited, at the date of the passage of the act, if they were otherwise qualified, should be entitled to a six months' preference right to enter the same under the homestead laws.

Anterior to the present controversy it is shown that one Leonard K. Knox made homestead entry of the tract; that George W. Kane, the defendant herein, initiated a contest against this entry, alleging settlement thereon prior to September 29, 1890. As a final result of the hearing had between these parties, the Department, on September 23, 1893, affirmed the action of your office in awarding the land to Kane. Motion for review of this decision was filed, and on April 26, 1895, the same was denied.

On February 16, 1895, before the decision by the Department in the

first case, Mary Rowan filed an affidavit of contest, alleging that neither Kane nor Knox had resided on or occupied the land for two years prior thereto, and that both had abandoned the same. On May 31, 1895, Rowan filed her application to make homestead entry of the tract, alleging that she was residing thereon.

On June 6, 1895, and within thirty days from receiving notice of the decision of the Department, Kane made homestead entry of the lands, and on June 10th following, Rowan filed another affidavit of contest, reciting her former applications to contest and enter, alleging settlement on February 15, 1895; that she established her residence thereon March 9, 1895; and that Kane had not cultivated or improved the same, or resided thereon for more than three years. A hearing was ordered, personal service made on Kane, and on the date set for the hearing he made default. The contestant put in her testimony, and the local officers decided in her favor.

Thereupon the entryman filed a motion for a rehearing, alleging that owing to his failure to get some money he was negotiating for, he was unable to procure witnesses for the trial, or go himself; that each year he had cultivated to crop a portion of the land; that he had made his home on the land and had no other; that he kept up and maintained his improvements thereon; that he did not remain there continuously because of his poverty; that he had his house furnished with all things necessary for house-keeping, and the same were stolen during his absence. This affidavit is corroborated by the person with whom he alleges he was negotiating a loan, and by two others, who swear they know the contents of the affidavit made by Kane, and know the same to be true. These affidavits were sworn to in Douglas county, Wisconsin. The land in controversy is in Bayfield county.

The local officers overruled this motion: whereupon the entryman appealed. Your office, by letter of March 18, 1896, dismissed the contest for the reason that—

> Pending this contest (Kane *v.* Knox) no rights could be acquired by any intervening settler or applicant. No rights could subsequently attach as against Kane by settlement, or the filing of an application, by a third party, and while the land was covered by an entry which he was contesting, he was not required to maintain his residence thereon.

Motion for review of this decision was overruled July 16, 1896.

The contestant has appealed, assigning error as follows:

I. Error in holding that pending the former contest of Kane *v.* Knox, no rights could be acquired by Mary Rowan as an intervening settler or applicant.

II. Error in holding that "while the land was covered by an entry which he (Kane) was contesting, he was not required to maintain his residence thereon."

III. Error in finding that "he (Kane) had returned on June 16, and when notice was served June 17, he was on the land."

IV. Error in dismissing plaintiff's contest.

V. Error in not holding that one who contests an entry by reason of his alleged prior settlement must comply with the settlement laws and must maintain his residence on the land, even though it is covered by the entry he is contesting.

The testimony submitted by the contestant shows that for a number of years prior to his entry Kane had not resided upon, improved or cultivated the land; that he did not reside in the same county, but was employed in the police department of a town in another county; that his house on the tract was in an uninhabitable condition, and that he was not even seen on the land for a long time prior to his entry. In brief, the testimony shows that he did not reside upon the land after the contest against Knox. It also shows that Rowan established her residence thereon March 9, 1895.

The Department is unable to agree with the decision of your office quoted above. It will be recalled that Kane based his right to the tract, in his contest against Knox, on the fact that he was a prior settler thereon, and it was decided that he was, on this ground, entitled to the land. But to avail himself of this right he must have maintained his residence and complied with the law. In Hall *v.* Stone (16 L. D., 199) the Department laid down the general rule that—

> A homesteader who claims priority of right by virtue of an alleged settlement, must comply with the settlement law and can not defer the establishment and maintenance of residence until the allowance of his application to enter.

The doctrine announced in this case has been followed in all cases where the party to the contest has relied on prior settlement. (McInnes *v.* Cotter, 21 L. D., 97; Foote *v.* McMillan, 22 Id., 280; Benjamin *v.* Eudailey, 25 Id., 103; Thompson *et al. v.* Craver, Id., 279; Griffin *v.* Smith, Id., 329.) In the case of Johnson *et al. v.* Smith *et al.* (23 L. D., 317), the facts are similar to those in the case at bar and the land situated in the same land district. It was there decided (syllabus):

> A second contest may be entertained on the charge that the entryman has failed to comply with the law since the hearing in the former suit.

If a contestant relying on his prior settlement does not maintain his residence on the land during the pendency of the contest, then it is competent for another to settle upon the tract and acquire a right superior to the first.

The rule announced by your office would be sound where the contest was based on mere default of the entrymen and when the latter had possession of the land, but where one relies on his prior settlement it is incumbent on him to maintain his residence and otherwise comply with the law. This, apparently, Kane has not done. Hence the contest should not be dismissed.

The order of your office, therefore, in dismissing the contest, is reversed.

The motion for a rehearing, which the local officers overruled, is not sufficient to warrant the re-opening of the case. Kane had full thirty days' notice, in which to prepare for the trial. If for any sufficient reason he was unable to proceed at the time set therefor, the hearing would have been postponed on application. Instead of making an application for a continuance, he elected to ignore the proceeding, and

after judgment against him seeks to have a rehearing. This motion must be treated the same as any other of a like kind and its sufficiency determined by the rules governing new trials in courts of law.

Kane does not allege that he has lived on the tract during the period of the former contest. He says he has made the same his "home and have had or owned no other home"; that he has not remained continuously thereon because of his poverty, and the expense of the former contest, and that he had to earn money by daily labor for his own support and that of his mother; that he has each year cultivated to crop a part of the land, as his time and means would permit.

He does not state that he can prove any of these matters if given an opportunity, neither does he give the names of any witnesses by whom he can establish any of the allegations, or set forth what he or any witness would swear to if a rehearing was granted. The witnesses who verify the affidavit do not pretend to know the land or the conditions that prevailed, neither do they swear that they would be present and testify.

The action of the local officers in denying the motion, and their recommendation on the merits of the case, is therefore approved.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN.

ROBEL *v.* GROVER'S HEIRS.

In a contest against the heirs of a homesteader, on the ground that they have failed to comply with the law, it is essential that the death of the entryman should be alleged and proven.

Secretary Bliss to the Commissioner of the General Land Office, March 10, 1898.
(W. V. D.) (H. G.)

James M. Grover made homestead entry, September 15, 1890, for the SW. ¼ of Sec. 24, T. 17 N., R. 1 W., within the land district at Olympia, Washington. July 11, 1895, Michael Robel instituted contest proceedings seeking a cancellation of such entry, alleging that Grover died in the month of June, 1894,

and that his heirs have wholly abandoned said tract and changed their residence therefrom for more than six months since making said entry, and next prior to the date herein, and that they have failed to improve said tract; that said tract is not settled upon and cultivated by said heirs as required by law.

The affidavit of contest is corroborated by Otto Hoffman, who afterward appeared at the hearing as a witness for the contestant, and who states in his corroborating affidavit that he knows from personal observation that the statements made in the affidavit for contest are true.

July 12, 1895, Robel filed an affidavit in the local office, which is to the effect that so far as can be ascertained by inquiry, and from the records in the office of the clerk of the court for the county in which

the land is situate, there has never been any administrator appointed for the estate of the deceased entryman; that his only heir resident in said State, "so far as affiant can ascertain," is Mrs. Lucy Warriner, of Whatcom county therein, and that he believed that all other heirs of said decedent are non-residents of the State of Washington, as he made diligent inquiry regarding the residences of the same from the neighbors in the vicinity of the land in question and also from the postmaster at Olympia, Washington, the post-office address of the residents in the neighborhood of the land. Upon this showing Robel requested that notice issue for publication, posting, and mailing, as provided by Rules 13 and 14 of Practice. Personal service of the notice was made upon Mrs. Warriner, on July 16, 1895, by the deputy sheriff of Whatcom county, Washington. It further appears that on said date the contestant deposited in the mails a registered letter, addressed to Mrs. Elizabeth Cruikshank, at Oakes, Colorado, a sister of the deceased entryman, containing a true copy of the notice of contest, and he also addressed a like letter to the heirs or legal representatives of James M. Grover, deceased, at Olympia, Washington, and deposited the same in the post-office at Olympia, Washington, which was the post-office at which the entryman, Grover, received his mail. The contestant further alleges in an affidavit filed by him that the residence of none of the legal heirs or representatives of the deceased, who are non-residents of the State of Washington, is known to him, except that of Mrs. Cruikshank, upon whom service by registered mail had been secured.

Notice by publication was ordered by the local office, and was published, posted in the office of the register and in a conspicuous place on the tract in contest, each for the prescribed period. The heirs are not named in the published notice.

A hearing was had, and prior thereto Mrs. Elizabeth H. G. Cruikshank caused a written appearance to be entered by her as sister and heir at law of the deceased entryman. At this hearing the evidence offered by the contestant was that of himself and Otto Hoffman, which was taken on printed blanks, and these witnesses were cross-examined by the attorney for Mrs. Cruikshank.

The contestant, Michael Robel, testified in chief, that he resided in Kitsap county, Washington, about seventy-five miles from the tract involved, and had been acquainted with the tract since about April 15, 1895; that he knew from personal observation that the heirs of Grover, deceased, had not fenced, cultivated, built or resided upon, or in any way improved said tract, except to slash about one and one-half acres and to erect a small log cabin; that the said tract was then in its natural condition, except as stated by him, and that the present residence of the defendants was unknown to him, except that of Mrs. Lucy Warriner and Mrs. Elizabeth Cruikshank, who were duly served with notice of the contest. Upon cross-examination, the contestant states, in substance, that he had been upon the land three times in April and July;

that he was shown the land by one Seyfang, who lived near the cabin on the tract; that none of the "slashing" was cleared, and that there was no place where the tract could have been cultivated; and that the cabin on the tract appeared as if it had not been occupied for three years.

Hoffman testified in chief, corroborating generally the testimony of the contestant, and stating that the present residence of the defendants was unknown to him, except that of Mrs. Warriner and Mrs. Cruikshank, which he gives. Upon cross-examination, he states, in substance, that he had been on the main part of the land three times the preceding spring; that Seyfang showed him the corners, and from that fact and because he had seen it on the map, he knew the tract visited by him to be the tract in dispute, although he could not give the section, township or range in which the tract is located; that he knew that there had been no cultivation of the tract the preceding year, 1894, because nothing had been done to the slashing and the land had not been cleared; that one could not stay in the house, and that he "would not like to sleep there at night;" and that everything was "torn up around there."

At the close of this evidence, the attorney for Mrs. Cruikshank, none of the other heirs appearing, either in person or by attorney, moved to dismiss the contest, for the reason that a *prima facie* case had not been made out, and because the allegations of the contest had not been proved. No further testimony was offered, and thereafter the local officers held that the land embraced in the homestead entry of Grover had been "wholly abandoned and not cultivated or improved by the heirs of the deceased claimant in accordance with the homestead law," and they recommended the cancellation of such entry.

Upon appeal by Mrs. Cruikshank, your office, on May 2, 1896, held that the contestant had made out a *prima facie* case, and affirmed the decision of the local office. A further appeal by Mrs. Cruikshank brings the case to the Department.

She contends that the contestant did not establish by proof the allegations of his contest and that the same should therefore be dismissed, no just grounds being shown for the cancellation of the entry.

It is unnecessary to consider her rights in the premises, or any question touching the sufficiency of the proof as to the identity of the land, its abandonment, or the alleged failure to cultivate and improve the same, inasmuch as there is a total failure of proof upon one of the essential allegations of the contest, namely, the alleged death of the entryman in the month of June, 1894. This allegation is not supported by any evidence whatever. This omission is fatal to the contest, as there must be both allegation and responsive proof as to the death of the entryman where the charge of the contest is the failure of the heirs to comply with the law after the death of the entryman. (Jenks *v.* Hartwell's Heirs, 13 L. D., 337–338.)

The appearance of Mrs. Cruikshank, as shown by the record, is not

sufficient to dispense with proof in this case of the death of the entryman. Other heirs, known and unknown, who were made parties by service and by publication, are not bound by the record unless all the essential allegations of the contest have been proven. The failure to prove the death of the entryman having been brought to the attention of the Department, and there being other parties who must be affected by the result of the contest for whom no appearance has been made, the necessary proof of the death of the entryman can not be dispensed with.

The decision of your office is therefore reversed and the contest must be dismissed.

SCHOOL INDEMNITY—INDIAN LANDS.

STATE OF SOUTH DAKOTA.

Lands within the limits of the Great Sioux reservation, restored to the public domain by the act of March 2, 1889, are subject to disposition only under the homestead law for the benefit of the Indians, and cannot be taken as school indemnity; and the certification, therefore, of said lands under school indemnity selections is wholly inoperative and conveys no title to the State.

Secretary Bliss to the Commissioner of the General Land Office, March 10, 1898.

(W. V. D.) (E. F. B.)

By letter of January 31, 1898, you submit for consideration two lists of indemnity school selections, heretofore certified to the State of South Dakota, said lands being within the limits of the Great Sioux reservation and were selected in lieu of losses occurring outside of said reservation.

All lands within the limits of this reservation, which were restored to the public domain by the act of March 2, 1889 (25 Stat., 888) are subject to disposition only under the homestead law upon the conditions prescribed by the act, except the sixteenth and thirty-sixth sections, which by the 24th section of the act are expressly reserved for the benefit and use of the public schools, whether surveyed or unsurveyed.

It was never contemplated that these lands should be subject to selections by the State as indemnity to compensate for losses, occurring either in the reservation or out of it, for the reason that the lands are to be disposed of for the benefit of the Indians and the act provided that payment should be made for every acre of land disposed of within said reservation which should be applied to the permanent fund of said Indians.

The act provides that all lands disposed of within the first three years after the taking effect of the act shall be at the rate of one dollar and twenty-five cents an acre, and at the rate of seventy-five cents an acre for lands disposed of in the succeeding two years, and thereafter at the rate of fifty cents an acre, and all lands, not disposed of at the end of ten years are to be taken by the United States at fifty cents an acre which sum is to be credited to the permanent fund of said Indians.

The 24th section reserves the 16th and 36th sections for school purposes, but provides that the United States shall pay said Indians for said lands at the rate of one dollar and twenty-five cents per acre for all lands reserved under the provisions of said section.

The certification of these lands to the State of South Dakota being clearly contrary to the express terms of the Statute, and in violation of the solemn agreement entered into with the Indians as expressed in the act of March 2, 1889, the certificate of the Secretary of the Interior was wholly void and ineffectual to convey to the State any right, title or interest in the same. Weeks *v.* Bridgman 159 U. S., 541. There is no authority to dispose of these lands except in the manner and for the purposes provided for by the Statute and as no conveyance of said lands has been made by such certification, it is the duty of the Department, to execute the trust imposed by the Statute and to dispose of the lands for the benefit of the Indians.

But in view of the fact that the State may have disposed of some of the tracts, since certification, the first being as early as September, 1892, relief should be afforded through legislation authorizing the State or its grantees to purchase said lands at the price for which the United States is liable under the 21st section of the act of March 2, 1889.

In order that the State or its grantees, may have the opportunity of securing such relief through congressional interposition, you will withhold from entry all lands embraced in such lists until further ordered by the Department. In the mean time the State should be notified of this action, that it may take such steps as it may deem proper.

With reference to the decision of February 12, 1894, in the case of the State of Nebraska (18 L. D., 124), to which you call attention, you are advised that no other lists of selections of lands, within said reservation should be acted upon by you under said decision until the attention of the Department is specially called thereto.

PRACTICE—APPEAL—CERTIORARI—MINING CLAIM—PROTEST.

CROWN POINT MINING CO. *v.* BUCK.

When notice of a decision is served on counsel resident in Washington the rule does not require a copy of said decision to be served.

Certiorari will not be granted where it is apparent, from the facts as stated by the petitioner, that if the appeal were before the Department it would be dismissed.

A protest against a mineral application will not be entertained during the pendency of adverse judicial proceedings instituted by the protestant and others; and this rule is especially applicable to a case where the matters alleged in the protest may be made the subject of legitimate inquiry in the pending adverse proceedings.

Secretary Bliss to the Commissioner of the General Land Office, March 10, 1898.

(W. V. D.) (P. J. C.)

It appears from the record that W. M. Buck, in January, 1897, made application for patent for the Louisa lode mining claim, survey No.

10,532, in Pueblo, Colorado, land district, and during the period of publication ten different adverses were filed against the same, and suits brought in support thereof, and are still pending.

After the commencement of these suits, and on May 24, 1897, The Crown Point Mining Company, one of the adverse claimants, filed in the local office a protest against the Louisa application, asking for its rejection and cancellation, on the ground that the Louisa survey was fictitious and fraudulent.

The local officers dismissed the protest, and the protestant appealed. Your office, by letter of September 9, 1897, sustained the action of the local officers, for the reason

> that all proceedings in the matter of said application must be stayed until such time as the suits pending on the adverse claims shall have been determined or said adverse claims waived.

On the same day, resident counsel was served with notice of your office decision. On November 13th following, resident counsel filed in your office an appeal. It appears that the local officers forwarded another appeal, filed in their office November 27th. Counsel for the applicant moved that these appeals be dismissed for the reason that they were not filed in time, and your office, by letter of December 24th, sustained the motion, holding that the time within which appeal should have been filed expired November 11, 1897.

Counsel for The Crown Point Mining Company have filed in the Department a petition for a writ of certiorari, praying that the record may be forwarded to the Department.

A motion has been filed by the defendant to dismiss this petition, for the reason that the right of appeal has not been denied, and therefore the petitioner, under the decisions, has no right to a writ of certiorari.

Aside from the recital of the facts, substantially as set forth above, the petition assigns no legal reason for the issuance of the writ. It is alleged that the appeals should not be dismissed for the reason that a copy of your office decision was not served until September 27th. It is not denied that local counsel had notice of the decision of September 9th, or that he received such notice on that day. When notice of a decision is served on counsel resident in Washington, the rule does not require a copy of the same to be served. The reason for this rule is fully set forth in Weed *v.* Sampsel (19 L. D., 461). See also Porter *v.* Burns (20 Id., 89).

This notice to resident counsel is equivalent to service on the party in interest, and appeal should have been filed within sixty days from date of such service on them. The time for filing the appeal expired prior to November 13th. It was not filed until November 13th.

It is well settled that an appeal filed in your office without objection, places the case to which it relates beyond the jurisdiction of your office, and the question as to whether it is filed in time, is ordinarily one for the Department to determine. But, while this is true, it would

seem to be unnecessary to require the record to be sent up in this instance. (Rudolph Wurlitzer, 6 L. D., 315.)

It is apparent from the facts as stated by the petitioner, that if the case were here the appeal would be dismissed, because of the tardy appeal, and in such cases the writ of certiorari will not be granted. (Nichols *v.* Gillette, 12 L. D., 388; King *et al. v.* Chicago, etc., 18 Id., 452; The Currency Mining Co., 20 Id., 178.)

Aside from this, however, the action of your office in dismissing the protest is not alleged or shown to be erroneous. The most that can be said is that the petitioner alleges that it will suffer material injury because of vexatious and costly litigation "in opposing an application which must be canceled, sooner or later, no matter what the courts may determine in the pending adverse proceedings." The "adverse proceedings" were initiated by the protestant. The Crown Point Company and the other adverse claimants resorted to the local courts to settle their respective rights to the ground in conflict, and if there be merit in their claims it will be established by the judgment of the court. In that event they will get all they could by any other means, and in the event of their failure the question as to the validity of the survey will be one simply between the government and the entryman.

Again, it is believed that the matters alleged in the protest may be made the subject of legitimate inquiry in the adverse proceedings. If there has been a fraud perpetrated on the government in making this survey, as charged, it would be a fraud to the same extent upon those who own or claim the ground in conflict. The locus of the land claimed by the applicant for patent, and that for which he procured an order for an official survey, is deemed to be an important element in determining the possessory rights of the parties to the litigation now pending.

The petition for certiorari is therefore denied.

RAILROAD LANDS—ACT OF MARCH 3, 1887—SETTLEMENT.

OLSON *v.* TRAVER ET AL.

The right to receive patent conferred by section 4, act of March 3, 1887, on purchasers of railroad lands, can not be recognized, where the contract of purchase has been abrogated by a subsequent agreement, made prior to the application for the exercise of such right.

A decision of the supreme court of the United States that annuls a patent for lands issued to a railroad company, and restores the title to the government, renders such lands subject to settlement, in the absence of any prohibition; but in such case it is competent for the Land Department to determine when said lands shall be opened to entry, and make due provision therefor.

One who settles on patented lands can gain no right thereto while the patent is outstanding; but if the patent is subsequently vacated, and the lands become subject to settlement as part of the public domain, the right of such settler will attach from such time, and must be protected, if duly asserted.

An application to perfect title under the act of March 3, 1887, will not defeat the right of the applicant to subsequently abandon such application, and assert a claim to the land as a homestead settler.

Secretary Bliss to the Commissioner of the General Land Office, March 10, 1898.
(W. V. D.) (V. B.)

This case comes before the Department on the appeal of Ole Olson and Daniel L. Simpkins from your office decision of March 6, 1897, affirming the action of the register and receiver in awarding to William Traver the right to make homestead entry of the SE. ¼ of Sec. 25, T. 94 N., R. 41 W., Des Moines land district, Iowa.

The tract in controversy is within the twenty-mile indemnity limits of the grant made by the act of Congress of May 12, 1864 (13 Stat., 79), to the State of Iowa, to aid in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, which grant was conferred upon the Sioux City and St. Paul Railroad Company; was withdrawn for the purposes of the grant September 2, 1867; is opposite the constructed line of road; was selected by the company September 2, 1867, and patented to the State for the benefit of said road June 17, 1873. Subsequently suit was instituted by the government to secure the cancellation of said patents and restore title to the lands to the United States, which resulted in the decision by the supreme court, October 21, 1895, in the case of Sioux City *v.* United States, 159 U. S., 349, awarding the land to the government. Afterwards, by order of November 18, 1895, the lands involved in that suit, including the tract in controversy, were made subject to entry, on February 27, 1896, under the public land laws, pursuant to instructions contained in said order. In said instructions it was directed that ninety days' notice be given, during which period claimants of rights under the provisions of the adjustment act of March 3, 1887, were required to give notice of their claims in accordance with the circular of February 13, 1889 (8 L. D., 348).

On January 7, 1896, Ole Olson and William Traver both filed applications for said SE. ¼, under the provision of the said act of March 3, 1887. Whereupon a hearing was ordered for March 24, 1896. On February 27, 1896, the day fixed for the opening of the lands to entry, Simpkins and eight others presented applications to make homestead entries of said SE. ¼, and tendered the usual fees. On the day fixed for hearing, March 24, 1896, Traver, tendering the proper fees, filed an application to make homestead entry of said tract, declaring that his former application had been made through inadvertence and misunderstanding. Thereupon the trial proceeded, Olson, Traver and Simpkins only being represented. The other applicants, not having then appeared or subsequently appealed, are out of the case. Decision was made, as before stated, by the register and receiver, and by your office, on appeal, in favor of Traver.

The case was elaborately argued here, has been fully considered, and conclusions reached as hereinafter stated.

Olson claims a right to purchase the tract under the provisions of section 4 of said act of March 3, 1887, and this claim will be first considered.

Said section, so far as applicable to his claim, is as follows:

> That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted.

Has Olson shown himself to be a qualified and *bona fide* purchaser, of the tract in question, from said company, within the purview of the section? To answer this question, in the view now taken of this case, it is only necessary to state the following material matters, found in the record, in addition to those already stated.

It thus appears that on March 21, 1887, Olson entered into a written contract with the St. Paul and Sioux City Railroad Company, and Drake and Wilder, trustees, to purchase the tract in question at and for the sum of $2,240; the sum of $160 being paid in cash and the balance to be paid in ten equal annual instalments, with interest on the deferred payments. From endorsements on the contract, it appears that two other payments were made prior to November 10, 1889, which made the aggregate amount paid on the contract $686.00.

On October 16, 1894, Olson and the railroad company made a supplementary contract, wherein it is recited that, in a suit pending therein, the United States circuit court for the northern district of Iowa had decided that the company had no title to said tract of land, and that the company had taken an appeal from this decision to the United States supreme court, and it is then agreed that the former contract be so modified as to postpone further payments thereunder until after the decision of the supreme court in said case, and it is also stipulated:

> That in the event of a decision in the above entitled action in the United States supreme court adverse to said Sioux City and Saint Paul Railroad Company as to the title to the said land above described, the said party of the second part will within ninety days thereafter surrender said original agreement and this modification thereof to the parties of the first part, at St. Paul, Minnesota, and receive therefor from the said parties of the first part, or either thereof, the amount which has then been paid on said agreement on account of principal and interest mentioned in said original agreement, the same to be received and accepted by said second party in full settlement of all his rights under said original agreement and this modification thereof, and as a release of any and all claims suffered by said party of the second part, his heirs, executors, administrators or assigns, by reason of the failure of the title of said parties of the first part to said land.

Conceding, for the sake of argument, that the original contract evidenced a purchase from the company, and that it is otherwise shown

that Olson acted in good faith and was duly qualified as required, the supplementary contract clearly provided for the annulling and surrender of the original contract and an abandonment of Olson's rights thereunder, on the happening of a stated contingency, and for the payment to him of a liquidated sum for said surrender and abandonment. After the supreme court, on October 21, 1895, decided that the company had no title to the land, under the terms of the supplementary contract and within the time fixed therein, in contemplation of law, the abrogation and annulment of the first contract, and the abandonment of Olson's rights thereunder, became fixed, determined and complete. In lieu thereof he had only the supplementary agreement with the company, which does not evidence a purchase by him from the company, but an annulment of a claim of purchase.

It results then that, in the opinion of this Department, Olson was not at the time of his application, on January 7, 1896, a purchaser of the tract in question within the purview of the provisions of either the act of 1887 or that of that of 1896.

This view eliminates the claim of Olson from the case.

It remains to decide between the claims of Simpkins and Traver.

As before stated, the record shows that Simpkins presented an application to make homestead entry of the tract in dispute on February 27, 1896, the day of the opening of the recovered land, and tendered proper fees and commissions.

In regard to this claim you say

> As to Simpkins, the testimony shows that he filed his application on the day of the opening of the lands to entry and prosecuted his claim up to this office, and that is all his connection with the land:

and his right to enter was denied.

In his appeal here Simpkins alleges that he also presented an application to enter said tract under the homestead laws on November 19, 1895, which application was rejected, and, on appeal, the rejection was approved by your office "by direction of the Hon. Secretary."

The evidence shows that Traver was a qualified entryman, that he purchased a small house from a prior claimant and settled upon the tract in question March 4, 1886, built another house, cornerib and stable, dug wells, broke about seventy acres that year and made other improvements, cultivating and fencing the land from time to time thereafter, so that at the time of the hearing his improvements were estimated to be worth $1000; that shortly after his settlement he applied to make homestead entry, and from that time his possession of the land has been continuous, open and notorious.

The fact of actual settlement and improvement by Traver as stated, is not denied by Simpkins; but whether denied or not it is substantiated by the evidence. However, whilst not questioning the evidence as to these facts, Simpkins denies their legal efficacy and asserts in his appeal, in substance, that Traver has no superior right because of set-

tlement, inasmuch as he could acquire no priority of right by virtue of said settlement in 1886, and continued residence since, the land then being patented land and not subject to settlement under the land laws; that, by his application to purchase the same under the act of March 3, 1887, filed January 7, 1896, and the published notice thereof, he waived and abandoned, and thus lost, any settlement rights that he may have previously had; that he, Simpkins, was therefore the first legal applicant for entry, and can not be deprived of his rights thus acquired by the application subsequently presented by Traver, who, as against that intervening right, is estopped from now claiming the land as a settler. In this connection, Simpkins states, in the specifications of error, that all parties went to trial on March 24, 1896, submitted evidence, relying upon the claim made and notice given by Traver, prior thereto, of his right to purchase; and that he did not present his homestead entry "until March 31, 1896," after the case "was closed;" that thus Traver also lost his rights as a settler because he did not present his application within the time required by the act of February 18, 1891 (26 Stat., 764), relative to settlers on forfeited lands.

Simpkins also insists that said land, either upon the rendition of the decision of the supreme court, October 21, 1895, or by the order of the Commissioner of the General Land Office of November 18, 1895, was restored to the public domain and his homestead entry presented November 19, 1895, should have been accepted as being first in point of time; and that the application of Traver of March 31, 1896, was too late to preserve any settlement right he may have had, because not presented within ninety days from the date of the restoration of the land to the public domain.

The decision of the supreme court of October 21, 1895, whilst removing the cloud from the title of the lands in controversy in that case, had the effect to restore them to the public domain in a certain sense. But that decision did not have the effect of so restoring them as to make them subject to entry without the co-operation of the Land Department or to deprive it of its administrative function as to the disposition of said land under the laws and regulations applicable thereto. After said decision, your predecessor proceeded to discharge the duty which the law devolved upon him, in this respect, and by letter of November 18, 1895, to the register and receiver at Des Moines, Iowa, directed that there be published, for the period of thirty days, in the vicinity of the lands, a description of the same, together with a notice that they are restored to the public domain and will be subject to entry "ninety days from the date of the first publication," during which period all parties claiming a right to purchase any of the lands, under the provision of the act of March 3, 1887, must come forward and assert their claims in accordance with the circular of February 13, 1889 (8 L. D., 348). And in order to avoid complications, which might arise, and to enable rightful claimants to acquire title with as little

delay as possible, it was further directed that notice be given at the same time—

to all prior applicants, that their applications confer no rights upon them, and that upon the day set by you for the restoration, the lands will be open to entry and disposal without regard to such applications, which shall be held by the notice to be rejected. That all such applicants may, however, have opportunity to present new applications upon the expiration of the ninety days' notice, you will notify specially all parties shown by your records to have pending applications for these lands of the rejection thereof, of the date of restoration, and of the necessity of presenting new applications for the protection of their rights.

There can be no doubt that when by the decision of the supreme court the legal title to the lands was restored to the United States they became part of the public domain, and subject to settlement, in the absence of any prohibition, as was the case with the Omaha lands, in relation to which the decision in the cited case of Smith *v.* Malone (18 L. D., 482) was made. But it remained for the Department, and for it alone, in the absence of congressional direction otherwise, to determine when and how they should be thrown open to entry. This authority to regulate the time, place and manner of making entries of the public lands is inherent in the Land Department, is essential to a proper administration of the system, and is not to be questioned at this late day.

In regard to these particular lands, the Department properly exercised its authority, in directing that entries should not be received therefor until the expiration of ninety days' previous notice by publication. This order, however, did not preclude the right to settle upon the land and acquire rights thereby, as was forbidden when the Omaha lands were opened.

Whilst, therefore, one who went upon the land and lived thereon and improved the same during the period when the patent was yet outstanding, could gain no right by such acts, yet if he was there at the time when the land became subject in due order to settlement, and he be otherwise qualified, he would acquire rights which ought to be protected, notwithstanding the fact that he may have previously trespassed upon patented land, the land laws providing no penalty for such trespass. It is not needed that decisions be cited for propositions so plain and well settled as these.

It results, then, from what has been said, Simpkins gained nothing by his application made to enter the land on November 19, 1895, the local officers having no authority to allow his application, the land not then being subject to entry.

It follows, therefore, that the only application by him, which remains to be considered, is that presented on February 27, 1896, the day of opening. As he has not shown that he made settlement upon or improved the tract in controversy during the period of the published notice, or at any time prior to the application of Traver, it would be an entire misapprehension of the theory of estoppel to make it applicable to him in this case.

It is considered utterly immaterial whether Traver filed his application to purchase by mistake or deliberately. Nobody was prejudiced by this action, and if he sought to correct his mistake or changed his mind on the subject he had an undoubted right to do so, as the rights of no one else had so intervened as to prevent it. From the fact that shortly after settling upon the land in 1886 he made application to enter it under the homestead law, the inference is most reasonable that the subsequent application to purchase the same made by him, was in some way due to a mistake. This inference is strengthened by the evidence in the record that the land was in fact sold by the company to Olson, and there is no pretense that there ever was such sale to Traver or any negotiations between him and the company relating to such sale.

However, whatever may have caused the filing of the claim to purchase, it is very clear that the subsequent presentation of his homestead application was a waiver and withdrawal of his claim to purchase, and was so treated, properly, by the local office and your office.

As the settlement, improvements and residence on the tract by Traver are clearly shown, and not controverted by Simpkins, who claims only through his applications, and Traver's application, though subsequent in date to that of the former, yet was presented within proper time after the land was open to entry, the latter has the superior right to the tract here in question, and your judgment to that effect is affirmed.

In this connection it is to be said that the forfeiture act of September 29, 1890 (26 Stat., 496), and its amendment of February 18, 1897 (29 Stat., 535), relate to lands described and forfeited by the first act and has no application whatever, as contended by Simpkins, to the lands involved in this controversy, the title to which was restored to the United States by decision of the court, not because the road was not constructed opposite thereto, but because they had been erroneously patented by the land officers.

The argument of counsel has taken a wide range and many questions supposed to bear upon this case have been exhaustively discussed; but the grounds upon which it has been disposed of render it unnecessary to herein consider many of the questions presented.

WAGON ROAD GRANT—SELECTIONS—ORDER OF WITHDRAWAL.

WILLAMETTE VALLEY AND CASCADE MT. WAGON ROAD CO. *v.* BRUNER (ON REVIEW).

Under the wagon road grant of July 5, 1866, it is the duty of the Secretary of the Interior to see that the selections made in satisfaction of the grant are confined to lands described in the granting act, but as between different sections, equally subject to selection under said grant, and the order of withdrawal, the Secretary cannot say which shall be taken.

An executive order of withdrawal made in aid of a Congressional grant, where there is no statutory prohibition against such action, rests upon the general authority of the Department, and no rights, either legal or equitable, can be acquired by settlement or entry in violation of such order.

The departmental decision herein of June 9, 1896, 22 L. D., 654, vacated on review. Directions given for the restoration of lands withdrawn for the benefit of this grant, and not included in pending selections.

Secretary Bliss to the Commissioner of the General Land Office, March 10, 1898.
(W. V. D.) (E. F. B.)

I have considered the motion of the Willamette Valley and Cascade Mountain Wagon Road Company asking a review and reversal of the departmental decision of June 9, 1896 (22 L. D., 654), involving lots 1, 2 and 3, Sec. 31, T. 22 S., R. 32½ E., Burns land district, Oregon.

The land is claimed by the wagon road company under the act of July 5, 1866 (14 Stat., 89), and is claimed by Bruner under a homestead entry made November 20, 1889.

The grant under which the wagon road company claims provides:

That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Albany, Oregon, by way of Canyon City, and the most feasible pass in Cascade range of mountains, to the eastern boundary of the State alternate sections of public lands, designated by odd numbers, three sections per mile, to be selected within six miles of said road: *Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever: *And provided further*, That any and all lands heretofore reserved to the United States by act of Congress or other competent authority be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted*, That the said lands hereby granted to said State, shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States.

SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, graduation, and bridges, as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of only in the following manner, that is to say: that when ten miles of said road shall be completed, a quantity of land not exceeding thirty sections for said road may be sold coterminous to said completed portion of said road; and when the governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, coterminous to said completed portion of said road, and so from time to time until said road is completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States.

The State of Oregon, by act of its legislative assembly of October 24, 1866, conferred this grant upon the Willamette Valley and Cascade Mountain Wagon Road Company.

The granting act was supplemented by the acts of July 15, 1870 (16 Stat., 363), and June 18, 1874 (18 Stat., 80), but their provisions are not now material, excepting perhaps that the last act recognizes the transfer of the grant by the State. Under section 4 of the granting act the

completion of the road in the manner required by that act was certified by the governor of Oregon in four several certificates, the first bearing date April 11, 1868, and the last bearing date June 22, 1871. Diagrams or plats showing the location of the constructed road were filed in the General Land Office and copies thereof also showing the lateral six-mile limits of the grant were transmitted to the local offices, accompanied by executive orders of withdrawal containing the following instructions to the local officers:

> It is hereby directed that you will withhold from disposal the odd sections thus falling within said designated limits, and make note of such in your records.

These withdrawals were received at the local offices long before Bruner made either settlement upon, or entry of, the lands in dispute.

The plat of the township embracing this land was approved by the United States surveyor-general February 28, 1884, the survey having been theretofore made in the field; the plat was filed in the local office May 26, 1884; and this land was selected by the wagon road company, under the grant, July 17, 1884. The land so selected is within the limits of the withdrawal; is in an alternate section of public land; is within six miles of the road; was not reserved to the United States or otherwise disposed of before the date of the grant; and was free from adverse claims at the time the withdrawal was received at the local office.

The facts respecting Bruner's claim, taken from his own affidavit which is a part of the record, are (1) that he settled upon the land about March 1, 1884, subsequent to the survey in the field and prior to the filing of the township plat in the local office; (2) April ——, 1884, he offered pre-emption declaratory statement for the land which was rejected by the local office because the township plat had not been received at that office; (3) about April 30, 1884, he again offered pre-emption declaratory statement which was rejected because the land was claimed by the wagon road company; (4) in April, 1885, he made application at the local office to make timber culture entry of the land, which was rejected because the land was claimed by the wagon road company and also because it was claimed by the State of Oregon as swamp land; (5) in September, 1888, he made application to make homestead entry of the land which was rejected for the reasons last named; (6) November 20, 1889, he again made application to make homestead entry of the land and the local officers, in violation of the order of withdrawal, allowed the entry; and (7) he resided upon the land continuously from his settlement up to the time of the hearing had in the local office.

The consideration of this motion for review has been postponed from time to time in order that counsel for both parties could be heard in oral argument. The oral argument has been had, both parties have filed written briefs and the case has been carefully considered.

In the decision under review (22 L. D., 654), it was held (syllabus):

While no rights are acquired as against the government by settlement on land withdrawn in aid of a congressional grant, and entries of lands so reserved should not be allowed, yet, under the withdrawal for the benefit of this grant wherein no rights to specific tracts are acquired prior to selection, and entries or filings have been allowed, based on settlement prior to selection, in violation of said withdrawal, the Department may, in its exercise of its supervisory authority, require the selection of other tracts, if it appears that the grant can be fully satisfied from the remaining lands; and to this end entries or filings of such character may be suspended to await the adjustment of the grant.

In that decision reference was made to the ruling of the Department in the case of Willamette Valley and Cascade Mountain Wagon Road Company *v.* Hagan (20 L. D., 259), in which the validity of the executive withdrawal made for the benefit of this grant and its effect in preventing the subsequent initiation of any claim to the lands withdrawn, were fully considered and determined.

In the case of Hagan, it was held that the company had the unqualified right to select in satisfaction of its grant any of the odd numbered sections within the limits of the withdrawal to which no adverse claim had been initiated, prior to the receipt of the withdrawal at the local office, and that settlement or entry of any of the lands so withdrawn after the receipt of the withdrawal at the local office would not enable the settler or entryman to defeat the company's right of selection, even though it failed to appear at the local office and assert its right in response to the usual notice of intention to offer final proof. It was intended that this decision should control in the adjustment of this grant. Its language is free from ambiguity and admits of but one meaning. The purpose of the withdrawal was to withhold the lands embraced therein from settlement and entry so that the State, or its grantee, could take any of the odd numbered sections within the six-mile limits in satisfaction of the grant.

If the withdrawal was valid it was as effective to withhold the lands from settlement and entry during its continuance as if it had been provided for in the granting act, and the right of the State, or its grantee, to select in satisfaction of the grant any particular tract covered by such withdrawal was fully protected thereby. The right of selection conferred by the granting act can not be restricted or limited by the Secretary of the Interior. It is his duty to supervise the administration of this grant but his authority does not permit him to revise or limit the laws of Congress. He is as much bound by the provisions of the granting act as is either of the claimants in this case. It is the duty of the Secretary to see that the selections made in satisfaction of the grant are confined to lands described in the granting act, which, according to its language, are—"alternate sections of public lands designated by odd numbers, three sections per mile, to be selected within six miles of said road," excluding "any and all lands heretofore reserved to the United States by act of Congress or other competent

authority;" but as between different sections equally subject to selection under the granting act and the order of withdrawal, the Secretary of the Interior can not say which shall be selected or which shall not be selected, for in doing this he would be denying the right of the State, or its grantee, to make the selection. The supervisory authority of the Secretary is not unlimited and can not be exercised arbitrarily for the purpose of conferring rights upon one person to the detriment of the acknowledged rights of others. Cornelius *v.* Kessel (128 U. S., 456).

However strong may be the disposition to exercise the executive will in favor of settlers, the Department must recognize its duty to administer the laws according to the interpretation given to them by the supreme court, and when that interpretation is expressed, it is the duty of the executive to follow it in the administration of the law.

The power of the Secretary of the Interior to withdraw lands in aid of a congressional grant, where there is no statutory denial of such authority and the effect of such withdrawal in reserving the lands from settlement and entry, has been so definitely settled by the decision of the supreme court that it is no longer a subject of controversy. Such power does not rest upon statutory provision expressly requiring or authorizing it, but upon the general authority of the land department to make a withdrawal in aid of the grant. Walcott *v.* Des Moines Co., 5 Wol., 68; Wolsey *v.* Chapman, 101 U. S., 755; Wood *v.* Beach, 156 U. S., 548; Spencer *v.* McDougal, 159 U. S., 62; Riley *v.* Wells, 19 U. S., 1. ed. 548.

In the case last cited the court said that a settlement upon land withdrawn by executive order was—

> without right, and the possession was continued without right; the permission of the register to prove up the possession and improvements, and to make entry under the pre-emption laws were acts in violation of law and void, as was also the issuing of the patents.

The effect of a withdrawal in preventing the acquisition of any legal or equitable right to the lands withdrawn by occupation or entry thereof after the withdrawal takes effect, is very forcibly and clearly stated by the supreme court in the case of Wood *v.* Beach, *supra.* There the land in controversy was withdrawn for indemnity purposes in aid of a congressional grant. Wood went upon the land and sought to enter it as a homestead, and his occupation and settlement although made prior to selection by the railroad company, was subsequent to the withdrawal. When he made application to enter the land he was informed that it was railroad land and his application was rejected. As to the effect of the settlement of Wood, the court said: "If those withdrawals were valid, no rights, legal or equitable, were acquired by his occupation and settlement."

After stating that it is the settled rule of the courts and of the land department that a withdrawal by the executive is sufficient to defeat the

acquisition of any right by settlement, while the order is in force, the court says:

> Upon these admitted facts it is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon the lands which were not open to homestead or preemption entry, and can not make his unauthorized occupation the foundation of an equitable title. He was not acting in ignorance, but was fully informed both as to the fact and the law. He deliberately took the chances of the railway company's grant, being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land. But the event he hoped for never happened. The party for whose benefit the withdrawal was made complied with all the conditions of title and took the land.

The rule announced in these decisions is so clearly stated by the supreme court and has been so frequently followed and applied in instances similar to the one at bar, that the Department can do nothing less than cancel the homestead entry of Bruner and sustain the selection of the wagon road company. Any other ruling would permit local officers to set aside a withdrawal made by the Commissioner of the General Land Office or the Secretary of the Interior, or even the President, and also to defeat a legislative grant.

The action of Bruner and others in settling upon and making entries of lands embraced within the existing withdrawal made for the benefit of this grant, is perhaps explained when it is stated that from 1878 until 1889, there were frequent and serious complaints made to the land department and to Congress of the alleged failure of the wagon road company to construct or complete this wagon road, and that these complaints resulted in the act of Congress of March 2, 1889 (25 Stat., 850), directing the attorney-general of the United States to institute a suit against the wagon road company and all claimants of the land granted

> to determine the question of seasonable and proper completion of said road in accordance with the terms of the granting act, either in whole or in part, and the legal effect of the several certificates of the governor of Oregon of the completion of the road, and to declare forfeited to the United States all land not earned in accordance with the granting act.

In pursuance of this act and for the purposes stated, a suit was instituted by the United States against this wagon road company and other claimants of the land, in the circuit court of the United States for the district of Oregon, which proceeding resulted in a decree December 16, 1892, in favor of the wagon road company and other claimants and against the United States (55 Fed. Rep., 711). This decree became final and precludes the United States and its land department from now inquiring into any of the questions of fact or law determined in that suit. Bruner and the other settlers probably hoped that the complaints against the construction and completion of the wagon road would be successful and that the land embraced in the withdrawal would be relieved from the claim of the wagon road company, but their

expectation was not realized. In making settlement upon and entry of the lands withdrawn they took the chance incident to the contemplated proceedings against the wagon road company, and lost.

It is contended by the wagon road company that this grant is one *in praesenti* and that when, by the construction of the road and by the company's selection, the sections granted are ascertained and identified, its title thereto takes effect by relation as of the date of the grant, and that if no withdrawal had been made, or if made and disregarded, the company's rights are not affected or defeated by any claim initiated after the date of the grant, and as a part of this contention the company refers to the fact that the only exception or reservation in the grant is "any and all lands heretofore reserved to the United States by act of Congress or other competent authority." The other matters hereinbefore discussed fully dispose of the case and render a decision upon this contention unnecessary.

The motion for review is sustained, the decision of the Department of June 9, 1896, is hereby revoked and set aside and you will proceed with the adjustment of the grant according to the views herein expressed.

In the Hagan case, *supra*, the following direction was given to your office:

> While I recognize the propriety of the withdrawal made by the executive to protect this company in the exercise of its right to make selection in satisfaction of its grant, I am also impressed with the importance of requiring the company to make the selections necessary to satisfy this grant as speedily as possible, in order that the surplus remaining in the limits of this withdrawal may be restored to settlement and entry. The reason alleged by the company for failure to make selections to satisfy the grant is, that the government has failed to have the lands surveyed. That reason no longer exists. The act of August 20, 1894 (28 Stat., 423), authorizes the deposit of a sufficient sum by the owners of grants of public lands for the purpose of having a survey of the townships within the limits of their grants. If this company refuses to accept the benefit of this act, it will be required to make its selections from the surveyed portion of lands along the line of its road, and the withdrawal of the unsurveyed lands along the line of its road will be revoked. It will, therefore, be notified that a survey must be made of such lands as it desires to survey, on or before November 1st, next, and to make all selections necessary to satisfy its grant, within ninety days thereafter, and thereafter the withdrawals will be revoked.

By departmental letter of October 26, 1895, the time within which the company was required to complete its selections was extended one year.

Your office letter of April 1, 1897, calls attention to the fact that the time allowed the Willamette Valley and Cascade Mountain Wagon Road Company within which to complete its selections has expired, and you recommend that the withdrawals heretofore made be revoked. The wagon road company has also expressly assented to the revocation of the orders of withdrawal made for the benefit of the grant.

I have therefore to direct that after due notice by publication you restore all lands formerly withdrawn on account of this grant and not included in pending selections.

RELINQUISHMENT—APPLICATION—VACANCY IN LOCAL OFFICE.

PRICE *v.* RILEY ET AL.

The tender of a relinquishment, accompanied by an application to enter, at a time when there is a vacancy in the office of the register, and when, under the rulings then in force, such papers should have been received and held to await the resumption of business, entitles the party making such tender to have said papers treated as though filed, though in fact they were returned on account of said vacancy.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 11, 1898.* (H. G.)

A hearing was ordered in this cause by departmental decision of October 9, 1894, upon the application of Willie C. Price upon his contest against the homestead entry of Francis M. Riley, made September 23, 1891, for the NW. ¼ of Sec. 9, T. 9 N., R. 3 E., I. M., in the land office at Oklahoma, Oklahoma Territory. (19 L. D., 175.)

The facts are detailed fully in the departmental decision, and it is unnecessary to rehearse them at length.

At this hearing, ordered upon the contest of Price, all the parties appeared. Francis M. Riley was called as a witness for Price, the contestant, and testified, in substance, that he made the entry of the tract; that he had been the head of a family since his entry, but did not go upon the tract with his family to live and make his home there; that he never made any improvement thereon and had not cultivated any part of it; that he made relinquishment of the tract in the month of March, 1892, from six to ten days prior to the expiration of six months after he made his entry, having sold out to Rodman for $250.00. No further testimony was offered on behalf of Price.

Rodman testified, over the objection of Price, to the effect that he, Rodman, was a married man and the head of a family, consisting of his wife and three children; that he gave Riley $250 to relinquish the land so that he could file on it; that this transaction occurred in March, 1892, before the 22d of that month; that he attempted to file on the land on the same day that he received the relinquishment, and presented the same, with his application to enter the land, to the clerk in the local office, who examined these papers and returned them to Rodman, informing the latter that the office could transact no business, as there was no register; that Rodman had the money ready to pay the land office fees at that time; that this tender was renewed a week or ten days later, but was not received, evidently because the office of register was yet vacant; that the receiver of the local office then informed Rodman that the latter had ninety days from the date of the relinquishment within which to file; that he finally tendered the relinquishment on May 9, 1892, which was five days after the filing of the contest by Price; that the same was accepted and Rodman was permitted to make entry of the tract; that Rodman settled on the land in

February, 1892, and had fenced eighty acres of the tract, built a house and barn thereon, dug a well on the premises, and had twenty-five acres of the tract in cultivation; that his improvements were of the value of $625.00, and that he had made no other homestead entry and did not own any other land. On cross-examination, Rodman testified that he could not give the dates when he unsuccessfully presented the relinquishment and his application to enter the land, but that he first offered these papers the day the register resigned. He also stated that he did not file the relinquishment in the interval between the second time he attempted to do so and April 18, 1892, when the register appointed to succeed Judge Burford qualified, because he had already made two trips for that purpose, was very busy on the claim, and did not desire to make the third trip until such time as he knew the land office could act upon his papers, and as he had been informed that the land office was besieged with applications for filing in another portion of the land district just opened to settlement, which would compel him to remain a day or two at the office before his application could be acted upon. He further testified that he had not made all of his improvements upon the tract before he was advised of the contest, but was dwelling in a tent on the land, and had erected a storm house and was building a permanent dwelling upon the tract at the time. Rodman learned that a successor to the register who resigned had qualified two days before he made his last trip to the land office, when the relinquishment was filed and his entry was made. He further offered in evidence the showing formerly made by him and referred to in the former departmental decision, the admission made by Price that the relinquishment made by Riley was not caused by Price's contest, and the records and files in the case. At this stage of the proceedings, counsel for Price called attention to the order addressed to Rodman, to show cause why his entry should not be canceled, issued by the local office at the time his entry was allowed, and requested Rodman to make any further showing that he desired to make under said order or to introduce further evidence in support of his entry. Rodman, in response to this request, contended that he had fully complied with the order of your office, and that of the Department.

Upon this evidence, the local office found that Price had sustained the allegations of his contest, and held that the entry of Rodman should be canceled.

Upon appeal from this decision, your office, on April 10, 1896, reversed the decision of the local office and dismissed Price's contest, upon the ground that it appeared that Register Burford had not vacated his office at the time of the tender by Rodman of the relinquishment of Riley and the application of the former to enter the tract. In support of this ruling, your office states that the evidence shows that Rodman presented to the local office these papers on the day the register resigned, March 22, 1892, which was the last day of his term of office;

that the account of the receiver for the first quarter of that year shows that the register had been paid his salary up to and including that day, and that Burford "was therefore register of said office until the close of said day, and said relinquishment and homestead papers should have been received when presented at your (the local) office for the first time." Price contends that Register Burford, having been appointed one of the judges for Oklahoma Territory, entered upon his duties on March 22, 1892, the day on which Rodman first tendered his papers, but there is no evidence to support this contention.

Although Rodman's affidavit, made at the time he offered these papers for filing, sets forth that he presented them on March 23, 1892, his subsequent affidavit, submitted on the rule to show cause why his entry should not be canceled, and quoted in full in the former departmental decision in this case (19 L. D., 176), fixes the date as March 22, 1892; and his testimony is to the effect that such tender of the relinquishment and application to enter was on the day the register resigned.

In the case of Smith *v.* McKerracher *et al.*, 20 L. D., 276, a case analogous to the one at bar, and relating to the vacancy in the same land district, it appears that on

> March 18, 1892, the register at said local office resigned and there was a vacancy in the office of register until April 18, 1892, on which last date the new register took charge.

This statement was not a controlling one in the case from which it was taken, and can not be resorted to in this case, but it throws some doubt upon the meager proof relating to the day upon which the register actually resigned.

The clerk of the local office declined to receive the papers presented by Rodman, because there was "no register," but your office holds that the register having drawn his salary for March 22, 1892, was in office for the day, and that Riley's relinquishment and Rodman's application to enter should have been filed for that reason; but the action of the clerk of the land office and his declaration that there was no register in office would imply that the position had been vacated at the time Rodman presented his papers.

It nowhere appears in the record that the resignation of the register was accepted by the proper authority. It seems that to create a vacancy in such a case there must not only be a resignation of the office, but an acceptance thereof by competent authority. Edwards *v.* U. S. (103 U. S., 477). Owing to the slight degree of proof present in the case at bar on the question of a vacancy in the office of register, the case will be disposed of on other grounds. It will be assumed that the office of register was vacant when Rodman presented the papers in the local office.

This leaves for disposition the question of the effect of such tender, if the office of register was vacant at the time.

No such question can arise under cases of like nature occurring since

the issuance of the circular of June 12, 1896 (22 L. D., 704), which provides that upon a vacancy in the office of register and receiver all business requiring the action of both officers must await the filling of the vacancy, and while the office is kept open for the purpose of furnishing general information, no action can be taken upon applications to contest or enter lands in the district where the vacancy occurs; and, in such cases, applications to contest entries or to enter lands and all other applications requiring the joint action of both officers, presented during the vacancy in the local office, are received, the time of presentation noted thereon, and upon the resumption of business, such applications are to be disposed of in their order. Prior to the taking effect of this circular, it was held that applications to enter lands received during a vacancy in the office of register at the land office at Guthrie, Oklahoma, caused by the death of the incumbent of that office, must be treated as simultaneous upon the resumption of business in the local office, and where one of the applicants had settled upon and improved the tract applied for and the other had not, the priority of right should be accorded to the actual settler. (Hillebrand *v.* Smith, 22 L. D., 612.) In the case just mentioned, the case of Williams *v.* Loew (12 L. D., 297,) is cited, where it was held that "An application to enter during the vacancy in the register's office is, in contemplation of law, submitted for official action when the vacancy is filled," and this decision, it is said, has never been overruled. It is further said, in the course of the opinion, that

> when the vacancy is filled, the machinery of the office resumes its work, and the register and receiver in the exercise of official duty proceed to adjudicate all cases on file and pending in their office.

The case of Hillebrand *v.* Smith, *supra*, is not in harmony with the earlier decision in the case of Smith *v.* McKerracher *et al.*, *supra*. In the latter case, an application to contest an entry, sent by mail to the local office during a vacancy in the office of the register, and there remaining unacted upon during said vacancy, was held subject to a similar application presented by another party on the opening of the office to business; and in support of the ruling a number of departmental decisions were cited.

The case of Armstrong *v.* Miranda (14 L. D., 133) holds that a vacancy in either of the local offices disqualifies the remaining incumbent for the performance of the duties of his office during the period of such vacancy, and that a relinquishment sent to the local office during a vacancy in the office of register is not filed in contemplation of law, and if returned to the entryman before said vacancy is filled, no action could be subsequently taken by the register and receiver. In that case, the entryman filed his affidavit, to the effect that he was so intoxicated at the time he executed the relinquishment as not to comprehend the character of the instrument, and demanded the return of the same, which request was granted, and the decision is partly based upon this fact, but mainly upon the ground that the relinquishment

was not the voluntary act of the entryman, owing to his intoxication at the time of its execution. It was said in that case that the relinquishment in question was received at the local office during a vacancy in the office of register and while the machinery of the office was stopped, and was therefore not filed therein, and before the vacancy was filled it was returned to the entryman, so that when the office resumed its work there was nothing connected with such relinquishment for the register and receiver to adjudicate.

In the case of Graham *v.* Carpenter (9 L. D., 365) Graham presented for filing an affidavit of contest, on the ground of abandonment of a homestead entry, but the register of the local office refused to receive and file it, on account of the vacancy in the office of receiver, caused by the death of the latter officer. It was held that neither of the local officers could operate independently of the other, and that when there was a vacancy caused by the death of one of them, the machinery of the office stopped at that moment, and could not be put in motion until the office was filled. The case of Christian F. Ebinger, 1 L. D., 150, was held as decisive authority in that case. The application for a timber culture entry was rejected in the Ebinger case, because there was a vacancy in the office of the register, owing to the death of the incumbent, and that the subsequent application, renewed when the vacancy was filled, was cut off by an intervening application.

It was held in the case of the Dean Richmond Lode, 1 L. D., 545, that in case of such vacancy in either of the local offices, the remaining incumbent is disqualified for the performance of his own duties during the period of such vacancy, except where by departmental order he was directed to temporarily fill the vacant office as well as his own.

In the case of Williams *v.* Loew, *supra*, the acting register was notified that his term had expired because the appointee for that office had not been confirmed, prior to the expiration of the Congress, at the last session of which it had been sent to the Senate. The former incumbent was directed to act as clerk and receive applications to enter lands, until a register should be appointed. During the vacancy, and while the former register was so acting as clerk, the package containing the application of a desert land applicant, with an enclosure of money to pay the initial instalment on the land, was received and filed by such clerk. The application was overlooked and another was permitted to enter the land after a register had been appointed and had qualified. It was held that the application for desert land entry being on file at the time of the resumption of business, the same was, in contemplation of law, submitted to the newly appointed register and to the receiver for official action, and that being first in point of time should have been allowed, even where the cash payment was required by circular issued the same day to be double the amount tendered, the land lying within railroad limits, as the applicant promptly paid the additional amount required by the later circular, when advised of such requirement.

From this resume of decisions, it is apparent that there is some conflict, but it may be gathered from these cases that prior to the departmental circular of June 13, 1892, no business could be transacted by any local office during a vacancy in either of the official positions therein, except merely to receive papers tendered for future action when the offices became filled, and the official quorum was present, but such applications should be treated as simultaneous applications, without preference or priority, when the office resumed business, and would have precedence over others presented thereafter. Applying this rule to the case at bar, it appears that had the application of Rodman been received, accompanied by the relinquishment of Riley, it would have been taken up and regarded as filed at the time of the resumption of the business of the local office, on April 18, 1892. This was sixteen days prior to the filing of the contest affidavit of Price, and would therefore dispose of the question of priority. Neither the relinquishment nor the application remained in the office, but this was not the fault of Rodman. He tendered them twice, and stood ready to pay the proper fees. He manifested his good faith by continuing the improvements he had already begun on the tract after purchasing the relinquishment from Riley. Twice baffled in his attempts to file the relinquishment and enter the land, laches can not be imputed to him because he did not renew his efforts to make entry immediately after the office resumed business, of which he had no official notice. He appeared again at the land office about three weeks after it was opened anew, a few days after having received information of the resumption of business, and was but five days later than Price, who contested the entry of Riley. Rodman's excuse for this delay is reasonable. He had heard that, owing to the rush to enter a tract of land recently thrown open to settlement, a few days would elapse before he could present his papers for the third time for action, and he was engaged at his labors upon the disputed tract, at a time in the year when farmers are unusually busy.

It must, therefore, be held, in the light of the rulings of the Department in similar cases, as applied to the circumstances of this case, that Rodman's efforts to file the relinquishment of Riley and his own application to enter, which were presented by and returned to him—once on account of an alleged vacancy in the office of register, and at a subsequent time by reason of an actual vacancy in said office—were tantamount to a filing of these papers, because they should have been received when offered, and held to await the resumption of official business. If they had been so received, when the machinery of the local office had been put in motion by the qualification of a new register, they could have been acted upon at once, as there were then no other applications to enter the tract, or to contest the entry then of record.

It was insisted at the hearing and is now urged that, under the former departmental decision, the case was fully decided, and Price was per-

mitted to establish the allegations of his contest against Riley, which excluded from consideration the claim of Rodman.

A careful reading of the opinion does not sustain this contention. Rodman had been cited to appear and show cause why his entry should not be canceled for conflict with the prior contest initiated by Price, and he appeared and presented his affidavit, the truth of which was admitted, to show that the relinquishment of Riley was not induced by the contest of Price, as it was executed nearly two months prior to the initiation of such contest. The former departmental decision did not direct the cancellation of Rodman's entry, but evidently provided that the entire case should be fully presented and not decided piecemeal. At the hearing ordered it was competent for Price to prove the allegations of his contest and disprove any allegations of Rodman not admitted, and it was competent for Rodman to show his attempts to make entry, that he acted in good faith and was not chargeable with laches in making application to enter. This was evidently understood by counsel for Price, who called upon Rodman to make any further showing he desired to make under the former order to show cause why the entry of the latter should not be canceled, or to introduce further evidence in support of his entry.

The uncontradicted testimony of Rodman establishes his reasonable diligence, evinced by two attempts to file the relinquishment of Riley and to enter the tract, and his good faith is shown by his continuous residence upon the tract and his occupancy and improvement thereof before the contest was initiated.

For the foregoing reasons, the decision of your office is affirmed. The entry of Charles M. Rodman will remain intact, and the contest of Willie C. Price is dismissed.

OKLAHOMA HOMESTEAD—QUALIFICATIONS OF HOMESTEADER.

MASON *v.* CROMWELL (ON REVIEW).

The limitation by section 20, act of May 2, 1890, of the right of homestead entry in Oklahoma to persons who are not "seized in fee simple of one hundred and sixty acres of land in any State or Territory" does not operate to disqualify an applicant for such right who may at such time own a less amount, though the land thus held may have been taken as a technical "quarter section."

The conclusive effect of the surveyor-general's return, as to the quantity of land in a legal sub-division, is only operative while such sub-division remains public land.

The field notes of survey are part of the permanent official records of the General Land Office, and as such may be resorted to upon any question, whereon they have bearing, arising in any case before the Land Department.

The decision herein of March 15, 1897, 24 L. D., 248, vacated on review.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 11, 1898.* (E. B., Jr.)

The above-entitled case comes again before the Department under an order dated December 27, 1897, entertaining a motion for review of its decision of March 15, 1897 (24 L. D., 248).

Cromwell's claim to the land involved—the SW. ¼ of section 20, T. 23 N., R. 6 W., Enid, Oklahoma, land district—was initiated by homestead entry thereof on October 27, 1893; Mason's claim by alleged settlement thereon October 13, 1893. Without deciding whether Mason made settlement, in fact, as alleged, the Department held that he was disqualified to make valid homestead settlement in Oklahoma by reason of his ownership at that time of the NE. ¼ of section 28, T. 9 S., R. 34 W., in the State of Kansas, containing one hundred and fifty-nine and thirty-five one-hundredths acres. Under the motion for review and entertaining order the question of law is again presented whether the ownership of that quantity of land disqualified Mason.

In section 20 of the act of May 2, 1890 (26 Stat., 91), among other provisions relating to the disposal of public lands in Oklahoma Territory, is the following:

> 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.

This is the provision of law which, applied to the facts of the case, the Department held disqualified Mason. It has not been proven that Mason owned one hundred and sixty acres of land in any State or Territory at the date of his settlement or since. The decision under review concedes that as a matter of fact he did not then own that quantity of land. He has steadily denied such ownership. He admitted at the trial of the case in the local office that he had owned "a quarter section" of land in Kansas, but claimed that he conveyed it by deed executed a few hours prior to his alleged settlement. The Department held, however, that no delivery of the deed prior to his alleged settlement had been shown and that therefore the title to the land was still in him at that time.

That Mason was the owner of the Kansas land above described at the time of his alleged settlement may be regarded as settled by the decision of the Department. But it was said, in that decision, in effect, that the terms "a quarter section" and "a hundred and sixty acres" as used in legislation by Congress were interchangeable terms, meaning the same thing, and that therefore as Mason owned "a quarter section" of land it made no difference, upon the question of his qualification, that the quantity of his land was "a fraction less than one hundred and sixty acres," that is, in fact, nearly three-fourths of an acre less. These are the propositions whose soundness is now in question.

It is true that in legislation fixing the maximum quantity of public land which might be taken by one person under the homestead, preemption and certain other laws, Congress has frequently used the foregoing terms interchangeably, but in no instance, so far as the Department is aware, where the ownership of land is made a disqualification for the exercise of the right, otherwise existing, to take public land, is the quantity of the land stated in other terms than as a specific

number of acres. Reasons for this difference in language are readily found. The present system of surveying and subdividing the public lands was not adopted until toward the close of the last century. Again, in several States the United States never held any public lands, and the system of rectangular surveys now employed by the general government was not extended to the State and private lands in those States, so that the term "a quarter section" is without application to the lands therein. A specific quantity of land expressed in acres is, on the other hand, applicable to the conditions in all the States and Territories, and a statute using such terms could not fail to operate equally upon all persons owning the same quantity of land without regard to its location. It would be unjust to hold disqualified one who owned less than one hundred and sixty acres of land in Kansas, and to hold another qualified who owned the same quantity in Pennsylvania. The law should operate equally upon all persons of the same class and undoubtedly this was the intent of Congress in enacting the statute in question. The words "a hundred and sixty acres of land" were here employed in a sense which permits their equal and uniform application to all persons coming within the purview of the statute in which they are found, and in that sense they are not the equivalent of the words "a quarter section," but are used to describe land according to its extent and area in acres no matter whether located in one tract or in several tracts nor whether constituting a subdivision of land embraced in the regular governmental survey or constituting a tract with irregular lines and embraced in a special or private survey.

But it is urged by counsel for Cromwell that as the proof that the land owned by Mason was less than one hundred and sixty acres was only brought to the attention of the land department after the case had reached the Secretary, such proof is not part of the record and should not be considered; and, at all events, it is further urged, that the return of the surveyor-general of the said section of Kansas land as a full section of six hundred and forty acres, is conclusive as to the quantity of land in the section, and also in the quarter-sections thereof.

For purposes of the disposal of the public lands the law makes the surveyor-general's return as to the quantity of land in a legal subdivision conclusive. See sections 2395 and 2396 Revised Statutes, especially paragraphs 5 and 3 respectively. Whether a section returned as a full section contains more or less than six hundred and forty acres of public land, according to actual computation from the field notes of survey, it must, under the provisions of the sections last above cited, be disposed of by the land department as containing just six hundred and forty acres, and each quarter thereof as containing one hundred and sixty acres. These provisions of law were enacted to facilitate the disposal of public land. Under their operation such a quarter section always contains, for the purposes of such disposition, exactly one hundred and sixty acres. In *fact* it rarely ever contains just that quantity,

but usually contains either more or less. This law is conclusive of the quantity in a legal subdivision only while it remains public land. It has no such conclusive effect after the land has become private property. Applying this rule to the present case, it is conceded by counsel for Cromwell, that the Kansas land falls short of one hundred and sixty acres in actual quantity.

No evidence to show the precise quantity of Mason's Kansas land was offered at the trial of the case. From an examination of the official field notes of survey and computation therefrom by your office it was found that the quantity of land owned by Mason was more than one half an acre less than one hundred and sixty acres. These field notes are part of the permanent official records of your office. Such records may always be resorted to upon any question whereon they have bearing, arising in any case before the land department. If, as would undoubtedly be the case, the Department would be bound to give due effect to anything in the official records of your office adverse to the qualification of Mason, whenever the same should come to its notice, it follows that it is equally bound to consider and give due effect to evidence from such records when favorable to him.

The contentions of counsel in favor of the conclusive effect of the surveyor-general's return, and against the consideration of the evidence afforded by the records of your office, are therefore equally unsound.

So much of the decision of March 15, 1897, *supra*, as is in conflict with the foregoing views is accordingly overruled and vacated.

It becomes necessary, in view of the foregoing, to consider the question of Mason's alleged settlement rights to the land in controversy. The evidence shows that he made due settlement thereon on the date he alleges, October 13, 1893; that he followed up the same promptly by making permanent improvements on the land; and within a few weeks had a house thereon, which has since been occupied as a home by himself and family. He appears to have fully complied with the homestead law. His settlement right is prior and superior to the entry of the land by Cromwell. The entry of the latter should therefore be canceled and Mason be allowed to perfect title.

The decision of your office is reversed.

SAVAGE *v.* CENTRAL PACIFIC R. R. CO.

Motion for review of departmental decision of January 18, 1898, 26 L. D., 57, denied by Secretary Bliss March 12, 1898.

MINERAL LANDS—AGRICULTURAL CLAIM—SANDSTONE.

HAYDEN *v.* JAMISON (ON REVIEW).

Land more valuable on account of the sandstone therein than for agriculture is mineral in character, subject to disposition under the mining laws, and a homestead entry thereof is unauthorized by law.

Departmental decision herein of May 5, 1897, 24 L. D., 403, vacated on review.

Secretary Bliss to the Commissioner of the General Land Office, March 12, 1898.

(W. V. D.) (G. B. G.)

This case is before the Department on a motion for review, made by Hayden, of departmental decision of May 5, 1897 (24 L. D., 403), in the case of Benjamin F. Hayden *v.* Thomas Jamison, wherein was involved the SW. ¼ of Sec. 6, T. 3 N., R. 70 W., Denver land district, Colorado.

Said motion was entertained November 8, 1897, service was made, and Jamison has answered.

The record shows that Jamison made a homestead entry for this land on September 24, 1889; that on September 18, 1889, Hayden, with others, made a placer location for one hundred and twenty acres of the same land afterward entered by Jamison, and on the 10th day of January, 1890, having purchased the interest of the other locators, Hayden presented mineral application therefor, which application was rejected on account of said homestead entry, and the mineral claimant thereupon filed a protest against the entry, alleging, among other things, that the land was more valuable for mining than for agricultural purposes; that after a hearing on the issues thus made, the local officers dismissed the contest; that your office, on appeal, found that the land was more valuable for the mineral it contained than for agricultural purposes and held the entry for cancellation; and that the Department, on appeal by Jamison, affirmed the action of your office (15 L. D., 276), which decision was adhered to on review March 7, 1893, but on June 21, 1893 (16 L. D., 537), the case then being before the Department upon a motion for re-review, reversed its former action and ordered a hearing to determine

the character of the land, its capacity for agriculture, and the nature, value and extent of all deposits of a stone or mineral character found therein, and re-adjudicate the question in the light of the evidence thus obtained:

it being said that this course was pursued because of the allegation of the presence of valuable deposits other than building stone, as gypsum and fire-clay, and on account of representaions that the land was worth $300,000 by reason of these alleged deposits.

After the second hearing the local officers recommended the dismissal of the contest. Your office affirmed that action, and the Department, on further appeal, by its decision of May 5, 1897, *supra*, affirmed the decision of your office. By said last mentioned decision it was held:

Prior to the passage of the act of August 4, 1892, there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws (syllabus):

And it was therein said:

An examination has been made of the voluminous record in this case. It is shown that the chief value of the land is for red sand stone suitable for building purposes, paving, and curb stones. The attempt to show gypsum, limestone, or a deposit of fire clay, is not supported by the evidence.

It is now alleged, substantially, that this decision is against both the law and the testimony.

Counsel for the homestead claimant asks that the motion for review be dismissed on the ground that it is not accompanied by an affidavit of good faith and does not specifically point out the errors complained of.

The Department when it entertained the motion for review, thereby waived these alleged omissions, and they can not now be urged in objection to the consideration of the motion.

Inasmuch as it is practically admitted that this land is more valuable for the red sand stone it contains than for agricultural purposes, it remains to be seen whether it was subject to disposition under the placer mining law prior to August 4, 1892. If it was, then the decision under review was error and must be vacated, for the reason that a mineral location thereof was made prior to the homestead entry of Jamison and for the further reason that if it was subject to placer location it is mineral land and title can not be acquired thereto under the homestead law if its character is known prior to the issuance of final certificate.

In the recent case of the Pacific Coast Marble Co. *v.* Northern Pacific R. R. Co. et al. (25 L. D., 233) the mining laws of the United States, and the decisions of the Department and the courts in construction thereof, were reviewed at length. In that case, in conclusion of the discussion of the question of what is a mineral within the meaning of the mining laws, it was said:

The Department adheres to the rule: That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

Bainbridge in his work on the law of mines and minerals, page one, says:

A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores.

Unquestionably, the great weight of authority is to the effect that sand stone is a mineral substance.

It having been found, and not being now questioned, that the land in controversy is more valuable on account of its sand stone deposit than for agriculture, this case comes squarely within the rule above set

out, and it results that the homestead entry of Jamison as to the land in conflict was and is unauthorized and can not be upheld.

Departmental decision herein of May 5, 1897, *supra*, is hereby vacated, and it is directed that the homestead entry of Jamison, as far as the same conflicts with the prior location of Hayden, be canceled and the mineral application of Hayden allowed, unless further objection appears.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

SOUTHERN PACIFIC R. R. CO. *v.* TRIPP.

An offer made by a settler to purchase from a railroad company lands within its indemnity limits that are not protected by withdrawal, and have not been selected, will not defeat the right of such settler to subsequently repudiate such offer and assert his settlement right.

An indemnity selection of land not protected by withdrawal, and included within a prior settlement claim, is no bar to the subsequent recognition of the settlement right.

Secretary Bliss to the Commissioner of the General Land Office, March 12, 1898.

(W. V. D.) (L. L. B.)

The appeal of the Southern Pacific Railroad Company, from your office decision of July 3d, 1897, rejecting the company's claim to the N. ½ NW. ¼ and the N. ½ NE. ¼ of Sec. 3, T. 7 S., R. 2 E., Los Angeles, California, and sustaining the application of Ozro C. Tripp to make homestead entry for the same, is here for consideration, and the following facts appear in the record.

The tract is within the indemnity limits of the grant to the company and was selected by the company July 13, 1885, without designating the losses for which indemnity was claimed.

October 14, 1887, another list was presented in which the losses were designated, and on April 21, 1894, the company filed a re-arranged list, in which another and different base was designated for the land here in controversy.

October 14, 1890, Tripp applied to make homestead entry of the land alleging in his application that he settled on the land April 30th, 1878; this application, as above shown, was made between the presentation of the lists of 1887 and 1894.

The register and receiver rejected his application and he appealed.

By your office decision of March 30, 1895, adhered to on motion to review, July 22, 1895, the decision of the local office was reversed and the company's selection held for cancellation.

The company appealed from said decision and this Department on July 13, 1896, so far modified your office decision as to order a hearing on Tripp's allegation of settlement.

On the hearing so ordered, the register and receiver recommended the cancellation of the company's selection and the allowance of Tripp's application to enter.

By your said office decision of July 3rd, 1897, the action of the local officers was affirmed, and the case is now here on appeal by the company.

The specifications of error assigned by counsel for the company are as follows:

1st. That it was error to hold that Tripp acquired any right to make homestead entry of this land under his application of October 14, 1890, on his alleged settlement in 1878.

2nd. That it was error to hold that the company's selection which was admitted to have been perfected October 14, 1887, was defeated by Tripp's alleged settlement.

3rd. That it was error not to have sustained the company's selection.

Inasmuch as this Department has held that an executive withdrawal for indemnity purposes is in violation of the plain terms of the grant, made for the benefit of this road (Southern Pacific R. R. Co. *v.* Kanawyer, 23 L. D., 500), the company's right to the land in controversy cannot antedate its selection made July 13, 1885; and inasmuch as Tripp's settlement is alleged as of April 30th, 1878, it follows that if it is shown that his settlement was of such a character as to except the land from the claim of the company at the date of its selection, the regularity and legality of the said selection and all subsequent changes and rearrangements of the company's list may be eliminated from consideration here, unless it is shown that he thereafter abandoned his settlement.

At the hearing Tripp alone testified; but it was admitted by counsel for the company that two other witnesses then present would if sworn and examined, corroborate him, "in all essential particulars" as to residence, cultivation and improvements. From his testimony it clearly appears that he settled upon the land at the date alleged in his application (1878) at which time he was nineteen years of age but otherwise qualified to make entry; that thereafter he resided continuously on the land for eight or nine years, and has since resided there "off and on" but has never removed his household effects from his house on the land; that his improvements are of the value of $600.00; that although he used the land principally for grazing he had grubbed about twenty acres and broke about ten acres; that he settled upon it with the intention of making it his home and securing title under the land laws.

He admits that on January 8th, 1883, he applied to purchase this tract, with some other land, from the railroad company; but says, the reason he made that application was

to save trouble with the railroad company as I understood it would be better to buy their right than to have litigation with them, intending, if I bought their right out, to go ahead and prove up on my homestead afterwards.

These statements having been accepted by the company as true, it is plain that Tripp's settlement was made with the intention of securing title from the government, and although he afterwards applied to purchase from the company, his reason therefor, is satisfactorily explained,

and such explanation by no means makes him a tenant of the company, but shows only that he preferred to purchase the railroad claim, rather than engage in litigation with the company.

Moreover, the application to purchase was made in January 1883, more than two years before the company's selection in 1885, and the withdrawal being invalid the question is brought directly under the ruling in Northern Pacific Railroad Company *v.* McMahan (21 L. D., 402), which holds that an offer to purchase from a railroad company, made prior to the time when the rights of the company attach, may be repudiated by the settler.

The objection that Tripp's residence was not continuous on the land, is not supported by the evidence to the extent of showing an abandonment of his claim. While it is true he spent considerable time in San Jacinto, it is shown that his household furniture always remained in his house on the land, and that he never has had a home elsewhere.

Having established his allegation of continuous claim to the land based upon his settlement ante-dating the selection by the company, such selection is no bar to the allowing of his homestead application, and your office decision is accordingly affirmed.

PRACTICE—MOTION FOR REVIEW—ORDER FOR HEARING.

WALK *v.* BEATTY (ON REVIEW).

There is no authority in the rules of practice for the review of a departmental decision ordering a hearing; and treating such a motion as a petition addressed to the supervisory power of the Secretary, it will be denied, if it presents no question that was not fully considered in the decision ordering the hearing.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) *12, 1898.* (G. B. G.)

The land involved in the case of Leffie W. Walk *v.* William W. Beatty is the SW. ¼ of Sec. 14, T. 13 N., R. 3 E., Oklahoma, Oklahoma Territory, and by departmental decision of January 18, 1898 (26 L. D., 54), a hearing was ordered between the parties to determine certain questions therein indicated.

Counsel for Walk has filed a motion for review of this decision.

There is no authority in the rules of practice for filing a motion for review of a decision ordering a hearing.

Considered as a petition addressed to the supervisory power of the Secretary, it is found that nothing is suggested that was not fully considered at the time said hearing was ordered; nor is anything urged to cause the Department to doubt the correctness of the direction thereby given.

The motion is denied.

MINING REGULATIONS—AMENDMENT OF RULE 53.

CIRCULAR.

Commissioner Hermann to registers and receivers, March 14, 1898.

Paragraph 53 of the Mining Regulations approved December 15, 1897, 25 L. D., 561, is hereby amended to read as follows:

The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof; Provided, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

Approved:

C. N. BLISS, *Secretary.*

ALIENATION—TIMBER CULTURE ENTRY—HEIRS.

GRAHAM *v.* APPLEGARTH'S HEIRS.

A contract of sale entered into by a timber culture entryman, to be consummated by delivery of deed after the submission of final proof and the issuance of patent, is in violation of law, and makes cancellation of the entry necessary; and where, after such alienation the entryman dies, his heirs are entitled to no greater rights under the entry than he had at the time of his death.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 14, 1898.* (C. J. G.)

The defendants in the case of Robert E. Graham *v.* Henry W. Applegarth's Heirs have appealed from your office decision of May 9, 1896, holding for cancellation timber-culture entry for the NE. ¼ of Sec. 11, T. 21 N., R. 46 W., Alliance land district, Nebraska.

November 19, 1890, Henry W. Applegarth made timber-culture entry for the above described tract, and May 25, 1895, Robert E. Graham filed affidavit of contest against said entry, alleging that the entryman had failed to comply with the law as to planting and cultivation and that he had entered into a contract to sell this land, the deed to be delivered upon the submission of final proof and issue of patent.

The decisions of the local office and your office were based upon the last mentioned charge.

It appears that the contract referred to was entered into by Applegarth September 26, 1893, less than three years after the date of his entry. The entryman died in August, 1894. In July of that year payment of a sum of money was made to and receipt obtained from the entryman's daughter, in pursuance of the terms of said contract.

It is urged in the appeal, among other things, that as this contract by the entryman was not ratified by the heirs and as the latter immediately took possession of the land and proceeded to comply with the timber-culture law, they thereby cured any violation of the law on the part of the entryman in making said contract. It was said in the case of Dixon *v.* Bell (12 L. D., 510).

When an entryman has sold his claim before final certificate has been issued, and soon thereafter dies, no amount of cultivation or improvement by his heirs or legal representatives will cure such entry, and a contest may be commenced at any time after the fact of such sale is known.

Proof that Applegarth entered into a contract to sell his claim, that fact not being denied by his heirs, is the factor that proves fatal to any rights they might have; for, ordinarily, where the entryman who has complied with the law dies before final certificate has been issued, the right to perfect the entry descends to the heirs or legal representatives. There is sufficient evidence in this case to show that there was a violation by Applegarth of the letter and spirit of the timber-culture law, as set forth in the affidavit filed by him at the time he made his entry. The entryman having thus parted, contrary to law with his interest in this land, the heirs are not entitled to any better rights than he had at the time of his death.

It is deemed unnecessary to discuss the other allegations contained in the defendants' appeal.

The cases of Klock *v.* Husted, 2 L. D., 329, Williamson *v.* Weimer, 9 L. D., 565, and Palmer *v.* Stillman, 18 L. D., 196, were properly cited in support of your office decision.

The said decision is hereby affirmed.

RAILROAD GRANT—PRE-EMPTION CLAIM—ENTRY.

SPIRLOCK *v.* NORTHERN PACIFIC R. R. CO.

The completion of a pre-emption entry for part of the land embraced within a declaratory statement is an abandonment of the filing as to the land not entered, and such filing, as to said land, will not thereafter serve to except it from the operation of a railroad grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 14, 1898.* (F. W. C.)

On October 1, 1897, the petition invoking the exercise of the supervisory power of the Secretary of the Interior to correct a mis-statement of facts in the matter of the decision in the case of James D. Spirlock

v. Northern Pacific Railroad Company, involving the W. ½ of the NW. ¼ of Sec. 5, T. 16 N., R. 1 W., Olympia land district, Washington, was entertained and returned for service. It has since been served and was forwarded with your office letter of October 19, 1897.

This case was first considered by this Department in decision of February 4, 1896 (22 L. D., 92), in which it was stated that:

> An examination of the records in your office shows that one Jeremiah Mabie made a pre-emption filing with alleged settlement prior thereto, upon the NW. ¼ of the NW. ¼ of said Sec. 5, township and range aforementioned, previous to the date of the grant to said railroad company; and that said filing was of record, subsisting and *prima facie* valid at the date of said grant, which excepted said forty-acre tract from the operation of the grant, and left Spirlock free to purchase the same in the absence of any adverse right.

As to the SW. ¼ of the NW. ¼ of said Sec. 5, it was held that, as the record showed a perfect patent, duly enrolled, issued upon the private cash entry made for said land by Spirlock, the same had passed beyond the jurisdiction of this Department.

Subsequently, upon motion for review, in departmental decision of December 26, 1896 (23 L. D., 588), it was held that this Department has authority to order the cancellation of the record of an incomplete patent which was placed upon the record by mistake and which, in fact, was never issued, but still remained in the custody of your office, and you were therefore directed to cause the cancellation of such record.

The land covered by Spirlock's application is within the primary limits of the grant made by the joint resolution of May 28, 1870, to aid in the construction of the portion of the main line of the Northern Pacific Railroad between Portland and Puget Sound. The map showing the line of general route upon which there was a statutory withdrawal was filed on August 13, 1870, and this tract was embraced within the limits of said withdrawal. It afterwards fell within the limits as adjusted to the map of definite location filed September 13, 1873.

After the filing of the map of general route, and before the receipt of notice of withdrawal at the local office, to wit, September 17, 1870, Spirlock was permitted to make private cash entry of the land before described. Upon said entry, as has already been adjudicated in the previous decision of this case, he gained no right as against the company under its grant. But as to the NW. ¼ of the NW. ¼ of said section 5, as before recited, it was held that the pre-emption filing of Jeremiah Mabie, existing at the date of the grant to the railroad company, served to except said tract from the operation of said grant.

The petition under consideration alleges that the filing referred to, made by Mabie, was filed on January 12, 1861, and embraces, in addition to said tract in section 5, certain other tracts in the adjoining even-numbered section, number 32; and that on June 16, 1863, Mabie perfected said filing into an entry as to the tracts in section 32, thereby abandoning the filing as to the tract in section 5.

Since the filing of the petition your office has reported that the alle-

gation relative to the partial completion of said filing is sustained by the records of your office.

It is clear, therefore, that under the decisions of the courts and this Department, said filing, as to the tract in section 5, can not be held sufficient to defeat the operation of the grant, and the previous decisions of this Department, in so far as they have held to the contrary, are recalled and vacated, and you are directed to cancel the cash entry by Spirlock as to said tract.

Nix *v.* Allen, 112 U. S., 129.

St. Paul, Minneapolis and Manitoba Ry. Co., 23 L. D. 539.

RIGHT OF WAY—CANAL—INDIAN RESERVATION.

RIO VERDE CANAL COMPANY.

The act of March 3, 1891, does not authorize the approval of an application for a right of way for a canal across an Indian reservation; nor will such right of way below said reservation be granted, if the canal is dependent for its water supply upon the right of way asked for through the reservation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 14, 1898.*

The record shows that on September 18, 1896, your office decision was rendered in the matter of the application of the Rio Verde Canal Company for a right of way to certain lands for the purposes of irrigation, in the Tucson land district, Arizona.

In part in said decision you held as follows:

There are herewith the enclosed seven maps and seven sets of field notes, each in duplicate, filed by the Rio Verde Canal Company, under Secs. 18 to 21, act of March 3, 1891 (26 Stat., 1095), as part of an application for canal and reservoir right of way, and transmitted with your two letters of May 23, and your letter of August 14, 1896.

The map numbered by the company sheet 3, transmitted with your letter of May 23, shows the location of the canal line on unsurveyed land, about thirty-six miles, of which seven and one half miles lie within the Salt River Indian reservation.

It has been held that the right of way act does not apply to Indian reservations (14 L. D., 265), and further that right of way for a ditch depending for water on a ditch passing through an Indian reservation should not be approved (21 L. D., 356).

Your office decision therefore refused to grant a right of way to said company for such portion of said proposed canal as lay within the Indian reservation known as the Salt River reservation, and for such additional part as lay beyond said reservation and depended for its water supply upon the proposed route through such reservation. From this action of your office appeal has been taken.

The act of March 3, 1891, *supra*, section 18 thereof, page 1101, is as follows:

That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall

have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation.

In the Florida Mesa Ditch Company (14 L. D., 265) the decision concludes as follows:

For the reason herein set forth, I am of the opinion that it was not intended by said act of March 3, 1891, to grant the right of way for canals and ditches through Indian reservations.

Without determining what the ruling would be if the question were now before the Department for the first time, the matter will be treated as settled by the decision cited, which has been acquiesced in for several years.

It is urged as a second ground of appeal that the appellant is entitled to the approval of such portion of his map as lies beyond the Salt River Indian reservation and outside of its limits, though dependent for its water supply upon the right of way asked for through such reservation.

This question was considered in the case of La Plata Irrigating Ditch Company (21 L. D., 355), and it was held (syllabus):

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.

I assume that the true meaning of the act of March 3, 1891, which requires the approval of this Department of the map of location, imposes upon the Department the duty of requiring that it shall *prima facie* appear, before approval of the map, that a source of water exists which can be reached by the route selected.

The Department having refused to approve the right of way through the Salt River Indian reservation, which is the necessary connecting link between the two sections of the right of way asked for outside of and on either side of said reservation, it follows that no source of water could be secured by said canal company along its proposed route on that portion of the canal which lies below the reservation.

The approval by this Department of a right of way upon any given tract of land operates as an easement upon the land, and to that extent is an impairment of the use of such land, and where no useful purpose can be subserved by a grant of the right of way to a company whose application upon its face shows an inability to secure water along the proposed route, such approval would be vain and useless, apparently creating an easement upon the land without any desirable object being gained.

I am therefore of the opinion that the company is not entitled to have its map approved for such portion of its route as lies below the Salt River Indian reservation.

Your office decision is accordingly affirmed.

PRACTICE—PETITION FOR THE RE-OPENING OF A CASE.

GAMMON *v.* WEAVER.

When a decision of the Department has become final under the rules of practice, has been long acquiesced in by the losing party, the lands involved have been disposed of thereunder, and such disposition was not unlawful, a petition to re-open the case will not be entertained, though the original decision may rest on a construction of the law that no longer obtains.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *March 14, 1898.* (G. B. G.)

The Department has received a "motion for re-review and petition to reopen" the case of Silas Gammon *v.* Henry Weaver, filed by counsel for the said Gammon.

This case involved the application of Silas Gammon to make an additional homestead entry under section 6 of the act of March 2, 1889 (25 Stat., 854), for lots 5 and 6 of Sec. 31, T. 20 N., R. 1 W., Perry land district, Oklahoma.

Said application was denied by the Department on June 18, 1896 (unreported 3), on the ground that the original entry was made subsequent to the passage of said act, and it appears that Weaver has since made a homestead entry of the land.

In the case of Nancy A. Stinson (25 L. D., 113), it was held (syllabus):

The right to make an additional homestead entry under section 6, act of March 2, 1889, extends to cases where the original entry was made either before or after the passage of said act, if the applicant is otherwise within the terms of said section.

If this had been the rule at the time the case at bar was considered here, the conclusion reached might have been different. But such was not then the rule, and while the denial of Gammon's application is now believed to have been erroneous, the fact that adverse rights have attached, on the faith of the decision then made, precludes a favorable consideration of the present petition.

When a decision of the Department has become final under the rules of practice, has been long acquiesced in by the losing party, the lands involved have been disposed of thereunder, and such disposition was not unlawful, a petition to re-open the case will not be entertained.

The petition is denied.

PRACTICE—COSTS—CONTEST—RESIDENCE.

DAVIS *v.* EISBERT.

A party who files a protest alleging grounds sufficient to warrant the cancellation of the entry, if proven, and offers to pay "the expenses of the contest," is properly taxable with all the costs as a contestant, under rule 54 of practice; and if, after a successful termination of such suit and the exercise of the preferred right by the contestant, a rehearing is ordered on the original issue the obligation to pay the costs thereof rests with the contestant.

The acts of a settler looking toward the establishment of a permanent home on the land may be properly considered in determining the good faith of his residence thereon.

An allegation of failure to comply with the law does not furnish a basis for cancellation if not made until after the alleged default has been cured.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1898.

(W. V. D.) (G. C. R.)

On April 25, 1884, Mihaley Eisbert filed his preemption declaratory statement for the NW. ¼ of the NW. ¼, Sec. 23, and the N. ½ of the NE. ¼ and the NE. ¼ of the NW. ¼, Sec. 22 T. 22 N., R. 3 E., Seattle land district, Washington. On April 25, 1885, he transmuted his filing into homestead entry, No. 7374, and on July 9, 1890, he gave notice of his intention to make final proof before the local office on October 31, 1890.

On August 27, 1890, Charles H. Davis filed his sworn protest, alleging that Eisbert had not established his residence upon said land until October 15, 1888; that subsequent thereto he had been absent from the land more than half the time; that the land was not settled upon and cultivated as required by law.

When, on October 31, 1890, Eisbert offered his final proof, Davis appeared, but waived cross-examination of Eisbert's witnesses until the hearing, which was had on his said charges on April 7, 1891. Upon the hearing the register and receiver decided in favor of Eisbert; on appeal, your office reversed that action and held the entry for cancellation; on further appeal, on March 3, 1894, the Department affirmed that action, and on March 31, 1894 (unreported), denied a motion for review. The case was closed, and Davis made entry of the land October 30, 1894.

On December 10, 1894 (unreported), the Department denied Eisbert's motion for new hearing on the grounds of alleged newly discovered evidence.

On March 7, 1895, Eisbert died.

On December 28, 1895 (unreported), the Department entertained a motion for review of the decision denying a motion for rehearing, saying: "There seems to be no legal obstacle in the way of resolving that doubt by a further hearing, which may be had on terms fair to both sides."

Hearing was had, and the register and receiver, on July 19, 1896, recommended that Eisbert's final proof be approved and the protest of Davis be dismissed.

On appeal, your office, by decision dated December 9, 1896, affirmed that action, and on November 10, 1897, denied a motion for review.

A further appeal brings the case here.

Pending consideration of the appeal herein, Davis has filed a petition asking a rule against the defendant (now Celia Eisbert, widow of the entryman,) compelling her to deposit with the register and receiver

the sum of money necessary to reimburse petitioner herein on account of a deposit which he was erroneously compelled by the register and receiver to make to cover cost of adducing all the testimony of the 'further hearing' ordered by the Department in said case.

While Davis's affidavit attacking the entry was in the form of a protest, yet in it he proposed "paying the expenses of the contest," and for all that appears in the record he paid without question the expenses of the first hearing, and was awarded the right of entry, as herein above shown. While his affidavit was styled "a protest," being filed after Eisbert had given notice of his intention to submit final proof, yet by his very terms and allegations Davis, to all intents and purposes, became a contestant, since these allegations, if true, were sufficient to bring about the cancellation of the entry attacked, and his proposition to pay the costs of the contest, and his prompt compliance therewith, would have given him the preference right of entry under the second section of the act of May 14, 1880 (21 Stat., 140), which, as shown above, was actually exercised by him October 30, 1894, after the Department (October 10, 1894,) denied Eisbert's motion for review, and your office (October 19, 1894,) canceled Eisbert's entry and closed the case. Davis was, therefore, a contestant, and the costs were properly taxed under Rule of Practice 54. Emblen *v.* Weed, 13 L. D., 722; Martin *v.* Barker, 6 L. D., 763; Thompson *v.* Smith, 22 L. D., 248; Denman *v.* Domenigoni, 20 L. D., 325.

After Davis had made his entry, the Department, on Eisbert's showing for a rehearing, was in "doubt" "as to whether justice has been done the entryman," meaning, of course, Eisbert.

In allowing this motion, the Department says:

There seems to be no legal obstacle in the way of resolving that doubt by a further hearing, which may be had on terms fair to both sides. I have therefore to direct that a further hearing be ordered, at as early a date as practicable, at which Eisbert shall be permitted to introduce the testimony indicated by affidavits, and which it is alleged it was not in his power to produce on the first hearing; after which rebuttal testimony may be introduced—the question of fact to be determined being, whether or not the entryman had complied with the homestead law in reference to residence and cultivation at date of offering final proof. Such testimony, together with that offered at the former hearing, will be considered, and a decision rendered thereon.

Here a rehearing was ordered—not to determine what Davis had done under his entry, but solely to determine whether Eisbert had complied with the law. If Davis could maintain his allegations, Eisbert would not be permitted a reinstatement; if he failed to sustain his charges, Eisbert's entry would be reinstated and his final proof approved.

Under all the showing, the Department was in doubt, and so ordered a rehearing. The status of the controversy was precisely the same as before Davis made his entry, the question of Eisbert's compliance with the law being the sole question at issue—that issue being raised by Davis's contest. And so, when the rehearing was ordered, Davis was still under obligation to pay the cost of the contest, if he would still retain the status of contestant. French *v.* Noonan, 16 L. D., 481. This he appears to have done, although under protest.

The petition, asking a division of the cost, is, for reasons herein given, denied.

The testimony taken at both hearings has been carefully examined; it is voluminous and somewhat contradictory. It clearly shows that Eisbert's family resided on the land with him after October, 1888; indeed, there was very little effort made to show lack of compliance with the law after that date. It was about two years after that date before Davis attacked the entry, and then only when Eisbert advertised to make final proof.

The principal issue tried was whether Eisbert was a *bona fide* resident on the land prior to the removal of his family thereto in October, 1888.

It is admitted that from date of entry, April 25, 1885, to October, 1888—a period of over three years—his family (wife and three children) did not live on the land, but did live in Seattle, in a house which they rented from month to month. It appears, however, that during that period Mrs. Eisbert, from time to time, visited her husband on the land, as did also his two minor sons. With the assistance of others, he built a double log-house, one half of which was situated on his claim, the other half on that of his daughter, who had a pre-emption claim adjoining on the north; this was in 1884. The land was heavily wooded, and he began to clear it off, grubbing out the stumps and burning the brush. His daughter lived in one side of the house, and he in the other. From year to year he cultivated such parts of the land, as he had prepared, into oats, vegetables, etc. It is in evidence that he was not a skilled farmer, but the proof shows that he used considerable diligence in his efforts to make a farm.

The land is situated on Maury Island, and is about a mile from a landing called Point Robinson; from this landing Eisbert and others, about the year 1885, carried the lumber on their backs to the house, and put a floor in the house. He appears to have had much trouble in getting water, digging in four different places. To avoid the expense of taking the testimony of witness George W. Brittain on this point, it was admitted that said Brittain would testify that Mr. Eisbert dug a well upon the place, commencing in the year 1885 and continuing in 1887; that the well was dug two hundred feet deep, for which Eisbert paid to witness over five hundred dollars in cash; that the well was curbed with about three thousand feet of lumber, which had to be carried on their backs from Point Robinson to the land, the price of

the lumber not being included in the amount paid witness. Certain of Davis's witnesses, while admitting the digging of the well, testified that it added no value to the land, because it never furnished any water. While that is true, it speaks eloquently for Mr. Eisbert's good faith.

The testimony shows that Mr. Eisbert did not bring his family to the land any sooner because of his inability to get water; that he finally dug and cemented a cistern, and secured water; then he brought his family. The whole amount of clearing was small; Eisbert's witnesses place the amount from four to six acres; Davis had it surveyed, making the amount about two acres. However this may be, there can be no question as to the amount of labor and money which Eisbert expended upon the land. This, of itself, appears to be ample to demonstrate his good faith. According to the testimony of certain witnesses, the work Eisbert did was in excess of neighboring homesteaders on the island.

The testimony shows that he was frequently away from the land; on some of these occasions he employed a neighbor to care for and milk his cow.

He was a Jewish rabbi, being ordained to perform certain rites of his church.

He was called away frequently to Seattle, Olympia, and other places to perform these rites, and would necessarily be away upon each occasion a few days. Again, he observed the Jewish holydays once or twice each year, and would be gone from the land two or three weeks upon those occasions. He also frequently went by boat to Seattle, where his family lived; would remain over Saturday and Sunday, and return to the land Monday.

An effort was made to show that Eisbert was engaged in the business of a tailor, in the years 1885, 1886, and 1887, in the city of Seattle, and in partnership with his son-in-law, one Finkelstein. The purpose of this testimony was to show that his real business was in Seattle, and not on the land. The fact that he might have been interested in such a business as partner, or otherwise, would not, *ipso facto*, show that his home was not in fact on the land, for the one is not inconsistent with the other. But the testimony failed in its purpose; it was positively denied by Eisbert at the first hearing and by Mrs. Eisbert at the second, and both were corroborated by other witnesses.

It will be noticed that Mr. Eisbert transmuted his filing into a homestead entry in 1885. He thus appears to have decided to live on the land at least five years. It is in evidence that he was not without means. Had he lived there under his filing only a few months, and purchased the land, which he might have done with less than half the money which he fruitlessly expended in digging for water, he might have obtained title much earlier, and with less expense. The fact that he did not do so, but voluntarily changed his filing to an entry, and thus imposed upon himself the obligations which the law prescribes,

indicates that he intended to make the land his home, and that the entry was not made for speculative purposes.

Much testimony was given as to his actual presence on the land for much of the time before his family moved to it. Witnesses who had worked for him in digging the wells, clearing and grubbing the land, and cultivating the crops, testify positively as to his presence on the land as an actual resident. His furniture—household and kitchen—was meager, but that he actually lived in the house there can be little question, and all the circumstances connected with his extraordinary efforts to procure water strongly corroborate the undisputed testimony of himself and afterwards his widow, that the late arrival of his family upon the land was due to his failure to procure water for their use.

Again, in December, 1887, Mr. Davis, the contestant, appears to have assumed the duties of a government officer, being a lighthouse keeper, at Point Robinson. He was in a position to know something of Eisbert's relations to the land; indeed, he swears that in March, 1888, he was on the land, saw Eisbert's house, shed, etc., but that no one was residing there then. He postponed filing his contest, however, until August 27, 1890, more than two years after he supposed no one was living there. While alleging, in his affidavit, that Eisbert "did not establish a residence on the land until on or about October 15, 1888," still he also alleges Eisbert's absence therefrom after that date "more than one half the time," and that the tract "is not settled upon and cultivated by said party as required by law."

As before seen, the proof wholly fails to show that Eisbert was in default, in any particular, after his family moved to the land in October, 1888, hence in that respect the contest failed. Admitting even that Eisbert was in default in the matter of residence prior to October, 1888, still the affidavit charging that default was not filed until nearly two years after it had been cured by Eisbert's presence on the land with his family; and until more than three years had elapsed since Davis thought the land was wholly unoccupied.

In Montgomery *v.* Newton (21 L. D., 15), the defendant failed to move on the land until nearly three years had elapsed after entry, still, as he established his residence thereon before he was served with notice, the contest failed.

It is a general rule that when a contestant fails to allege a default, until the same is cured, showing good faith on the part of the entryman, the contest must fail, and the entry stands. Neal *v.* Cooley, 18 L. D., 3; Heptner *v.* McCartney, 11 L. D., 400; Davis *v.* Fairbanks, 9 L. D., 530; Hall *v.* Fox, Idem., 153; Stayton *v.* Carroll, 7 L. D., 198.

As above shown, the suit which Davis brought has all the elements of an ordinary contest. It follows that, since the same was brought after the default was cured—admitting even that there was a default—it must fail.

The decision appealed from is affirmed.

APPLICATION TO ENTER—ORDER OF SUSPENSION.

NEFF *v.* SNIDER.

An application to enter, suspended on account of defects therein, with notice of such action to the applicant, operates to reserve the land from other disposition until final action thereon.

The case of Lawson H. Lemmons, 19 L. D., 37, overruled.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1898.
(W. V. D.) (W. M. W.)

The land involved in this case is the NW. ¼ of Sec. 2, T. 27 N., R. 3 W., Enid, Oklahoma, land district.

The record shows that on October 28, 1893, Anna Neff sent her application to enter said land, by mail, and accompanied it with $14.00, the usual fees.

On December 2, 1893, the local officers suspended her application because it was not signed and the money sent with it lacked five cents of being enough to pay fees and commissions, as the quarter section contained a fraction of an acre in excess of one hundred and sixty acres. Notice of this action of the local officers was sent to Mrs. Neff on December 26, 1893.

In her homestead affidavit Mrs. Neff stated that she made settlement on the land October 16, 1893, and was residing on the land at the time her application was made.

On January 17, 1894, Elijah R. Snider was allowed to make homestead entry for the tract.

On May 19, 1894, the register and receiver issued a notice to Snider to show cause why his entry should not be canceled.

A hearing was had, at which Snider and Neff appeared and submitted evidence.

The register and receiver found that Mrs. Neff was the prior settler on and the first applicant for the tract, and recommended the cancella- of Snider's entry. Snider appealed.

On May 2, 1896, your office reversed the judgment of the local officers, and rejected Mrs. Neff's application. She appeals.

The evidence shows that Mrs. Neff went upon the tract on the 12th or 13th of October, 1893, and remained there in a tent until the 17th or 18th of said month, and during this time she caused about two acres to be broken upon the tract and sowed to wheat. She then went to her former home in Kansas, and returned to the land in question about the 28th or 29th of October, and established a residence in a tent, and continued to reside on the tract for about two weeks, and then went back to her former home in Kansas. She returned to the tract early in April, 1894, and built a house, partly out of lumber and partly out of sod, with two windows and one door; built a hen house out of sod, and dug a well. She continued to live in the house and improve the land

up to the time the hearing was had; at which time she had about fourteen and a half acres broken on the tract and in crops.

Mrs. Neff swore that as soon as she received notice of the suspension of her application, she sent the five cents in a letter to the local officers. She also testified that as a matter of fact she was sworn to her homestead and other affidavits before they were mailed; that at the time she made her application to enter she went to the local office, but was physically unable to stand in line with the men and await her turn. Her testimony on these points is not contradicted. Her application was in due form, but was defective in that it was not signed by or for her before it was filed.

Under the circumstances disclosed by the record, it is clear that at the time Snider's entry was allowed Mrs. Neff's application was pending and operated to reserve the tract covered thereby from other disposition until final action thereon. Mallet *v.* Johnson *et al.*, 14 L. D., 658; Smith *v.* United States, 16 L. D., 352; Hudson *v.* Orr, 24 L. D., 429.

It follows that Snider's entry was improperly allowed, and must be canceled.

Snider's first act of settlement on the tract was made a few days before his entry, and his actual residence on it was established thereafter. He gained no rights under his settlement, residence and improvements upon the tract, for the reason that at the time it was made the land was embraced in Mrs. Neff's pending application to enter.

The case of Lawson H. Lemmons, 19 L. D., 37, is cited and relied upon by counsel for Snider as applicable to and governing this case. An examination of the authorities cited in support of that case shows that they do not support the conclusion reached by the Department. Said case, in so far as it conflicts with the views herein expressed, is overruled.

The decision of your office appealed from is reversed, and Mrs. Neff will be allowed to make entry of the tract.

RAILROAD GRANT—INDEMNITY SELECTIONS—SETTLEMENT RIGHT.

VANDEBERG *v.* HASTINGS AND DAKOTA RY. CO. ET AL.

Conceding that the time within which a settler must assert his settlement claim under the act of May 14, 1880, will not run while the land is embraced within a pending indemnity selection, yet if such selection is subsequently relinquished, and the intervening entry of an adverse claimant is allowed, it is then incumbent upon such settler, as against the adverse claimant, to present his claim by contest or otherwise within three months thereafter.

The right of a settler who is residing on land covered by a prior indemnity selection, and whose settlement is subject to such selection, will attach on the cancellation of said selection, if the land is then open to settlement, and defeat the right of the company under a subsequent selection.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1898.

(W. V. D.) (F. W. C.)

The Hastings and Dakota Railway Company and John Vandeberg have each appealed from your office decision of May 20, 1896, in which the

selection of the Hastings and Dakota Railway Company, covering the W. ½ of the NE. ¼ of Sec. 35, T. 121 N., R. 41 W., Marshall land district, Minnesota, was held for cancellation with a view to allowing the homestead application of John Vandeberg, as to said tract, and Vandeberg's application was rejected as to the E. ½ of the NE. ¼ of said section 35, for conflict with the prior right recognized in John Woods, under his additional homestead entry made December 31, 1892, covering said tract.

The entire tract is within the indemnity limits of the grant to the State of Minnesota, which was conferred upon the Hastings and Dakota Railway Company, and was first selected by said company on October 16, 1883, which selection was canceled by departmental decision of October 23, 1891 (13 L. D., 440), and the land declared to be subject to selection or entry by the first legal applicant. Prior to the date of said decision, to wit, on May 22, 1891 (12 L. D., 541), in accordance with the provisions of the fourth section of the act of September 29, 1890 (26 Stat., 476), the indemnity withdrawal formerly made on account of this grant was revoked and the lands restored to the public domain. On October 29, 1891, the Hastings and Dakota Railway Company again selected this land, which selection appears to have been made in accordance with the regulations then in force. Its relinquishment, executed in favor of John Woods, as to the E. ½ of the NE. ¼ of said section 35, was filed on December 31, 1892, and the same day John Woods was permitted to make additional homestead entry covering said tract under the provisions of the act of March 2, 1889 (25 Stat., 854), as additional to his homestead entry covering the adjoining tract, upon which proof had been made and patent issued.

With the record transmitted is an affidavit made by John Vandeberg, dated March 13, 1893, in which he alleges that he settled upon the NE. ¼ of said section 35 on April 15, 1891; that he built a house thereon and has ever since resided upon the tract with his family and improved the land to great value; and petitioned to be allowed to contest the entry of Woods and the right of the Hastings and Dakota Railway Company under its selection before referred to. The date of the filing of this affidavit in the local office is not noted upon the papers.

In your office opinion it is stated that this affidavit was received with the register's letter of January 27, 1894, and a hearing was ordered thereon by your office letter of July 1, 1895. Following the forwarding of said affidavit, to wit, on August 20, 1894, Vandeberg made formal application to make homestead entry of the NE. ¼ of said section, alleging settlement April 5, 1891, and that he had made improvements upon the land to the value of $1,200.

As the result of the hearing had, your office decision finds that Vandeberg settled upon the land, as alleged, in April, 1891, and that he and his family have resided there ever since, his principal improvements being upon the W. ½ of the NE. ¼, and a portion of his breaking upon the E. ½ of the NE. ¼, embraced in Woods' entry.

As regards the claim set up by Woods, your office decision finds as follows:

> Taking the testimony as a whole it establishes a prior claim for the E. ½ NE. ¼ of said section by John Woods, etc.

In view of the company's relinquishment of the E. ½ of the NE. ¼ the controversy presented by the record, as to said tract, is between Vandeberg and Woods, both of whom allege a claim to the land antedating the filing of the company's relinquishment on December 31, 1892.

Admitting that the time specified in the act of May 14, 1880, within which a settler must present his claim, in order to protect himself in his rights under a prior settlement, did not begin to run while the tract was covered by the railroad selection, yet upon the filing of the company's relinquishment, and the allowance of Woods' entry, it became incumbent upon Vandeberg to present his claim, either by contest or otherwise, within three months thereafter. According to the record transmitted, it would appear that no such action was taken by Vandeberg until long after the expiration of the three months; and without attempting to determine the rights of the parties under their claims of settlement as alleged, it must be held that whatever rights were secured by Vandeberg were lost by his failure to present his claim within the time required by law; and so far as your office decision rejected Vandeberg's application and recognized the right in Woods under his additional homestead entry, as to the said E. ½ of the NE. ¼ of section 35, the same is accordingly affirmed.

Relative to the W. ½ of the NE. ¼, the contest is between Vandeberg and the Hastings and Dakota Railway Company.

In its appeal the company alleges the following grounds of error:

> I. Error of fact in holding that Vandeberg made settlement on the tract in controversy in April, 1891, or had lawful settlement thereon at any time prior to the selection of said land under the Hastings and Dakota railway grant of October 29, 1891.
>
> II. Error of law in holding that such alleged settlement of Vandeberg in April, 1891, was in law prior or superior to the claim and right of said railway company and its assignee.
>
> III. Error of law in recognizing the validity of any settlement alleged by said Vandeberg in April, 1891, it appearing from the records and from said decision that the revocation of the indemnity withdrawal for the benefit of the Hastings and Dakota Railway grant was not made until *April* 22, 1891.
>
> IV. Error of law in holding that said tract was at any time lawfully subject to the settlement of said Vandeberg or any one else, the same being expressly excepted therefrom by the said order revoking the said withdrawal, because at the date of said alleged settlement, and for many years prior thereto, and at all times thereafter, the said tract had been selected under the grants for the Hastings and Dakota and the St. Paul, Minneapolis and Manitoba Railway Companies, and was not, therefore, lawfully subject to settlement or entry by any one.

In effect the contention is that the lands within its indemnity limits were reserved from settlement until the order of revocation of May 22, 1891; that said order did not restore lands that were embraced in pend-

ing selections, and that therefore no rights were acquired by the settlement of Vandeberg that can be respected as against the company's claim under its present selection.

A review of the matter will not sustain the company's contention; for if it be admitted that no rights could be acquired by a settlement made upon lands within the indemnity limits prior to the revocation by the order of May 22, 1891, and that said order was not intended to restore lands embraced in pending selections, nevertheless, after such revocation the company's claim to any specific tract would depend upon the legality of its selection then pending.

As before shown, at the time of the revocation of this indemnity withdrawal the company had a selection pending which had been presented on October 16, 1883. Vandeberg's settlement was therefore subject to the company's rights under this selection, which, as before stated, was canceled on October 23, 1891, and the land declared to be subject to settlement and entry. Vandeberg's rights under his continued residence upon and claim to this land surely attached as a settler upon the cancellation of said selection, and his claim, since maintained and asserted in his application under consideration, is superior to the right of the company under its pending selection made October 29, 1891.

Your office decision awarding Vandeberg the right to make entry of said W. ½ of the NE. ¼ is accordingly affirmed, and upon completion of entry by Vandeberg the company's selection will be canceled.

OKLAHOMA LANDS—SETTLEMENT RIGHTS—FINAL PROOF.

NORTH PERRY TOWNSITE *v.* LINN.

Land in the actual occupancy of townsite settlers is not open to settlement and entry under the homestead law.

Presence within the Territory of Oklahoma, during the prohibited period, by which an advantage over others is gained, operates to disqualify a claimant for land in said Territory.

Notice of intention to submit final proof must be published in a reputable newspaper having a general circulation.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1898.

(W. V. D.) (W. A. E.)

September 16, 1893, at 3:58 o'clock P. M., as shown by the record, Henry Linn made homestead entry for the SE. ¼ of Sec. 15, T. 21 N., R. 1 W., Perry, Oklahoma, land district.

September 23, 1893, Anna L. Burks filed affidavit of contest against said entry, on the ground of prior settlement.

September 25, 1893, Linn gave notice that he would, on January 6, 1894, make proof that the tract is needed for townsite purposes, and also show his compliance with law, with the view of acquiring title to said tract for townsite purposes, under section 22 of the act of Congress

approved May 2, 1890 (26 Stat., 81). Notice of this intention was published in the "Perry Rustler," which paper was designated by J. E. Malone, the then register, as "the newspaper published nearest the land described in said application."

At the time designated, Linn made final proof, and on January 10, 1894, the register transmitted said proof to your office, together with a certified check for $1500 in payment for the land.

On the same day that the proof was transmitted, a petition for intervention, signed by one hundred and sixty-eight persons, purporting to be residents upon the land, was forwarded to this Department. Said petition charged fraud and surreptitious conduct on the part of Linn and the local officers in allowing the final entry without sufficient notice.

January 20, 1894, a paper signed by twelve persons purporting to be townsite settlers was sent to the Department, asking that patent be issued to Linn.

January 15, 1894, an affidavit, sworn to by Victor A. Lyles, John W. Swearingen, and Robert W. Davis, was forwarded to the Department, in which it was stated that the "Perry Rustler" was not a newspaper of general circulation; that it was printed on a small hand press in a little bed-room in the back end of a restaurant out of the way and out of the sight of the general public; that the paper is in the nature of a real estate advertisement, advertising Linn's addition to Perry; that it was the practice of the register and receiver to advertise final proof notices in the Evening Democrat, Perry Times, Morning Sentinel, and Cherokee Sentinel; that the issue of the "Rustler" of December 16, 1893, was the only copy of the paper either of the affiants had ever seen; and that if said paper had been one of general circulation, affiants would have known it.

Other affidavits of a similar character were also forwarded to the Department.

By ordinance, duly passed and approved, this land was included within the corporate limits of the city of Perry on February 13, 1894.

March 12, 1894, your office ordered a hearing to determine when the land was first actually settled and occupied as a townsite; when first settled upon by the homestead claimants, and whether in good faith by them for homestead purposes; the character and value of the improvements; and the qualifications of the homestead claimants.

In accordance with the instructions from your office, a hearing was begun June 13, 1894, and closed August 16, 1894. The parties represented at this hearing were the townsite settlers, Anna L. Burks and Henry Linn.

September 22, 1894, the register and receiver, without rendering a formal decision, transmitted to your office the record in the case, together with their report. From this it appeared that when the case was called for trial June 13, 1894, a purported dismissal of the contest of the townsite claimants was filed in the local office. This paper was

signed by John M. Gore, Clark and Enright, and Grant Stanley, as agents for the townsite settlers. It was not shown, however, that these parties were authorized to represent anything more than some of the individual townsite settlers. Accompanying this dismissal was an agreement, signed by several parties styling themselves residents, occupants and claimants of lots on said land, to the effect that the contest of the townsite settlers against the homestead entry of Linn should be dismissed, on condition that Linn should secure and file the relinquishment of all other homestead claimants to said tract, make commutation proof under the townsite law, and upon receipt of patent deed lots to the occupants thereof for not to exceed twenty-five dollars per lot.

Subsequently, attorneys for townsite claimants filed a motion that their contest be reinstated, and the same was granted.

September 22, 1894, Anna L. Burks filed a formal dismissal of her contest, and on the same day the said attorneys for townsite claimants filed a second dismissal of said townsite settlers' contest. It was therein stated that the reason the townsite settlers had applied for a reinstatement of their contest was that Linn had failed to have Miss Burks dismiss her contest, which he had agreed to do; and that as he had now carried out his part of said contract by causing Miss Burks to dismiss her contest, they were authorized, as attorneys for the townsite people, to dismiss the townsite claimants' contest.

March 9, 1895, your office transmitted the record to the Department with the recommendation that Linn's proof and entry be approved.

March 20, 1895, Messrs. Bascom and Johnson, attorneys claiming to represent the townsite settlers, filed an informal application for reinstatement of the townsite settlers' contest, alleging fraud and collusion in the dismissal thereof. It was stated in said application that Linn's representatives had paid a few individuals, who claimed to represent the citizens, to withdraw the contest on the part of the townsite contestants, and leave Linn with clear sailing.

April 13, 1895, the Department, without formally passing on the motion to reinstate the townsite settlers' contest, remanded the case for a fuller investigation into the matter of the regularity of said entry and the good faith of the entryman in making the same.

In accordance with these instructions, a further hearing was had, commencing November 30, 1895, and ending January 6, 1896.

As a result of this hearing the local officers rendered their decision recommending the cancellation of Linn's entry.

On appeal by Linn, your office, by letter of January 6, 1897, addressed to the Secretary of the Interior, reversed the decision of the local office, and held Linn's entry intact.

The entire record in the case was transmitted to the Department with said letter from your office, and on January 18, 1897, it was returned with instructions that your office decision be promulgated in

the usual way, and that a copy thereof "be served on Linn, the mayor of the city of Perry, and Messrs. Bascom and Johnson, attorneys representing the townsite settlers, with the usual right of appeal."

Service on all parties was duly made February 3, 1897, and February 11, 1897, an appeal was filed. This appeal was signed by Bascom and Johnson, attorneys for the townsite settlers; A. C. Holland, mayor of the city of Perry; and W. M. Bowles, city attorney of Perry.

May 11, 1897, the attorneys for Linn filed a motion to dismiss the appeal, and May 26, 1897, a reply to this motion was filed.

The motion to dismiss consists in the main of a general argument in support of Linn's entry. It is alleged, however, in the course of the argument, that all parties claiming adversely to Linn have withdrawn, that the case has resolved itself into a matter between Linn and the government, and that the decision of your office should be declared to be final.

The townsite settlers' contest, as stated above, was dismissed, then reinstated, and again dismissed, but it was not shown that the parties who filed the dismissals were acting for the body of the townsite settlers. The mayor of Perry and Messrs. Bascom and Johnson, who are now claiming to represent the townsite settlers, allege that the withdrawal of the townsite settlers' contest was not in accordance with the wishes of a majority of said settlers. Moreover, the Department specifically directed, on January 18, 1897, as said above, that the mayor of the city of Perry and Messrs. Bascom and Johnson, representing the townsite settlers, be allowed the right of appeal, and this appeal was taken in accordance with the order of the Department.

Again, Linn is attempting to obtain title to this tract for townsite purposes, and it is necessary that his proof and entry be considered by the Department, and approved or disapproved as the case may be. The dismissal of the townsite settlers' appeal would not have the effect of rendering your office decision final.

As it is necessary, then, that the case should be considered by the Department, with or without the appeal, and as the Department has specifically directed that the townsite settlers be allowed the right of appeal, the motion to dismiss the appeal and declare your office decision final is denied.

Coming now to a consideration of the testimony, two questions naturally present themselves: (1) Was this tract occupied by townsite settlers at the time Linn made settlement and entry? (2) Were Linn's original and final entries obtained regularly and in good faith?

The first question was not passed upon by your office in the decision from which this appeal was taken, for the alleged reason that

the Department, with proof before it clearly showing the actual occupation of this land by seventy-five to one hundred people at the time of Linn's settlement, did not conclude that a segregation for townsite purposes had taken effect, but saw fit to order a hearing to determine wholly different questions.

It appears that a number of telegrams had been received by the Department from a special land agent, alleging that the entry was fraudulent in character and as the evidence already submitted on that point was not very clear, a further hearing was ordered for the purpose of more fully developing that phase of the case.

In the letter remanding the case, however, it was said: "If the rights of adverse claimants were the only question in issue, I should have no hesitation in deciding the case in favor of Linn." It is argued upon the part of Linn that this was a decision of the question as to whether or not this tract was occupied by townsite settlers at the time Linn made settlement.

This statement was not a decision as to the rights of the townsite settlers, but merely an expression of opinion on the part of my predecessor, induced by the several withdrawals of the townsite and homestead settlers' contests. There has been no examination by the Department prior to the present time of the evidence bearing on the question as to whether or not this tract was occupied by townsite settlers at the time Linn made settlement and that question still remains to be decided.

The original townsite of Perry, as surveyed prior to the opening, contained only three hundred and twenty acres. On the day of the opening many thousands of people rushed into Perry with the expectation of taking town lots. It was quickly seen that there would not be enough lots in the original townsite for all comers, and consequently there was an overflow upon the surrounding lands. The tract in controversy adjoined the townsite of Perry on the north, it was only a short distance from the land office, and was well adapted to receive this overflow.

It appears from the testimony of Linn and his final proof witnesses that he came in on the first train from the south, which reached Perry at 12:38 p. m.; that he jumped from the train and ran immediately to the land in controversy, where he stuck a stake with his name on it; that he then ran to the land office, secured a place in line, and made entry at 3:58 p. m. It is not entirely clear from the testimony of these witnesses whether there were other settlers already on the land when Linn reached it. A number of witnesses, however, most of whom came in on horseback and reached Perry before the first train did, testified on behalf of the townsite claimants that at the time the first train arrived there were not less than seventy five or one hundred people on the tract in dispute staking off town lots. Within a few minutes after the arrival of the first and second trains there were hundreds of townsite settlers on said tract. There have been more or less changes among these townsite settlers since the opening. Some of the original settlers have left and others have come in, but at no time since the day of the opening has the number of townsite settlers on said tract fallen below several hundred. At the time of the first hearing in the summer of

1894, the improvements on the land in controversy were valued at from $65,000 to $200,000.

By joint resolution approved September 1, 1893 (28 Stat., 11), Congress extended the provisions of the act of May 14, 1890 (26 Stat., 109), to "the territory known as the 'Cherokee Outlet,' and now a part of the Territory of Oklahoma." The first section of said act of May 14, 1890, provides:

> That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, 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, etc.

A clear preponderance of the evidence shows that when Linn made settlement and entry this tract was already occupied and claimed by townsite settlers. It has since been continuously used for townsite purposes.

This decision might properly be closed here, but in view of the amount of testimony submitted in regard to the regularity of Linn's original and final entries, a brief discussion thereof is not out of place.

Linn passed through the townsite of Perry several times during the prohibited period; he could see the land in controversy from the train; and when he came in on the day of opening he leaped from the train and ran without a moment's hesitation to the land in dispute.

The circular of July 31, 1884 (3 L. D., 32), in regard to final proof notices, reads, in part, as follows:

> You are enjoined to exercise the greatest care and diligence to see that final proof notices are published only in established *bona fide* newspapers, having an actual and legitimate circulation in the vicinity of the land. The paper must be actually published where it purports to be, and must be a reputable newspaper of general circulation and not a mere land notice advertising medium without regular subscribers or general patronage.
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> * * * * * * *
>
> You are not to give the publication to papers that are not "reputable newspapers of general circulation," upon the ground of being "nearest the land." The purpose of the law is that general public notice shall be given of intention to make proof. A publication that does not effectuate such notice is a defeat of the purpose of the law.

A number of witnesses, residents of Perry, among whom were four or five newspaper men, testified that they never heard of the "Perry Rustler" or saw a copy of it until after this case arose. The newspaper men in particular testified that had the "Rustler" been a reputable newspaper of general circulation they would have known it. Several business and professional men, whose advertisements appear in the "Rustler," testified that they had never authorized the advertisements and that no bills for advertising had ever been presented to them by any one connected with the "Rustler." No attempt was made by Linn to rebut this testimony and show that the "Rustler" was a reputable newspaper of general circulation.

To sum up, then, the conclusions to which we come are, that at the time Linn made settlement on said tract it was in the actual occupancy of seventy five or one hundred townsite settlers, which number increased during the day to several hundred, and has so continued; that Linn, by his repeated trips on the train through the townsite of Perry prior to the opening, acquired a special knowledge of this land and an advantage which disqualified him as an entryman; and that the sheet in which notice of his intention to submit final proof was published was not a newspaper at all.

Your office decision is accordingly reversed and Linn's entry will be canceled.

On proper application the land may be entered for the several use and benefit of the residents thereof under the townsite laws.

BUSH *v.* LEONARD.

Motion for a review of departmental decision of August 19, 1897, 25 L. D., 129, denied by Secretary Bliss, March 16, 1898.

CIRCULAR.

Rules and Regulations Governing the use of Timber on Non-mineral Public Lands in certain States and Territories, under the Act of March 3, 1891 (26 Stat., 1093).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1898.

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891 (26 Stat., 1093), the following rules and regulations are hereby prescribed:

1. The act, so far as it relates to timber on public lands, as extended by the act of February 13, 1893 (27 Stat., 444), applies only to the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Nevada, and Utah, the Territories of Arizona and New Mexico and the District of Alaska.

The following rules and regulations do not apply to the District of Alaska, for which rules and regulations are prescribed in a separate circular.

2. The intention of the act is to enable settlers upon public lands and other residents within the States and Territories above named who have not a sufficient supply of timber on their own claims or farms for use thereon for domestic purposes and who are unable to procure the needed timber from private lands, or from public lands under other authority of law, to secure from public lands, for said purposes, timber to supply their immediate and pressing wants.

Such being the case, it was not the intention of Congress to authorize the taking of timber from public lands in said States and Territories to serve as an article of merchandise and traffic, whereby profits might be secured, not only from the labor bestowed in handling the timber, but by charging for the timber itself, after obtaining the same free of cost from the Government; which would practically open a door for speculation in public timber, resulting in the holders of permits being in a position to prevent competition and virtually control the market for timber in their localities.

3. Settlers upon public lands and other residents of the States and Territories above named who have not a sufficient supply of timber on their own claims or farms for use thereon for such domestic purposes as firewood, fencing, or building purposes, or for necessary use in developing the mineral and other natural resources of the lands owned or occupied by them, may procure timber, free of charge, from unoccupied, unreserved, *non-mineral* public lands within said States and Territories strictly for use on their own claims or lands therein for the purposes enumerated in this section (but not for sale or disposal, nor for use on other lands or by other persons, nor for export from the State or Territory where procured), to an extent not exceeding, in stumpage valuation, $100 in any one year.

It is not necessary to secure permission from the Department to take timber from public lands as above allowed. The exercise of such privilege is, however, subject at all times to supervision by the Department, with a view to restriction or prohibition, if deemed necessary.

4. In cases in which the parties needing the timber are not in a position to procure it from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others, agreeing with the parties thus acting as their *agents direct*, in taking or otherwise handling the timber, that they shall be paid a reasonable amount to cover their time and labor expended and all legitimate expenses incurred in connection therewith, *exclusive of any charge for the timber itself.*

5. The uses specified in section 3 of these rules and regulations constitute the *only* purposes for which timber may be taken, free of charge, from public lands in said States and Territories, under this act.

6. The cutting and removing of timber, free of charge, under said act of March 3, 1891, is confined to unreserved, unoccupied, *non-mineral* public lands, in the States and Territories named therein, inasmuch as the act specifically provides that the same shall not operate to repeal the act of June 3, 1878 (20 Stat., 88), which makes provision, in said States and Territories, for the free cutting of timber on public lands that are known to be of a strictly mineral character.

7. It is further provided in said act of March 3, 1891, that "nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain." Consequently, no timber

may be taken thereunder from public lands for use by any railroad company.

8. In order, however, that sufficient public timber may be placed upon the *home* market in said States and Territories, for all legitimate purposes of trade, to such a reasonable extent as shall meet existing emergencies in the matter of demand therefor, sales of timber on the unreserved lands, in general, mineral and non mineral, in said States and Territories, may be directed by the Department from time to time.

The sale of timber is optional, and the Secretary may exercise his discretion at all times as to the necessity or desirability of any sale.

9. While sales of timber may be directed by this Department without previous request from private individuals, petitions from responsible persons for the sale of timber in particular localities will be considered. Such petitions must describe the land upon which the timber stands by legal subdivisions, if surveyed; if unsurveyed, as definitely as possible by natural land marks; the character of the country, whether rough, steep or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind per acre above the average diameter. State the number of trees of each kind above the average diameter it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands. These petitions must be filed in the proper local land office, for transmission to the Commissioner of the General Land Office.

10. Before any sale is authorized, the timber will be examined and appraised, and other questions involved duly investigated, by an official designated for the purpose; and upon his report action will be based.

11. When a sale is ordered, notice thereof will be given by publication by the Commissioner of the General Land Office; and if the timber to be sold stands in more than one county, published notice will be given in each of the counties, in addition to the required general publication.

12. The time and place of filing bids, and other information for a correct understanding of the terms of each sale, will be given in the published notices. Timber is not to be sold for less than the appraised value, and when a bid is accepted a certificate of acceptance will be issued by the Commissioner of the General Land Office to the successful bidder, who, at the time of making payment, must present the same to the Receiver of Public Moneys for the land district in which the timber stands. The Commissioner of the General Land Office must approve

all sales, and he may, in sales in excess of five hundred dollars in value, make allotment of quantity to any bidder or bidders, at a fixed price, if he deems proper, so as to avoid monopoly. The right is also reserved to reject any or all bids. A reasonable cash deposit with the proper Receiver of Public Moneys, to accompany each bid, will be required.

13. Within thirty days after notice to a bidder of an award of timber to him, payment must be made in full to the Receiver for the timber so awarded. The purchaser must have in hand the receipt of the receiver for such payment before he will be allowed to cut, remove, or otherwise dispose of the timber in any manner. The timber must all be cut and removed within one year from the date of the notice by the Receiver of the award; failing to so do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money.

14. Sixty days notice must be given by the purchaser, through the local land office, to the Commissioner of the General Land Office of the proposed date of cutting and removal of the timber, so that an official may be designated to supervise such cutting and removal, as required by law. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the Commissioner of the General Land Office, if not incompatible with public interests. Instructions as to disposition of tops, brush and refuse, to be given through the supervisors in each case, must be strictly complied with, as a condition of said cutting and manufacture.

15. The act provides, that the timber shall be used in the State or Territory in which procured, and, consequently, it may not be exported therefrom.

16. Receivers of Public Moneys will issue receipts in duplicate for moneys received in payment for timber, one of which will be given the purchaser, and the other will be transmitted to the Commissioner of the General Land Office in a special letter, reference being made to the letter from the Commissioner authorizing the sale, by date and initial, and with title of case as therein named. Receivers will deposit to the credit of the United States all such moneys received, specifying that the same are on account of sales of public timber on unreserved lands under the act of March 3, 1891 (26 Stat., 1093). A separate monthly account-current (Form 4–105) and quarterly condensed account (Form 4–104) will be made to the Commissioner of the General Land Office, with a statement in relation to the receipts under the act as above specified.

17. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

18. Section 2461, United States Revised Statutes, is still in force in the States and Territories herein named and its provisions may be

enforced against any person, or persons, who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

19. The Secretary of the Interior reserves the right to prescribe such further restrictions as he may, at any time, deem necessary, or to revoke the privileges granted, in any cases wherein he has information that persons are abusing the same, or when it is necessary for the public good.

20. The rules and regulations provided herein shall take effect April 1, 1898, and all rules and regulations heretofore prescribed under said act of March 3, 1891, relating to the use of timber on public lands in the above named States and Territories, are hereby revoked.

BINGER HERMANN,
Commissioner.

Approved March 17, 1898:
C. N. BLISS,
Secretary.

[Act of March 3, 1891; 26 Stat., 1093.]

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act; and he may designate the sections or tracts of land where timber may be cut; and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

[Act of February 13, 1893; 27 Stat., 444.]

AN ACT to extend the provisions of section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, concerning prosecutions for cutting timber on public lands to Wyoming, New Mexico, and Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of the act entitled "An act to repeal tim-

ber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page ten hundred and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word "Wyoming," in said act, insert the words "New Mexico and Arizona."

PUBLIC TIMBER IN ALASKA.

CIRCULAR.

Rules and Regulations Governing the use of Timber on Public Lands in the District of Alaska, under the Act of March 3, 1891 (26 Stat., 1093).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1898.

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891 (26 Stat., 1093), the following rules and regulations, governing the use of timber on public lands in the District of Alaska, are hereby prescribed:

1. Miners, prospectors, agriculturists, and other settlers in Alaska, who are citizens of the United States, and who have not a sufficient supply of timber on their own claims or lands for use thereon for firewood, fencing, or building purposes, or for necessary use in developing the mineral and other natural resources of the lands owned or occupied by them, may procure timber, free of charge, from unoccupied, unreserved public lands in Alaska, strictly for use on their own claims or lands therein, for the purposes enumerated in this section (but not for sale or disposal, nor for use on other lands or by other persons, nor for export), to an extent not exceeding, in stumpage valuation, $100 in any one year.

It is not necessary to secure permission from the Department to take timber from public lands as above allowed. The exercise of such privilege is, however, subject at all times to supervision by the Department, with a view to restriction or prohibition, if deemed necessary.

2. In cases in which the parties needing the timber are not in a position to procure it from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others, agreeing with the parties, thus acting as their *agents direct* in taking or otherwise handling the timber, that they shall be paid a reasonable amount to cover their time and labor expended and all legitimate expenses incurred in connection therewith, *exclusive of any charge for the timber itself.*

3. The uses specified in section 1 of these rules and regulations constitute the *only* purpose for which timber may be taken, free of charge, from public lands in Alaska, under this act.

4. In order, however, that the native timber of Alaska may be placed upon the *home* market for all *legitimate* purposes of trade, to such a rea-

sonable extent as shall meet existing emergencies in the matter of demand therefor, sales of timber on public lands in Alaska may be directed by the Department from time to time.

While such sales of timber are optional, and the Secretary of the Interior may exercise his discretion at all times as to the necessity or advisability of any sale, petitions from responsible persons for the sale of timber in particular localities will be received by this Department for consideration.

5. Such petitions must describe the land upon which the timber stands as definitely as possible by natural land marks; the character of the country, whether rough, steep, or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind per acre above the average diameter. State the number of trees of each kind above the average diameter it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands.

6. If deemed necessary, before any sale is authorized, the timber will be examined and appraised, and other questions involved duly investigated, by an official designated for the purpose, with a view to action being based upon his report.

7. When a sale is ordered, notice thereof will be given by publication by the Commissioner of the General Land Office.

8. The time and place of filing bids, and other information for a correct understanding of the terms of each sale, will be given by published notices, or otherwise. Timber is not to be sold for less than the appraised value, and when a bid is accepted a certificate of acceptance will be issued by the Commissioner of the General Land Office to the successful bidder, who, at the time of making payment, must present the same to the officer designated to receive it. The Commissioner of the General Land Office must approve all sales, and he may make allotment of quantity to any bidder, or bidders, at a fixed price, if he deems proper, so as to avoid monopoly. The right is also reserved to reject any or all bids. A reasonable cash deposit, to accompany each bid, will be required.

9. Within thirty days after notice to a bidder of an award of timber to him, payment must be made in full, as directed, for the timber so awarded. The purchaser must have in hand the receipt for such payment before he will be allowed to cut, remove, or otherwise dispose of the timber in any manner. The timber must all be cut and removed within one year from the date of the notice of the award; failing to so

do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money.

10. Notice must be given by the purchaser to the Commissioner of the General Land Office of the proposed date of cutting and removal of the timber, so that, if practicable, an official may be designated to supervise such cutting and removal. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the Commissioner of the General Land Office, if not incompatible with the public interests.

11. No public timber sold as above prescribed may be exported from the District of Alaska.

12. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

13. Section 2461, United States Revised Statutes, is in force in the District of Alaska, and its provisions may be enforced against any person, or persons, who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

14. The Secretary of the Interior reserves the right to prescribe such further restrictions as he may, at any time, deem necessary, or to revoke the privileges granted in any cases wherein he has information that persons are abusing the same, or where it is necessary for the public good.

15. The rules and regulations provided herein shall take effect April 1, 1898; and all rules and regulations heretofore prescribed under said act of March 3, 1891, relating to the use of timber on public lands in Alaska, are hereby revoked.

BINGER HERMANN,
Commissioner.

Approved March 17, 1898:
C. N. BLISS,
Secretary.

[Act of March 3, 1891, 26 Stat., 1093.]

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal

prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act; and he may designate the sections or tracts of land where timber may be cut; and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

SCHNEIDER *v.* LINKSWILLER ET AL.

The right to receive a patent under section 4, act of March 3, 1887, extends to purchasers holding under contracts of purchase, whether such contracts are fully or only partially performed, if rights thereunder are acquired in good faith.

A purchase of land from a railroad company must be held to be in good faith, and entitle the purchaser to a patent under said section, if the title thereto is thereafter declared by judicial decree to be in the United States on account of the company having received, exclusive of said tract, an amount of land in excess of its grant, where, prior to said purchase and the institution of said suit, the land had been earned by construction of the road, and had been patented to the State as provided by the grant, and where at the time of such purchase the State is holding such title.

Secretary Bliss to the Commissioner of the General Land Office, March 18, 1898.

(W.V. D.) (V. B.)

The Department has considered the appeal of John Schneider from your decision of June 23, 1897, rejecting his application, under the provisions of the adjustment act of March 3, 1887, for the NW. ¼ of Sec. 5, T. 95, R. 42 W., Des Moines, Iowa, and awarding to Sterling P. Linkswiller the right to make homestead entry of the same.

Said tract, situated in O'Brien county, Iowa, is within the primary limits of the grant made by act of Congress of May 12, 1864 (13 Stat., 79), to the State of Iowa, to aid in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, which grant was conferred by the State upon the Sioux City and St. Paul Railroad Company. It is also opposite to the constructed portion of the road, and before January 26, 1875, the United States issued patent for this land to the State of Iowa for the use of the said railroad company; but no patent was issued by the State to the company.

In October, 1889, suit was instituted by the United States, against said company, to restore the title of the lands to the United States. This suit resulted in a decision by the supreme court, on October 21, 1895, favorable to the United States (reported in 159 U. S., 349).

Thereafter, on November 18, 1895, it was directed that the lands involved in that suit be thrown open to entry after ninety days' published notice to that effect, during which period parties claiming to be purchasers of any of said lands from the company, were notified to present their claims to the local officers, under the provisions of the act of March 3, 1887, in accordance with existing rules and regulations. By this advertised notice the day fixed for the opening of the lands to entry was February 27, 1896. On January 15, 1896, Schneider filed application to make purchase of the tract herein involved, and gave notice of his intention to make proof on March 10, 1896. Linkswiller applied to make homestead entry of the land on February 18, 1896, which application was rejected and an appeal taken. He again applied to enter on February 27, 1896, the day the lands were opened to entry, on both occasions tendering the fees and commissions. On the latter day Hugh Cain, Wilhelm Andres, William R. Spry and Randall Bruning applied to make homestead entry of the land. On March 10, 1896, the day advertised, Schneider appeared and submitted his proof, and a hearing was had, Cain, Linkswiller and Spry appeared, but there was no appearance by the others.

Upon the evidence taken, the register and receiver decided in favor of Schneider. Linkswiller alone appealed, and your office holds that as to the others the case is closed. On June 23, 1897, you rejected Schneider's application, holding that his purchase from the company was not made in good faith.

From the testimony at the hearing it appears that Schneider claimed said NW. ¼ since 1881 or 1882; moved upon it in 1883 and lived there continuously up to the hearing; and that in 1884 he applied to make homestead entry of the same. On May 21, 1887, he contracted with the railroad company for the purchase of the S. ½ of said tract, and thereafter, prior to June, 1889, paid on account of that contract $462.70. It also appears that Frederick Singer, on June 27, 1887, contracted with the company for the N. ½ of said quarter section, which contract he assigned on July 16, 1888, to Schneider, who has paid on account of the same $613.35; that no part of the money thus paid on the contracts has been returned, nor has any suit been instituted for the recovery of the same or any part thereof.

Schneider claims to be the purchaser in good faith under section 4 of the act of March 3, 1887, and if he sustains his claim his right will be superior to that of others relying only upon applications to enter when the land became subject to such entry.

The case has been exhaustively argued here and fully considered.

The matter to be determined now is whether Schneider did purchase said tract, from the company, in good faith, within the purview of the act of March 3, 1887, and amendments; and in order to reach a proper conclusion it will be necessary to go at some length into the history of this grant and legislative and judicial action relating to the same.

If the inquiry were confined to the question whether the contract exhibited in this case evidences such a sale as is contemplated by said act, the matter might be disposed of more briefly, for the Department has, since the passage of said act, passed upon many similar contracts, and uniformly and invariably treated them as showing a sale or purchase within the meaning of the act. If the Department had held that such sale or purchase must be absolute, in the sense of a fully consummated and completed one, in order to be protected, the operation of the act would have been very limited and circumscribed. It is a part of the history of the times, that the land grant companies had sold much of the land within the limits of the grants to immigrants and others, and held out as inducements to such parties contracts giving long credit and requiring moderate annual payments. It was through this policy that vast bodies of land in the public-land States were disposed of to actual settlers and many communities established and built up. This was well known to Congress at the time of the passage of said act and it seems certain that such contracts, whether spoken of as sales or purchases; whether fully performed or only partially performed, constitute a part of the subject with which Congress was dealing, and the rights of the so-called purchaser thereunder are within the protection of the statute, if acquired in good faith. If there be any doubt about the correctness of this view of the purpose and intent of the act of 1887, it is removed by a perusal of the amendment thereto of February 12, 1896 (26 Stat., 6), wherein Congress expressly recognizes partly performed contracts of purchase, like that of Schneider, as constituting a purchase within the meaning of the law.

It is therefore held that there was a "purchase" of the tract in question within the meaning of the act of March 3, 1887.

It remains to ascertain whether said purchase was made in good faith.

The fourth section of the act of May 12, 1864, making the grant to the State of Iowa, contains the following provisos:

> That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine: *And provided further*, That said lands shall not in any manner be disposed of or encumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

The grant was conferred by the State upon the Sioux City company, and accepted by it September 20, 1866. Definite location of the line of road was made July 17, 1867, and construction was commenced in 1872, at the Minnesota State line, and continued southward to Le Mars, a distance of 56.13 miles, but the road was not constructed beyond this point to Sioux City, as required.

Prior to February 5, 1873, the governor of the State, in conformity

with the provisions of the act of 1864, certified to the completion of five consecutive sections, of ten miles each, of said road, southward from the Minnesota State line, and the tract here in controversy is within the primary limits of said fifty miles of constructed road.

320,000 acres was the most which the company could claim for fifty miles of constructed road, but notwithstanding this there were prior to June 4, 1877, patented to the State for the benefit of said company, 407,870.21 acres. Of this amount the State patented to the company 322,412.81 acres, retaining the legal title to the balance of 85,457.40 acres. The tract here involved was not included in any patent from the State to the company.

The amount patented to the company by the State was reduced by a claim of the Chicago, Milwaukee and St. Paul Railway Company, allowed in pursuance of the decision of the supreme court reported in 117, U. S., 406. It is not necessary for the purposes of this decision to go into the details of that case. It is sufficient to say that, notwithstanding the reduction because of the judgment in favor of the Milwaukee company, a greater quantity of land was patented to the State for the benefit of the Sioux City company than it had earned, and that the State patented to that company more than it was entitled to receive for the amount of road constructed. (159 U. S., 349, 366.)

In the meantime, on March 7, 1882, the attention of the governor of Iowa was called, by direction of the Secretary of the Interior, to the fact that the grant had lapsed by failure to complete the construction of said road, and inquiry was made as to what action would be taken looking to a surrender of the unearned lands which had been patented to the State. Apparently, in response to this inquiry, on March 16, 1882, the General Assembly of Iowa passed the following act:

Section 1. That all lands, and rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress, and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be, and the same are hereby, absolutely and entirely resumed by the State of Iowa, and the same be and are absolutely vested in said State as if the same had never been granted to said railroad company.

Section 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Sioux City Journal, newspapers published in the State of Iowa.

As this act did not restore to the United States the title to the unearned land, further correspondence ensued, and on March 27, 1884, the Iowa legislature passed another act, the preamble of which recited the grant by Congress, its acceptance by the State, and the act of 1882, and then the act proceeded—

It is desirable that all land and rights to lands resumed by the State of Iowa, as aforesaid, should be conveyed to and vested in the United States, to the end that such lands shall be made subject to the use of actual settlers, as provided by the acts of Congress relating thereto, now therefore:

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That all lands and all rights to lands resumed and intended to be resumed by chapter one hundred and seven (107) of the acts of the nineteenth General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

Section 2. The Governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City and St. Paul Railroad Company; and the list of lands so certified by the Governor shall be presumed to be the land relinquished and conveyed by section one of this act; *Provided,* That nothing in this section shall be construed to apply to lands situated in the counties of Dickinson and O'Brien.

Section 3. This act being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register, a newspaper published at Des Moines, Iowa, and the Sioux City Journal, a newspaper published at Sioux City, Iowa.

Thus by the act of 1882 the State resumed the lands not earned by the company by a compliance with the conditions of the grant, and the first section of the act of 1884 relinquished to the United States the lands so resumed by the State. The second section of the act of 1884 identified the lands relinquished by the first section as "all lands which have heretofore been patented to the State to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City and St. Paul Railroad Company," but this identification was rendered of at least doubtful application to the tract now in question by the proviso "that nothing in this section shall be construed to apply to lands situated in the counties of Dickinson and O'Brien."

In January, 1887, the governor reconveyed to the United States the lands outside of Dickinson and O'Brien counties, which had not been patented by the State to the Sioux City company. For the recovery of the lands within those counties the suit heretofore spoken of was instituted, resulting in the decision in favor of the United States in 159 U. S., 349.

In that case the court dwelt at much length on the subject matter in controversy, reviewed the history of the legislation, State and national, affecting said grant, discussed the law applicable to the subject, and made a careful and detailed statement of the amount of land the Sioux City company was entitled to, the amount received by the State for its benefit, the amount the company had received, and held that said company had received more land than it had earned and consequently the United States was entitled to the lands yet remaining under the control of the State.

The foregoing somewhat lengthy review of matters bearing upon this case may be summarized as follows:

The tract in question was within the primary limits of the grant, opposite constructed road as certified to by the governor; was, in fact, of the lands earned by the company, and should have been patented

to it. That it was not so patented was the fault of the State authorities, who, instead, patented to the company other lands in excess of the quantity it had earned, and the United States subsequently recovered the title to the land in question, because by such patenting of other lands the railroad grant had been fully satisfied.

Schneider went upon the tract in 1881 or 1882. He may at one time have had some doubt as to the right of the railroad to the land, for in 1884, he applied to make homestead entry of the same. It is not said what became of this application, but presumably it was rejected because the tract was then patented to the State as railroad land. He built upon it, lived there, occupied, improved and cultivated it for years, during all the controversy in relation to its title, hoping and believing, perhaps, that ultimately he would secure title either from the government or the railroad company. Doubtless he knew of the subsequent agitation and legislation in relation to the title, but this fact, instead of giving notice of the defect in the company's title may have tended to confirm that title in his opinion.

The man was either utterly ignorant of the existing infirmity in the title to the tract purchased, or he was misled by the action of the legislative and executive authorities of the State. Whilst his testimony is not apparently as direct, or as responsive, as it ought to have been, in this respect, he states that he always understood that it was railroad land, and that he bought it as such; and the circumstances may well be considered as justifying this statement.

As before said, the tract had actually been earned by the company; the governor of the State had certified to the completion of the road opposite thereto; the State had resumed only the unearned lands; this tract was excepted from the apparent description of unearned lands contained in the act of 1884 and from the State's reconveyance to the United States; and the local land office had rejected Schneider's application to enter it as public land. Why then should he not regard it as part of the earned lands, as in fact it was? At all events, it seems fair to assume that he acted under this conviction.

That this tract was not recovered by the United States upon the claim that it had not been actually earned by the railroad company, is shown by the opinion of the court in Sioux City &c. Railroad *v.* United States, 159 U. S., 349, and especially by what the court says at page 370, viz:

> the railroad company had, prior to the institution of this suit, received more lands, on account of the fifty miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands, containing a like number of acres, that were, in fact, transferred to it, and which cannot now be recovered by the United States, by reason of their having been disposed of by the company. If the company has received as much, in quantity, as should have been awarded to it, a court of equity will not recognize its claim to more in whatever shape the claim is presented.

In this connection dates are important. After the construction of the road opposite this land, after the tract was patented by the United States to the State for the benefit of the railroad company; after the recited legislation by the State in 1882 and 1884; after the failure and refusal of the governor in January, 1887, to reconvey the tract in question to the United States on its demand; and before the institution of suit by the United States in October, 1889, for recovery of the title thereto, viz., on May 21, 1887, Schneider purchased the S. ½ of said tract from the railroad company, paying $80.00 cash; thereafter, on June 22, 1888, the sum of $195.70, and on June 20, 1889, the sum of $187.00; and, on July 16, 1888, he purchased the N. ½ of the quarter section from Singer, who had bought from the company, paying him the sum of $432.32, and afterwards to the company the further sum of $181.03, making a total of $1,076.05 paid by Schneider for the land. It is hardly reasonable to suppose that a man would thus voluntarily pay so large a sum of money for a tract of land to which he believed his grantor had no right.

When Schneider purchased of the company no one was claiming the land under the settlement laws and he alone has been in possession thereof since that time. Considering all the circumstances of the case and the purpose and intent of the remedial act of March 3, 1887, the judgment of the Department is that Schneider was a purchaser in good faith of the tract in question from the railroad company, and as such purchaser is protected by law.

Entertaining these views, your judgment is reversed and the application of Schneider will be allowed if otherwise regular.

Having reached this conclusion it is not necessary to pass upon the claims of the homestead applicants for this tract.

CHORMICLE *v.* HILLER ET AL.

Motion for review of departmental decision of January 7, 1898, 26 L. D., 9, denied by Secretary Bliss, March 18, 1898.

ALIENATION—COAL LAND ENTRY—FINAL PROOF.

GULLETT ET AL. *v.* DURANGO LAND AND COAL CO. ET AL.

The sale of land embraced within a coal land entry prior to the time when final proof has been filed in the local office, but after the actual execution thereof, does not call for the cancellation of the entry in the absence of bad faith.

Secretary Bliss to the Commissioner of the General Land Office, March 18, 1898.
(W. V. D.) (G. B. G.)

The Durango Land and Coal Company has appealed from your office decision of June 15, 1896, denying the company's application to rein-

state canceled coal entry No. 5, made August 16, 1880, by J. H. Bowman and J. R. Stearns, at the Leadville, Colorado, land office, for the N. ½ of Sec. 33, T. 13 S., R. 86 W., which tract was at the date of such cancellation, and since has been in the Gunnison, Colorado, land district.

It appears that the said John H. Bowman and John R. Stearns, on February 24, 1880, filed their declaratory statement for said land. On August 16, 1880, final proof was filed in the local land office, the purchase money for the land—three thousand two hundred dollars—was paid, and on that day Leadville, Colorado, coal entry No. 5 was allowed, the land involved being at that time subject to sale at that office. Almost five years thereafter, viz., May 9, 1885, your office, by letter of that date, required the entrymen to furnish evidence to show whether the land in question was, at date of entry, within fifteen miles of a completed railroad, and by your office letter of November 28, 1890, the entrymen were again required to furnish the evidence called for by said letter of May 9, 1885. Notice of these requirements was given by registered letters addressed to the entrymen at their last known post-office address, which letters were returned unclaimed.

By your office letter of April 13, 1891, said entry was held for cancellation, and notice thereof was sent to the entrymen, April 20, 1891, in a registered letter, addressed to them at their last known post-office address, which registered letter was returned unclaimed.

On July 15, 1892, the Durango Land and Coal Company's attorneys filed in your office their request to be notified of any action affecting said entry.

On July 16, 1892, the additional evidence called for not having been furnished, your office canceled said entry, and said attorneys for the Durango Land and Coal Company were notified thereof.

On October 22, 1892, the said Durango Land and Coal Company, claiming to be the owner, by purchase in good faith, of the land in question, filed its application to reinstate said canceled entry, on the ground of want of notice of the order of cancellation, and alleging that the company was apprised of the order for the first time on August 13, 1892. This application was denied by your office, on November 12, 1892, on the ground that it was shown that said entry was not made for the use and benefit of the entrymen, but for the use and benefit of said Durango Land and Coal Company, and was therefore in fraud of the coal land laws; and it was further held, in view of the bad faith shown, the entry could not be reinstated, even though the evidence theretofore called for should be furnished.

The company appealed, and on April 5, 1894 (18 L. D., 382), the Department found that said entry was allowed in accordance with the then existing regulations which did not require affirmative proof as to the location of the land with respect to completed railroads, and held that an entry so allowed should not have been canceled for the want

of such proof. It was further found that the sale to said company, although made before final certificate issued, was not made until after the actual execution of the final proof, and it was held that

the sale of a coal land claim after the execution of the final proof, but prior to its filing and the payment of the purchase money, does not necessarily warrant the conclusion that the entry was made for the use and benefit of another.

In the meantime, as is recited, on July 26, 1892, Charles Gullett and John D. Carlisle filed in the land office at Gunnison, Colorado, their coal declaratory statement alleging possession and improvement of the same land on July 25, 1892, and on July 19, 1893, they tendered final proof and purchase price of the land, which were rejected by the register and receiver because of the pending proceedings on the application for reinstatement. On appeal by Gullett and Carlisle to your office from this action of the local office, the papers were transmitted to the Department, to be considered in connection with the then pending appeal of the Durango Land and Coal Company from the decision of your office rejecting its application for reinstatement of the entry, and the Department on the whole case presented by these two appeals, said:

In view of the introduction in this manner of an apparent adverse interest, and of the fact that there has been no contradictory hearing below upon the real question at issue, I think the case should be remanded for that purpose . . . . You will direct a hearing . . . . as to whether or not Bowman and Stearns made the entry for their own use and benefit.

A hearing was had pursuant to this decision, and the local officers found that Bowman and Stearns did not make said entry for their own use and benefit, and recommended that said entry be canceled and that Gullett and Carlisle be allowed to enter and purchase the land.

On the appeal of the Durango Land and Coal Company, your office, in its decision on the case June 15, 1896, said:

The evidence . . . . fails to prove that the entrymen were guilty of fraud, but on the contrary, in my judgment, shows that they acted throughout in good faith, and made this entry for their own use and benefit, and not directly or indirectly for the use or benefit of any one else.

The record, however, shows that the intervenors and contestants are claiming the land in controversy adversely to said entrymen and said company, and that an adverse claim intervened before application to reinstate said entry was submitted. Said adverse claim having intervened as aforesaid, it is decided . . . . that the application to reinstate said entry must be denied.

This conclusion is not believed to be correct.

The departmental decision, *supra*, of April 5, 1894, definitely held that the cancellation of this entry was erroneous. A hearing was therein ordered to determine one question only, and that was, whether Bowman and Stearns made the entry for their own use and benefit. By necessary inference, it was held that if the entry was made for their use and benefit it should be reinstated.

At the time of this departmental decision directing a hearing the Durango Land and Coal Company and Gullett and Carlisle were all

before the Department. All the facts necessary to a determination of the rights of the parties, outside of the good faith of Bowman and Stearns in making the entry, were shown by the record at the time the hearing was ordered on the one question of good faith. There was no occasion whatever to order this hearing, if because of other matters then shown by the record the entry could not, as against Gullett and Carlisle, be reinstated even if made in good faith.

The alleged adverse interests of Gullett and Carlisle must have been considered by the Department at the time said decision ordering a hearing was made, and the effect of it as against these parties was to make their right to make entry of the land contingent upon a showing that the original entry under which the Durango Land and Coal Company held was made in bad faith. Gullett and Carlisle were duly notified of that decision but did not ask a modification thereof, so they are bound by it.

The evidence submitted at the hearing had pursuant to this decision shows that the final proof was regularly executed on August 10, 1880, that said final proof was filed in the land office at Leadville, Colorado, and payment made for the land on August 16, 1880; that on August 10, 1880, but *after* executing their final proof, the entrymen conveyed the land to William A. Bell, trustee, who, on January 12, 1885, conveyed to the Durango Land and Coal Company.

There is nothing in the record to show bad faith on the part of the entrymen. The sale of the land after final proof was executed is not prohibited by statute, and assignments at any time of the right to purchase are recognized. See paragraph 37 of rules and regulations issued under the coal land law (1 L. D., 687, 693).

It not having been shown that said original entry was made in bad faith, your office decision is reversed, with directions to reinstate the entry.

HOSKIN *v.* CUPPAGE.

Motion for review of departmental decision of October 20, 1897, 25 L. D., 334, denied by Secretary Bliss, March 18, 1898.

HOMESTEAD CONTEST—RESIDENCE—JUDICIAL RESTRAINT.

WILLIAMS *v.* BLOCK.

A plea of "judicial restraint" will not be accepted as a sufficient defense to a charge of non-compliance with the law in the matter of residence and cultivation, if the homesteader had not established residence and otherwise complied with the law prior to the time when he was placed under such restraint.

Secretary Bliss to the Commissioner of the General Land Office, March 18,
(W. V. D.) *1898.* (J. L. M'C.)

The Department has considered the case of John Williams *v.* Adolph Block, involving the homestead entry of the latter for the E½ of the SE¼,

the SW¼ of the SE¼ and the SE¼ of the SW¼ of Sec. 25, T. 122 N., R. 56 W., Watertown land district, South Dakota.

Block made said entry on September 4, 1894. On March 11, 1895, Williams filed affidavit of contest, alleging failure to reside upon or cultivate the land.

A hearing followed, as the result of which the register found in favor of the plaintiff, and the receiver in favor of defendant.

The defendant appealed from the decision of the register.

Your office, on May 8, 1896, rendered decision in favor of the plaintiff, and held defendant's entry for cancellation. The defendant has appealed to the Department.

The facts necessary to be taken into consideration in arriving at a decision in this case are in substance as follows:

Defendant, at the time of making said entry, owned a house and lot in the village of Webster, near said land, in which he resided, with his parents, younger brothers, and a sister. He continued to reside there until December 24, 1894, when he was arrested, confined, and subsequently convicted of crime, for which he was sentenced to the penitentiary for two years and a half.

Defendant's counsel concede that he did not establish residence on the tract in controversy prior to his arrest and imprisonment, but contend that, inasmuch as his absence is the result of "judicial compulsion," a charge of abandonment and failure to reside will not lie against him—citing Anderson *v.* Anderson (5 L. D. 6), and Bohall *v.* Dilla (114 U. S., 47); and that, inasmuch as he had six months after entry within which to establish residence upon the land, of which only about four months had elapsed when he was arrested, he will have two months after the expiration of his term of imprisonment in which to establish residence, before his entry will be subject to contest.

The cases cited fail to sustain this contention. In the case of Bohall *v.* Dilla, the defendant, Dilla, filed pre-emption declaratory statement December 26, 1873, alleging settlement March 25, 1865. Your office and this Department found as a fact that Dilla and his family had resided on the land there in controversy, and had otherwise fully complied with the law, "from the time of his settlement in 1865, until ejected in 1868" (114 U. S., page 49); and this finding the supreme court accepted.

In the case of Anderson *v.* Anderson, cited by counsel for the defendant, this Department found (5 L. D. 6–7):

> Anderson had lived on this tract *for many years,* and up to the date of his arrest had complied with the requirements of the law as to residence and cultivation.

Another case of "judicial restraint" cited by counsel for the defendant is that of Cane *et al.* *v.* Devine (7 L. D., 532). Devine made homestead entry for the tract there in controversy on May 23, 1873; he and his family established residence on the land within the time prescribed by law; he continued to reside upon, cultivate and improve the same

until October 1, 1880, when he was sentenced to state prison; and during his absence his wife and children continued to reside upon and cultivate the land.

In the case of Arnold *v.* Cooley (10 L. D., 551), and Reedhead *v.* Hauenstein (15 L. D. 554), residence had been established and the law complied with in other respects, prior to the compulsory absence of the claimant because of "judicial restraint."

No case appears upon the records of the Department in which judicial restraint has been accepted as a sufficient reason for the failure of a claimant under the settlement laws to fulfill the requirements of the law, unless residence had been established and a commencement made in the way of compliance with the laws in other respects, prior to such "judicial restraint."

On the contrary, the Department, in the case of Gore *v.* Brew (12 L. D., 239), rendered a ruling which is in every respect applicable to the case now under consideration:

> In the case at bar the claimant had never established residence on the land; and after his sentence, in contemplation of law, his residence is presumed to have remained where it was at the time of his arrest and conviction—which was elsewhere than on his claim.

The decision of your office was correct, and is hereby affirmed.

RAILROAD GRANT—LANDS EXCEPTED—SETTLEMENT RIGHT.

SMITH *v.* NEW ORLEANS PACIFIC RY. CO.

An assignee of an alleged settler at the date of definite location who claims the benefit of the protective provisions of section 2, act of February 8, 1887, is not entitled thereto, if such settler is not shown to have been qualified at such time to assert a settlement claim.

Secretary Bliss to the Commissioner of the General Land Office, March 19,
(W. V. D.) *1898.* (G. B. G.)

The plaintiff, Willis H. Smith, in the case of said Smith *v.* New Orleans Pacific Railway Company, has appealed from your office decision of April 17, 1896, denying his application to enter the N. ½ of the NW. ¼, the SE. ¼ of the NW. ¼ and the SW. ¼ of the NE. ¼ of Sec. 35, T. 7 N., R. 1 W., New Orleans, Louisiana.

By the act of March 3, 1871 (16 Stat., 579), certain lands were granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company. By the act of February 8, 1887 (24 Stat., 391), part of these lands were forfeited to the United States, and by the second section of said act it was provided:

> That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accord-

ance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *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 tracts in controversy are coterminous with that portion of said grant confirmed to the New Orleans Pacific Railway Company by the act of February 8, 1887, *supra,* and with that portion of the road definitely located November 17, 1882, were listed by the company November 13, 1883, and patented March 3, 1885.

The record shows that one John Valentine established residence on the land in controversy in 1867, and continued to reside on and cultivate the same until some time in the year 1885, when he moved off the land. In 1886 he rented it to one T. B. Rogers, and in 1894 said Valentine sold out to the applicant, Willis H. Smith.

It is not shown that Valentine was qualified to assert a settlement claim at the date of the definite location of the road.

In the case of Pennington *v.* New Orleans Pacific Railway Company, 25 L. D., 61, it was said, in referring to the condition of the act, "occupied by actual settlers"—

> This was evidently intended to embrace only those who had settled with an intention to make entry of the land at some future time under the provisions of the settlement laws of the United States, and only those qualified to assert a settlement claim to the land so settled upon would be embraced within the protection of said section. It can not be presumed that Congress meant to except from the grant all lands that might be in the occupancy of persons without regard to their qualifications to make entry at the time under the general land laws.

It not having been shown that Valentine was qualified to assert a settlement claim at the date of the definite location of the road, it is held that the case as made is not sufficient to entitle Smith to the benefits of the act of February 8, 1887.

In this view it is not necessary to pass on the question as to the effect of the act, *supra,* on lands for which patent had issued.

The decision appealed from is affirmed.

REPAYMENT—ENTRY ERRONEOUSLY CANCELED.

THOMAS HAMMOND.

The statutory provisions regulating repayment do not include the erroneous cancellation of an entry among the cases where a return of the purchase money may be made.

Secretary Bliss to the Commissioner of the General Land Office, March 19,
(W. V. D.) *1898.* (E. B., Jr.)

This is an appeal by Thomas Hammond, as assignee of Clarence B. Riggs, from the decision of your office dated July 3, 1896, denying the

application of the former, filed June 10, 1896, for repayment of purchase money in the matter of canceled timber land cash entry No. 2074, made by the latter September 10, 1883, for the SW. ¼ of section 8, T. 6 N., R. 3 W., Oregon City, Oregon, land district.

It appearing from evidence adduced at a hearing had in June, 1885, that Riggs had conveyed the land on August 25, 1883, sixteen days prior to the entry, that the entry, though in the name of Riggs, was in fact completed by another party, and that the land, "when cleared of its timber, would be agricultural land and fit for cultivation," your office, on August 27, 1886, held the entry for cancellation on the ground that it was "illegal and fraudulent." On appeal by Hammond the Department, on March 17, 1888 (unreported), finding the facts to be as stated by your office, affirmed its decision. The entry was accordingly canceled April 6, 1888.

The application for repayment was denied on the ground that the law governing the return of purchase money does not apply to a case of this character. The appeal contends that Riggs had not conveyed the land and that the entry was not completed by another person as found by your office and the Department, and that under the decision of the supreme court in Budd *et al. v.* The United States (144 U. S., 154), it is no bar to the allowance of a timber land entry that the land when cleared of its timber would be fit for agriculture. If these contentions were all well taken, they might justify the conclusion that the entry was *erroneously canceled*, and if the land was still public land and there were no adverse rights thereto, might warrant the reinstatement of the entry, but they would present no lawful ground for repayment of purchase money. Money can not be repaid from the public treasury without express authority of law.

Section 2362 Revised Statutes authorizes the repayment of money paid for lands "erroneously sold by the United States, so that from any cause the sale can not be confirmed," and the second section of the act of June 16, 1880 (21 Stat., 287), authorizes repayment of "the fees and commissions, amount of purchase money, and excess paid" in cases of entries of public lands "where, from any cause, the entry has been erroneously allowed and can not be confirmed"; but these provisions of law do not, according to the applicant's own contention, apply to his case. His contention is that the entry was properly allowed and *erroneously canceled*. There is no law authorizing repayment in such a case. Upon the face of the papers the entry was properly allowed. It was only as the result of a hearing that it was determined that its allowance was fraudulent.

Whether or not the judgment of cancellation was warranted by the law and the facts, is not now an open question. Such judgment is *res judicata*. See in this connection the case of Falk Steinhardt (25 L. D., 210). The decision of your office is affirmed.

AMENDMENTS TO RULES AND REGULATIONS GOVERNING FOREST RESERVES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 21, 1898.

The following amendments and additions to the rules and regulations governing forest reserves, issued June 30, 1897, (24 L. D., 588) are hereby prescribed and promulgated:

Paragraph 11 is amended to read as follows:

11. The right of way in and across forest reservations for irrigating canals, ditches, flumes and pipes, reservoirs, electric power purposes, and for pipe lines, will be subject to existing laws and regulations; and the applicant or applicants for such right will be required, if deemed advisable by the Commissioner of the General Land Office, to give bond in a satisfactory surety company to the government of the United States, to be approved by him, such bond stipulating that the makers thereof will pay to the United States for any and all damage to the public lands, timber, natural curiosities or other public property on such reservation or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur.

Paragraph 27 is amended to read as follows:

27. Within thirty days after notice to a bidder of an award of timber to him, payment must be made in full to the receiver for the timber so awarded; or equal payments therefor may be made in thirty, sixty and ninety days from date of such notice, at the option of the purchaser. The purchaser must have in hand the receipt of the receiver for each payment before he will be allowed to cut, remove, or otherwise dispose of the timber covered by that payment. The timber must all be cut and removed within one year from the date of the notice by the receiver of the award; failing to do so, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money: *provided*, that the limit of one year herein named may be extended by the Commissioner of the General Land Office, in his discretion, upon good and sufficient reasons for such action being shown.

The following additional regulations are prescribed:

32. In order to meet the necessities of persons, firms, companies, or corporations, whose business requires a large and continuous supply of timber, it is hereby provided that where the annual consumption exceeds one million feet of timber, board measure, application for the succeeding year's supply may be made in time to permit the appraisement and sale of the timber desired six months in advance of its actual need.

33. Where timber has been appraised and advertised for sale and no satisfactory bid has been offered, a new appraisement and sale may be ordered, from time to time, until an appraisement and sale has been made, which shall receive the approval of the Commissioner of the General Land Office.

BINGER HERMANN,
Commissioner.

Approved, March 21, 1898.
C. N. BLISS,
Secretary.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE.

NORTHERN PACIFIC R. R. CO. (ON REVIEW).

The departmental decision of April 13, 1895, 20 L. D., 332, holding that the withdrawal on general route for the benefit of the Northern Pacific grant is no bar to the establishment of an Indian reservation within the limits of such withdrawal, adhered to on review.

Secretary Bliss to the Commissioner of the General Land Office, March 23, 1898.
(W. V. D.) (F. W. C.)

With your office letter "F" of May 31, 1895, was forwarded a motion, filed on behalf of the Northern Pacific Railroad Company, for review of departmental decision of April 13, 1895 (20 L. D., 332), in which it was held that (syllabus):

The withdrawal on general route for the benefit of the Northern Pacific grant is "from sale, entry, and preemption" only, and does not debar, within its limits, the executive from the exercise of its ordinary authority in the establishment of an Indian reservation; and lands within said limits, so reserved at date of definite location are excepted from the operation of the grant, and revert to the public domain on cession thereof by the Indians:

and the Department refused to disturb the previous directions given by your office, instructing the local officers to dispose of the lands within the ceded portion of the Cœur d'Alene reservation without regard to the claim of the Northern Pacific Railroad Company to the odd numbered sections.

The said motion was entertained March 3, 1897, and on April 6th following, counsel asked that the case be decided on briefs theretofore filed.

The Northern Pacific Railroad Company filed in the United States circuit court for the district of Idaho, northern division, a bill of complaint against the settlers upon the odd numbered sections within the ceded portion of the Cœur d'Alene reservation, alleging ownership thereof under its grant substantially as claimed in this motion for review, and sought to enjoin the settlers from exercising the rights asserted by them to such lands under their settlement claims.

Upon a hearing, the circuit court refused the injunction, deciding against the company's contention.

The company appealed to the circuit court of appeals for the ninth circuit, but thereafter withdrew its appeal, thus acquiescing in the decision of the circuit court. (82 Fed. Rep., 1004.)

After careful consideration of the argument filed in support of the motion for review the previous decision of this Department is adhered to and the motion is accordingly denied and herewith returned for the files of your office.

CLASSIFICATION OF LANDS—ACT OF FEBRUARY 26, 1895.

INSTRUCTIONS.

In classifying unsurveyed lands under the act of February 26, 1895, where the entire area of the tract, as designated by natural or artificial boundaries, is of the same character, the classification should be made without reference to the particular section.

Secretary Bliss to the Commissioner of the General Land Office, March 23, 1898.

(W. V. D.) (E. F. B.)

The Department is in receipt of your letter of February 23, 1898, submitting for my approval list of lands classified during the month of October 1897, in the Missoula land district, Montana, under the act of February 26, 1895 (28 Stat., 683).

The list embraces the entire area of unsurveyed land included within exterior limits determined by given distances from a corner established by a government survey.

In view of the fact that the classification of even sections will have to be noted upon the tract books of your office, and of the local office, involving considerable additional work, and may also involve the right of persons to enter said lands under the agricultural laws, and the right of the State to sections 16 and 36, you ask to be fully instructed in the premises.

The classification of unsurveyed lands in the manner shown by the report of the commissioners, is not contrary to any provision of the act of February 26, 1895, or of the instructions of the Department issued at various times for the guidance of the commissioners in the performance of their duties, imposed by said act.

The purpose of the act was to facilitate the adjustment of the grant to the Northern Pacific Railroad Company, by enabling the Secretary of the Interior to ascertain, without delay, what lands within the limits of the grant to said company in the States of Montana and Idaho were mineral in character, and excepted from the operation of the grant.

The approval by the Secretary of the Interior of the classification of lands made by the commissioners, under the provisions of said act shall be considered final only so far as it affects the right of the rail-

road company under its grant, but as said by the Department in the letter of November 30, 1897 (25 L. D., 446),

> it does not prevent other disposition of the land, where returned as mineral, should subsequent investigation prove the tracts to be not mineral in character, and an entryman making entry of such lands under the mineral laws should establish the mineral character the same as though such classification had not been made.
>
> A mineral return by the commissioners would not, therefore, prevent your office from making such disposition of the land as is proper upon a subsequent showing as to its character, but the classification should be considered as of the same effect as the return of mineral lands made by the government surveyor.

The instructions of June 25, 1895 (20 L. D., 571), did not abrogate any part of the original instructions of April 13, 1895 (20 L. D., 350), but were supplemental thereto. As the purpose of the act was to provide solely for the classification of the odd numbered sections within the limits of the grant, the commissioners were so instructed, but it was only intended that they should be restricted to the examination of the odd sections in cases where the mineral character of such sections could be satisfactorily ascertained, without resorting to an examination of the adjacent land. Otherwise they were required to take into consideration the mineral discovered or developed on adjacent sections, or its geological formation for the purpose of ascertaining the true character of the odd section.

These instructions were not intended to control in the examination of unsurveyed lands, because the locus of the odd sections could not be definitely ascertained until after survey, and hence the act provides that

> if the lands examined are not surveyed, classification shall be made by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the commissioners may determine.

The examination and classification of the commissioners, was made in the manner directed by the act. When the entire area of any tract of unsurveyed land designated by such natural or artificial boundaries as may be readily identified, is of the same character, the classification should be made without reference to the particular section. Any other course would not only involve a loss of time, and much unnecessary labor and expense, but it would also be impossible to designate accurately the actual lines of the odd sections.

The only objection that can be urged to the approval of the report of the commissioners is the uncertainty of the locus of the first mentioned tract. It starts from a common corner of a government survey which, they state, has not been accepted or approved. The report is therefore returned to your office, and you are directed to suspend action thereon until a definite starting point has been established, either by the approval of said survey or otherwise, which will accurately designate the land classified.

REPAYMENT—MORTGAGEE—ASSIGNEE.

CALIFORNIA MORTGAGE, LOAN AND TRUST CO. (ON REVIEW).

In the case of a mortgage executed prior to the cancellation of the entry covering the land, and a deed made to the mortgagee after such cancellation, for the purpose of giving additional effect to the mortgage, the holder of such conveyances may be regarded as an assignee within the meaning of the act of June 16, 1880, and as such entitled to repayment.

Secretary Bliss to the Commissioner of the General Land Office, March 23, 1898.

(W. V. D.) (G. B. G.)

By departmental decision of March 15, 18 7 (24 L. D., 246), the application of The California Mortgage, Loan and Trust Company, for the repayment of the sum of four hundred dollars paid to the United States by William B. Stewart, upon making his pre emption cash entry of the NE. ¼ of Sec. 32, T. 4 S., R. 1 E., Los Angeles land district, California, was denied.

It appeared that said cash entry was made January 12, 1889, and canceled on March 31, 1890, because the land had been, by executive order of June 19, 1883, reserved from entry, for the benefit of the Mission Indians; that on November 27, 1893, said company, claiming as mortgagee, applied to have the entry reinstated, which application was denied. Thereupon, the company made application for repayment of the purchase money, and filed therewith a certified copy of the receiver's receipt; the affidavit of the vice-president and general manager of the company, setting forth that said company, on July 28, 1889, loaned to said Stewart the sum of one thousand dollars, receiving as security for such loan a mortgage on the land; a deed of bargain and sale dated May 4, 1894, from Stewart to the company, duly recorded; a quit claim deed from the company to the United States; and an assignment by Stewart to the company of all right, title and interest in the money paid by him to the United States for the land in controversy.

In its decision of March 15, 1897, *supra*, the Department held that a mortgagee is not an assignee within the intent and meaning of the act of June 16, 1880 (21 Stat., 287), providing for repayment, if the mortgage is merely a lien on the land, that the right of assignees to repayment is limited to assignees of the land, and does not extend to one holding an assignment of the claim for the money paid on the entry, and that no right of repayment is acquired by an assignee whose interest in the land is not obtained until after the cancellation of the entry.

A motion for review of this decision was filed by the company, and on June 22, 1897, on examination of said motion, action thereon was deferred for thirty days,

to allow the California Mortgage, Loan and Trust Company to produce and file the mortgage deed aforesaid, or a duly certified copy thereof from the official records of

Riverside county, California, and to show by proper evidence the relation, if any, which the said mortgage and the indebtedness thereby secured bear to said deed of bargain and sale and said assignment; and to show by satisfactory evidence who is the present holder and owner of said mortgage and the indebtedness thereby secured.

In response to this, the company on July 22, 1897, filed in the Department a certified copy of the mortgage referred to, and the affidavit of E. J. Swayne, the vice-president and general manager of the company, wherein it is stated that the company loaned to said Stewart one thousand dollars, on the 28th day of June, 1889, to secure which said mortgage was executed, that the deed made by said Stewart, on the 4th of May, 1894, was without consideration, except the original indebtedness evidenced by the mortgage, and that the real object and purpose of such conveyance was to more fully protect and indemnify said company against loss than could otherwise be done by the mortgage. It is further stated that Stewart is and has been for a long time insolvent; that he has never paid any part of said mortgage—either principal or interest; that the California mortgage, Loan and Trust Company is still the owner of said mortgage, and is entitled to the principal debt, with interest thereon from June 28, 1889, to the present time.

The mortgage referred to bears evidence of having been executed on June 28, 1889, and appears to have been lodged for record on that day and duly recorded.

Enough is shown in regard to the whole transaction to authorize the finding that the company loaned Stewart one thousand dollars, on the 28th day of June, 1889, on the faith of his final certificate, taking a mortgage upon the land to secure payment, and that after the cancellation of the entry, the company took a deed from Stewart to the land and an assignment of his claim against the United States for repayment of the purchase money.

The *bona fides* of the whole transaction seems to be altogether free from doubt, and the only question left for determination is, whether the law authorizes a repayment of the money to the company.

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides that:

> In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assignees, the fees and commissions, amount of purchase money and excess paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

This entry was erroneously allowed, could not be confirmed, and has been canceled. It is therefore a case in which repayment is directed to be made to the entryman "or to his heirs or assignees," upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land.

It is believed that the California Mortgage, Loan and Trust Com-

pany is such an assignee. If it be conceded that a mortgagee is not an assignee within the meaning of this statute, and that the right of repayment is restricted to assignees of the land and does not extend to assignees of only the claim for money paid: and if it be conceded that the right of repayment is acquired by an assignee whose interest in the land is not obtained until after the cancellation of the entry, it does not follow that the claim of this company should be denied. Inasmuch as the deed executed by Stewart to the company in 1894 grew out of and was the consummation of the mortgage transaction, it should be treated as giving additional effect to the mortgage, which antedated the cancellation of the entry, and as converting the mortgage lien into a claim to the land itself in so far as Stewart or any assignee of his could have such a claim after cancellation of the entry.

The entryman cannot make application for repayment, because he has parted with whatever claim he had, both to the land and the money paid.

The company having surrendered Stewart's duplicate receipt and executed a proper relinquishment of all claims to the land, all the requirements of the statute appear to have been met.

Departmental decision of March 15, 1897, is hereby vacated, your office decision appealed from is reversed, and the case is returned for repayment of the money applied for.

HOMESTEAD ENTRY—REINSTATEMENT.

JOHN F. NEIGHBOURS.

An entry canceled with the view to allowing the entryman to make a second entry may be reinstated, where on account of poverty he is unable to make the second entry, and his good faith is manifest.

Secretary Bliss to the Commissioner of the General Land Office, March 23, 1898.
(W. V. D.) (H. G.)

John F. Neighbours made homestead entry, September 13, 1893, for the SE. ¼ of Sec. 34, T. 13 N., R. 14 W., in the Oklahoma land district, Oklahoma. The local office, on April 23, 1896, transmitted the application of the entryman for a second homestead entry for the E. ½ of the NW. ¼ and lots 1 and 2 of Sec. 31, T. 13 N., R. 14 W., in the same land district. This application was allowed by your office, June 6, 1896, upon condition that the application should be amended by inserting the correct description of the tract, and by changing the orthography of the applicant's name to conform to that of the original entry, which was canceled at the time of granting the application to make second entry.

The applicant informed your office that he had been misinformed by counsel, and understood that he would not be compelled to pay the fees and commissions for the entry of the second tract, and as he was unable to meet the same, asked to have his original entry re-instated.

This application was denied by your office, August 8, 1896, on the ground that from the applicant's previous showing it appeared that he would be unable to comply with the homestead laws on the land covered by his previous entry. Neighbours appeals to the Department.

There can not be much doubt that the applicant's reason for abandoning his application for second entry was his poverty, for it appears incredible that he should have abandoned his claim to the more fertile tract, embraced in his application for a second entry, which had been granted to him, for any reason than that advanced by him—his inability to pay the sum required to meet the fees and commissions of the local office.

It appears from his letters written to the Department and to your office that, although the land embraced in his original entry is situated among sand-hills and is not wholly susceptible of cultivation, the applicant has cultivated some thirty acres of the tract, and has made improvements in the shape of a dwelling, barn, and other farm buildings, has dug a well from which he obtained water, and has resided on the tract for three years prior to his application for second entry, and is now residing thereon with his family, consisting of a wife and three children. He claims that in spite of his crippled condition, having lost the use of one arm, he has expended much toil and labor upon his original claim, and ought not now to be deprived of it, because his lack of means prevented him from perfecting his application for a second entry. It seems a great hardship in this case to deprive the applicant of the fruit of his years of toil in struggling to obtain a home under such discouraging circumstances. It is true, that it appears from his application to make second entry that the soil of the tract entered by him is barren and can not be successfully cultivated, but his subsequent efforts in farming the tract have been fairly successful and have resulted in the cultivation of thirty acres or more. He is now content to remain upon the tract entered by him, and confidently expects, with apparent good reason, to support his family thereon. He claims that he was misled into making his application for a second entry by the representations of the cattle owners in the vicinity, in the midst of whose range his original entry was located, and also by his attorney, who informed him that he could make the proposed exchange without further payment of fees and commissions.

He was allowed sixty days within which to make his second entry by your office, but without awaiting the expiration of this period, his original entry was canceled. This cancellation was premature, as the original entry should have been permitted to stand until the second entry was consummated. The excuse of the applicant that his lack of means prevented his consummation of his second entry is sufficient, and in the opinion of the Department his original entry should be reinstated.

The decision of your office is reversed, and the original entry of the applicant will be reinstated.

RAILROAD GRANT—INDEMNITY SELECTIONS—SPECIFICATION OF LOSS.

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

Indemnity selections, accompanied by designations of loss in bulk, made prior to the decision in the La Bar case, operate to protect the right of the company, as against subsequent applications to enter, filed prior to said decision and the rearrangement of losses in accordance therewith.

The failure of the company to rearrange its losses within the time specified in said decision is a matter between the government and the company, and cannot operate to the advantage of one whose settlement and application to enter were made at a time when the lands were withdrawn and embraced within a pending selection made prior to said decision, and where before any steps were taken by the government looking toward the disposition of the land the company had complied with the requirements of said decision.

Secretary Bliss to the Commissioner of the General Land Office, March 24, 1898.

(W. V. D.) (G. B. G.)

The land involved in this case, lots 16 and 17 of Sec. 7, T. 122 N., R. 31 W., St. Cloud land district, Minnesota, is within the indemnity limits common to the grants for both the main line and the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba railway; was withdrawn from settlement and entry February 6, 1872, and was included in the company's list of selections made on account of the St. Vincent Extension, filed November 13, 1885. This list contained also a list of lands alleged to have been lost to the grant equal in amount to the selected lands.

On September 3, 1891, Joseph Lambeck presented his homestead application, which was rejected because of conflict with the company's said selection. Accompanying his application were two sworn statements, made by him, respecting settlements on the land involved. One is, that he settled in the month of September, 1887; built a house thereon, into which he moved his family, and has ever since continued to reside. The other statement is, that during the years 1884, 1885, and part of the year 1886, one Pick resided on said land with his family, and claimed the same as his homestead, and that in 1886 said Pick abandoned the land.

On the appeal of Lambeck to your office from the denial of his said application, the company's indemnity selection of the land involved was held for cancellation, with a view to allowing the homestead application of Lambeck.

The company appealed to the Department, and, by departmental decision of February 17, 1896 (22 L. D., 202), your said office decision was reversed, and it was held (syllabus):

Indemnity selections, accompanied by designation of loss in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the right of the company as against subsequent applications to enter, made prior to said requirement and the re-arrangement of losses in accordance therewith.

In said decision it was said:

Under the directions given by this Department in its decision in the case of La Bar *v.* Northern Pacific R. R. Co. (17 L. D., 406), this company was, during the month of December, 1893, called upon to re-arrange its indemnity selections so as to designate, tract for tract, the lands lost in place, in lieu of which selections had been made. Acting under this call the company on June 6, 1894, filed its re-arranged list in which the same losses were used, but re-arranged to show the losses tract for tract with the lands selected in its list filed November 13, 1885.

Your office decision holds that the company's selection as originally presented was invalid, and recognizes the intervening right of Lambeck.

Prior to the decision of this Department in this case of La Bar *v.* Northern Pacific R. R. Co., *supra,* there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands, the circular of 1879 merely requiring the designation of losses made the bases for the selections.

I am therefore of opinion that the company's rights were duly protected under the selection as made in 1885, and as they have since complied with the requirements in re-arranging their losses so as to show a specific loss for each tract selected, no rights were acquired as against the grant by the presentation of Lambeck's application in 1891.

A motion for review thereof was filed by Lambeck substantially on two grounds: (1) that it was error to hold that prior to the decision in the La Bar case, there was no specific requirement that the lost lands designated as the bases of indemnity selections should be arranged tract for tract with the selected lands, and (2) that this company's re-arranged lists were not filed within the time allowed under the decision in the La Bar case.

This motion was considered by the Department on December 23, 1896 (23 L. D., 552), and without passing directly on the question whether the statement that, prior to the decision of the Department in the La Bar case, there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands, was a correct one, it was said:

In effect, this decision held that where the company, within the time allowed under the direction given in the La Bar case, re-arranges a list prior to said order, the rights of the company are duly protected, and date back to the filing of the original list. To this decision the Department, after due consideration of the matter, adheres.

It was further held, on the second proposition, however, that a railroad company is entitled to six months from date of actual notice of the order issued under the La Bar case in which to file re-arranged indemnity lists, and the case was remanded to your office, in order that the fact as to whether said company re-arranged its lists within six months from the receipt of such notice be ascertained, and it was directed that appropriate action to that end be taken, and the case disposed of in accordance with that view.

The Department now has the report of your office, wherein it is made to appear that said company did not file its re-arranged lists within six months from actual notice of the requirements, *supra,* of the La Bar case, unless the company is entitled to the benefits of the additional

time allowed by rule 97 of the Rules of Practice for the transmission of certain notices by mail. Counsel for both Lambeck and the company have been heard orally on the questions presented since your said office report was forwarded to the Department.

On behalf of Lambeck, it is insisted that the statement in the first departmental decision herein, that prior to the decision in the La Bar case there was no specific requirement that lost lands should be arranged tract for tract with selected lands, was gross error, and it is submitted that said statement should be corrected, generally, because it threatens the settlement claims of hundreds of settlers, and, specifically, because of its effect on this case. The further insistence of counsel for Lambeck is, that inasmuch as it has been shown that the company did not file its re-arranged lists within six months from date of actual notice of the La Bar decision, the claim of Lambeck must prevail, in accordance with the rule laid down in the decision (*supra*) directing the investigation, it not being conceded that rule of practice No. 97 is applicable to a case of this character.

On the other hand, it is admitted by counsel for the company that said lists were not filed within six months from actual notice of the order in the La Bar case, unless the company is given the benefit of rule 97.

In the matter of the requirement of the specification of losses tract for tract with the selected lands, a most careful examination discloses that, while the regulations in the matter of selection of indemnity lands were, in several cases decided before the La Bar case, construed to require such an arrangement of the losses, yet this requirement was not made general or universal until the decision in that case; further, the previous action of your office in accepting lists without requiring a matching of the losses with the selections, was referred to in that decision and recognition thereby given to such lists by permitting the companies to re-arrange the losses previously assigned in bulk.

It was argued by counsel for Lambeck that prior to the first decision of the Department in the case at bar, it had been held by the Department that an assignment of losses in a railroad selection in bulk, equally with a failure to assign any losses whatever, was no bar to the acquisition of settlement rights, in the absence of a withdrawal, but since that argument was made said counsel has filed a paper with this case wherein it is admitted that such statement was error.

A distinction has always been made between cases of selections where the loss was assigned in bulk and where no loss at all was assigned, and it could not have been the purpose of the requirement made in the La Bar decision to avoid indemnity selections before made upon a designation of the losses in bulk which, as before stated, had been respected by your office, but rather to require of the companies the performance of labor thus imposed upon your office, viz., the matching of the losses with the selections when it came to the submission of clear lists for departmental approval.

In changing a practice which had long been permitted if not actively encouraged, by your office, it would have been altogether inequitable to have permitted the intervention of adverse claims pending a revision of lists whose only infirmity consisted of an informality which had grown embarrassing to a safe and speedy adjustment of railroad grants. Hence the decision in the case at bar, that indemnity selections, accompanied by designation of loss in bulk, made prior to the decision in the La Bar case, operated to protect the right of the company as against subsequent applications to enter, made prior to said decision, and the re-arrangement of losses in accordance therewith.

The Department adheres to this rule; and the remaining question is, whether this case comes within it, in view of the fact that the adjustment was not made within six months from date of actual notice of the order in the La Bar case.

After a full and careful examination of the whole subject, the conclusion has been reached that this is a question wholly between the railroad company and the government.

It must be remembered that indemnity selections under these railroad grants are generally to be made under the direction of the Secretary of the Interior; in fact, the courts have held that until approved by the Secretary of the Interior no selection has been made within the meaning of the granting act.

The companies have been required to formally select lands within the indemnity belt and their rights have been adjusted, when conflict occurred with the claims of others, upon the showing made as to the status of the land at the date of the initiation of such adverse claim.

In some cases the lands were reserved for the company by withdrawals, either required by law or resting upon executive action.

In the present case the act making the grant required the withdrawal of the indemnity lands, and they remained in reservation until restored May 22, 1890 (12 L. D., 541).

At the date of Lambeck's alleged settlement the lands were so withdrawn; further, the company had, prior to this time, presented its selection list at the local office including this tract, and in the list assigned tracts as lost to the grant, but not arranged tract for tract with the lands selected.

Lambeck is presumed to have had full knowledge of the fact that this tract was claimed to be needed in the satisfaction of the grant, both at the date of his settlement and the tender of his application to make entry, and said selection must in some way be avoided before recognition can be given to his claim.

No objection is made to the selection, otherwise than that the company was tardy in re-arranging the losses previously assigned.

Admitting the re-arrangement to have been a few days late, it can not be held that this fact in anywise influenced Lambeck's actions in connection with the tract, for he had long prior to the decision in the

La Bar case settled upon and applied for the tract. His application was properly rejected for conflict with the pending selection, and his pending appeal therefrom only entitled him to a judgment upon the question as to the correctness of the action then taken. He is not in a position therefore to take advantage of the tardiness on the part of the company in complying with the terms of the order made in the La Bar case.

True, it was said that at the expiration of the six months, if a particular basis had not been assigned in the manner prescribed, all tracts formerly claimed would "be disposed of under the terms of the order restoring indemnity lands without regard to such previous claim." It might also be admitted that the land department would have been authorized to so dispose of them after the expiration of the six months. This was not done, and before any steps were taken looking to the disposition of the land, the company had complied with the order.

Upon what reasonable ground, then, can the company's claim be avoided, especially when, as in the case of this grant, it is well known that it can not be anything like satisfied from the available lands within its indemnity belt.

For the reasons given the previous decision of the Department is adhered to and Lambeck's application will stand rejected.

In this view discussion of the applicability of rule of practice No. 97 is not necessary.

NORTHERN PACIFIC R. R. CO. *v.* KEMP.

Motion for review of departmental decision of January 11, 1898, 26 L. D., 17, denied by Acting Secretary Ryan, March 25, 1898.

WILSON *v.* DAVIS.

Motion for review of departmental decision of December 20, 1897, 25 L. D., 514, denied by Acting Secretary Ryan, March 25, 1898.

CONTESTANT—PREFERRED RIGHT OF ENTRY—PRE-EMPTION.

WILLIAMS *v.* WINGATE.

A successful contestant who secures the cancellation of an entry on a contest begun prior to the repeal of the pre-emption law, but not concluded until thereafter, acquires thereby no right of entry under the pre-emption law, if, prior to said repeal, he had not initiated a valid settlement claim to the land involved.

Secretary Bliss to the Commissioner of the General Land Office, March 29, 1898.

(W. V. D.) (E. F. B.)

The land in controversy to wit: The S. ½ NW. ¼ and lots 3 and 4, T. 1 N., R. 28 W., McCook, Nebraska, was formerly embraced in the

homestead entry of Henry M. Hare which was finally canceled February 26, 1890, upon the contest of James Williams who was awarded the preference right of entry, but who failed to exercise the right.

After the action of your office holding the entry of Hare for cancellation and prior to the decision of the Department upon the appeal of Hare, Charlie Williams was allowed to make homestead entry of the tract subject to the right of James Williams the contestant.

May 12, 1890, James E. Wingate, pre-emption claimant, who had filed a second contest against the entry of Hare, contested the entry of Charlie Williams upon the ground of failure to establish a bona fide residence on the tract and that the affidavit upon which his entry was allowed to remain of record was false and fraudulent. Upon this contest a hearing was had which resulted in the cancellation of the entry, and the preference right was given to Wingate.

The decision of your office holding Charlie Williams entry for cancellation was rendered March 10, 1892, which was affirmed by the Department upon the appeal of Williams, June 15, 1893.

July 5, 1893, Wingate filed declaratory statement for the S. ½ NW. ¼ and lots *1* and *2* T. 1 N., R. 28 W., which was evidently intended to cover the tracts in controversy, but they were erroneously described therein.

August 16, 1893, Charlie Williams made homestead entry of the land in controversy under the second section of the act of March 2, 1889 (25 Stat., 854).

October 23, 1893, Wingate published notice of intention to make pre-emption final proof, describing the land as the S. ½ NW. ¼ and lots *3* and *4*, with special notice to Williams who appeared and protested against the allowance of said proof, alleging that he Williams was a settler on the land, and that it was not subject to pre-emption entry by Wingate for the reason that the pre-emption law was repealed prior to any pre-emption filing or bona fide settlement by Wingate.

Upon the proof submitted, the local officers recommended the cancellation of the homestead entry of Williams—and the approval of Wingate's pre-emption proof, which was affirmed by the decision of your office of May 8, 1896, from which decision Williams has appealed.

The controlling question in this case is whether the land is subject to entry by Wingate under the pre-emption law, the proof showing that he commenced to reside on the tract July 23, 1893, maintained residence from that time to the date of hearing, and that he has shown sufficient improvement and cultivation of the tract during that period, to warrant the allowance of his entry, if he is entitled to make such entry.

Wingate ploughed and prepared a part of the land for planting in 1888, when he left the land, as he claims for fear of personal violence by the Williamses. In the spring of 1889, he again ploughed part of the land, and planted it in corn which was ploughed up by the Williamses against his protest. From the spring of 1889, to the spring of

1893, he did not reside on the land or cultivate it, nor make any improvements upon it.

From July 26, 1883, the date of Hare's entry until the decision of the Department of June 15, 1893, affirming the decision of your office holding for cancellation the entry of Charlie Williams, the land was covered by homestead entries, and no settlement right could be lawfully initiated upon said land while it was so segregated.

Section 4 of the act of March 3, 1891 (26 Stat., 1095), repealed all laws allowing pre-emptions of the public land but provided that

> all bona fide claims lawfully initiated before the passage of this act, under any of said provisions of law so repealed, may be perfected upon due compliance with law in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed.

Even conceding that the entry of Charlie Williams which was improperly allowed during the existence of the entry of Hare, did not have the effect to withhold the land from settlement, it does not appear that Wingate performed any acts of settlement after the cancellation of Hare's entry until after the repeal of the pre-emption law. His contest against the entry of Hare which was filed subsequent to the contest of James Williams upon which the entry was canceled, gave him no right. He did not contest either entry upon the ground of priority of settlement, but upon the failure of the entryman to establish and maintain residence.

The preference right to enter the land which he secured by his contest against the Williams' entry, was the right to enter the land under existing laws. It gave him no right to enter it under laws no longer in force unless he had lawfully initiated a bona fide claim under such law before its repeal.

It is true as stated in the decision of your office that

> settlement and residence on land subject to entry by qualified pre-emptor prior to the repeal of the pre-emption law, is the initiation of a right protected by section 4 of the act of March 3, 1891,

but this land was not subject to either settlement or entry at the date Wingate claims to have made settlement thereon, and the cases cited do not sustain the view entertained by your office in this case.

In the case of Dornen *v.* Vaughan (16 L. D., 8) the homestead entry of Dornen was canceled May 14, 1883, and the controversy was upon the application of Dornen for the reinstatement of the entry, which was refused, the decision of the Department being rendered January 5, 1893. The land was therefore subject to settlement under the pre-emption laws from May 14, 1883, until the repeal of the law.

The case of Sielaff *v.* Richter's Heirs *et al.* (20 L. D., 396) involved an issue formed between two contestants as to which contest should be entitled to precedence. Upon the hearing, the heirs of Richter, the entryman, made default, and the local officers recommended the cancellation of the entry upon Bradbury's contest, and that Sielaff's

contest be dismissed. December 12, 1890, your office held Richter's entry for cancellation, which became final, no appeal having been taken from the decision of the local office, and from that date the land was restored to the public domain, subject only to the rights of Sielaff and Bradbury as rival contestants.

In awarding to Sielaff the preference right of entry the Department said:

> The preference right awarded by the Department is such as attached to Sielaff on December 12, 1890—eighty-one days before March 3, 1891, the date of the act repealing the pre-emption laws. Sielaff's settlement on the abandoned, land in 1887, and so long as Richter's entry remained intact, was not a lawful initiation of a *bona fide* pre-emption claim. But the rights of a qualified settler intending to pre-empt would attach to the land as soon as the entry was canceled. If Sielaff was a settler on the land with intention to pre-empt it, on December 12, 1890, or afterwards before March 3, 1891, his claim was lawfully initiated, and is protected by the saving clause of section 4 of the act of March 3, 1891 (26 Statutes, 1095). If such be the fact, he will be permitted to perfect his said claim upon due compliance with law, as prescribed in said section.

As Wingate had not initiated a right under the pre-emption law prior to its repeal, there is no authority given by the act to allow his pre-emption entry, but as he was permitted to file his declaratory statement for the land in the assertion of his preference right, he will be allowed to make entry of it under any existing law to which it is subject, if he is qualified to make such entry.

You will therefore notify him that he will be allowed sixty days in which to make compliance with this direction, and if such action should be taken, the homestead entry of Williams will be canceled. If Wingate fails to comply, his declaratory statement will be canceled and the homestead entry of Williams will remain intact.

HOMESTEAD ENTRY—WIDOW—RELINQUISHMENT.

STEBERG *v.* HANELT.

> On the death of a homesteader, leaving a widow and heirs, the widow takes the homestead right of her husband free from any claim on behalf of the heirs, and is vested with full power to complete the entry for her own benefit, or relinquish the same if she so elects.
>
> The case of Eliza Willis, 22 L. D., 426, overruled.

Secretary Bliss to the Commissioner of the General Land Office, March 29, 1898.

(W. V. D.) (E. B., Jr.)

This is a contest for title to the S. ½ of the NE. ¼ and lots 1 and 2 of section 2, T. 135 N., R. 35 W., Fargo, North Dakota, land district.

On July 5, 1883, Julius Kelm made homestead entry No. 13,182 therefor, and about one year thereafter died, leaving a widow, Augusta Kelm, and four children, the children being then aged about eleven, nine, seven, and two years, respectively. In 1886, about one year and a half

after Kelm's death, his widow, then still residing, with her children, on the land, was married to William Hanelt, the defendant. Hanelt, his wife, and said children, continued to reside together upon the land until the death of his wife, formerly Mrs. Kelm, in 1891. Hanelt and the children continued to live together on the land for some time thereafter and until one of the children, Amelia Kelm, became the wife of Anton Steberg, the plaintiff. In the mean time, on July 8, 1889, Kelm's widow, then the wife of Hanelt, relinquished the land, the entry was canceled, and on the same date Hanelt made homestead entry therefor.

Hanelt having given notice of his intention to make final proof on August 29, 1896, there was filed, on July 28, 1896, the duly corroborated contest affidavit of said Steberg, alleging, among other things:

That on the 8th day of July, 1889, deponent is informed and believes that said Augusta Kelm, then the wife of said William Hanelt, wilfully and without the knowledge or consent of said minor children, and without the knowledge or approval of the probate court of Ransom county, state aforesaid, the court from which she received her authority as guardian, did conspire with her husband, William Hanelt, to unlawfully and fradulently, with intent to cheat and deprive said minor children of their rights under the law to said real estate, relinquish on said 8th day of July, 1889, said homestead entry, which had been made by her former husband on July 5th, 1883, to the United States, to enable her then husband, William Hanelt, to enter the same as a homestead, thus cutting off said minor children from all rights to said land.

That said William Hanelt did fraudulently and unlawfully conspire with his wife, the guardian of said minor children, to bring about said relinquishment, which enabled him to enter the land for the purpose of defrauding said minor children or their rights therein; and in pursuance of said conspiracy said William Hanelt presented at the Fargo Land Office, at Fargo, N. D., the said relinquishment, on the 8th day of July, 1889, and at the same time and place said William Hanelt entered said land as a homestead.

It is prayed in said affidavit that affiant be allowed to contest Hanelt's entry, that the same be canceled, and that the entry made by Julius Kelm be reinstated and his heirs allowed to make final proof and to have patent for the land. A hearing was duly had between the parties, before the local office, on September 30, 1896. The local officers, on April 1, 1897, agreed in their separate decisions that the allegations of fraud and conspiracy had not been proven. The receiver further held and recommended:

It appears to me that the widow of Kelm, Augusta Kelm, later the wife of Hanelt, derived from her husband only his inchoate or inceptive right to the homestead for life, and that both law and equity dictate that the children of Julius Kelm, deceased, should be allowed to complete the entry of the deceased entryman, their father, for their own benefit, and in view of this opinion I recommend that the present entry of William Hanelt be canceled, the entry of Julius Kelm reinstated, and the heirs be permitted to submit final proof as by law provided.

The register, *per contra*, held:

I am of the opinion that the widow of Julius Kelm had the right to make the relinquishment in this case. Whether she made the relinquishment with a full understanding of the consequences, so far as her children were concerned, or whether she made it in pursuance or connection with some contemporaneous agreement by which

the children were to be in a measure protected—does not appear in this case. Fraud has been charged, but not proven—hence the relinquishment must stand as having been executed by law understandingly and for the simple purpose shown on its face, viz., to return the land covered by the entry of Julius Kelm to the mass of the public domain.

I am therefore of the opinion that the entry of Hanelt should be allowed to stand and that this contest must be dismissed.

Upon appeal by Steberg, your office, on September 15, 1897, affirmed the decision of the receiver, held Hanelt's entry for cancellation and that in the event the decision became final Kelm's entry should be reinstated and his heirs allowed to submit final proof. Hanelt now prosecutes an appeal to the Department.

There is no evidence to support the allegations of fraud. It is not even alleged that the relinquishment was procured from the widow by duress, or deceit. There is nothing to show that it was not her free and voluntary act. The motives or reasons which induced it are not disclosed. Upon the testimony adduced at the hearing, it stands unassailed except as to the bare legal right of the widow to make the same. The only question in the case is whether the widow in her lifetime could lawfully relinquish to the United States all claim to the land under the entry of her deceased husband.

The right or privilege to take public land as a homestead is created by the laws of the United States and can be exercised, and can ripen into title, only in pursuance of those laws. From its inception until the title to the land passes from the United States, into whosoever's hands the right may come, it is still governed exclusively by the homestead laws of Congress.

Section 2291 Revised Statutes, which is a part of the homestead law, provides:

> No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

This statute controls the present case. The person who made the entry died. He left a widow, who under the statute succeeded to the homestead claim. She did not hold it as a trustee for her husband's heirs or devisees. They had no right to the land during the widow's lifetime. The father, in his lifetime, could have divested himself of the homestead claim by relinquishment. Nothing in the law precludes the widow from doing likewise. She succeeded to the right of her hus-

band, nothing more and nothing less. If she elected to part with it, her judgment and action were controlling. The right to the land was inchoate and could only be kept alive by compliance with law. The widow alone could determine whether this course was advisable. It is true, that if the right is kept alive by the widow and she dies without making final proof, the right passes to the heirs or devisee of the entryman, but here the widow, to whose judgment the further prosecution of the claim was committed by law upon the death of the husband-entryman, elected to relinquish the claim.

Instead of relinquishing, she might have made final proof and have obtained the full legal title by the issuance to her of a patent for the land. Her right to have done this is beyond question. The land would thereby have become her individual property and she might have conveyed it regardless of her husband's heirs or devisees. Since she could have lawfully acquired the full legal title, and have conveyed it at her pleasure, why should it be assumed that she could not relinquish the claim if that seemed to her the better course? Unless the homestead law precluded her from returning the land again to the government, divested of the homestead claim, which was then in her alone, the relinquishment can not be regarded as unauthorized. The statute contains no such inhibition either in its words or in what is reasonably implied by them.

The views announced in the case of Eliza Willis (22 L. D., 426) would, if allowed to prevail, sustain the decision of your office; but they are not in accord with the statute. The Department must administer the law as it stands and can not read into the statute new provisions, by arbitrary construction. In so far as the Willis case contains anything contrary to the views expressed in this case it is overruled.

It is expressly provided by section one of the act of May 14, 1880 (21 Stat., 140)—

> That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land-office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

The widow was the only lawful claimant to the land in question when her relinquishment was filed and under this section the land was thereby freed from the former claim and opened to settlement and entry.

Hanelt's entry was properly allowed, and he should be permitted to perfect title thereunder. The decision of your office is accordingly reversed. Steberg's contest is dismissed.

WAGON ROAD GRANT--REINSTATEMENT OF SELECTION.

KNOX *v.* GRANDY.

A selection made on behalf of a wagon road company, and thereafter relinquished, can not be reinstated for the benefit of a purchaser from said company, if it appears that said company has already received an amount of land in excess of its grant.

Secretary Bliss to the Commissioner of the General Land Office, March (W. V. D.) *29, 1898.* (F. W. C.)

By your office letter "F" of December 28, 1896, was transmitted a communication from R. F. Knox, petitioning that patent issue to him direct for the NW. ¼ of the SE. ¼ of Sec. 15, T. 27 S., R. 13 W., Roseburg land district, Oregon.

This tract was involved in the case of R. F. Knox *v.* John Grandy, decided by this Department April 16, 1894 (18 L. D., 401).

From the statement of the case then made it appears that this tract is within the indemnity limits of the grant to the State of Oregon made by the act of March 3, 1869 (15 Stat., 340), to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg. The grant was by the State conferred upon the Coos Bay Wagon Road Company.

Selection was made of the tract on account of the grant, June 12, 1874, but said selection has never been approved.

On October 24, 1888, John Grandy was permitted to make homestead entry for said tract, which he commuted to cash in 1889.

In July, 1891, a hearing was ordered between Grandy and the company to determine whether the tract was excepted from the withdrawal made on account of the grant in April, 1871.

Upon the day set for the hearing the company's relinquishment was filed, upon which its selection was canceled and Grandy's entry permitted to remain intact upon the records.

In November following, Knox, claiming to be the owner of the land through mesne conveyances from the company, asked for a hearing to establish his right to the land, which was duly ordered, and upon the testimony adduced it was found that the company sold the land to one W. G. Schofield on May 2, 1873, before it had selected the tract, and thereafter Schofield sold to Knox.

In the previous decision (18 L. D., 401) it was held that the land had not been shown to be excepted from the withdrawal, and was further embraced in a selection of record at the date of Grandy's entry, that said entry was erroneously allowed and should be canceled and the selection reinstated "in order that the same may inure to the benefit of plaintiff Knox."

In accordance with said decision the selection was reinstated and Grandy's entry canceled.

This action was taken notwithstanding by departmental order of February 1, 1892 (14 L. D., 121), your office had been directed to identify the excess in the certifications already made on account of this grant, amounting to 10,359.20 acres, with a view to the institution of suit for the recovery of the same.

While the showing heretofore made on behalf of Knox presents a case for favorable consideration, were it not for the excess, yet in view of this excess, to which the Department's attention does not seem to have been called, further certifications can not be made on account of the wagon road grant, and it is not, therefore, seen how the reinstatement of the selection can inure to Knox's benefit.

The order made in the previous decision of the Department, directing the reinstatement of the wagon road selection, is therefore revoked, and said selection will be again canceled and Grandy's entry reinstated.

PRACTICE—MOTION FOR REHEARING—SUPERSEDEAS.

CUNNINGHAM *v.* SAPPINGTON.

A motion for rehearing, on the ground of newly discovered evidence, will not be granted if it does not appear therefrom that said evidence is of such character as to necessarily modify the former conclusion.

The Secretary of the Interior may, in the exercise of his supervisory authority, by due order, make a motion for rehearing filed out of time, or a petition for re-review, act as a supersedeas, but in the absence of such order, they should not be so treated in the General Land Office.

Secretary Bliss to the Commissioner of the General Land Office, March 29, (W. V. D.) *1898.* (P. J. C.)

A motion for rehearing has been filed by Samuel E. Sappington in a case involving the NW. ¼ of Sec. 26, T. 26 N., R. 2 E., Perry, Oklahoma, land district.

The Department formally affirmed the concurring decisions below awarding the land to Cunningham. Motions for review by Perryman, who was also a party to the contest, and Sappington, and also Perryman's motion for a rehearing, were denied December 13, 1897, and January 29, 1898.

The ground of the present motion is newly discovered evidence, and consists of affidavits alleging that there was a contract entered into between Cunningham and one C. M. Flora, who was also one of the original contestants, by which it was agreed that Cunningham was to conduct the contest against Sappington's entry in the interest of himself—Cunningham

and Flora, jointly, and, in the event of success, that the land was to be equally divided between them and that said contest was prosecuted and the decision in Cunningham's favor procured under this agreement, Flora paying a large part of the expenses of the trial for Cunningham's benefit.

Flora's affidavit is presented in which he verifies the terms of the contract as above set forth and says further, that in pursuance of the contract he left the land and was to return when the case was won and take his half; that he paid the expenses of six witnesses and advanced other money for the contest.

There is in the record in this case two affidavits made by Flora for the purpose of obtaining a continuance of the trial before the local officers. He gives as a reason for a continuance the absence of material witnesses, and swears that they are absent because he had "made all preliminary arrangements for a compromise of said cause between himself and Cunningham;" that because "of the agreement and understanding" he did not bring his witnesses; "that on account of said agreement he has been misled," and that Cunningham "wholly fails to carry out the promises made by him tending toward a compromise."

If the statement made by Flora at a time when his memory ought to have been entirely clear as to any contract between him and Cunningham are to be taken as true, then his affidavit filed in support of the present motion is, to say the least, strongly suggestive of a faulty memory. The two statements are irreconcilable, except on the theory that his first negotiations, as recited in his affidavits for continuance, having failed, he subsequently made another. This, however, is not claimed, and it would seem as if that were improbable. The affidavits for continuance were sworn to August 23, 1894. In the present affidavit Flora says "that on or about July and August, 1894," Cunningham proposed to make the agreement, and "just before the hearing" it was consummated. The hearing began September 4, 1894, it having been continued on Flora's application to that date. He appeared in person and by attorneys, offered no testimony in his behalf, but took the witness stand in Cunningham's interest.

In view of the rather erratic course Flora has pursued in connection with this controversy it is not considered that his testimony would have any considerable force, even if he would testify to all he now swears to. He does not state that he will so testify if given an opportunity, and from the statement made by Sappington in his affidavit he seems to have some doubt about it himself. At all events, he could not force Flora to produce the alleged contract, as suggested in his affidavit.

The statements of the persons who make affidavits in relation to this alleged agreement are based entirely upon conversations with Flora, and between Cunningham and Flora, which were overheard. But from all that appears, these may all have taken place prior to the time Flora made his affidavits stating that the compromise had failed.

Cunningham and his brother testified at the hearing that they made the run from the north line of the territory. Affidavits are now presented which tend to show that they made the race from the Osage Indian reservation on the east, which would be a much shorter distance than from the north. This is alleged to be newly discovered evi-

dence the effect of which would be to impeach Cunningham and his witnesses. It is stated by counsel that this of itself would not be sufficient upon which to grant a re-hearing, but taken in connection with the alleged contract with Flora "should be considered as going to Cunningham's good faith."

Since it is clear that Flora's testimony as to the alleged agreement is not sufficiently satisfactory to warrant its serious consideration, it would seem as if there was no necessity for discussing the question of the place from which Cunningham ran.

The motion is therefore denied, and the papers are herewith returned.

In transmitting the papers in connection with this motion for rehearing, it was said in your office letter of February 28, 1898:

> Said motion is herewith transmitted and by letter of even date the local officers have been directed to suspend all action regarding the land in question.

With your office letter of March 16, 1898, there is forwarded a letter from counsel for Cunningham, which might be termed a protest against the action of your office in ordering a suspension of all action regarding the land. It is claimed by counsel that motions for re-review and rehearing, not served upon the opposite party, do not act as a supersedeas and should not prevent further action unless the same has been entertained by the Secretary of the Interior. It is asked that your letter of February 28, 1898, be modified and the instructions amended.

The letter from counsel for Sappington objects to any such action in the part of your office, and asks that the matter be referred to the Secretary of the Interior for consideration.

In transmitting these letters your office requests "that the case be considered at your (my) earliest convenience and that this (your) office be given specific instructions for its guidance in the future in similar matters."

Rule 114 (23 L. D., 607) provides that motions for review and rehearing must be filed

> within thirty days after notice of the decision complained of, and will act as a *supersedeas* of the decision until otherwise directed by the Secretary.

These two classes of motions are the only ones that the Rules of Practice contemplate should suspend further proceedings in relation to the land, and then only when filed "within thirty days after notice of the decision complained of." When these motions thus filed are finally disposed of by the Department, there is no provision in the rules that the filing of any other or further motion shall operate as a *supersedeas*. No suspension can therefore take place except upon the express order of the Secretary.

Rule 77 (23 L. D., 603) allows motions for rehearing to be filed after the expiration of thirty days from notice of the decision of the Department, when based on newly discovered evidence. There is no specific time fixed for the presentation of a petition for re-review. These are addressed to the Secretary of the Interior, and are an appeal to his

supervisory power. They should not be filed in your office, but in the office of the Secretary. (Golden *v.* Cole's Heirs, 25 L. D., 154; Dorn *v.* Ellingson, Id., 292.) The Secretary of the Interior in the exercise of his supervisory power, may, by order, make a motion for re-hearing filed out of time, or a petition for re-review, act as a supersedeas, but otherwise they should not be so treated in your office.

Inasmuch as the motion for rehearing in the case at bar is denied, there exists no necessity now for modifying the order of your office, notwithstanding it was clearly erroneous.

APPLICATION TO ENTER—REINSTATEMENT—HOMESTEAD ENTRY.

NEEDHAM *v.* NORTHERN PACIFIC R. R. CO.

An application to enter properly rejected by final decision of the Department, under the rulings then in force, can not be reinstated with a view to favorable action under a changed construction of the law.

Land settled upon and occupied by townsite claimants is not subject to entry under the homestead law.

Secretary Bliss to the Commissioner of the General Land Office, March 29, 1898.

(W. V. D.) (W. A. E.)

In accordance with the instructions of the Department, dated October 29, 1896 (23 L. D., 433), your office has transmitted the record in the case of John H. Needham *v.* Northern Pacific Railroad Company, involving the N. ½ of the SE. ¼ and the E. ½ of the SW. ¼ of Sec. 19, T. 13 N., R. 19 E., North Yakima, Washington, land district.

This land is within the limits of the withdrawal of June 11, 1879, on amended general route of the branch line of the Northern Pacific Railroad, and on definite location of the road, as shown by map filed May 24, 1884, it fell within the primary or granted limits of said road.

January 29, 1884, John C. McCrimmon filed a timber culture application for said tract, but this application was rejected by the local officers on account of the withdrawal for the benefit of the railroad company. McCrimmon appealed, and his appeal was pending before your office at the date of the definite location of the road.

March 21, 1885, your office sustained the action of the local officers, and on further appeal the Department, by letter of February 7, 1887 (132 L. and R., 434), affirmed your office decision.

June 23, 1887, the railroad company listed said land.

February 6, 1891, John H. Needham filed his homestead application for the tract in question, and this application was rejected for conflict with the company's claim.

On appeal, the action of the register and receiver was affirmed by your office on May 22, 1895.

Needham thereupon attempted to appeal to the Department, but

owing to a misunderstanding on his part, this appeal was not filed until after the time allowed for filing it had expired. Your office accordingly declined to forward the appeal, and Needham applied for a writ of certiorari, which was granted by the Department on October 29, 1896.

It was held by the Department that the withdrawal on amended general route of the Northern Pacific Railroad was without sanction of law and invalid (citing Northern Pacific R. R. Co. *v.* Miller, 7 L. D., 100; and Northern Pacific R. R. Co. *v.* Cole, 17 L. D., 8); that McCrimmon's timber culture application was consequently filed at a time when the land was subject to entry; that his appeal from the rejection of his application pending before your office at the date of the definite location of the road, excepted the land from the operation of the grant (citing the case of Weeks *v.* Bridgman, 159 U. S., 541); that your office decision rejecting Needham's application appeared therefore to be erroneous; and that where lands have been erroneously awarded to a railroad company by decision of the General Land Office, the Secretary of the Interior may review such action without regard to the manner in which the matter is brought before him.

February 25, 1897, after the record in the case had been transmitted to the Department by your office, but before further action thereon, John C. McCrimmon filed an application for reinstatement of his timber culture application. He quotes from the decision of the Department to show that said application was erroneously rejected, and invokes the supervisory power of the Secretary in his behalf.

March 26, 1897, the mayor and common council of the city of North Yakima filed a petition asking that they be allowed to intervene in said case and be made parties thereto. This petition is sworn to, and shows service upon all the adverse claimants. It is alleged that the Northern Pacific Railroad Company platted the land in question into lots and blocks in the year 1885, and has sold said lots and blocks from time to time until the title to no part of said lands is claimed by said company; that the city of North Yakima was incorporated January 27, 1886, and the land here involved was included within the corporate limits of said city; that said land has been settled upon and occupied as a townsite since the last named date, and has many houses and other valuable improvements thereon. Petitioners ask that they be given an opportunity to prove these allegations, in order that if the facts are found to be as alleged, entry may be made for said land under section 2387 of the Revised Statutes of the United States.

It is unnecessary to say more in regard to the railroad company's claim than has been already said by the Department. The company's list will be canceled as to the land here involved.

In the case of Frank Larson (23 L. D., 452), it was held (syllabus), that:

> An application to enter properly rejected by final decision of the Department, under the rulings then in force, can not be reinstated with a view to favorable action under a changed construction of the law. The applicant in such case may make a new application, if he is qualified and no intervening rights have attached.

McCrimmon's timber culture application, having been rejected by final decision of the Department, under the rulings then in force, can not now be reinstated with a view to its allowance under a changed construction of the law, and as the timber culture law has been repealed, and intervening rights have attached to this land, he can not be allowed to file a new timber culture application therefor. His application for reinstatement is accordingly denied.

If, as alleged by the mayor and city council of North Yakima, this land was settled upon and occupied by townsite settlers on February 6, 1891, when Needham filed his homestead application therefor, it was not subject to entry under the homestead law.

You will therefore instruct the local officers to appoint a day for hearing upon the question as to the status of the land at the time when Needham filed his application, and notify the parties in interest thereof.

RIGHT OF WAY—HIGHWAY—SECTION 2477, R. S.

DOUGLAS COUNTY, WASHINGTON.

It was not intended by section 2477 of the Revised Statutes to grant a right of way for highways over public lands in advance of an apparent necessity therefor.

Secretary Bliss to the Commissioner of the General Land Office, March 31, 1898.
(W. V. D.)

With their letter of April 16, 1897, the local officers at Waterville, Washington, transmitted to your office a certified copy of an order of the board of county commissioners of Douglas County, Washington, purporting to be an acceptance of rights of way claimed to be granted by section 2477 of the Revised Statutes, and asking that the right of way so granted and accepted be made a matter of reservation in all subsequent patents issued for lands affected thereby.

Your office considered the matter, on April 28, 1897, and held that the statute does not authorize the exclusion of such right of way from patents issued for lands subject to such an easement. The county commissioners have appealed to the Department.

Section 2477 of the Revised Statutes is as follows:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Claiming to act under authority of the laws of the State of Washington, the board of county commissioners of Douglas county, in that State, passed the following order:

BE IT REMEMBERED: That, on the 6th day of April A. D. 1897, at a regular meeting of the board of county commissioners of Douglas county, State of Washington, said meeting being duly held and all members of said board being present, on motion, it was ordered that the right of way for the construction of highways over public lands, as granted by act of Congress (Section 2477 Revised Statutes), be

accepted, and the same is hereby accepted, as far as said grant relates to said Douglas county, that is to say to the extent of thirty feet (30) on each side of all sections lines in said county; it is hereby declared that all sections lines in said county shall be, and the same are hereby declared to be, the center lines of highways and public roads in said county, wherever said section lines are bounded by public lands, and said highways are hereby declared to be sixty feet (60) in width; wherever any such section line shall be found to lie between public land on one side and private land on the other, such highway shall be sixty feet in width, and be wholly on such public land and bounded on one side by such section line.

It is further ordered that E. K. Pendergast, prosecuting attorney, for said county and state, file a certified copy of this order in the United States Land Office at Waterville, Washington, and take all necessary steps to have the Hon. Commissioner of the General Land Office exclude such easement and right of way from all patents issued for lands in said county, which shall be claimed or settled upon subsequent to the date hereof.

Dated this 6th day of April A. D., 1897.

It is urged on appeal that it is the duty of the land department of the government to execute this statute, that it authorizes the exclusion of the right of way thereby granted from patents issued for lands to which an easement may have attached by virtue thereof, and that the propriety of such action is manifest.

The declaration by the board of county commissioners, that highways shall be extended along all section lines designated by the public surveys in said county sixty feet in width, that where the section lines are bounded on both sides by public lands, such section lines shall be the center of the highway, and that where any such section line shall be found to lie between public land on one side and private land on the other, the highway shall be wholly on such public land and bounded on one side by such section line, embodies the manifestation of a marked and novel liberality on the part of the county authorities in dealing with the public land.

There is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed, or that their construction and maintenance is practicable. Whatever may be the scope of the statute under consideration it certainly was not intended to grant a right of way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed.

If public highways have been, or shall hereafter be, established across any part of the public domain, in pursuance of law, that fact will be shown by local public records of which all must take notice, and the subsequent sale or disposition by the United States of the lands over which such highways are established will not interfere with the authorized use thereof, because those acquiring such lands will take them subject to any easement existing by authority of law.

The decision appealed from is affirmed.

OKLAHOMA LANDS—SECOND ENTRY—SECTION 13, ACT OF MARCH 2, 1889.

JAMES W. LOWRY.

In determining the qualifications of an applicant for the right to enter lands in Oklahoma obtained from the Seminoles and Creek or Muscogee Indians, as provided for in the first proviso to section 13, act of March 2, 1889, the status of the applicant at the date of his application must control; and if he has at such time, attempted to, but for any cause failed to secure title in fee to a homestead under existing law, or shall have made entry under the commutation provision of the homestead law, he is qualified to make entry under the provisions of said section.

The cases of Miller *v.* Sebastian, 19 L. D., 288, and James T. Krigbaum, 12 L. D., 617, overruled.

Secretary Bliss to the Commissioner of the General Land Office, March 31, 1898.

(W. V. D.) (G. B. G.)

This case involves the SW. ¼ of Sec. 28, T. 19 N., R. 11 W., Kingfisher land district, Oklahoma Territory, and is before the Department on the appeal of James W. Lowry from your office decision of May 16, 1893, denying his application, styled an "Application for a restoration of homestead right and to be allowed to enter another tract of land."

In that application, under oath and corroborated by three witnesses, Lowry stated, in substance:

1. That on June 14, 1887, he made homestead entry for one hundred and sixty acres of land in Kansas, at the Garden City land office.

2. That he resided on and cultivated said tract in good faith, and made valuable and lasting improvements thereon during the years 1887, 1888, and 1889, but for reasons given found it impossible to maintain a home there, and therefore commuted said entry and paid for the land, and afterwards sold it for $300—a small part of what he had expended on it.

3. That afterwards relying upon the laws in relation to Oklahoma, he settled upon the SW. ¼ of Sec. 28, T. 19 N., R. 11 W. (the land first above described), and in April, 1892, moved thereon, with his family and effects, and established his residence, which he has maintained ever since, improving and cultivating the land in good faith.

4. And thereupon he prayed that said paper might serve as an application to make entry of said tract of land "until such time as the Honorable Commissioner can pass upon my application for a restoration of homestead rights."

It appears from your office decision aforesaid that Lowry's commutation of his entry at Garden City was made on October 16, 1889; that the tract upon which Lowry alleged settlement in April, 1892, is part of the land obtained by cession from the Muscogee or Creek Nation, and is segregated by homestead entry No. 9877, of Nathaniel F. Brown, made December 27, 1892, based on soldier's declaratory statement, No. 1347, filed July 9, 1892.

Your office rejected Lowry's application,

for the reason that he has exhausted his homestead right, having made a former entry before, and commuted the same subsequent to the act of March 2, 1889.

Your office treated Lowry's application as "a petition to be allowed to make a second entry," and the act of March 2, 1889, above referred to, is the act of that date, entitled "An act to withdraw certain public lands from private entry, and for other purposes" (25 Stat., 854), generally known as the "second entry act."

This act has no application to the real question here presented. The Congress, however, passed another act on the same date, March 2, 1889 (25 Stat., 980–1005), entitled,

An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes.

This act controls the question presented by the record. Section 13 of this act provides, that the lands acquired from the Muscogee or Creek Indians shall be disposed of to actual settlers under the homestead laws only, except as therein otherwise provided, and enacts as follows:

And provided further, That any person who having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, *or who made entry under what is known as the commuted provision of the homestead law,* shall be qualified to make a homestead entry upon said lands.

The land upon which Lowry alleges settlement and which he now desires to enter, being land acquired from the Muscogee or Creek Indians, is under the terms of this proviso subject to entry by one "who made entry under what is known as the commuted provisions of the homestead law," and the question here presented is, whether Lowry is within the statute.

The entry referred to in the statute is the commuted or cash entry. The original entry in this case was made before the passage of the act and the commuted or cash entry afterwards.

Is Lowry one "who made entry"? This depends entirely on whether the word "made" refers to a time previous to the passage of the act exclusively, or to a future time as well. Grammatically, the word indicates past time; but what *is* past time depends upon the date of reckoning. Reckoning from the date of the act, the word would refer to time previous to the act, but reckoning from the date of an application under the act, it would refer to time previous to the application, which would include time subsequent to the act, as well as previous to it.

The proviso, taken as a whole, indicates that the qualifications of an applicant should be determined from his status at the date of his application. The word "heretofore" is not found in the proviso. In this respect it is more liberal than the second section of the general second entry act, as recently construed by the Department in the case of

Hertzke *v.* Henermond (25 L. D., 82). In that case it was held that the word "heretofore" in that statute limited the operation of the act to cases in which the entry had been made prior to the passage of the act, but that the failure to perfect title thereunder might be a future contingency for which the act provided.

The act here under consideration was passed on the same day, and was for the same general purpose, but will not bear the construction given the act, *supra*, in the case of Hertzke *v.* Henermond, for the reason that if any part of it relates exclusively to time prior to the passage of the act, it all relates to such past time.

It is thought that past time is meant to be reckoned from a future time, and that the past time contemplated by the act is the time prior to the date of the application to make second entry. If, then, any person has, at the date of his application under this act, attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, or shall have made entry under the commutation provision of the homestead law, he is by virtue of this act qualified to make entry upon lands, in Oklahoma Territory, acquired from the Seminoles, or from the Muscogee or Creek Indians.

It follows that Lowry is entitled to the benefits of the statute. The cases of Miller *v.* Sebastian (19 L. D., 288), and James T. Krigbaum (12 L. D., 617), are hereby overruled, in so far as they are in conflict herewith.

Your office decision herein is reversed. A hearing will be ordered between James W. Lowry and Nathaniel P. Brown, to ascertain their respective rights in regard to the tract in question, in which the corroborated affidavit of Lowry, now in the record, will be treated as an affidavit of contest filed as of the date of its presentation, July 14, 1892.

CONTEST—DILIGENCE IN PROSECUTION—SECOND CONTEST.

GAUTERAU *v.* CHANEY.

The failure of a contestant to prosecute his suit, and a resulting order of dismissal for want of prosecution, will defeat the right of such contestant to be afterwards heard on a charge substantially the same as that presented in the first instance.

Secretary Bliss to the Commissioner of the General Land Office, March 31, 1898.

(W. V. D.) (W. M. B.)

The land involved herein is lots 2 and 3, and S. ½ of NE. ¼ Sec. 9, T. 15 S., R. 3 W., S. B. M., Los Angeles land district, California.

The record submitted discloses, as recited in your office letter, the following facts: That Edward W. Chaney made timber culture entry on July 7, 1887, for the above described tract of land; that on November 5, 1892, he gave notice of his intention to make commutation proof

at the local office on December 12, 1892; that Frances Gauterau on November 19, 1892, filed protest and application to contest the entry of Chaney, claiming preference right under act of May 14, 1880 (21 Stat., 140).

The protest against the allowance of Chaney's proof, and the application to contest his right of entry, were based upon the ground that said entryman had failed to comply with the requirements of the timber culture law, alleging, substantially, wherein such failure consisted.

With respect to the proof and entry submitted and made by the entryman your office letter contains statement as follows:

> Chaney made proof on the day set and Gauterau filed an affidavit asking that hearing be had on his complaint at San Diego, Cal. A counter affidavit was filed by Chaney. By agreement of the attorneys at Los Angeles, the case was continued to December 21, 1892, before your office. December 21, the claimant appeared and filed a motion to dismiss for the want of prosecution, the plaintiff being in default. The motion was sustained and the case dismissed. The next day the claimant made C. E. No. 4959.

The above referred to action of the local office in dismissing the protest of Gauterau and his application to contest for failure to prosecute was, upon appeal, considered and sustained by decision of your office, of date January 23, 1894.

Appeal was taken from said decision to this Department, and after full consideration of the same the concurring decisions of the local office and your office were approved and your office decision affirmed by departmental decision of August 31, 1895.

A motion was made by Gauterau for review of said departmental decision of August 31, 1895, which was considered and denied by departmental decision of December 16, 1895.

More than five months subsequent to said departmental decision, to wit, on May 22, 1896, Gauterau filed a new contest application, and asked for a hearing in the case, which matter being considered somewhat at length the hearing requested was refused by your office decision of July 8, 1898, upon the ground that nothing new or different was alleged in the new complaint from that set up in the former complaint, and that Gauterau had failed to appear and prosecute under the said former complaint at the time set for the hearing thereof, and had offered no excuse for such failure.

An appeal from the said decision of your office, refusing the new hearing applied for, brings the case before this Department for the third time.

A day having been set, as appears, for Chaney to submit final proof upon his entry for the land in question, and for Gauterau to appear and submit evidence against the allowance of the same, and he (Gauterau) having failed, after due notice as to the time and place named for such proceeding, and without giving a reason or excuse therefor, to appear and show cause why such proof should not be accepted and Chaney not allowed to make cash entry of the land involved, lost the right to

be afterwards heard upon a complaint containing nothing new, but which in fact set forth, substantially the same state of facts upon which was based the application for the hearing originally asked for by Gauterau and allowed in pursuance thereof. See case of Quirk *v.* Stratton, 5 L. D., 210.

For the foregoing reasons the decision appealed from, which refused the application for the new or second hearing asked for, is deemed to be without error, and the same is therefore hereby affirmed.

RAILROAD GRANT—INDEMNITY SELECTIONS—MINERAL LAND.

SOUTHERN PACIFIC R. R. CO.

Lands excepted from the grant to the Southern Pacific by homestead entries that were existing at the date when the grant took effect, may be taken on behalf of said grant in lieu of mineral lands, if at the date of selection such entries have been canceled, and the lands are free from other claims or rights.

Secretary Bliss to the Commissioner of the General Land Office, March 31, 1898.

(W. V. D.) (F. W. C.)

With your office letter of February 4, 1898, was forwarded with favorable recommendation, supplemental clear list No. 64, covering eighty acres within the Visalia land district, California, selected on account of the grant made by the act of July 27, 1866 (14 Stat., 292), to aid in the construction of the Southern Pacific Railroad, main line.

The lands selected are portions of odd numbered sections within twenty miles of the line of said road and according to the certificate attached to the list said tracts were covered by homestead entries at the date of the attachment of rights under said grant, which entries have since been canceled and the lands were, at the date of selections under consideration, free from adverse claims.

These selections were made in lieu of certain tracts lost to the grant by reason of their mineral character. Section 3 of the act of July 27, 1866, *supra*, provides:

> That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided.

It will be observed that the selections in lieu of lands lost to the grant by reason of their mineral character are limited to the same sections purported to be carried by the grant, namely, the odd numbered sections nearest to the line of said road and within twenty miles thereof.

Without discussing this peculiar provision of the act, the selections in question meet the terms thereof and as they are free from other claim or right I have approved the list submitted which is herewith returned as the basis for patent.

JURISDICTION—SURVEY—RIPARIAN RIGHTS—SCRIP LOCATION.

HARVEY M. LA FOLLETTE ET AL.

The Secretary of the Interior, in the proper exercise of his supervisory authority, may vacate a decision of the General Land Office and direct a reconsideration of the case by said office, even though no appeal may have been taken from its decision therein.

The jurisdiction of the Land Department is confined to public lands, and does not extend to lands that have passed into private ownership; hence if through mistake, or otherwise, a tract is surveyed as public land, when in fact it is private property, such survey will not change the status of the land so that the Department will thereafter be prevented from taking proper action to protect the rights of the private owner.

The survey of a tract of land and the approval thereof do not preclude the Department from re-examining the matter at any time before the legal title to the land has passed out of the United States, setting aside such approval, and annulling the survey, if the facts disclosed by the re-examination demand such action.

The cases of Childress *et al. v.* Smith, 15 L. D., 89, Case *v.* Church, 17 L. D., 578, Gowdy *v.* Gilbert, 19 L. D., 17, California and Oregon Land Co., 21 L. D., 344, overruled.

A scrip location confers no vested right that precludes inquiry on behalf of the Department as to the status of the land, or as to any question affecting the validity of such location.

Lines of survey run along permanent bodies of water are run as meander lines, the water itself being the true boundary line of the land to be sold, and all accretions after survey and prior to patent, pass under the patent when issued, and the government thereafter is not entitled to subsequent accretions.

Land lying between the meander line of a lake and the water line thereof is not public land of the United States subject to location by McKee scrip, if at the time of such attempted location the government has no interest in said land as riparian owner.

Secretary Bliss to the Commissioner of the General Land Office, April 2, 1898. (W. C. P.)

Harvey M. LaFollette and Mathias Benner have appealed from your office decision of May 26, 1897, rejecting their application to enter with McKee scrip certain lands in Sec. 10, T. 39 N., R. 14 E., 3rd p. m., Illinois, claimed to be vacant public lands.

August 3, 1896, Martin M. Cooney and eight others, among them Harvey M. LaFollette and Mathias Benner, filed in your office their application to enter the same land with the same scrip. This application was accompanied by several affidavits by persons who claim to have known the land from 1850 to 1868, asserting in effect that the land lies between St. Clair street in the city of Chicago and the waters of Lake Michigan; that St. Clair street is on the east line of Wall's survey of 1821, and stating that there was quite a body of this land at the time affiants first knew it which has been enlarged by filling in and accretion and that there are no laid out streets on said tract and that the same is vacant. This application was rejected by your predecessor's letter of August 31, 1896, upon the ground, among others, that the

land in question had been formed by the hand of man or by natural causes subsequent to the survey of 1821. No appeal was taken from that decision nor was there any effort to have the case reconsidered in your office or to have the decision thus rendered modified or set aside.

September 18, 1896, there were filed in your office certain instruments executed by all the original applicants including LaFollette and Benner, by which each for himself declared that he

> hereby relinquishes all his right, title, and interest in and to the premises described in an application for a patent under the McKee scrip, heretofore filed by them and others, the receipt for which is dated July 15th, 1896, and each for himself hereby files his relinquishment and withdrawal of his name from said application and proceeding for a patent thereunder pending before the United States Land Department,

and permission was asked to withdraw all papers filed in support of that original application. There is nothing in the record before me to show what action or in fact that any affirmative action was taken by your office in respect to these relinquishments and the application to withdraw papers. On the same day, however, September 18, 1896, Harvey M. LaFollette and Mathias Benner filed an application to locate with the same scrip the same lands, and on September 21, 1896, requested that the papers and maps filed with the former application be withdrawn and re-filed and considered in connection with their new application.

September 24, 1896, your predecessor recommended that certain clerks in your office be detailed to survey as "unsurveyed public land" the tract in question, and on the same day the detail recommended was made, the language of the order following that of the recommendation as follows:

> On the recommendation of the Commissioner, you are hereby detailed for duty as United States surveyor to survey a strip of unsurveyed public lands lying between the original meander line and the present shore of Lake Michigan, in section 10, township 39 north, range 14 east, 3rd P. M., Illinois.

September 27, 1896, N. K. Fairbanks *et al.*, claiming to be owners in possession of parts of the land applied for by LaFollette and Benner, filed a protest against, and motion to set aside this order for survey, upon the grounds that the United States had no title thereto, citing in support thereof departmental decision of August 31, 1895 (21 L. D., 131), rejecting the application of George W. Streeter to make homestead entry of said land for the reason

> that such lands do not belong to the government, and therefore this Department has no jurisdiction to direct their survey or disposal.

By letter of October 1, 1896, to your office and received there October 5, the attorney for the board of commissioners of Lincoln Park referred to the fact that surveyors were then making a survey of said land as public land, and to the application of LaFollette and Benner, objected to the issuance of any patent for said land and asked permission to show cause why patent should not be issued.

October 12, 1896, notice was given by your office to the attorneys for the applicants and to those for opposing parties that on October 27, 1896, the parties objecting to the issuance of patent to LaFollette and Benner would be heard.

October 15, 1896, LaFollette and Benner filed an amended application describing the land applied for as

> Lot A of said fractional section 10, in township and range aforesaid, as described and shown on the plat of the official survey of such lands approved October 15th, 1896.

The reason for this amended application is stated as follows:

> It being expressly understood that this application is intended as an amendment to, and in lieu of, the application to locate filed by the undersigned September 18th, 1896, in the General Land Office. This amendment being made for the purpose of conforming to the description of the United States survey recently made, and approved October 15th, 1896, and to include all the land embraced therein it having been the purpose of the original application to cover and include such lands.

It seems, however, that the plat in question was not received in your office on October 15, 1896, but was received October 16, and on the same day was formally approved by your predecessor.

On the next day, October 17, the applicants filed another amended application saying—

> It being expressly understood that this application is intended as an amendment to the amended application to locate, filed by the undersigned October 15, 1896, in the General Land Office, and is made for the purpose of giving the correct date of the approval of the plat and field notes of the official survey covering the land applied for.

October 26, there were filed on the part of some of those opposing the survey of this tract as public land and the location of the scrip thereon, separate protests verified and supported by affidavits and on the next day yet other formal protests and affidavits were filed. October 26, the applicants filed evidence of the assignment to LaFollette of the scrip in question by the party to whom it was issued, and of the assignment of an undivided one-half interest therein by LaFollette to Benner and also proof of the naturalization of the latter.

November 6, those objecting to said survey filed a formal motion for the review and setting aside of the approval of the plat of said survey filed and approved October 16.

Besides those objecting to the survey of this tract and the location of this scrip, on the ground that the land is not public land of the United States, others, claiming the tract to be public land but asserting a right to enter it under the homestead law or to locate other scrip thereon, also appeared and objected to the application of La Follette and Benner.

While the matter was still pending in your office, N. K. Fairbanks *et al.* addressed a communication to this Department calling attention to the fact that in the order detailing clerks in your office to survey said land it had been designated as "a strip of unsurveyed public

lands" and that the attorneys for La Follette and Benner in their argument before your office had claimed that this language in the order of detail constituted a determination by this Department that said tract was public land of the United States and asked that said order be so modified as not in any way to determine or affect the controversy as to whether or not said tract is public land of the United States. February 19, the Department addressed a letter to your office, which was received there the next day (erroneously stated in appellants' brief to be February 26), asserting that the Department did not intend to utter any judgment as to whether said land was public land, modified said order by describing the land to be surveyed as "a strip of lands *claimed* to be unsurveyed public lands" and by adding to said order the words:

> Nothing herein shall be construed as determining whether said lands are public lands of the United States, this question having been referred to the Commissioner of the General Land Office for decision in the first instance, and, according to my understanding, being now under consideration by him.

While your predecessor had announced that a decision in the case would be promulgated February 23, 1897, it seems that a decision in favor of La Follete and Benner received his signature February 20. Upon February 22, and before the decision was promulgated, Secretary Francis addressed and delivered to your predecessor an order directing him to suspend judgment in said case until the further order of this Department.

Respecting this purported decision of your predecessor the applicants in their brief filed upon this appeal say:

> Upon Saturday, February 20th, 1897, Commissioner Lamoreux decided the case and found the applicants entitled to patent. Learning this by their daily inspection of the record, the attorneys for the applicants ordered and received a certified copy of said decision—the copy given being a duplicate or carbon copy and probably made with the original draft. They were then informed that all notices were preparing and would be mailed out that day or the (office) day following.

Concerning the same matter, your predecessor, in a communication dated March 11, 1897, to the then Assistant Attorney General of this Department, says:

> On the twentieth I signed opinion and had number of copies made the same day to be given to the press on the twenty third which date I had announced that the decision would be promulgated. One of the copies on the twentieth I gave to a party with permission for him to use it after the decision should be promulgated but in no case to be used until promulgation. This was all done on the twentieth. On the twenty-second Secretary suspended promulgation.

This decision of your predecessor was not prepared by him or by any one in the government's service. When in advance of the time fixed for its promulgation, he gave to the attorneys for the applicants a certified copy and also gave a copy "to a party with permission for him to use it after the decision should be promulgated" his decision had not been placed among the papers in this case, had not been noted in the records of your office and had not been press copied, although all of these acts usually precede giving publicity to your office decisions.

Upon ascertaining this situation of the matter the present Secretary issued to your office the following order, March 13, 1897:

It having been made known to me that there is in your office what purports to be an opinion signed in the matter of the application of Mathias Benner and Harvey M. La Follette, to locate McKee scrip on what is known as the Lake Front of Chicago, Illinois, and that a copy of said paper has been delivered to one of the parties to the controversy before its rendition and promulgation, in flagrant disregard of right and justice, in violation of the express order of my predecessor and the usual and just rules of procedure; now, therefore, in the exercise of the discretion and authority conferred upon me by law, I direct you to order a rehearing of such application at such time as you may designate, not later than thirty days from the date hereof, and to immediately notify all parties in interest of this order and of the time fixed for the hearing.

All orders and acts of your department heretofore made or done in the matter of such application are hereby rescinded, vacated and annulled to the end that said application may be heard *de novo* and true and equal justice done between the parties.

A motion for review and revocation of this order presented by the applicants was denied March 22, 1897.

The case was thereafter heard in your office, arguments being presented by all parties in interest, and a decision was rendered May 26, 1897, holding that the land in question is not public land of the United States, denying the application of La Follette and Benner and setting aside the approval of the survey and plat.

From this decision the applicants appealed to this Department and the case was submitted upon printed briefs.

The land involved is a tract claimed to be outside and east of the survey line of section 10, township 39 N., range 14 E. 3rd p. m., Illinois, as run by surveyor John Walls in June, 1821. By that survey section 10 was returned as fractional and that part of it lying north of Chicago river was designated as the north fraction of said section and returned as embracing 102.29 acres. May 7, 1831, Robert A. Kinzie made preemption cash entry for said north fraction paying therefor at the rate of $1.25 per acre. On March 9, 1837, patent issued on said entry in which the land is described as follows:

The lot or north fraction of section ten in township thirty-nine, north of range fourteen east, in the district of lands subject to sale (formerly at Palestine, now) at Chicago, Illinois, containing one hundred and two acres and twenty-nine hundredths of an acre, according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor-general, which said tract has been purchased by the said Robert A. Kinzie.

It is claimed by the applicants that a strip of land lying outside of the eastern line of said north fraction as established by said survey and between that line and the waters of Lake Michigan was not included in said survey and remained unsurveyed public land of the United States. However this may be, the fact is that large additions have been made to the land as it then existed until now there is a tract lying between the survey line of 1821 and the present water line of Lake Michigan, estimated to contain over one hundred and sixty acres.

These additions resulted in part from natural accretions and in part from artificial causes. The addition was at first by way of natural accretion which was afterwards accelerated by the building of piers into the lake and by the dumpage of refuse from the city. About the year 1891 the board of commissioners of Lincoln Park, under the authority of a statute of Illinois, began the construction of a drive-way in the lake some distance from the shore line as it then existed and the filling in behind this drive-way has progressed rapidly until now the body of land between the original survey line and the present shore line has reached the area above mentioned. Two of the protestants against the allowance of the application of LaFollette and Benner have heretofore sought to acquire title to parts of this tract under the homestead law and by the location of scrip and still assert a right thereto if the land be determined to be public. The other protestants generally claim to be owners of parts of said tract by virtue of the ownership of the land bordering on the original shore line. All applications heretofore made to acquire title to this land under any of the public land laws have been denied upon the ground that the government had no title thereto.

The specifications of errors made in support of the appeal are thirty, but it does not seem necessary to quote them. It is insisted that the order of this Department of February 22, 1897, directing a suspension of judgment in this case and that of March 13, were without authority and hence of no effect; and that the decision made February 20, not having been appealed from became final, is in full force, and binding upon this Department.

This question seems to be conclusively settled adversely to the contention of appellants by the citation of a single authority. In the case of Knight *v.* United States Land Association (142 U. S., 161), a survey had been made of the claim of the Pueblo of San Francisco and had been approved by the Commissioner of the General Land Office. No appeal from this action was taken but the Secretary of the Interior sent for the papers, examined into the matter, and reversed the action of the Commissioner. It was contended that there was no authority for such action and of this contention Justice Lamar, speaking for the court, said:

> This contention is based upon the proposition that the Secretary of the Interior had no authority to set aside the order of the Commissioner approving and confirming the Stratton survey, especially in view of the fact that no appealwas taken from such order, and the authorities of the city acquiesced in that survey. This proposition is unsound. If followed as a rule of law the Secretary of the Interior is shorn of that supervisory power over the public lands which is vested in him by section 441 of the Revised Statutes.

After citing the various sections of the Revised Statutes directing that the Commissioner of the General Land Office shall perform certain duties in relation to the public lands "under the direction of the Secretary of the Interior," the court said:

The phrase "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government by reason of the laws of Congress, or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

The court also quoted with approval a part of the decision of this Department in the case of Pueblo of San Francisco (5 L. D., 483–494) a part of which quotation reads as follows:

The statutes in placing the whole business of the Department under the supervision of the Secretary of the Interior, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands with a just regard to the rights of the public and of private parties.

Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice.

Various decisions of the supreme court are then cited as authority for this holding and as if to render more clear if possible the position taken, the following language is used:

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. 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 disposed of to a party not entitled to it.

The doctrine thus announced has been adhered to in subsequent cases, among which may be mentioned the following:

Orchard *v.* Alexander (157 U. S., 372);

Stoneroad *v.* Stoneroad (158 U. S., 240);

Warner Valley Stock Co. *v.* Smith (165 U. S., 28);

Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589).

On the part of appellants, stress is laid upon the fact that Section 453, Revised Statutes uses the word "executive" in describing the duties pertaining to the survey and sale of the public lands which are to be performed by the Commissioner of the General Land Office under the direction of the Secretary of the Interior, and it is asserted that the decision in Knight *v.* United States Land Association, *supra*,

at first reading might seem to hold that the authority of the Secretary is absolutely coextensive with that of the Commissioner, but does not, in fact, so hold except *as to executive or ministerial duties.*

There is nothing in the language used to justify this statement, but on the contrary that language indicates that in the opinion of the court the supervisory authority of the Secretary extends to all matters involving the disposition of the public lands. Not only is the language used by the court broad and unequivocal, but there is a quotation from a decision of this Department (5 L. D., 483–494) which can not be said to restrict the supervisory power of the Secretary to any particular class of cases. That quotation is in part as follows:

> For example if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He would not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter.

The contention here is that the decision of the Commissioner dated February 20, 1897, not having been appealed from became final and that the Secretary has no authority to prevent it being carried into effect by the execution of a patent, even though he should find that the Department has no jurisdiction over the land in question, or that the applicants are not for any other reason entitled to acquire it. This is, in effect, just what the Secretary, in the above quotation, said would not be seriously contended. In Orchard *v.* Alexander, *supra*, the question was as to the finality of decisions of the local officers upon final proofs in pre-emption cases which the statute (Section 2263, Revised Statutes) requires

> shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior.

The court, however, mentions the act of July 4, 1836 (5 Stat., 107), which it says was substantially carried into the Revised Statutes as Section 453 (quoted from above) and concluded that the power of supervision and control granted by said act, although in terms extending to only executive duties, included the right to review a decision of the local land officers as to the matter of settlement and improvements, at least in cases in which the proof before those officers was by *ex parte* affidavits, and continuing the following argument is made:

> And if the right of supervision and control over their decision exists under those circumstances, it is difficult to perceive any reason why it does not exist under all. There is certainly nothing in the statute which in terms creates any distinction, and, indeed, in the nature of things there is no foundation for any.

This argument may be applied with equal force to the case here under consideration.

In the case then before the court the decision in Butterworth *v.* Hoe

(112 U. S., 50), was cited to support the contention that the Commissioner had no authority to interfere with the decision of the local officers and it is cited here to support the proposition that the Secretary has no supervisory authority over the Commissioner except as to executive or ministerial duties. The court there said that an examination of the opinion in Butterworth *v.* Hoe showed that it threw little light on the question and after calling attention to the fact that there is a special provision of law for an appeal from the Commissioner of Patents to the supreme court of the District of Columbia, said:

> This special provision for an appeal to a judicial tribunal, with a declaration as to the effect of the decision of such tribunal, was held to be conclusive so far as respects proceedings in the department. But the difference between the two cases is obvious. There is no special provision for an appeal from the decision of the local land officers as to the matter of settlement and improvement; nothing to take the case out of the general grant of power to the Commissioner of the General Land Office and the Secretary of the Interior to control all matters in respect to the sale and disposal of the public lands.

The contention that the supervisory power of the Secretary is limited to cases involving only executive or ministerial duties of the Commissioner can not be sustained. Under the authorities cited it must be held that such power extends to all cases involving the disposal of public lands except those, if there be any, where the law expressly declares that the action of the Commissioner shall be final or provides for a review by some other tribunal.

The authority of the Secretary to make the order of February 22, 1897, directing the Commissioner to suspend judgment in this case until further orders of this Department, and the effect of such order, are discussed quite elaborately in the various briefs in the case. The appellants claim that there was no authority for the order and that it had no effect whatever. The subsequent action of the Department renders this order entirely unimportant. If the decision of the Commissioner of February 20 had been regularly promulgated and not appealed from, still the Secretary, as herein shown, would have had full authority to send for the papers in the case, consider it and modify, reverse and set aside that decision if the facts justified such a course. His authority to direct a re-examination of the case in your office before an examination by him can not be questioned. This course was the one which, in the nature of things, would most surely result in a just conclusion and the proper adjudication of the questions involved. This course was adopted and on March 13, 1897, the order quoted above was given, directing a rehearing of the case in your office and revoking all orders made or acts done in the premises by your office.

Another contention made by appellants is that the order for the survey of 1896 and the approval thereof was a final determination that the land in question is public land and that thereby that question became *res judicata* and beyond the further control and jurisdiction of the Department. They say, in effect, this land was surveyed as public

land and the survey approved October 16, 1896, when they finally located their scrip on it, by virtue of which the title thereto vested in them, and after that neither the Commissioner of the General Land Office nor the Secretary of the Interior had any authority in the premises, except to cause a patent to issue to them and this notwithstanding it might be subsequently shown that the land did not belong to the United States, or that there were gross fraud and irregularities in the survey. The departmental decisions relied upon to support the proposition that by ordering a survey of a tract of land the Department finally determines the character of that tract to be public land, and thereafter is powerless to change that determination are—

Childress *et al. v.* Smith (15 L. D., 89);

Case *v.* Church (17 L. D., 578);

Gowdy *v.* Gilbert (19 L. D., 17);

California and Oregon Land Co. (21 L. D., 344).

In Childress *et al. v.* Smith the land involved was an island in White river, Arkansas. By a survey made in 1821 the river was meandered and the island, if it then existed, was omitted from that survey, but in 1854 the survey was extended to include it. It remained uncultivated and apparently unclaimed until 1886 when Smith made homestead entry therefor against which Childress and Glenn protested, alleging ownership thereof by virtue of owning the lands on the east side of the river opposite to the island. Of the survey of 1854 Secretary Noble said:

> The ordering of the survey of 1854 was a determination by your office (the proper tribunal) that the land belonged to the government.
>
> It has been so held and considered for nearly forty years, and as such it was entered by Smith. I shall therefore not disturb his entry, but leave the contestants to their remedy in court.

The Secretary did not discuss his authority to act in the premises, but did say that because of the long lapse of time during which the former departmental action had stood unquestioned he did not deem it best to interfere.

In Case *v.* Church the land involved was an island in Long Lake, Michigan, which Case, who had been in possession thereof for some years, applied to have surveyed. The survey was directed to be made, the land ordered sold as an isolated tract, and so sold. Church becoming the purchaser. Case protested against the issue of patent on that sale and applied to enter the land under the pre-emption law. On appeal to this Department, however, he changed his position and insisted that the patent should not be issued because the lands on Long Lake had been patented, as a part of the riparian lands whereby the government had parted with its title to the island and that he, Case by virtue of his long continued adverse possession had acquired prescriptive title thereto. After a statement of the facts substantially as above the Secretary said:

> These are questions essentially for the courts to determine and have no proper place in departmental adjudications. The question as to whether the land is, or is

not, the property of the United States government became *res adjudicata*, so far as the power of this Department extends, when it was ordered sold by the Secretary of the Interior.

In Gowdy *v.* Gilbert the section embracing the land involved was surveyed in 1839 and upon a resurvey made in 1889 an additional lot (6) was marked out. Gilbert was allowed to make entry of said lot, whereupon Gowdy protested claiming the land by virtue of riparian ownership. Upon these facts Secretary Smith said:

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

The case of California and Oregon Land Company involved a large body of lands on Goose Lake, Oregon. By a survey made in 1868 this lake was meandered and in 1888 settlers upon lands lying between the original meander line and the waters of the lake, applied to have said lands surveyed. Objection being made thereto by those claiming to be riparian owners, a hearing was ordered "to determine whether the lines of survey were properly run or whether the land in dispute has been formed by accretion since survey." A hearing was had as a result of which it was decided, December 17, 1888, that the survey was made at a time when the waters of the lake were much higher than the ordinary water line by reason of which the true water line was not defined by the meander line fixed by said survey. It was held that the land between said meander line and the true water line of said lake was public land of the United States and a survey thereof was ordered (7 L. D., 527). Afterwards the California and Oregon Land Company as owner of certain lands bounded by the original meander line protested against the disposal of the lands between that line and the waters of the lake urging that inasmuch as the company was not a party to the former hearing it should be given an opportunity to show its rights in the premises. In passing upon this protest Secretary Smith said:

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 lines 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 upon 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.

These decisions seem to justify the contention of appellants and to go to the extent of saying that when this Department has once ordered a survey of lands as public lands it is afterwards bound by that determination and is without power to change it. I am not inclined to give the rule so broadly stated in said decisions my approval, even by the inference that would be drawn from an attempt to distinguish this case from those. The jurisdiction and authority of the land department is confined to public lands, and does not extend to lands which have passed into private ownership.

Appellants' proposition, carried to its legitimate conclusion, means that where the land department by mistake, or otherwise, surveys as public land a tract which both in law and in fact is private property and subject to private disposition alone, the land thus surveyed obtains, for the purpose of future proceedings in the land department, a fictitious status whereby the officers of that department are powerless to prevent the annoyance to the private owner and the clouding of his title, which would necessarily follow the issuance to another of a patent from the United States. Stated in other words: the claim is that one unauthorized act of the land department requires that the wrong thereby initiated be consummated by succeeding acts equally unauthorized. A statement of the proposition accomplishes its refutation.

Even public lands remain under the care and control of the land department until patent issues, or action equivalent to the issue of patent is taken, and the power remains until that time to correct mistakes in their survey or in the other steps taken by the land officers in the process of disposing of them and to inquire into the extent and validity of any rights thereto claimed against the government. This proposition is sustained by the judicial decisions hereinbefore cited respecting the supervisory authority of the Secretary of the Interior, but it is most specifically asserted in the case of Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589), wherein the court said:

> It is of course not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title and upon a hearing to determine the question whether or not such title has passed. Cornelius *v.* Kessel, 128 U. S., 456; Orchard *v.* Alexander, 157 U. S., 372, 383; Parsons *v.* Venzke, 164 U. S., 89. In other words the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

Under these authorities there is no foundation for the proposition that this Department is precluded, by the fact that a survey of a tract of land has been made and approved, from re-examining the matter at any time before the legal title has passed from the United States, setting aside such approval, and annulling the survey if the facts disclosed by such re-examination demand such action.

The Department is not bound by action taken upon a mistaken view

of its own jurisdiction. The cases of Childress *et al. v.* Smith, Case *v.* Church, Gowdy *v.* Gilbert, and California and Oregon Land Co., relied upon by appellants, in so far as they are in conflict with the views here expressed, are overruled.

It is also claimed by appellants that the statutes under which the McKee scrip certificates were issued

> operated as a present grant of any vacant lands of the United States that they might be located upon by the holders of the certificates and that the title thereto vested at the time of such location.

Unless they mean the legal title this assertion is without force, and that they do mean the legal title is negatived by their present demand for a patent. A patent is the superior and conclusive evidence of legal title and the general rule is that it is necessary to transfer the legal title from the United States and that until its issuance the fee remains in the government. Carter *v.* Ruddy (166 U. S., 493). There are exceptions to this rule and the appellants claim that the statutes authorizing the issue of the McKee scrip constitute one of the exceptions because of the words of present grant therein. That act of January 25, 1853 (10 Stat., 745), as to the question involved here, reads as follows:

> *And be it further enacted,* That to each of the orphan children of the said McKee, there shall be, and hereby is, granted one quarter section of land, to be located upon any vacant land of the United States; and to be located where and in such manner as the President of the United States shall direct.

This act was amended by the act of March 1, 1889 (25 Stat., 1307), which reads as follows:

> That the Commissioner of the General Land Office, to carry into effect the grant of one quarter section each to the orphan children of William R. McKee, made in the second section of said act, be and is hereby authorized and directed to issue to the surviving children and grand-children of said McKee or to the owners or holders thereof, other certificates for those they now hold, issued by authority of said act, which new certificates they may enter and locate for themselves upon any lands in satisfaction of said grant of the class described in the act to which this is an amendment.

Without considering whether this latter act changes the scheme from a grant of lands to a grant of scrip with which lands may be acquired, the power, in any event, rests in the government to determine whether the lands selected are vacant public lands and therefore of the class contemplated, and this Department having in charge the public lands must decide as to that. A valid location is necessary to the vesting of a right or title and vacant public land is necessary to the making of a valid location. If the land here claimed is not public land of the United States no location thereon could give the owners of the scrip a right thereto nor could the approval of such a location by this Department or the issuance of a patent give them any right to the land. The contention that appellants by reason of their location acquired a vested right in this land, which precludes further inquiry by this Department as to the status of the land, or as to any question affecting the validity of such location, can not be sustained.

This disposes of the preliminary questions presented by the appeal. As to the merits of the case, the first question to be considered is whether the land in question is public land of the United States. If that question be answered in the negative no examination of the other questions raised by the arguments will be required.

As said before, the township in which this land lies was surveyed in 1821 and section ten thereof was returned as fractional. Robert A. Kinzie made pre-emption entry for the north part of this fractional section being that part lying north of the Chicago river. According to the field notes and the plat made therefrom the southern, western and northern boundaries of the section are shown to be the straight lines usually run in dividing a township into sections. The east line deviates from a straight course and is described by courses and distances. It is claimed by the appellants that this was a boundary line and that all land lying outside thereof was excluded from the survey and remained unsurveyed land of the United States. On the other hand, it is claimed by those opposing this application that this line was run as a meander line to ascertain the quantity of land in said fractional section and that the waters of Lake Michigan constituted its true eastern boundary. The plat in the files of your office, made from the field notes of said survey of 1821, and which is referred to in the Kinzie patent, does not show any land between the eastern line of the section and the waters of Lake Michigan, but clearly indicates that both the north line and the south line of the section were extended to the waters of the lake as the eastern boundary, and that the eastern survey line was run as a meander line only. The field notes show that the south line of the section was run east from the corner common to sections 9, 10, 15 and 16 until it "struck the bank of Lake Michigan" where a post was set as a corner of fractional sections 10 and 15, that the north line of section 10 was run east from the corner common to sections 3, 4, 9 and 10, until it "struck the bank of Lake Michigan" where a post was set to mark the corner of fractional sections 3 and 10, and the line run between the two corners thus established is spoken of as the "meanders" of Lake Michigan. If these field notes and the official plat made therefrom are to be taken as conclusive, it must necessarily be held that said survey included all the land then existing. The applicants file copies of various plats purporting to show the formation of the land at and around the mouth of the Chicago river, and also affidavits respecting the existence of land at the date of survey, which was not included therein. These other plats were not made under the authority of the land department nor were they made as a basis for the disposition or sale of the lands platted. A map of the "mouth of Chicago river and plan of Ft. Dearborn" made in 1818 in the engineer department of the United States Topographical Bureau shows the river turning in a southerly direction before emptying into the lake and leaving a strip or tongue of land run-

ning south along the east side of the river, not shown by the survey of 1821. Another map made in the same bureau in 1830 shows the same strip. Another map made in the same bureau in 1839 shows this strip while one made in 1842, being a plan of Chicago harbor, shows the land after the improvement of the harbor by the straightening of the river and the building of piers. The plat of north fractional section ten as Kinzie's addition to Chicago, recorded in 1834, purports to show a subdividing and platting of all of the land to the waters of the lake. The affidavits made by parties who claim to have known the land for many years, some from before the date of Kinzie's entry, assert that there was land between the original survey line and the waters of the lake, the quantity thereof being estimated variously at from twenty to fifty acres. Without attempting to give here a detailed analysis of this evidence, it is sufficient to say that the conclusion to be drawn therefrom is that the survey line of 1821 did not coincide exactly with the actual water line. It seems to show the existence, at the time of the original survey, of a small body of land on the north side of the mouth of Chicago river, not shown on the official plat, but the size of this tract can not be determined with any certainty. So far as such a tract is shown to have existed at that time, it appears to have been only a sand bar and of no value. It may be doubted if this evidence is sufficient to overcome the official return of the United States surveyor respecting the true location of the water line represented to have been meandered by him. It is clear, however, that the north line of the section as well as the south line thereof, extended to Lake Michigan and that the line between these two points was run as a meander line and was not intended as a boundary separate and distinct from the water line.

The law regulating the survey of the public lands at that time is now embraced in sections 2395, 2396 and 2397 of the Revised Statutes. It is provided that in those townships made fractional because of abutting on water courses, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, or other external boundary. In such cases the law contemplated that the water should form the boundary line. In this case the appellants lay great stress on the fact that the field notes show that the north line of the section in question ended at the "bank" of Lake Michigan, and cite numerous decisions of State courts to show that a line described as reaching to or extending along the bank of a stream can not be held to extend to or to be coincident with the water line. This question has, however, been considered by the supreme court of the United States in a case involving the survey of public lands. The facts in Railroad Company *v.* Schurmeir (7 Wall., 272), are very similar to those presented here. There the field notes showed that the lines running from established corners intersected the bank of the Mississippi river, the plat showed the river

as the boundary line, and the land was sold by the United States and described as lot 1, containing so many acres, "according to the official plat of the survey." Afterwards it was shown that at the time of the survey there was a considerable body of land between the line fixed by said survey and the actual water line and this was surveyed by the United States as public land. The railroad company claimed this newly surveyed land under its grant. The contention made here is the same as that made there, as is shown by the following statement of the court:

> Appellants contend that the river is not a boundary line in the official survey; that the tract, as surveyed, did not extend to the river, but that the survey stopped at the meander-posts and the described trees on the bank of the river. Accordingly, they insist that lot 1 did not extend to the river, but only to the points where the township and section lines intersect the left bank of the river, as shown by the meander posts.

The court held that the line between the posts on the bank of the river was a meander line, that the purchase of lot 1, took to the actual water line and that the subsequent survey could not affect his title. In the course of the decision the following language is used:

> Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.
>
> In preparing the official plat from the field notes, the meander-line is represented as the border-line of the stream, and shows to a demonstration, that the water-course and not the meander-line, as actually run on the land is the boundary.

In Hardin *v.* Jordan (140 U. S., 371) the line of the survey cut across a tongue or strip of land extending into the waters of a lake and it was claimed that this strip was excluded from the survey. This contention was not sustained by the court and in the course of the decision it was said:

> The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary.

In Mitchell *v.* Smale (140 U. S., 406), the same rule is again laid down and in both these decisions many authorities are cited in support of the proposition. The rule is also adhered to in subsequent decisions of the court among them being Horne *v.* Smith (159 U. S., 40) and Grand Rapids and Indiana R. R. Co. *v.* Butler (159 U. S., 87).

That lines of the public survey run along permanent bodies of water are meander lines run to determine the quantity of land subject to sale and that the water line rather than such meander line forms the true

boundary, has been held in numerous cases decided by this Department:

Reuben Richardson (11 C. L. O., 284);
James H. May (3 L. D., 200);
James Hemphill (6 L. D., 555);
John W. Moore (13 L. D., 64);
Watson H. Brown (20 L. D., 315).

In this patent to Kinzie the official plat made upon the survey of 1821 is referred to as part of the description of the land conveyed and the rule is that where a plat is thus referred to in a deed, the elements of identification shown thereby are to be as much regarded in ascertaining the true description of the land as if they had been specifically stated in the deed, and this rule is applicable to patents from the United States the same as to conveyances between individuals.

Jefferis *v.* East Omaha Land Co. (134 U. S., 178).

It is claimed by appellants that even if the line of 1821 is held to be a meander line, still the accretions belong to the United States because

it is a well settled rule of law that where the land entered is specifically and fully described by boundaries and the exact area is specified the entryman takes that amount of land and no more.

The case of Jones *v.* Johnston (18 How., 150), is one of the cases cited in support of this proposition. There the court lays down the rule

that a grantee can acquire by his deed only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it and can not acquire lands outside of the description by way of appurtenance or accession.

There the side lines of a certain lot were to run at right lines till they intersected the lake shore and the court held that the lake shore as it was a the date of the deed was the southern boundary and not as it was at the date of the plat referred to in the deed, and that any alluvial accretions after the date of the deed belonged to the grantee in that deed. So here the north and the south line of section ten were extended till they intersected the lake and the water line at the date of Kinzie's patent was the true boundary line and the alluvial accretions after that belonged to him.

Gazzam *v.* Phillips (20 How., 372), is also cited in this connection by appellants, but it does not sustain their contention. There a section was rendered fractional by private claims, and this fractional part was divided by a line running north and south through it laying off in the west subdivision ninety-two and sixty-seven hundredths acres and in the east one hundred and ten and fifty hundredths acres. A purchased the west and B the east subdivision, the purchases being made on the same day. The patent to A described the land as the southwest quarter of the section, "containing ninety-two and sixty-seven hundredths acres according to the official plat of the survey of said lands." The court simply held that under these facts it was clear that A pur-

chased and paid for only the west subdivision of said section and could take nothing more. This is without special application to the question here.

Horne *v.* Smith (159 U. S., 40), cited on this question is equally inapplicable. There a survey of public lands was shown by the field notes to abut on Indian river and sections 23 and 36 were thereby made fractional. It was shown, however, that the river was more than a mile west of where the survey stopped and that the water which was meandered as the west line of said fractional sections was in fact a bayou between which and the river was a large body of land so that if the river was held to be the boundary the lots which were shown by the official plat to contain one hundred and seventy acres, would embrace over seven hundred acres. The court mentions the lengths of the various lines simply to show that a mistake must have been made and that the bayou and not the river was the water that formed the boundary line.

Directly in point and against the proposition that where land is specifically described by boundaries and the area is specified the entryman can take no greater amount, is the case of Jefferis *v.* East Omaha Land Co. (134 U. S., 178). In that case the land was surveyed in 1851 the Missouri river being the north boundary and a meander line being run along the bank of the river. The land was entered in 1853 and patent issued in 1855 describing the land as lot 4 in fractional section 21 etc. "containing 37.24 acres, according to the official plat." It was shown that accretions had been made to this land until 1870 when there had been added about forty acres. It was impossible to determine how much of this increase had been formed between the survey and the date of the patent. It is thus seen that the case was very similar in this point to the one under consideration. There the court said:

> In the present case, the plat was made in accordance with the statute, showing the river as the northern boundary of fractional section 21 and of lot 4 therein; and as the patent referred to the official plat of the survey, and thus made that a part of the description of lot 4, that description made the river the boundary of lot 4 on the north.

After citing and quoting from Railroad Co. *v.* Schurmeir, *supra*, it was said:

> We are therefore, of opinion, that the patent of June 15, 1855, which described the land conveyed as lot 4, according to the official plat of the survey, of which a copy is annexed to the bill, marked Exhibit A, conveyed to the patentee the title to all accretion which had been formed up to that date.

It seems that in this last case, the case of Jones *v.* Johnston, *supra*, was cited for the same purpose that it is cited here, that is, to sustain the proposition that a grantee can acquire by his deed only the lands described in it by metes and bounds, and can not acquire, by way of appurtenance land outside of such description, and of that contention the court said:

But that case holds that a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object such as a street or a wall; and it justified the view announced by the circuit court in its opinion, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line.

The same question has also been considered by this Department and ruled adversely to the contention of appellants.

In Gleason *v.* Pent (14 L. D., 373), the land involved was surveyed in 1845, by which survey section 19 was shown to be fractional because abutting on a bay, and it was divided into lots numbered 1 and 2. Gleason made entry for these lots in 1870 and patent issued to him in 1878. In 1875 another survey was made and other lands were marked on the plat as lying between the original survey and the water line, the result of accretion. It was held that the original entryman took this land thus formed by accretion between the survey of 1845 and that of 1875 and it was said:

The public surveys are the official description by which the public lands are disposed of by the government. When, therefore, the patentee made his original entry, the then official survey of 1845 was as claimed by counsel, an 'assurance of the proprietor that a riparian estate was for sale.'

Such entry was a segregation and a disposal of the land in accordance with that survey, and rights thereby acquired, could not be impaired by the subsequent survey of 1875.

The patent under which the appellant claims being based upon such original entry, took effect as of its date, and conveyed the riparian estate described by the first survey.

This case was cited and followed in Lewis W. Pierce (18 L. D., 328).

These decisions of the supreme court and this Department settle beyond all doubt and adversely to appellants the question thus raised by them. It is clear that the patent to Kinzie conveyed to him the land up to the water line as it stood at the date of that instrument. All accretion formed between the date of the survey and the date of the patent became a part of said fractional section. There is no question here as to which of two bodies of water was meandered in the survey as was the case in Horne *v.* Smith, *supra*. Neither was the land, if any, lying between the meander line and the water line at the time of the survey of sufficient area or value to necessarily charge a subsequent purchaser with notice of material mistake or fraud in the survey, and any question which might arise in such a case is not presented here.

It is not doubted that if the accretion had resulted in the formation of a body of land sufficient to have justified such a course, the United States before parting with the title to said north fraction, that is, while they were still riparian proprietors, might have resurveyed and replatted the land and have sold it according to such resurvey, but that was not done nor do the facts indicate that the accretion was so large prior to the sale to Kinzie as to have called for such a course.

In several cases before the supreme court involving lands in this fractional section, or riparian and water rights in connection therewith, the question of the legal effect of the Kinzie patent arose either directly or indirectly, and in every instance where a direct statement is made by the court it is that the patent conveyed all the land to the water line. In Jones *v.* Johnston, *supra*, both parties claimed under the Kinzie patent, so that there was no controversy as to this question, but the whole discussion was upon the theory that the Kinzie title embraced the lands to the water line and the same may be said of the later decision in the same case, reported in 20 Howard, 209.

In Bates *v.* Illinois Central R. R. Co. (1 Black, 204), Bates, the grantee of Kinzie, claimed a portion of a sand bar south of the mouth of the Chicago river, as shown by the plat of the government survey and sued the railroad company to gain possession thereof. After stating that the land sued for was situated outside of fractional section ten, as its boundary was described by the trial judge in his charge to the jury, the court said:

> And this raises the question, by what rule is the public survey to which the patent refers for identity to be construed? The land granted is 102.29-100 acres, lying north of the Chicago river, bounded by it on the south and by the lake on the east. The mouth of the river being found, establishes the south east corner of the tract. The plat of the survey, and the call for the mouth of the river in the field-notes, show that the survey of 1821 recognized the entrance of the river into the lake through the sand-bar in an almost direct line easterly, disregarding the channel west of the sand-bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of the water only temporary at particular times, and this flow produced to some extent by artificial means, by a cut through a bar, leaving the water to wash out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river, for the purpose of a survey and sale of the public lands.

It may be said in passing that this case is quoted from upon this point in Horne *v.* Smith, *supra*.

In Banks *v.* Ogden (2 Wall., 57), it was held that accretion from Lake Michigan belongs to the proprietor of the land bounded by the lake, and that the land in controversy there, being a part of the tract involved here, belonged to Kinzie and passed to his assignee in bankruptcy.

In Illinois Central R. R. Co. *v.* Illinois (146 U. S., 387–437), which involved lands in said section ten, south of the Chicago river, it was said:

> The city of Chicago is situated upon the southwestern shore of Lake Michigan and includes with other territory, fractional sections 10 and 15, in township 39 north, range 14 east, of the third principal meridian bordering upon the lake which forms their eastern boundary.

This Department has also had occasion to consider the status of accretions to the land embraced in the original survey of this section in 1821. In John Farson, decided June 8, 1883 (2 L. D., 338), an application had been made to locate Valentine scrip on land in section 15, and Secretary Teller said:

The land in question is part of a sand bar lying opposite to Secs. 10 and 15, which appears from the record to have been formed of said fractional Sc. 15, to the State. The status of this sand bar in respect to its being public land of the United States has been repeatedly considered in your office and by this Department.

Again, referring to several cases where the question had been considered, he said:

From the cases which I have already referred to, and the opinions which have prevailed respecting the character of this land from the time of Commissioner Whitcomb's letter in 1838 to the present, it would seem that it ought to be understood by this time that the tract in question, including that part of it which lies opposite Sec. 10, is not public land of the United States, and therefore not the subject of any scrip location whatever.

In Nine *et al. v.* Fairbanks *et al.*, decided August 31, 1895, (not reported) application was made to locate a military bounty land warrant on the land in controversy here and the Secretary in affirming the decision of your office denying that application said:

The land applied for does not belong to the United States, being east of the original meander line of the lake, as shown by the public surveys of 1821. As such it is not subject to private entry, or any other kind of entry, under the public land laws.

In George W. Streeter *et al.* (21 L. D., 131), application was made to make entry of the land lying east of the south half of fractional section 3 and also that lying east of the north half of fractional section 10, this last parcel being the land involved here and the Secretary said:

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.

Thus it is seen this Department has always heretofore when the question was presented, held that the land in question does not belong to the United States. If its status was left in doubt by the decisions of the supreme court, which it is not, the fact that this Department has more than once decided that the land is not public and does not belong to the United States, would be entitled to great weight in determining the present controversy.

The decisions of the supreme court cited herein cover every material point involved in this case and the rulings are so clear and conclusive as to leave no doubt of the status of this land. It is clearly established that lines run along permanent bodies of water are run as meander lines and that the water itself, and not such meander line, constitutes the true boundary of the land to be sold, that all accretion after the date of the survey upon which the sale is made and prior to the date of the patent passes under such patent, and that the plat of public lands when referred to in a patent becomes a part of such instrument and is to be considered in determining what land is sold. The facts in this case are

that section ten was made fractional by abutting on the waters of Lake Michigan, that Kinzie purchased the north fraction of the section, that the plat was made a part of the description in the patent to Kinzie, and that the plat shows the waters of the lake to be the eastern boundary of the section. Applying the law declared in the decisions cited to the facts shown, it must be held that the survey of 1821 and plat included all the land between the western line of section ten and the waters of Lake Michigan, that Kinzie by his purchase took all the land included in the north fraction of the section, including accretions thereto prior to his patent, and that upon the issuance of that patent the government ceased to be a riparian proprietor and is therefore not entitled to subsequent accretions. It follows that the land here involved is not public land of the United States and is not subject to location or entry with McKee scrip.

For the reasons given the decision of your office of May 26, 1897, rejecting the application of LaFollette and Benner is affirmed. Under these circumstances, it is not necessary to discuss the many alleged irregularities in the survey of 1896, because the conclusion that this tract is not public land of itself requires the annulment of that survey and therefore your action in setting aside the approval thereof is also affirmed and the survey declared to be of no effect.

Approved:

WILLIS VAN DEVANTER,
Assistant Attorney General.

TIMBER CULTURE CONTEST—REPEAL OF TIMBER CULTURE LAW.

HENRY W. BUTCHER.

A successful timber culture contestant whose suit is begun prior to the repeal of the timber culture law, but not concluded until after said repeal, is not entitled to make a timber culture entry in the exercise of his preferred right, if no application to enter under said law was made by him prior to said repeal.

Secretary Bliss to the Commissioner of the General Land Office, April 2, 1898.

(W. V. D.) (H. G.)

By departmental decision in this case, of January 25, 1896, your office was directed to afford Henry W. Butcher, the applicant for timber culture entry of the NE. ¼ of Sec. 34, T. 25 S., R. 23 E., within the limits of the Visalia, California, land district, an opportunity to furnish further evidence in the matter of his application, and upon receipt of such evidence your office was directed to render decision upon the same.

This additional evidence was transmitted to your office, and, upon consideration thereof, your office on May 22, 1896, rejected the application, as it did not show that Butcher had shown the filing in the local office of a timber culture application prior to the repeal of the timber culture act. Butcher appeals.

He brought contest against a timber culture entry for said tract, and the same was canceled as the result of that contest by your office on November 15, 1893. He was given the preference right of entry, but your office letter, directing the cancellation of the contested entry, states that there was no timber culture application on file in your office.

The local office reported that the records thereof do not show whether or not Butcher filed an application with his contest prior to the repeal of the timber culture act.

Butcher claims that he filed such application at the time of the contest, and his first showing was to the effect that he had employed an attorney, who was son of the register of the local office, to draw up the contest papers, including a timber culture application for the tract covered by the contested entry, and believes that such an application was filed. He filed a number of corroborative affidavits of parties who were with him at the land office at the time, who state that they know or believe that the claimant intended to make timber culture entry, and that they believed that he did so. The supplemental showing by Butcher, under the authority of the departmental order, consists of the affidavits of the receiver of the land office at the time the application should have been made, that of claimant and of one Heise.

The former receiver states that Butcher came to the land office, with the purpose, as he announced, of contesting a timber culture entry on the tract, and making application therefor, and that some time thereafter Butcher inquired of the receiver if $5.00 had been paid in for him on his application by the attorney, and when informed that no money had been paid, seemed much surprised, and from his manner the receiver is positive that Butcher thought he had a timber culture filing on the tract.

The affidavit of Heise is of no weight, and need not be considered, as it states no facts, but merely the belief of the affiant.

The affidavit of Butcher is to the effect that he is unable to procure the evidence of the attorney who acted for him; that he supposed that the attorney was acting as clerk in the land office and made his offer to draw up the papers "through kindness," and was surprised when a fee of ten dollars was demanded for the services of the attorney, but was informed that five dollars of the same went to the receiver.

He submits a leaf from his diary, showing the transaction of July 28, 1890, the day on which the contest was initiated, as follows: "Paid $5.00 on land and $5.00 Budlong." The latter was, it is averred, a partner of the son of the register who made out the affidavits of contest and presented them to the local office.

Butcher has made valuable improvements upon the tract, to the extent of one thousand dollars, including the sinking of an artesian well, and asks that if there is any doubt as to his filing of the application, it be resolved in his favor, as no adverse rights have intervened.

An inspection of the entire record in the contest case mentioned—that of Butcher *v.* Averill—shows that the five dollars mentioned was

paid as a deposit upon the initiation of the contest, and is so endorsed on the affidavit of contest. There was no timber culture application submitted, except one tendered by Butcher, on December 27, 1893, after the contest had been decided. It further appears from the files of your office in said contest case that Butcher addressed a letter to your office on November 30, 1893, in which, in substance, he states that he was informed of the decision in his favor in the contest case, and of his right to exercise his preference right of entry within thirty days. He asks to be allowed to file a timber culture entry on the tract, as he filed his contest about seven months before the act was repealed. He states that he paid five dollars when he "started the proceedings," and was informed that he could file a timber culture entry upon it, but "now the register will not take my (his) filing." He asks to consummate his filing (of contest) by "planting a timber culture," and to "come in under the old act." He states that he filed the contest July 28, 1890, and requests an early answer, as he then had but twenty-seven days in which to file. Prior to the receipt of the answer of your office, which was dated January 31, 1894, informing him that "entries of public land can only be made under the laws in force at the time the application therefor is made, or at the time the right to make such entry accrued," he made, on December 27, 1893, application to enter the tract under the timber culture laws, then repealed, and this application was rejected.

The evidence offered by Butcher is vague and uncertain. No one pretends to testify that the application for a timber culture entry was tendered by him or in his behalf at the date of the initiation of his contest, on July 28, 1890, or at any time subsequent thereto and prior to the repeal of the timber culture act. The money he claims was left to apply on the filing was left as a deposit on his contest, and was not the amount of the fees required for a timber culture entry. All doubts as to the filing of such an application, or of tendering the same, are dissipated by the admissions in Butcher's said letter of inquiry, bearing date November 30, 1893, addressed to your office. He states the date of filing the contest, the amount of the deposit made by him when he "started proceedings," and that he was informed that he "could" file a timber culture application on the tract. It is clear that no such application was filed by him at the time the contest was initiated or prior to the repeal of the timber culture act, and that he was fully cognizant of this fact at the time such letter of inquiry was written.

The preference right of entry given to him was a right under the laws as they existed at the time of tendering the application. No application was made until December 27, 1893, long subsequent to the repeal of the timber culture act. He could have exercised his preference right to enter under his unused rights, such as a desert land filing, which he now seeks to make, if his present application is rejected.

The act repealing the timber culture act by its terms saved any valid rights theretofore accrued, or accruing, "under said laws," and all *bona*

fide claims lawfully initiated before the passage of the act were permitted to be perfected upon due compliance with the law. (26 Stat., 1095.) In the case of August W. Hendrickson, 13 L. D., 169, 172, where the saving proviso of the act was fully considered, it was held to include as claims "lawfully initiated" those only where one qualified to enter makes written application, accompanied with the requisite amount of fees to enter the land that is subject to entry, and not to apply to one who had not shown that he was qualified to make entry, and who had not at the time of the repeal of the act offered a written application, nor tendered the fees to the register and receiver, nor taken any steps by which he could perfect a timber culture entry. Such a failure to file an application was held to leave the contestant remediless under his preferred right of entry secured to him by his successful contest.

The case of Frederick Tielebein, 17 L. D., 279, cited by the applicant, does not change this rule, but applies to a case where the affidavits filed by the successful contestant made a *prima facie* showing that an application to make timber culture entry was filed at the time the contest affidavit was filed. In the case at bar, it is clear from a careful examination of the affidavits offered in support of the application, as originally offered, and those tendered with the supplemental showing permitted by the Department, and an inspection of the entire record in the contest case, where it is claimed that they were offered, together with the letter of inquiry addressed to your office by the applicant, that no application to enter the land as a timber culture entry was filed by him at the time he initiated such contest proceedings.

The decision of your office is affirmed and the application will be rejected.

GRINNELL *v.* SOUTHERN PACIFIC R. R. CO.

Petition of the railroad company praying for a revocation of the order for a hearing, made in departmental decision of December 15, 1896, 23 L. D., 489, denied by Secretary Bliss, April 2, 1898.

SWAMP LAND GRANT—EVIDENCE AS TO CHARACTER OF LAND.

ARCHER ET AL. *v.* WILLIAMS.

In the adjustment of the swamp grant the burden of proof is upon the State to show that the land claimed is of the character granted, where the field notes of survey do not show such land to be swamp and overflowed.

Evidence as to the character of land since the date of the swamp grant is competent as tending to show whether the land was in fact swamp and overflowed at the date of said grant.

Secretary Bliss to the Commissioner of the General Land Office, April 2, 1898.

(W. V. D.) (G. B. G.)

By departmental decision of February 11, 1896 (22 L. D., 168), in the case of Williams *v.* State of Iowa, a hearing was ordered to determine

the question whether the W. ½ of the SW. ¼ of Sec. 26, T. 96 N., R. 36 W., Des Moines, Iowa, "is in fact swamp, and such as to pass" by the swamp land grant of September 28, 1850.

It appeared that on December 15, 1893, Henry M. Williams made homestead entry of said land, which entry was held in suspension on account of conflict with the claim of the State of Iowa under its swamp land grant; that on August 13, 1894, said entry was relieved from suspension, in pursuance of circular of December 13, 1886 (5 L. D., 279), under which the State of Iowa had received the required notice and made default, and the claim of the State under its selection of September 21, 1882, was rejected; that on September 25, 1894, C. T. Archer filed in the local office a petition, alleging that he bought the land of Clay County, Iowa, and had been in possession thereof more than ten years under a good and sufficient deed from said county; that the entry of Williams was illegal; that he (Archer) had no notice of the entry nor of the proceedings theretofore had in reference thereto, and that the local office had no right or authority to allow the entry, the same being swamp land.

In consideration of the premises, the aforesaid hearing was ordered. That hearing was had, and the local officers found that the land was not swamp and overflowed within the meaning of the law.

On September 24, 1897, your office affirmed that decision, and the appeal of Archer brings the case to the Department.

It is urged, substantially, that the evidence shows that the land is and was swamp and overflowed land within the meaning of the act of 1850, that it was error to hold the burden of proving its character was on the State or its grantees, and error in holding that evidence of the dry character and condition of said land since September 28, 1850, was competent and material to show that it was not swamp and overflowed land on September 28th, 1850.

The contention that the burden of proof was not on the State to show the character of the land is based on the idea that the swamp land selection of the tract by the State in the year 1882, *prima facie* fixed the character of the land. Said list appears to have included the land here in controversy, and appears from the oath of two witnesses to have then been "swampy as to a majority of each forty acres," and it is further said, in a marginal note: "This tract was attempted to be held as a homestead, but abandoned on account of its swampy character."

This selection does not appear to have ever been approved by the Secretary of the Interior, or certified to the State under its grant. No question, therefore, of the jurisdiction of the Department over the land arises.

In those cases where the State has accepted the field notes of survey as the basis of adjustment under the swamp land act, such field notes are *prima facie* evidence of the character of the land, but this rule has no application here, because the State of Iowa elected to make its

selections in the field, and for the further reason, that the field notes of survey do not return this land as swamp land.

Where the field notes of survey do not show the tracts claimed to be swamp and overflowed, the burden of proof is upon the State to show such tracts to be of the character granted. Linn County, Iowa (19 L. D., 126).

On the question of the admissibility of certain testimony, it may be said that there exists no reasonable doubt that evidence of the character of the land at any time since the year 1850 is competent as tending to prove its character as of that date, and in cases like the present one, if the contention of the appellant in this regard were sound, he having the burden, the case must be necessarily decided against him, without looking to the record further than to ascertain that there is no positive or direct testimony going to show the character of the land in 1850.

In nearly all cases the best evidence obtainable of the character of land in the year 1850 is evidence of its character since that date, and the best evidence obtainable is always competent to establish any litigated fact.

True, land that was swamp and overflowed in the year 1850 may have since become dry agricultural land by natural processes, and land which was not then swamp and overflowed may now be of that character, so that proof of the character of land at any time other than the date of the granting act may, and in some cases probably does, lead to error, but this is no sufficient argument for the rejection of evidence which tends to establish the real fact in issue.

It is not held that evidence of the character of land since the year 1850 will be taken as conclusive proof of its character at that time, but only that such evidence is competent as tending to establish the important fact upon which alone must rest an adjudication whether it passed under the swamp land grant: viz., was it swamp and overflowed at the date of the grant.

The evidence in this case has been carefully examined, and fails to show that the land was swamp and overflowed in the year 1850. The decided preponderance of the testimony is to the effect that it is now, and has been for a number of years, good agricultural land, and the only hindrance to its successful cultivation to crops is an occasional overflow from the Little Sioux River, such overflows during the crop season being of rare occurrence. The conclusion is, therefore, that it was not swamp and overflowed at the date of the grant.

The decision appealed from is affirmed.

With the papers in the case is found what purports to be a decision of the register and receiver at Des Moines, Iowa, dated April 9, 1895, in the case of C. T. Archer *v.* Henry M. Williams, involving this same land, wherein it was held that "H. M. Williams, the entryman herein, has failed to establish his residence and to live upon the land in contro-

versy as contemplated by law," and it is recommended that the entry be canceled.

As this decision appears to have been made before the departmental decision, *supra*, ordering a hearing herein, and no reference being made in said departmental decision to the fact of a hearing having been theretofore had between Archer and Williams in reference to this land, its pertinency to the present case does not appear.

The attention of your office is, however, called to this alleged decision, for the reason, if such decision was rendered under proper procedure and not appealed from, it would seem that the entry of Williams should be canceled, notwithstanding the claim of the State has been rejected.

STATE OF WASHINGTON *v.* NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of April 24, 1896, 22 L. D., 482, denied by Secretary Bliss, April 2, 1898.

DESERT LANDS.

Regulations Concerning the Making of Proof for Desert Lands Segregated under Section 4, Act of August 18, 1894 (28 Stat., 372–422), as Amended by the Act of June 11, 1896 (29 Stat., 434).

The language of the fourth section of the act of 1894 is as follows:

SEC. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the 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, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be

approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars.

In the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1897, and for other purposes, approved June 11, 1896, there is, under the head of appropriation for "Surveying public lands," the following provision:

That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamatien until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such State without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

1. In the circular of November 22, 1894, as amended March 15, 1898, instructions are given for the designation of the lands by the proper State authorities. Upon the approval of the map of the lands and the plan of irrigation, the contract is executed by the Secretary of the Interior and approved by the President, as directed by the act. Upon the approval of the map and plan, the lands are reserved for the purposes of the act, said reservation dating from the date of the filing of the map and plan in the local land office. A duplicate of the approved map and plan, and of the list of lands, is transmitted for the files of the local land office, and a triplicate copy of the list is forwarded to the State authorities.

2. By the Honorable Secretary's decision of January 22, 1898 (26 L. D., 74), it was held that the act of 1896 applies to all lands segregated

under the act of 1894, and patents will be issued for all such lands in accordance therewith.

3. When patents are desired for any lands that have been segregated, the State should file in the local land office a list, to which is prefixed a certificate of the presiding officer of the State land board, or other officer of the State who may be charged with the duty of disposing of the lands which the State may obtain under the law, Form 1, page 3; and followed by an affidavit of the State Engineer, or other State officer whose duty it may be to superintend the reclamation of the lands, Form 2, page 4.

4. The certificate of Form 1 is required in order to show that the State laws accepting the grant of the lands have been duly complied with.

5. The affidavit of Form 2 is required in order to show compliance with the provisions of the law, that an ample supply of water has been actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to each tract in the list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

6. These lists will be called Lists for Patent, and should be numbered by the State consecutively, beginning with No. 1. The list should also show, opposite each tract, the number of the approved segregation list in which it appears.

7. Upon the filing of such list, the local officers will place thereon the date of filing, and note on the records opposite each tract listed: List for Patent No. ———, filed —— ——, giving the date.

8. When said list is filed in the local land office there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections where less than a section is designated (Form 3, page 4). This notice shall be published at the expense of the State once a week in each of five consecutive weeks in a newspaper of established character and general circulation, to be designated by the register as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local office during the entire period of publication.

9. At the expiration of sixty days from the date of the first publication, the State shall file in the local office proof of said publication and of payment for the same. Thereupon the register and receiver shall forward the List for Patent to the Commissioner of the General Land Office, noting thereon any protests or contests as to failure to comply with the law or as to prior adverse rights, together with any recommendations they may deem proper.

10. Upon the receipt of the papers in the General Land Office such action will be taken in each case as the showing may require and all tracts that are free from valid protest or contest, and respecting which

the law and regulations have been complied with, will be certified to the Secretary of the Interior for approval and patenting.

F. W. MONDELL,
Acting Commissioner General Land Office.

Approved March 15, 1898:
C. N. BLISS,
Secretary of the Interior.

FORMS FOR VERIFICATION AND PUBLICATION OF LISTS FOR PATENT.

[Form 1.]

I, ——— ———, do hereby certify that I am the ——— ——— (designation of office) of the State of ——— ———; that I am charged with the duty of disposing of the lands granted to the State by section 4, act of August 18, 1894 (28 Stat., 372–422), and the act of June 11, 1896 (29 Stat., 434); and that the laws of the said State relating to the said grant from the United States have been complied with in all respects as to the following list of lands prepared on behalf of the said State for the issuance of patent under the said acts of Congress.

———— ————,
———— ————.

(Here add list of lands.)

[Form 2.]

To follow list of lands.

STATE OF ———
COUNTY OF ——— } *ss:*

——— ———, being duly sworn, deposes and says that he is the ——— ——— (designation of office) of the State of ———, charged with the duty of supervising the reclamation of lands segregated under section 4, act of August 18, 1894 (28 Stat., 422), and the act of June 11, 1896 (29 Stat., 434); that he has examined the lands designated on the foregoing list, and that an ample supply of water has been actually furnished (in a substantial ditch or canal, or by artesian wells or reservoirs) for each tract in said list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

———— ————,
———— ————.

Subscribed and sworn to before me this —— day of ———, 189—.
[SEAL].

———— ————,
Notary Public.

Form for published notice.

[Form 3.]

UNITED STATES LAND OFFICE,
———, ———, 189—.

To whom it may concern:

Notice is hereby given that the State of ——— has filed in this office the following list of lands to wit: ——— and has applied for a patent for said lands under the acts of August 18, 1894 (28 Stat., 372–422), and June 11, 1896 (29 Stat., 434), relating to the granting of not to exceed a million acres of arid land to each of certain States; that the said list, with its accompanying proofs, is open for the inspection of all persons interested and the public generally.

Within the next 60 days following the date of this notice, protests or contests against the claim of the State to any tract described in the list, on the ground of failure to comply with the law or on the ground of a prior adverse right, will be received and noted for report to the General Land Office at Washington, D. C.

——— ———, *Register.*
——— ———, *Receiver.*

MINING CLAIM—AMENDED LOCATION—PROOF OF OWNERSHIP.

JOHN C. TELLER.

Rights under the amended location authorized by the Colorado statutes depend upon the locator's ownership of the original location, and if at the time of such amended location the original is owned, wholly or in part, by others, their title will not be divested by the amended location.

A mineral entry allowed on insufficient showing of title in the applicant is properly held for cancellation by the General Land Office; but where the applicant after such decision obtains by proper conveyances a complete chain of title, and makes a showing thereof before the Department which is satisfactory, as between him and the government, the entry may stand and patent issue thereon.

Secretary Bliss to the Commissioner of the General Land Office, April (W. V. D.) *4, 1898.*

It appears from this record that John C. Teller made application for patent for the Nellie Bly, Unique, Arkansas Traveller and Maverick lode claims, lot No. 10,162, Gunnison, Colorado, land district, and after due notice made entry No. 519, of the same, no adverse claim being filed.

This entry was made June 1, 1896, and the abstract of title to each claim was brought down to May 26, 1896.

After examination of the papers your office informed the local officers, by letter of November 24, 1896, that the abstracts of title did not show title in John C. Teller, and directed them to notify him that he would be allowed sixty days in which to comply with the regulations by showing title in himself.

An effort was made by the entryman to show that he had the possessory title to the claims, but your office, by letter of May 17, 1897, held that it was not shown that Teller, either at the date of entry, "or at any time prior thereto had any interest in and to said lode claims," and, for this reason held the entry for cancellation. The claimant thereupon appealed, assigning error as follows:

Because it is shown by the abstract of title filed with said application that said appellant had duly located and preempted said property so applied for before making said application, and that at the time of said application he was the owner thereof, and had full right and authority to make application therefor and entry thereof and to receive receiver's receipt therefor.

Because the said application was duly advertised as by law required and as shown by the papers on file herein, and that no adverse claim was filed in the land office against said application.

Because appellant was at the time of making said application the owner of said premises by right of purchase and conveyance to him thereof.

Because no adverse claim or protest of any kind has been filed by any one against said application.

Because appellant was at the time of making said application the owner of said premises and every part thereof, and ever since has been and now is such owner subject only to the superior title of the United States.

The mining regulations of December 10, 1891, in force when this entry was made, requiring the applicant to show his title, are as follows:

31. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claims to a patent.

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 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 a purchaser for valuable consideration, a copy of the location record must be filed under seal or upon oath as aforesaid, with an abstract of title from the proper recorder, under seal or oath as aforesaid, brought down as near as practicable 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 in his office other than those set forth in the accompanying abstract.

Under paragraph 32, when the applicant claims as locator he must furnish a copy of his location, and when he claims as a purchaser he must furnish a copy of the location, together with an abstract of title brought down as near as practicable to the date of the application.

In complying with paragraph 31, the applicant by his attorney-in-fact, says:

Deponent further states that the facts relative to the right of possession of John C. Teller, to each of said mining claims, veins, lodes or deposits and surface ground so surveyed and platted are substantially as follows, to wit, by direct line of transfer and amended location which will more fully appear by reference to the copy of the original record of location and the abstract of title herewith filed.

Turning now to the abstracts of title presented before entry, it appears (1) that the Nellie Bly was located March 6, 1890, by T. J. Reed and Walter Reed; the Unique was located August 4, 1891, by T. J. Reed; the Arkansas Traveller was located January 1, 1892, by T. J. Reed and P. Fitzpatrick, and the Maverick was located April 12, 1892, by T. J. Reed and M. Reed; (2) that June 1, 1893, T. J. Reed, by deed recorded June 12, 1893, conveyed all of said claims to the Red Jacket Mining and Milling Company; and (3) that December 9, 1895, John C. Teller filed an "amended location certificate" for each claim.

It thus appeared that at the date of Teller's entry (1) the interest originally possessed by T. J. Reed was vested in the Red Jacket Mining and Milling Company; (2) no transfer had ever been made of the interest of Walter Reed, in the Nellie Bly, or of the interest of P. Fitzpatrick in the Arkansas Traveller, or of the interest of M. Reed in the Maverick, and (3) Teller had no interest in any of the claims, unless his amended location thereof gave him title.

While the laws of the United States provide (Sec. 2324 Rev. Stat.) that in default of the required annual expenditure in labor or improvements, a mining claim "shall be open to re-location in the same manner as if no location of the same had ever been made," they make no provision whatever for an amended location. Section 3160, Mill's Annotated Statutes of Colorado does, however, and provides for an "additional certificate" of location, which is commonly known as an "amended location certificate." The section reads as follows:

> If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *Provided*, That such re-location does not interfere with the existing rights of others at the time of such re-location, and no such re-location or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location.

It will be observed that it is the locator or his assigns to whom is granted this privilege and that this amended location or "re-location," as it is also styled in the state statute, does not preclude the claimant from proving any title held under the previous location. The amended location so authorized by the Colorado law is essentially different from the relocation authorized by section 2324 of the Revised Statutes. The former is made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto, while the latter is a new and independent location which can only be made where the original location and all rights thereunder have been lost by failure to make the necessary annual expenditure.

Teller does not claim, and the form of his amended location certificate does not permit him to claim, that he relocated these claims within the meaning of section 2324. This is shown by his amended location certificates which state:

> This further amended certificate of location is made without waiver of any previously acquired rights but for the purpose of correcting any errors in the original location, description or record.

Teller's rights under the amended locations depend upon his ownership of the original locations and if at that time they were owned or partly owned by others their title was not divested or lost by his amended location.

Supplemental abstracts were filed in your office October 29, 1896, and by these it is shown that (1) by deed dated July 5, 1894, and recorded September 28, 1896, T. J. Reed conveyed to J. C. Teller, "all his right, title and interest in and to" each of the claims, and (2) by deed dated September 25, 1896, and recorded September 28, 1896, Teller conveyed these mining claims to The Red Jacket Gold and Silver Mining Company.

As shown by the original abstracts, Reed had conveyed all his interest in the claims to The Red Jacket Mining and Milling Company, June 12, 1893, so that apparently he had no interest in the claims at the date of his deed to Teller, but there was filed in your office April 21, 1897, a certified copy of a deed from The Red Jacket Mining and Milling Company to John C. Teller, dated February 11, 1897, and recorded March following, conveying "all the right and interest" it "has now or ever had" in each of said claims.

Since the case came to the Department there have also been filed a certified copy of a deed, dated April 4, 1896, and recorded September 17, 1897, from Fitzpatrick to T. J. Reed, conveying to the latter the interest of the former in the Arkansas Traveller, and a certified copy of a deed dated March 23, 1898, and recorded March 25, 1898, from T. J. Reed, M. Reed and Walter Reed to John C. Teller conveying to the latter all their right, title and interest in the Arkansas Traveller, Nellie Bly and Maverick. By the supplemental abstracts and additional deeds it is shown that John C. Teller has acquired and now holds a full and complete title to each of these claims, subject only to his said conveyance thereof to the Red Jacket Gold and Silver Mining Company, dated September 25, 1896.

Notice of Teller's application for patent to these claims was duly posted and published. No adverse claim was filed and there is no protest against Teller's entry.

It is shown by the affidavits filed since this appeal that at the time of T. J. Reed's conveyance of these claims to the Red Jacket Mining and Milling Company, dated June 1, 1893, he was in the peaceable and exclusive possession and occupation of said claims, and continued in such possession and occupation until his conveyance thereof to Teller, dated July 5, 1894; that the Red Jacket Mining and Milling Company did not comply with the conditions of its purchase from T. J. Reed, and never had possession of or asserted any right to either of said claims under Reed's deed; that at the time of his purchase from T. J. Reed Teller also acquired all of the capital stock of the Red Jacket Mining and Milling Company, thereby becoming practically the owner of that company; that from the time of his purchase from T. J. Reed to the time of his entry, Teller was in the peaceable and exclusive possession and occupation of said claims; and that at the time of Teller's entry no right to either of said claims was asserted by the Red Jacket Mining and Milling Company, P. Fitzpatrick, T. J. Reed, M. Reed or Walter Reed. The statements in these affidavits are of course strongly

corroborated by the conveyances subsequently obtained from all of the parties named.

The action of the local officers in allowing Teller's entry upon the proof of his title then before them was in conflict with rule 32 of the then existing mining regulations, and the action of your office of May 17, 1897, holding said entry for cancellation was fully justified by the incomplete showing of title then made. Since your office decision, however, Teller has by proper conveyance obtained a continuous and complete chain of title from all of the original locators of these claims and has made a showing which, as between him and the government, is sufficient to relieve his entry from the cancellation which would otherwise be required.

The Red Jacket Gold and Silver Mining Company, to whom Teller conveyed the claims after his entry, also asks that the entry be sustained and patent be issued to him, and the showing now made seems to fully justify this course, and it is so ordered.

FINAL PROOF AND PAYMENT—SUSPENDED ENTRIES.

INSTRUCTIONS.

Instructions as to the manner in which payment may be made and final receipt issued on the submission of final proof under entries made within the formerly recognized limits of the Northern Pacific east of Duluth.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *April 4, 1898.* (F. W. C.)

With your office letter "F" of March 31, 1898, is forwarded, without recommendation, a telegram from the register at Duluth, Minnesota, asking:

> Will this office, after taking proof in homestead entry, timber and stone entry, heretofore allowed, accept payment, issue final receipts and final certificates? Referring to suspended Northern Pacific land east of Duluth.

By departmental communication of February 28, 1898 (26 L. D., 265), in ordering a suspension from entry and patent of lands remaining undisposed of in odd-numbered sections within that part of the formerly recognized limits of the grant to the Northern Pacific Railroad Company lying east of the terminus established by departmental decision of August 27, 1896 (23 L. D., 204), pending the judicial determination in the courts of the question as to the eastern terminus of said grant, it was said:

> While entry of these lands will not be allowed during this suspension, yet in all cases where entries have been allowed the parties will be permitted to complete the same by making proof thereon, but the issue of patent will be suspended until such judicial determination.

The question raised by the telegram from the register at Duluth is as to his authority, upon the making of final proof upon entries heretofore allowed, to accept payment and issue final receipts and certificates upon such entries.

It is not the intention of this Department to require of these entrymen that they make payment at the time of their offer of proof, due to the pendency in the courts of the question as to the legality of the company's claim to these lands, but where the money is tendered the usual final receipt and certificate will be issued if the proof is otherwise regular and satisfactory; but upon the final certificate issued by the register, and the duplicate final receipt given to the entrymen, will be noted, in red ink, across the face of each, the following:

This receipt (or certificate) is issued under the order of the Secretary of the Interior dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the land herein described.

You will issue appropriate instructions to the local officers in the several districts in which these lands are situated.

RAILROAD LANDS—PURCHASER—ACT OF MARCH 2, 1896.

JOHN H. BARTON ET AL.

The act of March 2, 1896, prohibits the annulment of a patent erroneously issued on account of a railroad grant where the lands covered thereby are held by a bona fide purchaser, and confirms the right and title held by such purchaser under the erroneous patent, and thereby avoids the necessity for the issuance of another patent as required by the adjustment act of March 3, 1887.

The word "purchaser" as used in the act of March 2, 1896, includes one who under a subsisting contract of purchase, made in good faith, holds lands erroneously patented or certified on account of a railroad grant, and title is confirmed in such a purchaser, by said act, even though he may not have made all the payments called for under said contract of purchase.

On application for confirmation of the title held by an alleged bona fide purchaser, as provided for in said act of 1896, the railroad company, or its successor in interest, should be advised of said application, and allowed opportunity to show cause why title should not be confirmed in the applicant.

If such application for confirmation embraces land which was covered by a homestead or pre-emption entry that has been erroneously canceled on account of the railroad grant, such entryman should be notified and given opportunity to apply for reinstatement under section 3, act of March 3, 1887.

Secretary Bliss to the Commissioner of the General Land Office, April 6, 1898.

(W. V. D.) (F. W. C.)

In your office letters of July 30, 1897, you make report upon the following applications, filed in your office, for confirmation of title under the provisions of the act of March 2, 1896 (29 Stat., 42):

John H. Barton, the NE. ¼ of the SW. ¼ of Sec. 21, T. 21 N., R. 4 E.;

Loretta E. Cosgrove and Chris Pendle, the N. ½ of the NW. ¼ of Sec. 21, T. 21 N., R. 4 E.;

Alexander B. Stewart, the W. ½ of the NW. ¼ of Sec. 9, T. 23 N., R. 5 E.;

William D. Begg, the NE. ¼ of the NE. ¼ of Sec. 33, T. 23 N., R. 5 E.;

Walter Cooper, the SE. ¼ of the NW. ¼ of Sec. 15, T. 24 N., R. 5 E.; and

Alexander B. Stewart, lot 4, Sec. 19, T. 24 N., R. 5 E.; all in the Seattle land district, Washington.

As the several applications presented are only submitted for instructions, the entire matter is disposed of in one paper.

Your said office letters report that the above described tracts are within the primary limits of the grants for the branch line of the Northern Pacific Railroad as adjusted to the map of definite location filed March 26, 1884. They are also within the limits of the withdrawals upon the map of general route filed August 15, 1873, and the map of amended general route filed June 11, 1879, of said branch line. It also appears that the tracts are within the limits of the withdrawal upon the map of general route of the main line of said road filed August 13, 1870, but they fall north of the terminal established upon said main line at Tacoma.

It is claimed that the tracts above described have all been erroneously patented on account of the grant for said company; further that the above parties have all contracted with the Northern Pacific Railroad Company for the purchase of the tracts described, but the conditions named in said contracts have not all been performed, and as to some of them the stated time for the performance of the conditions has expired, but no forfeiture of the contract has been declared by the company and there has been no repudiation thereof by the purchaser.

You call attention to the position indicated by this Department in letter of May 3, 1897, returning the showing made on behalf of the Chicago, Burlington and Quincy Railroad Company, successor to the Missouri River Railroad Company, in support of an application for confirmation of title under the act of March 2, 1896, *supra*, in which attention was called to the fact that a number of the tracts had only been contracted for and that deeds had not been issued by the company; in which letter it was stated

> As the confirmation is only in favor of the purchaser, and can not be invoked where the contract has not been completed or is surrendered, I have to direct that a separate list be prepared of such lands.

In view of the position thus indicated, you submit the matter without recommendation for the consideration of the Department, and in your letter state that

> the railroad company has not been called upon for any showing in these cases, and in so far as this office is informed has no knowledge of these applications.

The act of March 2, 1896, is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant, shall

only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser, is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee, in consequence of the failure of the government or its officers to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed of contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Prior to this legislation of March 2, 1896, the act of March 3, 1887 (24 Stat., 556), and its amendment of February 12, 1896, furnished the rule for the adjustment of all claims to lands erroneously certified or patented on account of a railroad land grant. That act directed the bringing of suits for the recovery of title to all lands so erroneously certified or patented, and made provision for the protection of pur-

chases in good faith of such lands from the railroad by citizens of the United States, or persons who have declared their intention to become such, and authorized the issuance of patents to such purchasers "which shall relate back to the date of the original certification or patenting." In the execution and administration of this act it was held that the title transmitted to the railroad company by the erroneous patent or certification must be recovered before the Department could recognize the claim of the good faith purchaser and make the same good by the issuance of a patent to him (6 L. D., 272, 276).

By the act of March 3, 1891 (26 Stat., 1095, 1099), the time for bringing suits to recover title to lands erroneously patented, was limited to five years from the date of that act, and this limitation would have expired March 3, 1896.

It having been found impracticable to adjust these grants within this period, the act of March 2, 1896, *supra*, was passed, extending the time for bringing such suits but providing, in the first section, that "no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." This extension therefore does not apply to "any lands held by a *bona fide* purchaser."

The statute of March 2, 1896, embraces three sections and from a consideration of the entire act it is evident that one of its objects was to relieve *bona fide* purchasers from the annoyance and delay incident to suits for the recovery of title under the act of 1887. In furtherance of this object the act of 1896 prohibits the vacating or annulling of a patent to lands held by a *bona fide* purchaser, and directly operates upon and confirms the right and title held by such purchaser under the erroneous patent and thereby avoids the necessity for the issuance of another patent as required by the act of 1887.

The first question which arises is: Who is a purchaser within the meaning of the act of March 2, 1896. That act and the act of February 12, 1896 (29 Stat., 6), were adopted in furtherance of the general policy first declared in the act of March 3, 1887, *supra*, of protecting those who, in good faith, purchased lands of railroads on the strength of patents erroneously issued or certifications erroneously made.

The act of February 12, 1896, *supra*, provides:

> That section four of an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto the following proviso: "*Provided further*, That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the government a sum equal to the difference between the portion of the purchase price so paid and the government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

Here the word purchaser is used to embrace one who had "paid only a portion of the purchase price."

The third section of the act of March 2, 1896, *supra*, speaks of purchasers "by deed or contract, or otherwise," thus including under the term "purchasers" those who are without a deed passing the legal title, but who are nevertheless deemed to occupy the status of a purchaser of the land.

It was a matter of common knowledge at the time of the passage of this act that the lands claimed by railroads under their grants were to a great extent held and occupied by those who in good faith had entered into contracts providing for the purchase of such lands and payment therefor in five, ten or some other number of annual installments, and conferring upon the purchaser the right to occupy, cultivate and improve the lands from the date of the contract. For many years this had been the prevailing method of disposing of railroad lands, both patented and unpatented.

In common understanding the word "purchaser" includes those who hold lands under such contracts, and the history of this legislation seems to make it quite clear that the word was so used in the act of March 2, 1896. The reasons for protecting those who have obtained deeds but who have not made full payment, or for protecting those who have made full payment but who have not obtained deeds, apply with equal force to those who, while they have neither made full payment nor obtained deeds, have nevertheless made binding contracts to make complete payment and hold the enforceable obligations of the railroads to execute and deliver deeds and who on the faith thereof may have made valuable and permanent improvements upon the land. This view of the language employed insures the equal protection and benefit of the statute to those who from necessity purchased upon long-time contracts providing for small annual payments and who expected by the cultivation and use of the land to obtain the means wherewith to make ultimate payment therefor.

The Department is of opinion that one who, under a subsisting contract of the character here described, in good faith, holds lands so erroneously patented or certified, is a *bona fide* purchaser within the meaning of the act of March 2, 1896, whose right and title are thereby confirmed. The fact that the time for making some deferred payment has not arrived, or that with the indulgence of the railroad some deferred payment may have been passed, does not alter his status as a purchaser, if, in good faith, he claims the land under a contract which has not been surrendered or otherwise avoided.

In the case of the Chicago, Burlington and Quincy Railroad Company, before referred to, the construction of the word "purchaser" was considered, but in view of the act of February 12, 1896, and the act of March 2, 1896, and upon further consideration, what was then said upon that question is recalled.

You call attention to an informality or defect in the execution or signing of the Cooper and Stewart contracts, but since only copies of those contracts are submitted and since upon inspection thereof it seems more than probable that the purported copies are not complete transcriptions of the originals, the matter will not be noticed further than to suggest that the attention of the applicants be called to the apparent defect in order that any error in the copying may be corrected.

In connection with those applications your attention is called to the fact that it is first necessary to ascertain whether the tract involved was erroneously patented or certified, and before any determination is had of that question, the railroad company should be notified of the application and be given an opportunity to make a showing. To that end it is directed that, upon the filing of an application for confirmation, the company, or its successor in interest, be advised thereof and allowed thirty days within which to show cause why the tract involved should not be held to have been erroneously patented or certified on account of its grant and the title of the purchaser held confirmed. It is only where the title of the purchaser stands confirmed that demand can be made upon the company for the value of the land under the act of March 2, 1896.

If any such application embraces land which was covered by a homestead or preemption entry, which has been erroneously cancelled on account of the railroad grant or a withdrawal of lands in aid thereof, the entryman should also be notified of the application and be given thirty days as a reasonable time within which to apply for reinstatement under the third section of the act of March 3, 1887, in default of which the land will be otherwise disposed of according to law.

RAILROAD LANDS—CONFIRMATION—ACT OF MARCH 2, 1896.

CHICAGO AND NORTHWESTERN RY. CO.

The distribution, under a plan of reorganization, of lands erroneously patented on account of a railroad among the holders of mortgage bonds, issued by the company receiving the benefit of the grant, brings the parties receiving such title within the confirmatory provisions of the act of March 2, 1896.

A demand under the act of March 2, 1896, for the payment of the government price of lands erroneously patented on account of a railroad grant and thereafter disposed of to bona fide purchasers, should not be made on a railroad company as the successor in interest to the company receiving the benefit of the grant, if it appears that, as such successor, said company received no benefit from the sale of the lands erroneously patented.

Secretary Bliss to the Commissioner of the General Land Office, April 6, 1898.

(W. V. D.) (F. W. C.)

With your office letter "F" of March 23, 1898, is forwarded an answer filed on behalf of the Chicago and Northwestern Railway Company to the rule laid upon said company to show cause why reconvey-

ance should not be made of certain tracts found by the adjustment made by your office to have been erroneously patented.

The lands in question were patented on account of the grant made by the act of June 3, 1856 (11 Stat., 20), to the State of Wisconsin, to aid in the construction of a railroad from Fond du Lac, on Lake Winnebago, northerly to the State line, which grant was by the State conferred upon the Chicago, St. Paul and Fond du Lac Railroad Company.

It is not shown for what reason the lands included in the rule issued by your office were held to have been excepted from the grant above referred to.

From the answer filed on behalf of the Chicago and Northwestern Railway Company it appears that all the lands covered by the rule, except a forty-acre tract, were distributed to the holders of certain mortgage bonds issued by the Fond du Lac company prior to the incorporation of the Chicago and Northwestern Railway Company.

The Fond du Lac company defaulted, and the purchasers at the foreclosure sale under the mortgage issued by the Fond du Lac company in the re-organization became the incorporators of the Chicago and Northwestern Railway Company. Said last-mentioned company, however, never received any benefit from the sale of the lands embraced in the rule under consideration, for the reason that it took a mere naked legal title in the lands, incumbered with the interests of the holders under the mortgage bonds issued by the Fond du Lac company, for which due provision was made in the plan of re-organization.

In submitting said answer your office letter states that:

> The showing of *bona fide* purchase of the lands in my judgment is sufficient to warrant a declaration by the Department of a confirmation of title in the purchasers under the provisions of the act of March 2, 1896 (29 Stat., 42). There remains the question as to the advisability for institution of suit for the recovery of the price of the land. It is clear from the answer of the Chicago and Northwestern company that it acquired no interest or right in the lands guaranteed to the original holders of the bonds secured by the mortgage made by the Chicago, St. Paul and Fond du Lac company under the plan of re-organization aforesaid, which was accepted by all parties concerned, including said Chicago and Northwestern company; that said lands were sold under the provisions of the fourth section of the granting act, which authorized the sale of one hundred and twenty sections of land within a continuous limit of twenty miles of the line prior to the construction of said road, and upon the completion of any section of twenty miles of road, of additional lands not exceeding one hundred and twenty sections for each twenty miles of road constructed.
>
> This office has no other knowledge of the so-called re-organization spoken of in the company's answer than is found therein, but the Chicago and Northwestern Railway Company is the successor to the Chicago, St. Paul and Fond du Lac company both as to its railroad and the grants made in aid of its construction. It secured the benefits of said grant and must be charged, I think, with the obligations thereof, and as the Chicago, St. Paul and Fond du Lac company is probably not now in existence, and no other party or parties appear to be responsible for the erroneously patented lands, it is suggested that instructions be given that demand be made on said Chicago and Northwestern company for the government price of such lands.

After careful consideration of the showing made in the answer to the rule, together with your letter submitting the matter, it seems clear that all the lands covered by said rule have been disposed of to *bona fide* purchasers, whose titles are hereby declared to have been confirmed.

Relative to the suggestion contained in your office letter to the effect that demand be made upon the Chicago and Northwestern Railway Company for the government price of such lands, there would seem to be no good ground upon which such demand could be made of that company for the value of the lands so erroneously patented, for the reason that it never received any benefit therefrom.

While it is clear that if the lands were shown to have been erroneously patented the right of recovery would remain in the United States, unless the lands were shown to be in the hands of *bona fide* purchasers, yet any right of action in the United States for the value of the lands would seem to be limited to a suit against the company that received the benefit from the sale of such erroneously patented lands, and it would be necessary in such a suit to show that the company against which the suit was brought received the benefit from the sale of such erroneously patented lands. That the Chicago and Northwestern Railway Company succeeded to the grant conferred by the State upon the Fond du Lac company, and to such road, if any, as had been constructed by said company prior to the foreclosure proceedings before referred to, is not a sufficient showing of a benefit derived by the Northwestern railway company from the sale of the particular tracts covered by the rule under consideration.

In the matter of the adjustment of the grant made under the act of March 3, 1863 (12 Stat., 772), to the State of Kansas, to aid in the construction of a certain railroad, which was by the State conferred upon the Leavenworth, Lawrence and Galveston Railroad Company, your office letter of June 8, 1895, made report that certain lands had been erroneously certified and patented on account of said grant, and for the recovery of the same a rule was served upon resident counsel of said company, to which counsel responded calling attention to the fact that the Leavenworth, Lawrence and Galveston company had passed out of existence; that said company was succeeded by the Southern Kansas Railway Company, and that the road at the time of the answer was operated by the Atchison, Topeka and Santa Fe Railroad Company, which latter company, however, disclaimed having received any benefit from any of the lands covered by the rule, it being alleged that said lands were disposed of by the Leavenworth, Lawrence and Galveston company before it passed out of existence.

This matter was considered in departmental communication of February 21, 1895 (L. & R. Press Copybook No. 323, page 415), in which it was held:

> If the answer made by the Atchison, Topeka and Santa Fe Railroad Company be true, and as there is nothing to be found in the record which suggests the contrary, it follows that such railroad company never had any such connection with

the lands in question as would subject it to suit on behalf of the United States to compel a re-conveyance of the land. The title to such lands, if the answer be true, was never in the Atchison, Topeka and Santa Fe Railroad Company, and it therefore follows that the company could not reconvey the lands to the government. The rule to show cause is therefore discharged.

Upon inquiry at your office it is learned that no subsequent action was ever taken looking to a demand upon the Atchison, Topeka and Santa Fe Railroad Company for the value of the lands shown to have been erroneously certified and patented to the Leavenworth, Lawrence and Galveston Railroad Company.

It would therefore seem that the construction placed upon said departmental communication discharging the rule in effect relieved the Santa Fe railroad company of any responsibility on account of the lands shown to have been so erroneously certified and patented.

No sufficient reason appears why a like disposition should not be made of the case in hand, and the suggestion contained in your office letter under consideration, to the effect that you be instructed to demand of the Chicago and Northwestern Railway Company the value of the lands covered by the rule to show cause, is not approved, and the rule issued by your office is hereby discharged.

It might be stated that the answer to the rule admits that one tract, covering forty acres, embraced in the rule, was sold by the Chicago and Northwestern Railroad Company for one hundred dollars. As to said tract there would seem to be no reason why suit might not be instituted to recover the value of the same if it were established that the tract was erroneously patented on account of the grant; but in view of the small amount involved it is not deemed advisable to direct proceedings looking to the institution of suit.

The showing submitted with your office letter of March 23, 1898, is herewith returned to the files of your office.

INDIAN LANDS—ACT OF JULY 1, 1892.

COLVILLE RESERVATION.

No part of the Colville Indian reservation restored to the public domain by the act of July 1, 1892, should be opened to settlement and entry prior to the survey of the entire tract, unless the Indians choose to take their allotments prior to the completion of the survey; but if they do so elect, then all the lands so restored to the public domain may be opened to settlement, though a portion of them may be unsurveyed.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, April 9, 1898.

I am in receipt, by reference from you, of a communication from the Commissioner of the General Land Office, relating to the opening of a part of the Colville Indian reservation under the act of July 1, 1892 (27 Stat., 62), in which he requests an opinion as to whether any part

of the lands restored to the public domain by that act can be opened to settlement and entry by proclamation of the President in advance of the survey of the entire tract so restored.

The first section of the act provides

That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington herein provided for [a certain described portion of that reservation] is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

The fourth section of the act provides for the allotments, in severalty mentioned in the first section, and contains the following directions upon that subject:

That each and every Indian now residing upon the portion of the Colville Indian reservation hereby vacated and restored to the public domain, and who is so entitled to reside thereon, shall be entitled to select from said vacated portion eighty acres of land, which shall be allotted to each Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the Congressional survey or subdivisions of said tract or country, ... Such selections shall be made within six months after the date of the President's proclamation opening the lands hereby vacated to settlement and entry, and after the same have been surveyed, and when such allotments have been selected as aforesaid and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the benefit of the allottees respectively.

An examination of the sections mentioned shows that the restoration to the public domain and the opening to settlement and entry by executive proclamation provided for in the first section are in terms made subject to the Indian allotments in severalty provided for in the fourth section. The latter section directs that the allotments shall be made from the portion of the reservation restored to the public domain, that they shall be selected by the individual Indians without restrictions as to locality other than that they shall conform to the congressional survey or subdivisions, and that

such selections shall be made within six months after the date of the President's proclamation opening the lands hereby vacated to settlement and entry, and after the same have been surveyed.

The communication from the Commissioner of the General Land Office shows that a considerable portion, but not all, of the tract so restored to the public domain has been surveyed.

The Indian allotments provided for must "conform to the Congressional survey or subdivisions," and therefore can only be made from surveyed lands. They are not to be otherwise restricted in locality. Having the entire tract, so restored to the public domain, from which to make selection of their allotments, it follows that the Indians, under the present legislation, can not be required to make such selections

until the entire tract has been surveyed and thereby rendered subject to selection.

Nothing in the act prohibits or prevents the making of allotments before the executive proclamation opening the lands to settlement and entry. A consideration of the entire act shows that the period for selecting allotments begins when any portion of the tract is surveyed and ends with the expiration of six months after the entire tract is surveyed and opened to settlement and entry by executive proclamation. While they can not be compelled to do so, the Indians may choose to take their respective allotments from the lands now surveyed. In that event there would be no objection to an executive proclamation opening to settlement and entry the entire tract restored to the public domain, although a portion of it be unsurveyed. If, however, the Indians are not disposed to select all of their allotments from the lands now surveyed there would be serious objection to a proclamation opening them to settlement and entry in advance of the completion of the surveys. The objection lies in the fact that any one settling upon or entering any of the lands under such proclamation would do so subject to the right of an Indian to select the same as an allotment at any time before the expiration of six months after the entire tract had been surveyed and opened to settlement and entry. The survey of the lands now unsurveyed may, because of insufficient appropriations, or otherwise, be long postponed and it would not be consonant with good administration to invite settlement and entry of lands which at some indefinite time in the future may be taken for Indian allotments without reference to the preceding settlement or entry thereof.

Approved, April 9, 1898.

C. N. BLISS,
Secretary.

DESERT LAND—ACT OF AUGUST 4, 1894—CANCELLATION.

MAXSON *v.* CORY ET AL.

The act of August 4, 1894, dispensing with annual expenditure on desert entries for that year applies to entries existing at the time said act took effect, and does not operate to revive entries rightfully canceled prior thereto.

The assignee of a desert entryman is not entitled to notice of action, on the part of the government, adverse to his interests, if he has not prior to such time filed evidence of the assignment.

The cancellation of a desert land entry without due notice of such action to the original entryman, with opportunity given him to show cause why such action should not be taken, is unauthorized by law, and an entry so canceled prior to said act of 1894 must be held in law an existing entry, and therefore entitled to the benefit of said act.

Secretary Bliss to the Commissioner of the General Land Office, April 9, 1898.

(W. V. D.) (H. G.)

January 11, 1892, John D. Cory made desert land entry for the S. ½ of Sec. 28, T. 8 N., R. 12 W., S. B. M., within the limits of the Los

Angeles, California, land district. April 4, 1893, the entryman assigned and transferred all his interest therein to W. H. Holliday, who, thereafter, and on July 15, 1893, assigned and transferred all his interest therein to Matthew Maxson, the contestant.

January 28, 1893, Cory, the entryman, prior to his assignment of said entry, filed his annual proof of expenditures to improve said land for the first year, but no proof was filed of the expenditure for the second entry year ending January 11, 1894.

April 30, 1894, the entry was canceled by your office for failure to make annual proof for the second year, but, on March 16, 1895, the entry was reinstated upon the application of Maxson, as assignee of the assignee of the entryman, because the parties in interest had not been allowed an opportunity to appear and show cause why the entry should not be canceled.

After the cancellation of the entry and before it was restored of record, the following entries were made, wholly or partially, of portions of the original entry of Cory—namely: August 6, 1894, Abner D. Melick made desert land entry for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 28, T. 8 N., R. 12 W.; August 9, 1894, Kate A. Calkins made desert land entry for the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section; and September 4, 1894, Bessie R. Atkins made desert land entry for the W. $\frac{1}{2}$ of said section.

A hearing was directed by your office, in order to determine the rights of the claimants to the land, including any question affecting the qualifications of the assignees, and the sufficiency, as ground of cancellation, of the fact of failure to make yearly proof prior to the expiration of the time prescribed for final proof.

This hearing was had May 27, 1895, at which all of the parties appeared, either in person or by attorney. Cory and Holliday, the original entryman and his assignee, waived all of their rights in favor of Maxson, the assignee of the latter. The evidence taken at the hearing was in behalf of Maxson, except the testimony of Melick, which related solely to the state of the record and his ignorance of the right of Maxson when he (Melick) made his entry. The local office found that the entries of Melick, Calkins and Atkins were properly allowed, on the ground that the land was opened to entry when they were severally made, and there was no record then showing any existing claim of Maxson, although the good faith of Maxson was conceded.

Upon Maxson's appeal, your office, on April 24, 1896, reversed this decision, and held for cancellation the several entries of Melick, Calkins and Atkins, in so far as they conflict with the entry of Maxson.

Calkins and Atkins appeal. No appeal or other action was taken by Melick.

The record and the testimony show that Cory, the entryman, assigned his interest in his entry and the land involved therein to Holliday, and that the latter assigned his interest therein to Maxson for six hundred

dollars; that Cory filed in due time his proof of his first yearly expenditure of six hundred dollars in boring an artesian well on the tract, which flows twenty-five or more miners' inches of water, and the expenses connected therewith; that Maxson was qualified as assignee to hold the land, except as to his citizenship, which was not proved; and that Cory informed Maxson that everything necessary was done to hold the land for two years. No proof was submitted of the yearly expenditure for the second entry year ending January 11, 1894.

Under the act of August 4, 1894 (28 Stat., 226), it was, among other things, provided that where declarations of intention to enter desert land had been filed prior to the taking effect of the act, the requirement that the persons filing the same should expend the full sum of one dollar per acre during the year toward the reclamation of the land entered should be suspended for the year 1894, and such annual expenditure for that year "and the proof thereof" was dispensed with. Your office held that, as this act was approved and took effect prior to the entries of Melick, Calkins and Atkins, it applied to this case, and that the yearly proof for the second year was dispensed with under the terms of the statute, and was not due until January 11, 1895.

This is not the controlling question in the case. If the entry of Cory was rightfully canceled by your office, on April 30, 1894, it is manifest that at the time of the taking effect of the act of August 4, 1894, which, among other things, dispensed with the annual proof on desert claims for the year 1894, the entry was not a subsisting entry, and the statute did not apply to it. The act can apply only to entries existing at the time of its taking effect, and can not operate to revive prior entries rightfully canceled. (See Parsons *v.* Venzke, 164 U. S., 89.)

The entry, although canceled prior to the approval of this act, was thereafter reinstated by your office because the parties in interest had not been allowed an opportunity to appear and show cause why the entry should not be canceled. The record did not disclose the interest of Holliday in the tract, nor does it appear that there was any evidence of the assignment of Cory to him, until after the cancellation of the entry and about the time Maxson filed his petition to have the entry reinstated, when he also filed the original assignment from Cory to Holliday, and the assignment from Holliday to Maxson, which was endorsed on the instrument. Holliday insists that the assignment was filed directly after the same was executed and delivered to him, and it appears that the fact that he was the assignee of Cory, the entryman, must have been known to the local office, as he, Holliday, was the only one who received notice of the contemplated cancellation of the entry for failure to make annual proof for the second entry year.

No notice was given either to Cory the original entryman, or to Maxson, as assignee of the entryman. Such notice to Maxson was not required, as he had not disclosed his interest in the entry, by filing the proper certified copy of the original assignment in the local office. It

does not appear that there was ever any record of the several assignments at any place, either at the local office or that of the proper recorder of the county where the land is situate or elsewhere.

Generally, an assignee, to be in a position to demand protection and notice from the local office, must inform that office of his rights. Van Brunt *et al. v.* Hammon, 9 L. D., 561; American Investment Co., 5 L. D., 603. The assignee of a desert land entry is required to prove his assignment by filing an affidavit and a certified copy of the instrument under which he claims, and must make affidavit as to the amount of land held by him. Circular, General Land Office, 40. None of these requirements was observed, either by Cory or Maxson, the assignee, owing to their ignorance of the law and departmental requirements.

But, although notice was given to Holliday, to which he was not entitled of record, but to which he was entitled if his interest had been disclosed by a compliance with the law on his part, and although notice was not required to be given to Maxson, who had not complied with the regulations in filing his affidavits and evidence of the assignment, yet notice should have been, but was not, given to the original entryman and assignor, Cory.

This has always been required in the case of perfected entries, where final receipt has issued, and where the tract covered by such entry is held to be subject to alienation. United States *v.* Gilbert *et al.*, 17 L. D., 20; William A. Fowler, 17 L. D., 189; Lambert *v.* Lambert, 21 L. D., 169; Drew *v.* Comisky, 22 L. D., 174; United States *v.* Montoya *et al.* 24 L. D., 52. As much reason exists in requiring notice to be served upon the entryman of a desert land claim, under the law permitting assignments before the entry is completed by final proof, as in those cases where the tract may be transferred only after final proof. In either case, the entryman should be afforded an opportunity to be heard before the entry is canceled, in order to protect his rights growing out of the assignment or transfer, and to conclude him by the proceeding.

It follows that the cancellation of the entry was not rightful, and that it must be considered as an existing entry at the time of the taking effect of the statute dispensing with yearly proof under that and like existing entries. Subsequent to the decision of your office in the case at bar, the rule was announced in the case of Hodgson *v.* Epley, 23 L. D., 293, 296, as to the computation of time under the statute, as follows:

> If the entryman was in default for the year ending in 1894, the act should be applied to cure the default for that year. If not in default for the year ending in 1894, he should be excused for the entry year beginning in 1894.

In this case, the second entry year expired January 11, 1894, and therefore the proof of the annual expenditure for the entry year preceding that date was dispensed with by the statute, the entry must be considered one falling within the terms of the statute, as its cancellation had been illegal. The failure to file yearly proof for that year is

not, therefore, a cause for the cancellation of the entry now, as such proof has been dispensed with by the express terms of the statute which applies to entries existing at the time of its taking effect.

There is evidence tending to show that the assignment from Cory to to Holliday was held as collateral security for a debt due from the former to a bank in which the latter was a large stockholder, but this fact does not invalidate the assignment. At any rate, Maxson purchased the rights of Holliday in good faith and for a valuable consideration, and with the knowledge and consent of the original assignor. The failure of the parties to comply with the law in reference to filing evidence of their assignments and the affidavit of interest was not an intentional disregard of the law and departmental requirements, but was caused by ignorance of them.

The hearing supplies the omissions, except as to the citizenship of Holliday and Maxson, the assignees. They will be permitted to file their affidavits showing this fact, and the other facts required of assignees. It is not intended by this decision to decide the matter as to the yearly proof for the third entry year, as that matter is not in issue. Maxson states that he is ready to furnish the same, but there is no showing that it had been made.

Upon furnishing this required proof the entry of John D. Cory will remain intact, and so much of the entries of the parties to this proceeding as are adverse to such entry will be canceled.

JACKSON ET AL. *v.* GARRETT.

Petition for re-review denied by Secretary Bliss, April 9, 1898. See departmental decision of September 22, 1897, 25 L. D., 273, also 26 L. D., 48.

RAILROAD LANDS—SETTLEMENT CLAIM—SECTION 5, ACT OF MARCH 3, 1887.

TACOMA LAND CO. *v.* NORTHERN PACIFIC R. R. CO. ET AL.

Lands embraced within homestead entries or pre-emption filings at the date of a railroad grant, or at the time when said grant takes effect, are excepted from the operation of the grant.

A corporation created and existing under the laws of a State is a citizen of the United States within the intent and meaning of section 5, act of March 3, 1887.

A settlement within the corporate limits of a city can confer no pre-emptive right on the alleged settler, where no steps are taken to subject the land to the settlement laws under the act of March 3, 1877, prior to the repeal of the pre-emption law.

A settler who, under the law as it stood at the time of his settlement, had exhausted his homestead right by a prior entry, is not entitled to make a second or additional entry under the act of March 2, 1889, where prior to the passage of said act, and prior to the initiation of a valid settlement claim, the land had been sold by a railroad company as part of its grant, and the right of the purchaser validated by the act of March 3, 1887.

Secretary Bliss to the Commissioner of the General Land Office, April 12, 1898.

(W. V. D.) (F. W. C.)

Ten separate appeals have been filed from your office decision of September 20, 1895, sustaining the action of the local officers in awarding to Abner Shrives, upon certain conditions, the right to make entry of the SE. ¼ of the SW. ¼ of Sec. 5, and to the Tacoma Land Company the right to purchase under the provisions of Sec. 5 of the act of March 3, 1887 (24 Stat., 556), the W. ½ of the NE. ¼, the E. ½ of the NW. ¼, and lots 1 and 2, Sec. 7, and the E. ½ of the NW. ¼ of Sec. 29; all in township 20 north, range 3 east, W. M., Olympia land district, Washington.

The several tracts involved are all within the limits of the grant made by the joint resolution of May 31, 1870 (16 Stat., 378), for that portion of the main line of the Northern Pacific Railroad between Portland, Oregon, and Puget Sound. The E. ½ of the NW. ¼ of said section 29 is also within the limits of the grant for the branch line of said road across the Cascade Mountains, as shown by the map of definite location of such branch line filed March 26, 1884.

At the date of the passage of the joint resolution of May 31, 1870, *supra*, the tracts above described in sections 5 and 7, were embraced in subsisting homestead entries of record, which were, subsequently to the passage of said resolution, canceled. The tracts were, therefore, excepted from the operation of the grant made by said resolution. Northern Pacific R. R. Co. *v.* Bardon (145 U. S., 535); Northern Pacific R. R. Co. (20 L. D., 514). The remaining tract in section 29 was included in the pre-emption declaratory statement of Richard Martindale, made February 27, 1869, alleging settlement on the 19th of that month. This filing was of record, uncanceled, both at the date of the passage of said joint resolution of May 31, 1870, and also at the date of definite location of said Cascade branch, March 26, 1884, and was therefore excepted from the operation of the grants for both the main and branch lines of said road. Fish *v.* Northern Pacific, on review (23 L. D., 15); Whitney *v.* Taylor (157 U. S., 585).

It therefore appears that all the land here involved was excepted from the operation of the grants for the Northern Pacific Railroad Company. Your office so held; from which the Northern Pacific Railroad Company duly appealed, and after a careful consideration of the matter your office decision in this particular is affirmed.

It might be stated that all the land here involved is in close proximity to Tacoma. It appears that a portion thereof has been within the corporate limits of the city of Tacoma since February 3, 1875. It

also appears that other portions of the land were included within the city by the extension of its boundaries at a special election held April 17, 1891.

The Tacoma Land Company, originally known as the Southern Improvement Company, was incorporated under the laws of Pennsylvania in 1871, with authority to do business in the then Territory of Washington, as provided for in its articles of incorporation, a copy of which was filed and recorded in the office of the Secretary of the Territory, on January 3, 1874. On October 20, 1892, it applied to purchase, under the provisions of the act of March 3, 1887, *supra*, all the lands here involved, basing its claimed right upon a purchase made of the Northern Pacific Railroad Company on December 30, 1874, of a large body of land, including that here in question, as shown by certified copy of the conveyance which was duly recorded in the county on March 10, 1875.

It is insisted that the Tacoma Land Company, being a corporation, is not a citizen of the United States or a person who has declared his intention to become such citizen, and is, therefore, not entitled to the benefits of the remedial legislation contained in the fifth section of the act of March 3, 1887. This question has frequently arisen in the land department in the administration of this act. In Telford *et al. v.* Keystone Lumber Company, on review (19 L. D., 141, *145*), it was said:

> It will be noticed that the language of the section in defining the personal qualifications of purchasers, is: 'Citizens of the United States, or to persons who have declared their intention to become such citizens.' Unlike the settlement laws, the further qualifications that they be over twenty-one years of age, or the head of a family, are not included in the section. No personal act, such as settlement, residence and cultivation, is required, or could be interpolated into the statute, and the acreage is not limited that the citizen could purchase. It seems to me that in view of this, it is not going too far in the construction of this section, to say that a corporation, where the purchase is made in good faith, and under the conditions prescribed, may have the benefit of the remedial statute, and that 'citizen,' as here used, should be construed as including corporations.

In Daily *v.* Marquette, Houghton and Ontonagon R. R. Co. *et al.* (19 L. D., 148), it was said:

> This objection is pressed with much insistence, and a number of decisions are cited to sustain the contention. An examination of those decisions shows that their purport has been, in each instance, misunderstood and misconstrued. They only go to the extent of holding that a corporation is not a citizen for all purposes. There is, however, a long line of decisions which holds that a corporation is a citizen of the State wherein it has a legal existence, and as such citizen can sue and be sued in the courts of the United States. (Railroad Company *v.* Wheeler, 1 Black, 285; and Santa Clara Co. *v.* Southern Pacific R. R. Co., 118 U. S., 395'6, where the supreme court refused to hear an argument on the question.) For a full discussion of the question, reference is made to the case of the Louisville R. R. Co. *v.* Letson (2 How., 497), where the court concludes, p. 558,—'that a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purposes of its incorporation, capable of being treated as a citizen of that State

as much as a natural person.' And many other authorities to the same effect might be cited. As such citizens of the State they are in contemplation of law citizens of its laws. (Minneapolis R. R. Co. *v.* Beckwith, 129 U. S., 26.) The objection, on the ground that the land company is not a citizen, is overruled.

See also Gasper *et al. v.* St. Louis River Water Power Co. (22 L. D. 587), Nevada Southern Railway Co. (22 L. D., 1).

The departmental rulings upon this question have been uniform and many tracts of land of great value are now held thereunder, the title to which is wholly dependent upon these rulings.

In United States *v.* Northwestern Express Co. (164 U. S., 686), the sole question presented was whether a corporation created under the laws of the State of Minnesota was a citizen of the United States within the meaning of the act of March 3, 1891 (26 Stat., 851), conferring upon the court of claims jurisdiction to inquire into and finally adjudicate "all claims for property of citizens of the United States" taken or destroyed by Indians under the circumstances specified in the act, and at page 690, the court said:

> The act in question was a provision made by the United States as the guardian of the Indians, controlling as well their persons as their property, designed to make provision for the payment of the injuries committed by its wards. It certainly contemplated that citizens of the United States, even strictly speaking, should be made whole for the losses they might have sustained. But it is evident that cases might arise, where, in order to make restitution to citizens of the United States, the term in question would require a construction embracing Federal and state corporations. For, as the legal title to the property of a corporation is generally in the corporation, claims for damages to such property could not be presented in the names of the several stockholders. To deny relief to such a corporation would be practically therefore to refuse redress to citizens of the United States.
>
> It must have been contemplated, therefore, that a corporation thus chartered by Congress was to be treated under the terms of the act herein referred to as a citizen of the United States for the purposes thereof; and the same reasoning which thus operates to bring a Federal corporation within the terms of the act, leads also to the necessity of including corporations of the several States of the Union.

See also Smyth *v.* Ames (159 U. S., 466).

The Tacoma Land Company being a corporation created and existing under the laws of the State of Pennsylvania, is a citizen of the United States within the meaning of the act here in question and the decision of your office to that effect is affirmed.

The numerous claims made for this land under the homestead and pre-emption laws, and applications to locate scrip, are clearly set forth in your office decision, and date back to March 21, 1884, when Donald McRae tendered his homestead application to enter the SE. ¼ of the SW. ¼ of said Sec. 5. The case arising upon his application was duly prosecuted to this Department, resulting in the decision of September 20, 1887, reported in 6 L. D., 400, in which it was held that by the joint resolution of May 31, 1870, *supra*, there was conferred upon the Northern Pacific Railroad Company a grant of lands for the line of its road from Portland to Puget Sound, and for that reason McRae's application was denied.

Your office decision now under review denied all of the several applications to make filing and entry and locate scrip upon the lands here involved, for conflict with the superior right of purchase in the Tacoma Land Company, except the application of Abner Shrives, covering the tract in section 5, above described. Shrives' application to make entry of that tract under the homestead laws was presented on September 24, 1892. It appears that he went upon the land in 1884, as the representative of McRae, whose homestead application for the land had been rejected for conflict with the grant of the Northern Pacific Railroad Company and was then pending upon appeal in your office. He resided upon the land in a little house built by McRae, under an agreement that McRae was to pay him a certain amount for occupying and making improvements upon the land for McRae. It is claimed, McRae failed to keep this agreement and in 1885 Shrives repudiated his relations with McRae and set up a claim to the land in his own right. He has since resided upon the same, and claims to have sought to make entry thereof on several occasions.

The tract is part of an odd-numbered section within the limits of the Northern Pacific grant, for conflict with which, McRae's homestead application had been rejected March 21, 1884, of which Shrives was fully advised.

The land was at the time of the claimed settlement of Shrives and still is, within the corporate limits of the city of Tacoma, and no proceeding to subject the same to the settlement laws, under the act of March 3, 1877 (19 Stat., 392), was instituted or even requested so far as the record shows, prior to the repeal of the pre-emption law on March 3, 1891 (26 Stat., 1095). Shrives, therefore, had not "lawfully initiated" any claim to the land under the pre-emption law, which can be recognized under the saving clause of the repealing act. Indeed, his present record-claim is asserted under the homestead law, and respecting this it is sufficient to say that in 1869 he made homestead entry of eighty acres in Kansas, and was not, therefore, qualified to make another or additional homestead entry until the passage of the act of March 2, 1889 (25 Stat., 854), two years after the act of March 3, 1887, had given vitality and force to rights, like those of the Tacoma Land Company, asserted under purchase of lands claimed under railroad land grants.

The record does not sustain the claim that Shrives initiated any settlement right to the land prior to the act of March 3, 1887, upon which the Tacoma Land Company's right to purchase is based. Upon the passage of that act the land company's prior ineffectual purchase from the railroad company, if *bona fide*, was converted into a lawful right to purchase from the United States, and knowing that the land was claimed by the railroad company under its grant, and having at least constructive notice of its sale to the land company, as shown by the recorded deed, Shrives could not thereafter initiate any settlement

right which would defeat the land company's right to purchase under the fifth section of the act. His settlement is not, therefore, protected by the provisio to that section and his application to make homestead entry will stand rejected.

Subject to the modification herein made, your office decision is affirmed and the application of the Tacoma Land Company, if otherwise regular, will be accepted and the company permitted to make the purchase applied for.

RAILROAD GRANT—INDEMNITY—WITHDRAWAL—SELECTION.

IOWA RAILROAD LAND CO. *v.* NEWELL ET AL.

The act of June 2, 1864, did not work a legislative withdrawal of the even numbered sections within the original six mile granted limits, and in the absence of an executive withdrawal of said lands no right of the company thereto can attach prior to selection.

Secretary Bliss to the Commissioner of the General Land Office, April 12, 1898.
(W. V. D.) (C. J. W.)

By your office letter of March 23, 1896, addressed to the register and receiver at Des Moines, Iowa, it appears that the records of your office show that the N. ½ of the SW. ¼ of Sec. 36, T. 85 N., R. 44 W., Des Moines land district, was embraced in homestead entry No. 616, made by John Allen, August 22, 1872, and canceled for abandonment September 10, 1884; also that other filings were of record for the tract, and amongst them declaratory statement No. 3585 of Nathan Newell, filed February 5, 1884, alleging settlement January 15, 1884, and declaratory statement No. 3690 of Nathan Newell, filed May 8, 1889, alleging settlement September 13, 1888. March 3, 1890, Newell offered final proof, upon which cash certificate No. 21,721 issued.

On the presentation of the final proof, it appearing that Newell's entry conflicted with the selection of the Iowa Railroad Land Company, successors to Cedar Rapids and Missouri River Railroad Company, filed August 23, 1884, and said final proof appearing to be defective, a hearing was ordered by your office, January 5, 1894, to determine whether Newell's pre-emption cash entry, was valid on the final proof presented; also whether his claim as a settler could be established and his settlement thus disclosed so exhibit his claim to the land as to be superior to that of the company.

The hearing was duly had, December 18, 1894, at which W. W. Ordway, as transferee of Newell's rights, appeared and was allowed to intervene, and at which the railroad company appeared by agent and counsel. Testimony was taken in behalf of the entryman and transferee, upon which the local officers found that the failure of Nathan Newell to sign his testimony (form No. 4069) was a clerical error or oversight, and that the testimony was properly taken; also that he

was a *bona fide* settler on said land on the 23rd day of August, 1884, the date of the company's selection, and that he had established his residence on the land and made valuable improvements upon it before that date. They held his pre-emption cash entry intact and recommended the cancellation of the company's selection, made August 23, 1884. The company appealed, and, on March 23, 1896, your office affirmed their decision and held said selection for cancellation.

The company has appealed to the Department, in which the following assignment of error is made, which presents the chief basis of its claim, which is:

> That your office erred in not holding that the act of June 2, 1864 (13 Stat., 95), amendatory of the act of May 15, 1856 (11 Stat., 9), under which appellant claims, created a legislative withdrawal of the land in question upon the definite location of appellant's modified line of route, December 1, 1867, and that by reason of such legislative withdrawal the land was reserved from settlement and entry when the said Newell made his alleged settlement in January, 1884, as well as thereafter, thus barring his right of entry under the pre-emption law.

It appears that the land in controversy is within the six mile granted limits under the before recited acts, but as the acts primarily granted only odd numbered sections, and as it is a part of an even numbered section, the only right the company could acquire to it was by its selection in lieu of odd numbered sections lost, and no right would attach to it except upon its selection as indemnity land. No such selection was made until after Newell's settlement.

The contention that the act of June 2, 1864, operated as a legislative withdrawal of an even numbered section would seem to be illogical and not authorized by the act. In the case of Cedar Rapids, etc., Railroad Co. *v.* Herring (110 U. S., 27), a similar question arising under the same grant was considered, and it was, in substance, held that the grant did not attach to the indemnity lands until the right of selection was exercised.

It is insisted that it became the duty of the Secretary of the Interior to withdraw a sufficiency of the lands, both within the primary and indemnity limits of the grant, to cover losses of odd numbered sections, upon the filing of the map showing definite modified line of the road, December 1, 1867, and that the failure to make the actual withdrawal did not prevent their withdrawal by operation of law.

The act of June 2, 1864, clearly contemplates the executive withdrawal of lands for indemnity purposes, upon the terms and conditions therein specified, but for the very reason that it directs such executive action, it does not operate as a legislative withdrawal. As there was neither executive nor legislative withdrawal of the land in question between December 1, 1867, the date of the filing of the map of the company's modified line, and January 15, 1884, the date of Newell's settlement, it was subject to his settlement rights.

It is further insisted that it was error to allow Newell to supplement his final proof by proof offered at the hearing. There were sufficient

grounds for ordering the hearing, and the proof then made, which is set out in detail in your said office letter of March 23, 1896, to which reference is hereby made, was sufficient to cure the apparent defects in the final proof, as well as to justify and support the conclusion reached, that Newell settled and made improvements in good faith, and thereby acquired rights to the land prior to the railroad company's selection of it.

It is further insisted that it was error not to hold that Newell had abandoned the land, and that the rights of appellant attached upon such abandonment. This contention is not supported by the record. The record shows that Newell was residing upon the land at the time final proof was made and final certificate issued, and had been from the date of his settlement in January, 1884, and that when he went west he rented it out and left a tenant upon it, and it was so occupied by his tenant until Ordway, the intervenor, foreclosed his mortgage against it and had it sold. The transferee, Ordway, seems to have acted honestly and in good faith, and exhibits title acquired since the date of Newell's final proof and final certificate.

Your office decision is accordingly affirmed.

SCHOOL LAND—INDEMNITY SELECTION.

FREDERICK W. SCHROEDER ET AL.

A school section made fractional by the exclusion of "mud flats" from the public survey, as shown by the returns of the surveyor general, constitutes a proper basis for school indemnity selections in the absence of any proof of fraud or mistake in the survey.

Secretary Bliss to the Commissioner of the General Land Office, April 13, 1898.

(W. V. D.) (C. J. G.)

Frederick W. Schroeder *et al.*, purchasers, have appealed from your office decision of January 18, 1896, holding for cancellation school indemnity selections numbers 4667, 4668, 4671, 4681, 4684, 4685, 4686, 4689, 4690 and 4691, San Francisco land district, California.

These selections are fully described in your said office decision and are based upon an alleged deficiency in Sec. 36, T. 4 S., R. 23 E., S. B. M. The said section is designated upon the plat of survey as "mud flats;" but notwithstanding such return it was decided by your office that the tract in question is school land in place, and that the said selections by the State of California are therefore invalid for want of a proper basis.

It is alleged in the appeal to this Department that section 36, which is named as the basis for the selection of indemnity land, is not subdivided, and that the field notes show that it was never surveyed; that it is part of the bed of the Colorado river and should have been so represented upon the official plats, and that therefore it is not land in place. The plat of survey shows that the Colorado river to the north of section 36, about the middle of section 26, divides into two well-defined channels which come together again south thereof, about the

middle of section 7, T. 5 S., R. 24 E., S. B. M. The estimated area between these two channels is 1100 acres, and is designated on the plat as "mud flats." The whole of section 36 falls within this area with the exception of a small corner on the western bank of the river containing 6.75 acres.

In support of the contention that the section in question forms part of the bed of the Colorado river, a corroborated affidavit by surveyor W. F. Benson is filed with the appeal, and is as follows:

I am the same W. F. Benson who made a contract with the government and executed a survey of township 4 south, range 23 east, San Bernardino Meridian. The township is bounded on the east by the Colorado river, which cuts off a strip along the whole eastern boundary thereof. In the southeastern corner of the township, I returned all of section 36 lying east of the westerly channel of the river, as a "mud flat."

At the time I made this survey, the water was quite low, and, directly north of this section, the river divided into two well-defined channels, coming together again about three miles south of the point of separation. I judge, from observation, that what is now delineated upon the map as the western channel of the Colorado was originally the main river. What is indicated on the plat as mud flats is, in fact, the bed of the river, and is uncovered only when the river is running less than one-half of its maximum volume. Between the eastern and western channels of the river, as shown on the plat, and running through these so-called mud flats, there are numerous smaller channels, which change every year. At the time I was there, the river was low, and, in my report of the survey, I indicated the land that was uncovered as a "mud flat." If I had considered it land in place, I would have surveyed it; but it was nothing but a bed of silt brought down by the waters of the Colorado, and left exposed during low water. If I had made any attempt, in my field-notes, to return these mud flats, as they existed at that time, with the numerous channels running through and dividing the same into sand-bars, it would not have been correct the next year, because it is not the same two years in succession.

I have made a plat and attached the same to this affidavit, showing these so-called "mud-flats," though it would have been more correct to have returned them as sand-bars or ridges. I have no hesitancy in stating that all of that portion of section 36 east of the west bank of the river is a part of the natural bed of the Colorado river.

The township plat shows that the western bank of the western channel of the Colorado river at this point has been meandered, and the only land in section 36 outside of this meander line is the 6.75 acres heretofore referred to. The eastern bank of the eastern channel, which is within the limits of an Indian reservation, appears never to have been meandered. From the most reliable data obtainable it appears that the eastern channel is the main channel of the Colorado river at this point, and it is so delineated upon the township plat.

The particular provision referred to in the appeal as authorizing the indemnity selections made by the State, is found in the last clause of section 2275 of the Revised Statutes as amended by the act of February 28, 1891 (26 Stat., 796), and is as follows:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The returns of the surveyor-general and the record of survey made under his direction are entitled to consideration as evidence, upon all questions respecting which such returns and record are required to speak. There has been no allegation that the plat of survey in this case does not contain a true representation of the land in question, and in the absence of mistake or fraud the return of the surveyor will be accepted as correctly showing the true area of the land. As previously set out herein, the bank of the Colorado river bordering on the so-called "mud flats" has been meandered, section 36 being returned on the plat of survey as containing 6.75 acres. This undoubtedly renders said section fractional, and being so returned, it will be considered as containing the quantity of land expressed in such return; and the rights of the State of California under the school grant will be governed thereby. The fact that the surveyor did not survey these so-called "mud flats" will in the absence of proof to the contrary be accepted as establishing that it is not land in place. If the tract so described is land in place it was the duty of the surveyor to extend the lines of survey over it and so represent the same upon the official plat.

The State has been governed by the field-notes of survey in making its school indemnity selections in this instance; consequently the Department will not be justified in canceling the selections in the absence of some proof of fraud or mistake in the survey of the basis.

The swamp land grant takes precedence over the school grant, yet the tract in question was never included in the list of swamp lands, which would seem to indicate that it was regarded as the bed of the Colorado river.

It is well settled that by accepting indemnity in lieu of the deficiency in section 36 shown by the survey, the State thereby relinquishes said section and is thereafter divested of all right to the basis thus used.

Your office decision is hereby reversed, and the school indemnity selections named will be approved.

ALASKAN LAND—RIGHTS OF NATIVES—APPLICATION FOR SURVEY.

LOUIS GREENBAUM.

An entry of Alaskan land under the provisions of section 12, act of March 3, 1891, should not be allowed in such form as to include a trail or roadway between a native village and a harbor landing, long used by the natives to reach said landing, and necessary for their free access thereto.

Where a survey of Alaskan land, with a view to its purchase under section 12, of said act, has been made without written application therefor, as required by departmental regulations, and the amendment of such survey is found necessary, it will not be allowed until due application therefor has been made in conformity with said regulations; and prior to the execution of such amended survey a deposit of an amount sufficient to defray the expense thereof, and all expenses incident thereto, must be made.

Directions given that whenever a survey is desired of Alaskan land due compliance with the departmental regulations of June 3, 1891, in the matter of written applications and otherwise, shall be exacted in each instance.

Secretary Bliss to the Commissioner of the General Land Office, April 13, 1898.
(W. V. D.) (W. M. B.)

Louis Greenbaum, claimant and alleged owner, who seeks to purchase and enter a parcel of land under provision of section 12 of the act of March 3, 1891 (26 Stat., 1095), has appealed from the decision of your office of May 8, 1895, wherein was suspended survey No. 35, executed by Albert Lascy, U. S. deputy surveyor, on July 28 and 29, 1892, which said survey embraces an area of 3.92 acres of land situate at Port Etches, Hinchinbrook Island, Prince William Sound, district of Alaska, and which is claimed for the purpose of a trading post.

The survey was suspended, as stated in the decision of your office, upon the ground that:

The survey in its present form can not be accepted by this office for the reason that all the land claimed by the appellant is not occupied and used for his business.

The plat shows that the land included in the survey "in its present form" is remarkably irregular in shape, and that such irregularity is not due to the configuration of the land. Said fact and the further fact that the survey in its existing form apparently encroaches upon certain rights of the natives of Alaska which are protected by the provision of section 14 of the act of March 3, 1891, would of themselves constitute a sufficient ground for suspending the survey, thereby pretermitting, at this time, the consideration of the question relating to the extent of appellant's occupation of the land claimed and the quantity thereof to which he would be entitled by reason of such occupancy.

It appears from the plat that none of the improvements claimed by appellant are located upon the larger portion or main body of the land embraced in the survey, which comprises an area of about three acres, but that all of said improvements are situate upon a parcel of land comprising an area of about one acre in the form of a parallelogram, which projects from the main body which is in the form or shape approximately of a square.

It is shown by the plat and field notes that there is a native village to the north of and within a few yards of the lines of the survey which embrace said narrow strip of land, and also "barrabarries," or huts, to the east and south of, and as equally near to, said lines of survey.

Across the main body of the land included in the survey in its present form—which lies between the landing on the harbor and the tract upon which claimant's alleged improvements are situate—extends a "trail," or narrow roadway, from the village to the landing on the harbor, long used by the villagers to reach said landing.

With regard to the use of this "tract" by the natives as a means of

reaching the landing, Inspector A. P. Swineford in his report dated Sitka, Alaska, August 6, 1895, to your office, says:

> It is apparent that the survey cuts them (the native villagers) off from free and unrestricted access to the river harbor, to which the trail delineated on the plat thereof leads from their habitations, and to the use of which they have fully as much right as the real or fictitious claimant. It is undoubtedly the intention of the Alaska Commercial Company (which is alleged to be the real claimant) to possess itself of the harbor front to the exclusion of all others.

To permit purchase and entry to be made of the land embraced in the survey in its existing form would give to the owner of the land the exclusive use and control of said "trail"—as against the natives who would appear to have a prior right thereto—as a right of way, for which reason the survey should not be approved in its present form.

Said right of way should be left open to the public, whereby appellant would, along with others, be entitled to the free use and enjoyment thereof.

With respect to the infringement by this survey upon the rights of the natives, Inspector Swineford makes statement as follows:

> My recollection of the location, corroborated and strengthened by that of several persons who recently returned from a sojourn of some days at Port Etches, is that a number of native habitations are included within the limits of this survey, though none are indicated on the plat or mentioned in the field notes.
>
> I am not prepared to say that any of the land embraced in the survey is claimed by natives. It is not probable that they have the least conception of what the survey means; but if they have, and really know that they have any rights in jeopardy, they are too far remote to make any protest, and are without any representative capable of speaking for them.

With regard to the rightful claimant or owner of the land embraced in this survey, Inspector Swineford in his report, which he states is based upon personal knowledge of the location and the most reliable information, says:

> The claimant is not in possession of the premises as alleged by the deputy surveyor, nor has he ever occupied any of the buildings for trading or manufacturing purposes. The improvements are owned and occupied by the Alaska Commercial Company, and theirs is the only trading station on Hinchinbrook Island. Charles Swanson, the agent of that company, is the only white resident in that locality, and in view of that fact I do not see how it possibly can be true, as alleged by the deputy surveyor, that "the location is used by the claimant as a trading post." There is but one trading post at Port Etches (Natchuk), and as showing by whom it is owned and maintained I enclose herewith copy of a hand bill, now conspicuously posted throughout southwestern Alaska, and which I have marked "Exhibit A." The Alaska Commercial Company is, in fact, the real claimant of the tract embraced in the survey, and Greenbaum a mere "dummy" through whom it seeks to obtain title. . . .
>
> In the name of this or that one of its shareholders or trusty agents, it has preferred claims under the act of March 3, 1891, to nearly all the best and most available harbor frontage in western Alaska, together with the most eligible townsite and fishing stations.

The hand bill referred to in the inspector's report (forming a part thereof and marked Exhibit "A"), reads as follows:

$1,000 *Reward Offered:* For the apprehension and conviction of the party or parties who on the 5th day of July entered the Alaska Commercial company's store at Natchuk, Alaska, and took therefrom 24 sea otter skins and $140.00 in money.

It appears that said inspector's report was not made until about three months subsequent to the date of your office decision suspending this survey.

Such application as is required by paragraph 1 of the rules of June 3, 1891 (12 L. D., 583), to be made for this class of surveys is not found with the returns made of the survey under consideration, nor has any such application been found with the returns of any survey of said class of Alaskan surveys. Said paragraph 1 reads as follows:

Applications for surveys must be made in writing by the person entitled to purchase under said act or by the authorized agent of the association or corporation so entitled. The application must particularly describe the character of the land sought to be surveyed and, as accurately as possible, its geographical position, with the character, extent, and approximate value of the improvements. If a private survey had previously been made of the land occupied by the applicant a copy of the plat and field notes of such survey should accompany the application, which must also state *that the land contains neither coal nor precious metals,* with reasons for such statement; that no part of the land described in the application includes improvements made by or in possession of another prior to the passage of said act; that it does *not include* any land *to which natives of Alaska* have prior rights by virtue of actual occupation; that it does not include a portion of any town site of lands occupied by missionary stations, or any lands occupied or reserved by the United States for public purposes or selected by the United States Commissioner of Fish and Fisheries, or any lands reserved from sale under the provisions of this act. *These statements must be verified by affidavit.*

While the claim of Greenbaum should not be rejected upon the report of the inspector without giving the claimant an opportunity to be heard upon the statements of fact therein, there is in this instance especial reason for giving attention to the inspector's report when we consider, as before shown, that the claimant has not made any statement, verified or otherwise, of his relation to the land or of its occupancy and improvement, all of which is required by the regulation cited.

In your office decision herein it was held that the present survey would not be approved for the reason that, as shown by the surveyor's return, not all the land claimed is occupied by claimant and it was suggested that if the survey were amended in a manner therein pointed out that it would receive consideration. It now appears that an amendment of the survey in the respect suggested would avoid an encroachment upon the right of the natives to reach the harbor by the "old trail" and thus one of the objections mentioned by the inspector would be obviated.

Before appellant should be permitted to have the survey amended according to the suggestion of your office he should be required to file in the office of the surveyor-general for Alaska, within such reasonable time as you may name, a written application therefor, conforming to the regulations above quoted, and he should also be required to file

with such application his affidavit showing particularly his relation to the land and the state of its occupancy and improvement at the date of the original survey and at the present time.

It is further directed that the execution of an amended or new survey will not be authorized by the surveyor-general until appellant has, in accordance with the provision of section 13 of the act of March 3, 1891, placed in a proper United States depository to the credit of the United States an amount sufficient to defray the total cost of such amended or new survey, and all expenses incident thereto, without cost or expense to the government.

By reason of the many irregularities found to exist in connection with the execution of a large number of the surveys thus far executed in Alaska under section 13 of the act of March 3, 1891, and especially since no written applications appear to have been made for any of the same, so far as is ascertained from the returns made thereof, it is hereby ordered that in the future whenever a survey is desired by a claimant or claimants, of land used and occupied for the purpose of "trade or manufactures," the foregoing regulations and instructions must be observed and strictly adhered to in every such case, without further direction by this Department.

INDIAN LANDS—BOUNDARIES OF THE FIVE NATIONS.

OPINION.

In the treaties affecting the boundaries of the lands secured to the Five Nations wherein a river is established as a boundary it was intended thereby to extend the title and proprietorship of riparian claimants to the middle thread of the stream.

Assistant Attorney General Van Devanter to the Secretary of the Interior, April 13, 1898. (F. W. C.)

I have the honor to acknowledge your reference of a communication from the Commissioner of Indian Affairs, dated March 29, 1898, accompanied by two communications from Mr. C. H. Fitch, topographer in charge of certain surveys in the Indian Territory, dated respectively February 2, and February 9, 1898, all relating to the proper boundaries of the country secured to the Five Nations, respectively, where, according to the treaty calls, rivers form such boundaries.

In my opinion of February 3, 1898, (26 L. D., 140), respecting a part of the boundary between the Choctaw, Creek and Cherokee Nations, it was said that the treaty of the Choctaw Nation, proclaimed January 8, 1821 (7 Stat. 211), "clearly made the right bank of the Canadian river a part of the northern boundary of the Choctaw country," and that Article 1, of the treaty with the Choctaw and Chickasaw Nations, proclaimed March 4, 1856 (Revision of the Indian Treaties, page 275),

"established the right bank of the Canadian river as part of the northern boundary of the Choctaw country." The real question discussed in that opinion is not what bank, or what portion of the Canadian river, constitutes the boundary in question, but whether a stated portion of that boundary is marked by a straight and artificial line or by the Canadian river as a natural monument. The opinion holds that the river and not the artificial line constitutes the boundary. What was said, however, respecting the Choctaw treaty of January 8, 1821, and the Choctaw and Chickasaw treaty of March 4, 1856, establishing "the right bank of the Canadian river" as a part of the northern boundary of the Choctaw country, would have been better expressed and would have been free from ambiguity if, as in the concluding portion of the opinion, the reference had been to the river itself and not to the right bank thereof.

Where a conveyance of land is made by statute, treaty, patent or private deed, in which the land conveyed is described as bounded by a non-navigable river, the title and proprietorship of the grantee, in the absence of some expression to the contrary, extends to the middle thread of the stream. An examination of the several treaties affecting the boundaries of the lands secured to the Five Nations, respectively, shows that where in those treaties a river is established as a boundary, it was intended thereby to extend the title and proprietorship of the riparian claimants to the middle thread of the stream.

In running and marking actual surveys upon the ground it is not convenient or even possible to run and mark lines along the middle thread of a stream, and therefore such lines are usually run and marked along the shore or water line.

The description in Senate Document No. 120, 25th Cong., 2nd Sess., Vol. 2, page 952, of a survey made of the Cherokee country in which a portion of the boundary line was surveyed "on the north bank of the Arkansas river," to which Mr. Fitch makes reference in his communications, was not intended to limit or restrict the Cherokee title and proprietorship to the north bank of the river. That survey was made preliminary to the issuance of a patent to the Cherokees, and a patent thus describing the lands conveyed would have carried the title and proprietorship of the grantee to the middle thread of the river, especially when considered in the light of the treaty.

Approved, April 13, 1898.

C. N. BLISS,
Secretary.

ALASKAN LANDS—RIGHTS OF NATIVES—WATER SUPPLY.

POINT ROBERTS CANNING CO.

A survey of Alaskan land, with a view to the purchase thereof as a trading post, should not be allowed in such form as to deprive native villagers of free access to the surrounding country.

Land upon which is located the fresh water supply of a native Alaskan village may be regarded as land "actually occupied" by such natives, and therefore excluded from entry for purposes of trade and manufactures under the act of March 3, 1891.

Secretary Bliss to the Commissioner of the General Land Office, April 15, 1898.

(W. V. D.) (W. M. B.)

The Point Roberts Canning Company, a corporation, have appealed from the decision of your office of May 10, 1895, wherein was suspended survey No. 70, of a tract of land claimed by said company, containing 157.35 acres, situate on Kvichak River, Alaskan Peninsula, which is used for a fishing and salting station.

Said survey was executed on July 20 and 21, 1894, by Clinton Gurnee, Jr., U. S. deputy surveyor, under provision of sections 12 and 13 of the act of March 3, 1891, (26 Stat. 1095) and the regulations of June 3, 1891, (12 L. D. 583).

The action of your office in suspending the survey is based, as appears, upon the ground that "more land is claimed than is used by the claimants in their business."

The contention of appellants pertinent to question at issue is:

That the tract as surveyed is practically in a square form, except the exclusion of the Indian village.

That the inland extent of the claim is necessary for the fresh water supply of the fishery station.

The value and character of the improvements upon the tract claimed clearly indicate that the same is occupied in good faith by appellants for the purpose of "trade." But it also appears that the survey is objectionable in its present or existing form upon the ground that it is an infringement upon certain "prior rights" of the natives of Alaska, to a portion of the land in question.

In his final oath to field notes the deputy states that the improvements owned by the company consist of a ware house, dwelling for fishermen, residence, and a complete outfit for salting salmon, and that such improvements are of the approximate value of $6,000.00.

The deputy in his general report states further that: "There is an Indian village on the river adjoining on the north west of the claim of about thirty huts."

It appears from the field notes and plat that, beginning at corner No. 5 on the south bank of Kvichak river, course five (a line to the south west of the village, and between fifty and sixty yards from the nearest cabin therein) runs S 41 45′ E, a distance of 7.00 chs. to corner No. 6; that from thence course 6 (a line to the south east of the village and between sixty and sixty five chains from the nearest cabin) runs N. 52 E. a distance of 15.00 chs. to corner No. 7; and that from thence course seven (a line to the north east of the village, and between fifty and fifty-five yards from the nearest cabin) runs N. 41 45′ W. a distance of 6.00 chs. to corner No. 8 on south bank of river.

Thus it will be observed that the tract upon which is located the Indian village is bounded on three sides by the land claimed and sought to be entered by appellants, and on the fourth by the above named river, whereby the native villagers would be shut in and deprived of free egress and ingress from and to the said village and the adjacent section; no communication with or outlet to the surrounding country being possible except by trespassing upon the land claimed by appellants and included in the survey in question, or save by crossing the river.

Furthermore, there is upon the southeastern portion of the tract, as delimited by the survey in its present form, a small fresh water lake about 20 chains in length and about 10 chains wide, there being on the north-western portion thereof a small creek, which is very near the village. Said lake and creek form the nearest sources of a fresh water supply to the native village, from one or both of which the inhabitants thereof obtained fresh water for domestic purposes at the time the survey was executed.

These fresh water privileges, appurtenant to the land occupied by the villagers, are privileges or easements which are protected by provision of section 14 of the act of March 3, 1891, which reads as follows:

> That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands . . . . to which the natives of Alaska have prior rights by virtue of actual occupation.

Land upon which is located the fresh water supply of a native Alaskan village, which is in such close proximity thereto, as appears in this particular case, may be regarded in the light of land "actually occupied" by such natives to which they have a superior claim, by virtue of the above quoted provisions of the said act of March 3, 1891, as against those claiming the right to purchase thereunder.

For the foregoing reasons the decision appealed from suspending survey No. 70, subject to emendation in accordance with law and regulations, is hereby affirmed.

PRACTICE—COSTS—HEARINGS ON SPECIAL AGENTS' REPORTS.

INSTRUCTIONS.

The rule observed in apportioning costs of taking testimony in contests arising under Rule 55 of Practice should be followed in hearings ordered on special agents' reports.

Circular of November 4, 1895, 21 L. D., 367, modified.

Secretary Bliss to the Commissioner of the General Land Office, April 15, 1898.

(W. V. D.) (F. W. C.)

The attention of this Department has been called to the matter of variance between the instructions relative to hearings ordered upon special agents' reports contained in departmental circular of November

4, 1895 (21 L. D., 367), in the matter of taxation of costs for the taking of testimony, and the rule established in contest cases.

In the circular referred to it is provided that—

> 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 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.

In the case of Milum *v.* Johnson (10 L. D., 624), it was held that—

> In contest cases, under Rule 55 of Practice, each party must pay the cost of taking the testimony of his own witnesses, both in direct and cross-examination of said witnesses. (syllabus.)

This rule has been repeatedly reaffirmed in many decisions by this Department upon contest cases.

There would seem to be no reason for a different rule in the case of hearings upon special agents' reports; and future hearings upon special agents' reports will be governed, in the matter of taxation of the cost of taking testimony, by the construction of Rule 55 of Practice as made in the case of Milum *v.* Johnson (*supra*). The circular of November 4, 1895, is modified accordingly. You will advise the local officers of the change.

The particular case to which the attention of this Department was called in this matter is that of United States *v.* Quirino Valesquez *et al.*, pending at the Pueblo land office, Colorado, in which case hearing has been continued to the 26th of this month. Information of the change should be at once communicated to that office, so that the same may be received before the date set for the hearing.

RIGHT OF WAY—ACTS OF MARCH 3, 1891, AND MAY 14, 1896.

CHICALA WATER CO. *v.* LYTLE CREEK LIGHT AND POWER CO.

On application for right of way for reservoirs and canals under the act of March 3, 1891, the Department will not attempt to interfere with the control of the water, or determine the rights of conflicting claimants thereto, except in so far as may be necessary to ascertain whether such *prima facie* right to the use of the water, or to store the same, has been shown as will entitle the applicant to utilize the grant for the purposes contemplated by the act.

Questions arising on allegation of damage to private property through the construction of reservoirs are matters within the jurisdiction of the State tribunals, and are not to be determined by the Department.

An application for right of way for a canal and pipe line under the act of May 14, 1896, to be used for the purpose of generating and distributing electric power, will not be denied on the ground of a prior appropriation of the water, if it is made to appear that the water can be used for said purpose, and returned to the stream above the prior appropriator's intake, practically unimpaired in quality and quantity.

Secretary Bliss to the Commissioner of the General Land Office, April 15, 1898.
(W. V. D.) (E. F. B.)

With your letter of February 7, 1898, you transmit the record in the appeal of the Chicala Water Company from the decision of your office of October 20, 1897, dismissing the protest of said company against the granting of the application of the Lytle Creek Light and Power Company for right of way for reservoirs and canals through the San Gabriel and San Bernardino forest reserves, for the purpose of generating, manufacturing and distributing electric power, under the act of May 14, 1896 (29 Stat., 120), and holding that the application of the Chicala Water Company for right of way for reservoirs and canals under the act of March 3, 1891 (26 Stat. 1095), is subject to the right of the Lytle Creek Light and Power Company by virtue of its prior appropriation of the surplus waters of Lytle creek.

The Lytle Creek Light and Power Company filed an application for right of way through the San Gabriel and San Bernardino forest reserves, for the purpose of generating and distributing electric power, under the act of May 14, 1896 (29 Stat., 120). It also asked permission for the use of ground for two reservoirs and canals and for power plant.

The Chicala Water Company protested against the granting of said application, claiming that it has the prior right to the use of more water than usually flows through Lytle creek during the irrigating season, and that the use of any of the waters of Lytle creek by the Lytle Creek Light and Power Company could not be made available for the purposes contemplated without seriously interfering with the development of its system of irrigation. It also filed an application for right of way for reservoirs and canal for irrigating purposes under the act of March 3, 1891 (26 Stat. 1095), with maps and accompanying proofs, as required by the act and the regulations.

The application of the Lytle Creek Light and Power Company was rejected as to the right of way for reservoirs, for the reason that each of the sites applied for covered an area greatly in excess of the area authorized by the act of May 14, 1896, which limits the right of way to twenty-five feet and the use of the necessary grounds not to exceed forty acres. It then being questionable whether the right of way for canals and the necessary grounds could be used for electrical purposes without the use of such reservoirs, the company was allowed thirty days to show cause why its application should not be rejected.

Within the time allowed by the rule, it amended its application so as to exclude the reservoirs, and filed an amended map and field notes

showing the survey and location of a pipe line and canal from Lytle creek, at a point known as Miller's Narrows, the proposed intake of said canal and pipe line, to the proposed site of the power house on Sec. 6, T. 1 N., R. 5 W. Said line passes over sections 25, 26, and 36, in T. 2 N., R. 6 W., and on unsurveyed land over what upon survey would be Sec. 31, T. 2 N., R. 5 N., and Sec. 6, T. 1 N., R. 5 W.

The Chicala Water Company has also filed an amended map showing the location of its reservoirs and canals, and has supplied the proofs which it contends are in full compliance with the directions contained in your letter of October 20, 1897. Besides its claim to the control and use of all the waters that flow through Lytle creek during the irrigating season, it also claims the right, under notice of appropriation, to the underflow and flood waters of said creek.

The Grapeland Irrigation District, James M. Applewhite, J. N. Miller, C. H. Vosburg and C. B. Hughes have filed their several protests against the granting of the application of the Chicala Water Company, alleging substantially that said company has no right to any of the surplus or other waters of Lytle creek that can be beneficially used in connection with the right of way for the reservoirs and canals applied for, without destroying and rendering useless by the construction of such reservoirs the vested property and water rights in said stream, which are prior to the claim of the Chicala Company; that the construction of said reservoirs will destroy and render useless rights and privileges belonging to the people of the State of California, and prevent the proper occupation by the United States government of a large portion of said forest reserves; that the application, maps and papers have been prepared in a fraudulent and illegal manner, and not in accordance with the regulations approved by the Department.

Protestants Applewhite, Miller and Hughes further allege that the granting of said application will seriously affect their rights as homesteaders and owners of land embraced in said reservoirs, and the protestant Vosburg claims that it will be a damage to land upon which he has settled with a view to entering as a homestead.

In support of the allegation that said company has no right to any of the waters of Lytle creek, they file their several affidavits, alleging that the only claim of said company to any of said waters rests upon notices of appropriation filed during the month of August, 1897, and upon a contract entered into with the San Francisco Savings' Union, for the conveyance of certain stock of the Lytle Creek Water Company and of the Lytle Creek Water and Improvement Company, being merely an option to purchase a claim or title which rests in said last named companies until the terms of the contract have been fully complied with and all the money has been paid.

The Chicala Water Company claims to be the owner by purchase of all the water rights in Lytle creek canon, except the first six hundred and fifty inches, which it is now delivering under contract to the

lessees of the owners of said right, as follows: One hundred inches to the city of San Bernardino, and fifty inches to the city of Mount Vernon, as lessees of John L. Campbell; five hundred inches to the Lytle Creek Water Company, of which the Chicala Water Company uses two hundred inches as owner of two-fifths of the stock of said company. In support of this claim, it alleges that the superior court of Los Angeles county, California, in the case of Lytle Creek Water and Improvement Company against the Grapeland Irrigation Company *et al.*, being an action brought by plaintiffs to determine the adverse claims of various parties to the waters of Lytle creek, in which all of said protestants, except Applewhite, were parties defendant, entered up a decree by which it was adjudged that the flow of Lytle creek during the irrigating season was under two thousand inches, and that all the water flowing down Lytle creek canon to the extent of two thousand inches over and above the six hundred and fifty inches above referred to belongs to the Lytle Creek Water and Improvement Company; that the Chicala Company is the owner by purchase from the grantees of the Lytle Creek Water and Improvement Company of said right of two thousand inches decreed by the court to belong to said company, and that it is also the owner by appropriation and use of the underflow and flood waters of said creek.

A certified copy of said decree has been filed, from which it appears that the court did award to the plaintiff in said suit the prior right to the extent of two thousand inches, the usual flow of said stream in the irrigating season after the subsidence of the winter floods, subject to the prior right of John L. Campbell and the Lytle Creek Water Company, as contended by said Chicala Water Company. It further decreed that as against said rights defendant John N. Miller has no title or interest in the waters of Lytle creek, except the waters rising in the sulphur spring on his land; that C. H. Vosburg is not the owner of or entitled to take, use or divert any of the waters of the middle fork of Lytle creek, or the surface or underflow thereof, except the right to use and enjoy for beneficial purposes the percolating water flowing in a small ditch constructed by him, and also the percolating waters found on the hillside garden opposite his house; that C. B. Hughes is not the owner of or entitled to divert or use any portion of the waters of the south fork of Lytle creek, except as thereinafter adjudged. The court then decrees that defendants, The Grapeland Irrigation District, C. H. Vosburg, C. B. Hughes, and John N. Miller, being claimants of rights in the canon above the point of plaintiff's diversion are the owners of rights as follows: C. H. Vosburg of two thousand inches of the waters of the middle fork of Lytle creek; C. B. Hughes of ten thousand inches of the waters of the south fork of Lytle creek; The Grapeland Irrigation District of not exceeding five thousand inches of the surplus water flowing down Lytle creek other than those waters theretofore appropriated and used by other parties to said action prior to the third

day of March, 1892, the date of its appropriation by The Grapeland Irrigation District and John N. Miller of sufficient of said waters of the main stream of Lytle creek where they cross his lands to enable him to irrigate the same and for household and domestic purposes, not exceeding one hundred inches. All of said rights are, however, decreed to be subject to the paramount right of plaintiffs, who are entitled to the first two thousand inches, which the court found is greater than the usual flow of the stream through the irrigating season.

The Grapeland Irrigation District and all parties claiming any right, title or interest in the tunnel constructed under the bed of Lytle creek were enjoined from diverting any of the waters of said stream that flow through or from said tunnel, or any of the waters from the surface of said stream, until the paramount rights established by the decree be first fully supplied.

The main ground of objection to the granting of this application pertains to matters solely within the jurisdiction of the State tribunals.

The Department will not attempt to interfere with the control of the water, and will not attempt to determine the rights of conflicting claimants thereto, except in so far as may be necessary to ascertain whether such *prima facie* right to the use of the water or to store the same has been shown, as will enable the grant applied for to be utilized for the purposes contemplated by the act.

The regulations adopted by the Department to carry into effect the act of March 3, 1891 (18 L. D., 168), declare that

> this act is evidently designed to encourage the much needed work of constructing ditches, canals and reservoirs in the arid portion of the country by granting a right of way over the public lands necessary to the maintenance and use of the same.

Hence, the law should be so administered as to effectuate the purposes intended, by authorizing the use of vacant public lands available as sites for reservoirs, whenever it is shown that the storm or waste waters of any stream can be conserved by storage, leaving the condemnation of private property and the control of the flow and use of the water to local laws.

> The control of the flow and use of the water is therefore a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands. (Regulations, *supra*.)

The Chicala Water Company has filed sufficient evidence of its right to the control of the water rights in Lytle creek, formerly owned by the Lytle Creek Water and Improvement Company, under the contract with the San Francisco Savings' Union. While the protestants assert a right to the use of the waters of Lytle creek, under the decree of the court in the litigation between the Lytle Creek Water and Improvement Company and The Grapeland Irrigation District and others, such rights were expressly decreed to be subordinate to the paramount rights of the owners of the first two thousand inches, and that during

the irrigating season there is no surplus after that two thousand inches, or even less, has been supplied.

A surplus of water in Lytle creek can only be created by augmenting the flow of the stream during the season when it is needed, and it is apparent that this can only be accomplished by the construction of reservoirs to impound the storm waters that are wasted between the irrigating seasons, and by holding the underflow by means of dams constructed upon the bed rock.

If this theory is well founded, and it appears so from the record, the construction of the system of reservoirs and canals in the canons through which the three forks of Lytle creek flow, as outlined by the Chicala Company, would materially increase the duty of the waters of this stream, and would seem to be in strict accord with the purpose of the act, which was designed to encourage the construction of reservoirs in the arid west, for the conservation of the waters that annually go to waste between the irrigating seasons.

As to whether the company would have the sole right to the use of the surplus water so stored, or whether it would be subject to the rights of other appropriators, is not for the Department to determine.

The complaint that the building of these reservoirs would cover private property and would affect the property rights of the owners of adjacent lands, is also a matter within the jurisdiction of the State tribunals. The rights of private owners and of settlers are protected by the laws of the State, and the 19th section of said act of March 3, 1891, which provides that,

> Whenever any person or corporation in the construction of any canal, ditch or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

It is not shown wherein the construction of these reservoirs will be detrimental to the interests of the United States, or the State of California, or interfere in any manner whatever with the occupation and control of the forest reserves. These reserves were intended mainly for the conservation of the water supply.

No sufficient reason being shown why the application of the Chicala Water Company should not be granted, the protests of the Grapeland Irrigation District, James M. Applewhite, J. N. Miller, C. H. Vosburg and C. B. Hughes are therefore dismissed.

The papers are returned to your office, with instructions to examine the amended map, and if said map has been amended in accordance with the directions contained in your letter of October 20, 1897, you will immediately retransmit it to the Department for approval.

The remaining question to be considered is, whether the application of the Lytle Creek Light and Power Company should be granted upon the amended application and maps, and upon the showing made in answer to the rule to show that it can beneficially and successfully use

the proposed canal and pipe line for generating and developing electric power at the power house site, without the use of the reservoirs.

It contends—First: The appropriation heretofore made of the water of the stream has, without exception, been effected by a diversion of the water from the stream below the place of intended use by the applicant for power purposes. Second: That the proposed use of water by the applicant will not diminish the quantity or in any manner pollute the quality of the water, but, on the contrary, will increase the normal flow of the stream at the intake of the canals of the Improvement Company and The Grapeland District. Third: That said proposed use will in no manner affect, abridge or impair to any extent the uses to which the water of the stream has heretofore been appropriated or subjected.

It contends that a subsequent appropriator may use so much of the water of a stream for manufacturing purposes as he may choose, provided it is returned to the stream in the same quantity and quality, without abridging or impairing the rights of others, and that the application of this rule of law to the facts in this case would authorize the approval of its application.

If it be true that the waters can be used for manufacturing purposes and returned to the stream above the plaintiff's intake in practically the same quantity and unpolluted, as contended by applicant, there is no reason why the right of way applied for should not be granted, for, so long as a subsequent appropriator does not injure or impair the prior rights of others, he may use as much of the water of a stream as he chooses. Kinney on Irrigation, Sec. 181, and authorities cited.

This principle will materially influence the action of the Department in granting or withholding permission to use the public lands for purposes provided for by the act of May 14, 1896.

But it is contended by the Chicala Water Company that it is impossible from the proposed location of the power house of the Lytle Creek Light and Power Company for said company to use the waters of Lytle creek to develop power and then return the same to the intake of the Chicala Water Company's cement ditch, without great expense for pumping, for the reason that the proposed location of the power house is about two thousand feet down toward the mouth of the canon, below such intake, and is sixty-four feet lower in altitude.

The Chicala Water Company has filed an affidavit in support of its contention, while the Lytle Creek Light and Power Company has filed affidavits by John L. Campbell, the president of the company, and by F. C. Finkle, a civil and hydraulic engineer, who state that the power house of applicant has an elevation of several feet above the intake of the Chicala Water Company's cement ditch, and that the water after leaving the power house can be returned to the natural channel above the intake of said cement ditch. F. C. Finkle is the engineer who prepared the maps of the Light and Power Company. He states that the conduit of the company will consist of canal and tunnel lined with

cement, and iron or steel pipe of sufficient capacity to convey the average normal flow of the creek, and that by reason of the impervious character of the proposed conduit, the waters will be conducted with a much less loss from seepage and evaporation than when flowing in the natural bed of the stream, and that said waters after being conducted through said canal and pipe line will be delivered in identically the same condition above said intake as when diverted from said stream at Miller's Narrows.

The survey of the canal and pipe line and the location of the power house do not appear to have been made with reference to the delivery of the water above the intake of the cement ditch of the Chicala Company after its use by the Light and Power Company, nor does it appear that any survey has been made to ascertain the altitude of these locations. If it can be satisfactorily shown that the waters, after being conducted through the canal and pipe conduit of the Light and Power Company, can be used for power purposes at the present or a new location of that company's power house, and can be returned to the bed of the stream at or above the intake of the Chicala Company's cement ditch in the same condition as when diverted, the application should be approved.

You are therefore directed to notify the Lytle Creek Light and Power Company of this decision, and upon furnishing satisfactory proof, as herein required, their application will be approved.

SETTLEMENT RIGHTS—NOTICE OF SETTLEMENT CLAIM.

JORDAN *v.* SMITH.

A claim of notice of a settlement right by reason of improvements on the land will not be heard as against an adverse claimant, where, at such time, the settlement and posted notice of the party claiming such benefit of said improvements show the assertion of a settlement right to another quarter section.

Secretary Bliss to the Commissioner of the General Land Office, April 15, 1898.

(W. V. D.) (C. W. P.)

The record in this case shows that Robert Smith filed soldier's declaratory statement No. 237, for the SE. ¼ of Sec. 3, T. 23 N., R. 7 W., Enid land district, Oklahoma, December 8, 1893, and made homestead entry No. 7902, May 21, 1894; that Charles B. Jordan applied to enter the W. ½ of the SE. ¼ and the S. ½ of the SW. ¼ of Sec. 3, T. 23 N., R. 7 W., January 11, 1894, which application was suspended, and marked suspended application No. 1720, to await action on the application of Wilkie J. Kruse to amend his homestead entry No. 6666, made December 30, 1893, for the SW. ¼ of said Sec. 3, so as to embrace in lieu thereof the SW. ¼ of Sec. 29, T. 24 N., R. 7 W.; that Kruse's said entry was canceled, September, 1894, and the local officers directed to sus-

pend Jordan's application pending final disposition of his contest against said Smith.

The local officers rendered a decision in favor of the defendant, and denied a motion for rehearing.

On appeal, your office concurred in the decision of the local officers, and dismissed plaintiff's contest.

The plaintiff appeals to the Department.

The evidence shows that the plaintiff lives on the S. ½ of the SW. ¼ of said section, and that he made a pasture of some three or four acres in the W. ½ of the SE. ¼ of said section, by placing some poles and brush at each end of the pasture, which was in a canyon, the sides of which formed the sides of the pasture; that he also placed notices on stakes about the lines of the W. ½ of said SE. ¼, and made two or three small mounds thereon. He admits that he also placed stakes with notices to keep off, signed with his name, on the N. ½ of the SW. ¼, and on other parts of said Sec. 3. He says, in his testimony, that he was trying to hold "the east half of section 3, a mile strip," for a son who was not quite of age.

The witnesses for the defendant testified that there were no signs of improvement on the W. ½ of said SE. ¼ on December 7, 1893, the day before the plaintiff's soldier's declaratory statement was filed, and it is not pretended that the defendant had actual notice that the plaintiff claimed the W. ½ of said S. E. ¼, but it is insisted that his use of part of the canyon, which he had fenced in for a pasture, is such a notice of plaintiff's claim to the W. ½ of said SE. ¼ as bound the defendant as effectually as if he had actual notice of the claim. This would undoubtedly be so, were it not that the plaintiff also gave notice by posting on the N. ½ of the said SW. ¼ "to keep off" said N. ½ of said SW. ¼, on the S. ½ of which he made settlement and established residence on October 12, 1893. It is well settled that notices describing the land claimed, posted on a tract of land in conspicuous places, are quite as effectual in notifying others of the extent of the claim as improvements placed on the different subdivisions. (Smith *v.* Johnson, 17 L. D., 454; Sweet *v.* Doyle, Id. 197.) In the face of an adverse claim, a settler should not be allowed to say, It is true I gave notice by posting that I claimed the N. ½ of the quarter-section on the S. ½ of which I made settlement and established residence, but I had a small pasture in the W. ½ of another quarter section, and I claim that half and not the N. ½ of the quarter section on the S. ½ of which I settled and established residence.

For this reason, your office decision affirming the judgment of the local officers is affirmed.

TIMBER LAND PURCHASE—APPLICATION TO RE-ADVERTISE.

JAMES N. TRUE.

The application of a timber land applicant to re-advertise, he having failed to submit proof and make payment in accordance with his first advertisement, can not be allowed, where, pending action thereon, an application to purchase the land is filed by an adverse claimant.

Secretary Bliss to the Commissioner of the General Land Office, April 16, 1898.

(W. V. D.) (C. J. W.)

January 24, 1896, James N. True made timber and stone sworn statement No. 2787, for lots 6, 7, 9, and 10, Sec. 2, and lot 1, Sec. 11, T. 69 N., R. 21 W. 4th P. M., at Duluth, Minnesota. He advertised to make proof on June 2, 1896, but failed to appear and submit final proof. On June 16, 1896, he filed in the local office his application to re-advertise notice of intention to make proof and payment under his said timber and stone statement.

It appears from the record that on June 17, 1896, John J. Welch filed timber and stone statement for the same land, which was held in abeyance in the local office awaiting action on the application of True to re-advertise, and your office treated the application of Welch as an adverse claim within the meaning of the decision in the case of Caleb J. Shearer (21 L. D., 492), and rejected said application; from which action True appealed.

Two questions are presented by the case:

1. Is there any authority under the law by which the Department may extend the time in which proof and payment may be made for offered land under the timber and stone act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348)?

2. Do the words, "in the absence of any adverse claims" as used in the decision in the case of Caleb J. Shearer (21 L. D., 492) include adverse claims arising after application to re-advertise notice; and is said decision in conflict with the decision in the case of John M. McDonald (20 L. D., 559)?

The decision in the later case contains an express disclaimer of any intention to overrule the former one. This being true, an application to purchase by an intervenor pending an application to re-advertise by the defaulting applicant, is such adverse claim as comes within the meaning of said decision. Favorable action upon the application of True to re-advertise notice, would have been no bar to the application of Welch to purchase, made before proof and payment by True. It was error upon the part of the local officers to hold the sworn statement of Welch in abeyance pending action upon True's application to re-advertise. The effect of such action was to withhold the land from other disposition while True was taking steps to cure his default, which withholding was unauthorized. (John M. McDonald, 20 L. D., 559.)

True was not injured by the rejection of his application to re-advertise, and he has no right to complain so long as the application of Welch to purchase is pending. Your office decision is accordingly affirmed.

DAMMON *v.* SINCLAIR.

Motion for review of departmental decision of February 17, 1898, 26 L. D., 210, denied by Secretary Bliss, April 16, 1898.

MINING CLAIM—PROTEST—MINING REGULATIONS.

MCFADDEN ET AL. *v.* MOUNTAIN VIEW MINING AND MILLING CO.

A protest filed as the basis for adverse proceedings may be properly rejected as insufficient if it fails to "show the nature, boundaries, and extent" of the adverse claim in accordance with the requirements of paragraphs 83 and 84 of the Mining Regulations.

Secretary Bliss to the Commissioner of the General Land Office, April 16, 1898.

(W. V. D.) (E. B., Jr.)

On September 22, 1896, the Mountain View Mining and Milling Company filed application for patent to the Mountain View lode mining claim, Spokane Falls, Washington, land district. On November 28, 1896, during the period of publication of notice, W. D. McFadden, David O'Neil, and Charles W. Vedder, each for himself, and W. D. McFadden as alleged agent for W. E. Harris, filed their joint affidavit alleging themselves to be the owners and entitled to the possession of the Columbia and the Kruger lode mining claims, sometimes known as the Gray Eagle and Exchequer claims, respectively, and that the Mountain View claim conflicted with the Columbia and Kruger claims to the extent shown therein, and asked that proceedings in the matter of the Mountain View application be stayed until the rights of the parties could be determined in a court of competent jurisdiction.

McFadden, O'Neil and Harris, together with one Cox, were therein alleged to be the locators of the Columbia and Kruger claims, and Vedder to have acquired by purchase and conveyance the interests of said Cox in and to these claims. Attached to the affidavit and referred to therein as "Exhibit A," was a plat purporting to have been made by one "E. P. Harrison, surveyor," and to represent the conflict above referred to. Said affidavit and plat having been offered as an adverse claim, the local office, on December 14, 1896, rejected them as insufficient for that purpose, for the reasons that no copy of the location notice of the Columbia and Kruger claims had been filed, as required by paragraph 85 (now 83) of the regulations under the United States mining laws, and that it did not appear that the plat had been made

from an actual survey by a United States deputy surveyor, as required by paragraph 86 (now 84) of the said regulations. McFadden *et al.* appealed, and, pending the appeal, on March 15, 1897, filed evidence showing that on December 28, 1896, they had commenced proceedings in a court of competent jurisdiction to determine the right of possession as between themselves and the said applicant. On March 23, 1897, your office affirmed the decision of the local office. Protestants now prosecute their appeal to the Department, contending that the papers filed by them "show the nature, boundaries and extent" of their adverse claim, as required by section 2326 Revised Statutes, and that it was error to hold them insufficient for the reasons stated.

The provisions of the United States mining laws relative to the assertion before the land department of a claim to mineral land adverse to that of an applicant for patent, are found in section 2326 Revised Statutes. In addition to requiring that the adverse claim shall be filed during the period of publication the statute further requires that "it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim." Where this has been done the statute commands that

all proceedings, except the publication of notice and making and filing the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

It is made the duty of the adverse claimant,

within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the right of possession, and prosecute the same with reasonable diligence to final judgment;

and it is provided that

a failure so to do shall be a waiver of his adverse claim.

Paragraphs 83 and 84 of the regulations above referred to read:

83. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

84. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements,

if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made: *Provided, however,* That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.

As already stated, the papers filed as an adverse claim were filed during the period of publication and are "upon oath of the persons making the same." Judged by the language of the statute alone, and disregarding the foregoing regulations, they would "show the nature, boundaries and extent" of the adverse claim. They do not, however, contain the evidences of title required by said paragraph 83, nor the plat and certificates made by a United States deputy surveyor in conformity with said paragraph 84. Protestants' plat was made by a private surveyor, and there is not attached thereto any showing as to the value and ownership of labor and improvements upon the claim, as required by that paragraph.

These requirements, though apparently known to protestants, were simply ignored by them. They offer no excuse whatever for their failure to observe the requirements of paragraph 83, and none which merits any consideration by the Department for their failure to observe those of paragraph 84. The local officers were bound to respect and enforce the requirements in question in passing upon the sufficiency of the papers presented, and neither they nor your office could properly do otherwise than take the action of which protestants complain. The said requirements are of many years' standing, have repeatedly received the approval of the Department, and have never heretofore, so far as the Department is aware, been modified or waived, except in a few cases where compliance therewith was shown to be physically impossible or could only have been made at great risk of life or health. They are believed to be warranted by law and to be in conformity with the statute, and hence to have, in accordance with well settled construction, all the force and effect of law.

The Department finds no warrant to disturb the decision of your office, and the same is accordingly affirmed.

PETER BORTLE.

Motion for review of departmental decision of February 4, 1898, 26 L. D., 150, denied by Secretary Bliss, April 19, 1898.

ALASKAN LAND—SURVEY—TIDE LANDS.

RED STAR OLGA FISHING STATION.

A survey of Alaskan land that embraces tide lands within its limits will not be approved as there is no authority by which title thereto can be acquired under the public land laws.

Secretary Bliss to the Commissioner of the General Land Office, April 19, 1898.

(W. V. D.) (W. M. B.)

The Red Star Olga Fishing Station, a corporation and claimant, has appealed from the decision of your office, of date April 10, 1895, wherein was suspended survey No. 49, executed by T. J. Dewoody, U. S. deputy surveyor, on May 7, 1892, which said survey embraces a body of land comprising an area of 41.03 acres, situate on the southern shore of Olga Bay, Kodiak Island, district of Alaska, and used as a fishing station.

It appears from the record submitted that said survey No. 49 was accepted by your letter of date May 24, 1893, to the ex-officio surveyor-general, but that after an examination thereof subsequent to said date such acceptance was, to wit, on April 10, 1895, revoked. The action of your office in revoking the former acceptance of the survey, and suspending the same, was based, as stated in your above referred to office decision, upon the ground:

That the survey includes a spit, or island, separated from the mainland. At both ends of this spit Salmon river is open to Olga Bay. This river being more properly a lagoon or arm of the bay, is undoubtedly affected by the tides, the openings or mouths at the ends of the spit allowing the sea to flow in. The deputy should have followed with his meander the line of ordinary high water mark along the shore line of the mainland, thus excluding from the survey the tide water which the government does not give title to, and the spit, for the reason that after the meander line noted above had been run, the tract would not be in "one compact" body as the regulations require.

The assignments of error by appellant, material to the issue in the case at bar, are as follows:

2. That the field notes of survey do not suggest any sand spit or tract of land separate from the mainland; that if such is shown on the plat, it is a clerical error by draftsman and not reported in the field notes of the survey made on the ground.

3. That by the field notes no lagoon nor tide waters are shown, and so far as officially known, none exist.

4. That under the surveyor's manual no meanders need be made of streams less than three chains in width.

5. That final entry having been made with the consent of the local land office upon the approved plat by the surveyor-general, and Commissioner, the same should be sustained, approved, and relieved from explanation.

Thus it is seen that the second and third assignments of error question the correctness of the finding of your office decision, alleging, in effect, that the same was not supported by the evidence furnished by

field notes of the survey and the plat made therefrom in the office of the ex-officio surveyor-general, as approved by said officer.

The allegation by appellant that no such spit and lagoon, as mentioned in the decision appealed from, are shown to exist by the field notes of this survey, is disproved by the entries themselves made by the deputy in his book of field notes, as appears from the transcript thereof returned to your office.

The following, among others, are the notes made by the deputy during the execution of the survey in the field.

No.	Course.	Chains.	
3	N. 45° W....	19.80	Set stone 22 × 10 ×8—18 inches in the ground, marked W. C. on side facing the claim: this corner is on left bank of Salmon river.
		20.40	Across Salmon river, course S. W.
		21.09	To ordinary high water mark, on gravelly spit on south shore of Olga Bay. Set stone 25 × 14 × 10, etc.
4	S. 42° W		Thence along shore of Olga Bay following line of high water mark. Variation 24° 5′ E.
		9.50	Cross Salmon river 40 lks. wide, course from N. E.
		20.00	To point of beginning.

The plat of this survey, as made in the office of the ex officio surveyor-general, approved by him, and forwarded to your office, is executed in strict accordance with the foregoing field notes returned by the deputy surveyor who executed the survey.

It will be observed from the above that in running course No. 3 the south bank of what is known as Salmon river—but what in reality is only a short lagoon about 14.00 chs. or 308 yards long, as appears from the plat—was reached at the end of 19.80 chs. from cor. No. 3, and at the end of 20.40 chs. the opposite or north bank of said lagoon was reached, showing the lagoon at that point—near its junction with the bay—to be 60 lks. wide. From the last named point, the *locus* of which is on the southern side of the so-called spit—which is nothing more than a small sand bar—the said sand bar is crossed, and at the end of 21.09 chs. a corner is established on the northern side thereof. The field notes, as copied and set out above, further show that from said last named point, in running corner No. 4, that at the end of 9.50 chs. the line of survey again crosses the lagoon at a point where its waters connect with those of the bay—the lagoon being 40.00 lks., or a little over 26 feet, wide at said point. It appears from the plat that the sand bar is only 69 lks., or 45.50 feet, wide at point of greatest breadth, that it is about 10.00 chs., or 220 yards, in length, and that it is completely surrounded by the waters of the bay and the lagoon.

There can be no doubt but that the tide waters of Olga Bay reach and wash that portion of the mainland—distant only 1.29 chs., or about eighty-five feet, from said bay—embraced in the survey, through the short lagoon which extends along its northern border. By reason of said fact the contention of appellants that the lagoon is not meander-

able, under the surveying manual, because it is less than three chains in width, is without any force. Upon this subject the manual of June 30, 1894 (p. 56), contains instructions as follows:

> Shallow streams, without any well-defined channel or permanent banks, will not be meandered, except tide water streams, whether more or less than three chains wide, which shall be meandered at ordinary high water mark, as far as tide water extends.

The lagoon—which the deputy denominates as Salmon river in his field notes—falls within the exception named in the manual, and the deputy should have meandered the same, and thus have excluded from the lines of the survey the sand bar, the lagoon and the tide land adjacent to the line of ordinary high water mark extending along the northern shore of that portion of the land claimed by appellants and situate south of the lagoon, for the reason that it is not proper that tide lands should be embraced in a survey, since there is no general or existing legislation by Congress with respect to the public lands whereby title may be acquired to tide lands. See case of Shively *v.* Bowlby (152 U. S.,): Mann *v.* Tacoma Land Company (153 U. S., 273).

The consideration of the contention of appellants to the effect that the survey should be relieved from explanation, and that the entry should be allowed to remain intact, because the local officers permitted final entry of the land designated on the plat of survey approved by the ex officio surveyor-general and your office, is immaterial for the reason that said appellants could derive no benefit from departmental action affirmatory of that of the local office, in the particular named, since patent could not lawfully issue for the tide land which constitutes a part of their claim.

Furthermore, it may be observed that if the line of ordinary high tide, extending along the shore of the mainland, to the south of the lagoon, had been meandered, as should have been done, the tract claimed, as embraced in the survey in its present form, would not have been left in "one compact body" as required by paragraph 13 of the rules and regulations of June 3, 1891 (12 L. D., 583), wherefore it would not be subject to purchase and entry under such circumstance, since the condition imposed by rules and regulations requires that the purchase and entry of lands under the provisions of the act of March 3, 1891, for the "purpose of trade or manufactures," must be confined to land which is in "one compact body." This constitutes as essential a condition with respect to the right to purchase and enter lands for the stated purpose, as does the condition that lands so purchased and entered must be taken in square form as near as "the configuration of the land will admit."

For the foregoing reasons the decision of your office suspending survey No. 49—subject to emendation—is hereby affirmed.

COPE *v.* BRADEN

Motion for review of departmental decision of October 21, 1897, 25 L. D., 341, denied by Secretary Bliss, April 19, 1898.

SCHOOL INDEMNITY SELECTIONS—FEES—SECTION 2238, R. S.

TERRITORY OF OKLAHOMA.

School indemnity selections filed on behalf of the Territory of Oklahoma, under section 4, act of January 18, 1897, should not be approved until payment of the fees provided for in section 2238 of the Revised Statutes.

Secretary Bliss to the Commissioner of the General Land Office, April 19, 1898.

(W. V. D.) (G. B. G.)

The Department is in receipt of your communication of the 4th instant, wherein it is said that the local officers at Mangum, Oklahoma Territory, have reported to your office the filing of application for indemnity by the territorial authorities, amounting to 38,943.40 acres selected under section 4 of the act of January 18, 1897 (29 Stat., 490), and that no fees were tendered with said application, it being claimed by the territorial authorities that none were required.

It is further said that under date of September 26, 1892, your office, by letter to the register and receiver at Beaver, Oklahoma, advised those officers that section 2238 of the Revised Statutes requires the payment of fees "in the location of lands by states and corporations under grants from Congress," that the selections in the list then under consideration (List 1, Beaver, O. T.,) were made for the Territory of Oklahoma, under the act of May 2, 1890 (26 Stat., 81), and section 2275:

> that said act made no grant of the school sections, but simply reserved them for schools, and indemnity lands when legally selected are simply placed in a state of reservation for schools, and that, therefore, the payment of fees was not required in making school indemnity selections in Oklahoma.

There is no difference in principle in the case then under consideration and that now presented, but doubt is expressed as to the ruling of your predecessor, and the Department is asked for instructions in the premises.

No question is made as to the authority of the territorial officers to make these selections under section 4 of the act of January 18, 1897, *supra*.

Section 2238 of the Revised Statutes provides, among other things, that:

> Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:
>
> * * * * * * *

Seventh. In the location of lands by States and corporations under grants from Congress for railroads and other purposes, (except for agricultural colleges,) a fee of one dollar for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

It is clear that the location of school indemnity lands is a "final" "location of lands" within the meaning of this statute. It is within the ordinary import of the language used, and the special exception of locations "for agricultural colleges" lends additional force to such construction.

Whether it is a location by a State or corporation under a grant from Congress is a more difficult question. A Territory is not a State within the meaning of that word as used in the Constitution (New Orleans *v.* Winter, 1 Wheaton, 94; Campbell *v.* Read, 2 Wall., 198), but it is a State in the general sense of the term "political society." Watson *v.* Brooks, 13 Federal Reporter, 540.

In "The Ullock" case (19 Fed. Rep., 211), wherein was involved a construction of the act of Congress of March 2, 1837 (5 Stat., 153), making certain regulations in regard to vessels carrying trade "upon waters which are the boundary between two States," it was said:

It may be admitted that the Columbia river is not a boundary between two "States" in the sense in which the word is used in the Constitution, but it is the boundary between one such State and an organized territory of the United States. The case is within the mischief intended to be remedied by the act of 1837. The subject is wholly within the power of Congress, and it may apply the rule contained in the act to the case of a water forming the boundary between a State and a Territory, as well as between two States of this Union. The Territory of Washington is an organized political body, a State in the general and unqualified sense of the term.

A Territory is also a public corporation with municipal functions. A public corporation is such corporation as exists for political purposes, and

a public corporation created by the government for political purposes and having subordinate and local powers of legislation; an incorporation of persons inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government, ... an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government,

is a municipal corporation. (Anderson's Law Dictionary, page 263, and cases cited.)

The organized Territory of Oklahoma comes squarely within this definition. It was created for political purposes, has subordinate and local powers of legislation, is an incorporation of the inhabitants of a particular district, has a local and civil government, and is an agency instituted by the sovereignty of the United States for the purpose of carrying out in detail the objects of government. In this regard it bears substantially the same relation to the federal government as a county bears to a State government.

It is believed therefore that Congress used the words "States" and "Territories" in the sense of "bodies politic," and that a Territory is both a State and a corporation within the meaning of the statute.

But does a reservation of school lands for the benefit of the State to be thereafter erected out of the Territory of Oklahoma come within the term "grants from Congress"?

Such a reservation is equivalent to a grant, in so far as it reserves the land from other disposition and segregates it from the general public domain. The faith of the government is pledged to this end, and the fact that Congress has already authorized indemnity selections for lands lost to the contemplated grant to the State to be erected out of the Territory of Oklahoma, shows that it is being treated as a grant. Moreover, if the people of the Territory are to have the benefit of indemnity selections at this time, it is not believed that they should be permitted to evade the payment of these fees by the technical plea that no grant of Congress has ever been made of these lands.

These fees are part of the revenues of the government, in the sense that they are paid into the United States Treasury; they constitute part of the emoluments of an officer of the United States, and it is the duty of the government to require the payment thereof as a condition precedent to the approval of final locations of land within the spirit of the act allowing such fees.

Your office is therefore instructed accordingly.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT RIGHT.

HASTINGS AND DAKOTA RY. CO. *v.* ARNOLD.

A decision of the Department directing that a tract of land, that had been embraced in a railroad indemnity selection, should be held "subject to entry by the first legal applicant" operates to restore such tract to the public domain as effectually as though restored to settlement and entry.

A settlement on land covered by indemnity withdrawal attaches at once on the revocation of the withdrawal, and will operate to exclude such tract from subsequent selection on behalf of the railroad grant; and the failure of the settler to assert his claim within three months after notice that the land is open to entry can not be taken advantage of by the company.

Secretary Bliss to the Commissioner of the General Land Office, April 20, 1898.

(W. V. D.) (G. B. G.)

The land in controversy in this case is the NE. $\frac{1}{4}$ of Sec. 23, T. 122 N., R. 43 W., Marshall, Minnesota, and is within the indemnity limits common to the main line of the St. Paul, Minneapolis and Manitoba Railway, and the Hastings and Dakota Railway.

It appears that this tract was selected October 16, 1883, by the St. Paul, Minneapolis and Manitoba Railway Company, which selection was canceled by departmental decision of October 23, 1891 (13 L. D., 440), wherein it was said:

> The designations upon which the selection of October 16, 1883, are now based can not be recognized, and in rejecting the designations the selections, being unsupported, must be canceled.

The orders of withdrawal of indemnity lands for these companies having been revoked (12 L. D., 541), and there being no valid selection of the lands by either company, you will hold the same subject to entry by the first legal applicant, or to selection by the company first presenting application therefor, in the manner prescribed by the regulations governing such selections.

On October 29, 1891, the Hastings and Dakota Company selected the said tract, with others, designating a proper basis therefor.

On June 6, 1894, the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Company filed a re-arranged list, describing the lost lands tract for tract as a basis for its said selections of October 16, 1883, which had been canceled by the departmental decision, *supra*, of October 23, 1891.

In the meantime, however, on February 27, 1894, Paul Arnold filed in the local office an application to make homestead entry for the land in controversy, and therewith he also filed a corroborated affidavit, upon which he asked a hearing, alleging that he made settlement on the land in the month of October, 1890, and had lived thereon continuously ever since, having placed on the land certain improvements, therein set out, which he valued at one thousand dollars.

The Hastings and Dakota Company filed a protest, on May 19, 1894, against the allowance of Arnold's said application, upon which a hearing was had May 25, 1894, upon testimony taken before a notary public designated by the local officers and appointed for that purpose, both parties in interest being represented thereat.

The record was transmitted to your office September 20, 1894, under instructions, without action by the local officers.

Your office held:

1st. That the list filed by the St. Paul, Minneapolis and Manitoba Company is without force as against the claim of the Hastings and Dakota Company, and held the first named company's list for cancellation, to the extent of the land involved.

2d. That Paul Arnold, a qualified homestead claimant, was an actual settler on the land in controversy, with valuable improvements, at the date of said selection by the Hastings and Dakota Company, that he has resided thereon and cultivated the same as a homestead ever since, and the company's selection was held for cancellation, to the extent of the tract in question, "with a view to the allowance of Arnold's homestead application."

From this decision the St. Paul, Minneapolis and Manitoba Company did not appeal, but the Hastings and Dakota Company has appealed to the Department, assigning the following specifications of error:

1st. Error to hold that the occupation of this land by Arnold at date of Hastings and Dakota selection determined the right of the company to select same as indemnity land.

2d. Error to hold that occupation without application to enter was sufficient, under the Secretary's decision of October 23, 1891, to defeat the company's selection.

3d. Error not to hold that the application and selection of record of the Hastings and Dakota Company and the Manitoba Company were effectual bars to entry of these lands.

No question is made of Arnold's qualifications, nor of the fact of his settlement in the year 1890, and his continuous occupation and cultivation since that time. It therefore only remains to be seen the effect of it on the selection of the company.

It was not the purpose of departmental decision of October 23, 1891, *supra*, to hold the land in reservation for an indefinite or any length of time for the benefit of "the company first presenting application therefor." Instead, it was in terms held "subject to entry by the first legal applicant." The effect of this was to restore it to the body of the unappropriated public lands of the United States, as fully and effectually as if it had been directed that it be restored to settlement and entry. All public lands of the United States "subject to entry" under the homestead law are subject to settlement, and they may be as effectually appropriated for the time being by settlement as by entry. At the date of Arnold's settlement, this land was embraced in an indemnity withdrawal for the benefit of both the roads named, but when that withdrawal was revoked, May 22, 1891, his settlement right attached. If Arnold failed to present his claim to the land within three months after notice at the local office that it was subject to entry, that fact can not operate to his prejudice in this case. A failure to file an application to enter lands within three months after settlement forfeits the claim to the next settler in order of time, but such default is not one that can be taken advantage of by a railway company.

In the essentially similar case of Vanderberg *v.* Hastings and Dakota Railway Company *et al.*, 26 L. D., 390, it was said:

> Vanderberg's settlement was therefore subject to the company's rights under this selection (October 16, 1883), which, as before stated, was canceled on October 23, 1891, and the land declared to be subject to settlement and entry. Vanderberg's rights under his continued residence upon and claim to this land surely attached as a settler upon the cancellation of said selection, and his claim, since maintained and asserted in his application under consideration, is superior to the right of the company under its pending selection made October 29, 1891.

The decision appealed from is affirmed, the company's selection is hereby canceled, and Arnold will be permitted to make entry for the land.

MINING CLAIMS—EXPENDITURE—LOCAL REGULATIONS.

HUGHES ET AL. *v.* OCHSNER ET AL.

On a showing made of an expenditure for the common benefit of several locations, embraced in one application, the Department will not undertake to determine whether such plan of development will be effective or not, if it appears that the expenditure is made in good faith, and for the purpose alleged.

Compliance with local laws and regulations in the location of mining claims, in the matter of posting notices thereon, will be presumed, in the absence of any showing that such question is of material importance in the case.

Secretary Bliss to the Commissioner of the General Land Office, April 20, 1898.
(W. V. D.) (E. B., Jr.)

This is an appeal by Thomas B. Hughes, B. Leppel, John Healey and A. G. Verhofstad from the decision of your office dated April 9, 1896, dismissing their protest filed December 24, 1895, against the issue of patent to M. H. Ochsner and Frank B. Klock for their lode mining claim, survey No. 5786, embracing the Crouse, Nichols, Michael, Salina, St. Jacobs, Fryer Hill, Union Bank, Nelson, Lumsden, Brink, Clark, Hopkins, Charles and Silver Cave lode locations, Leadville, Colorado, land district. Your said decision also dismissed the protest of N. N. Robertson and George S. Curtis; and their appeal therefrom was dismissed by the Department on February 13, 1897 (unreported).

Application for patent to this entire group of fourteen lode locations was filed on September 2, 1891; notice thereof was published from September 4, to November 5, 1891, inclusive; and entry No. 3993 was made therefor on December 14, 1895. It appearing that the discovery shaft of the St. Jacobs location was on ground excluded from the entry, and the applicants electing not to comply with the requirement of your office in the premises, the entry was formally canceled as to that location on August 17, 1896.

The protest alleges, among other things, that protestants are the owners of a great portion of the premises claimed by the applicants for patent, such portion being embraced in the Blackbird, Verhofstad and Sam Randle lode claims; that there was no discovery by applicants or their grantors of any lode or vein in place bearing mineral upon any one of the group of locations first above indicated; that the discovery shafts upon these locations were not sunk to the depth of ten feet, nor were notices of the locations posted thereon; that the annual assessment work had not been done on any one of these locations for any year since location, and that applicants had not expended $500 for labor or improvements upon any one of the said locations nor upon the entire claim. Your office considered the allegations of the protest in detail and in its said decision held that the showing made by the protestants did not warrant a hearing, and so, as already stated, dismissed the protest. The appeal assigns several errors of law and of fact.

Numerous affidavits, pro and con, have been filed by protestants and applicants, going to each of the above allegations, since the decision of your office. There have also been filed the field notes and plat of an amended survey of the claim as now constituted, made in April, 1896, under the supervision of the United States surveyor-general for Colorado, and approved by him on September 11, 1896; also two additional certificates of the said surveyor-general as to improvements, dated

September 11, 1896, and February 15, 1898, respectively. The first official survey of the entire claim, which then included the St. Jacobs location, was made in December, 1889, the several locations having been made in June, 1888. The field notes of this survey show specifically that there was then a discovery shaft ten feet deep on each location. The first certificate of the surveyor general as to improvements, and the only one on file when the entry was allowed, is dated May 23, 1890, certifies, in the usual form, to an expenditure of $500 on the claim, and that the improvements consist of eighteen shafts. A second certificate of the surveyor-general, dated January 31, 1896, shows that the improvements on the claim consist of nineteen shafts valued at $3,040, two eighty-horse-power boilers, a fifteen-horse-power hoister, and a building to enclose them, valued at $4,000, making a total expenditure of $7,040. It is further certified therein that one of these shafts, which is on the Salina location, one hundred and forty feet deep, timbered, and valued at $2,500, was not credited to the applicants in the former certificate for the reason that the ownership thereof was then in dispute, and that such ownership is now "settled and concluded to the claimants herein;" and also that the first one hundred feet of this shaft, value $1,500, was sunk prior to August 1, 1891.

The field notes of the amended survey show eighteen shafts on the claim, and other improvements consisting of building, boilers and hoister, as above mentioned. The timbered shaft on the Salina location was then two hundred and fifty feet deep and valued at $5,000. The total valuation of improvements at that time was $9,510. The certificate of the surveyor-general dated September 11, 1896, which is the third filed in the case, is in the regular form, to the effect that $500 have been expended in labor or improvements on the claim and that the improvements consist of the eighteen shafts, building, boilers, and hoister, as set out in the field notes. The certificate of February 15, 1898, shows a total expenditure of $12,510 on the claim, credited to eighteen shafts and the other improvements already repeatedly mentioned. The timbered shaft on the Salina had then reached a depth of three hundred and seventy feet and was valued at $8,000. It is also certified therein concerning this shaft:

> This shaft last described is so located and has been sunk to be used for drainage and development of the entire claim. It is situated near the lowest portion, geologically, of the claim and by thus draining the entire claim, it thereby enables the veins of each location to be economically and advantageously developed and worked to a great depth, the work in said shaft being credited pro rata to each location embraced herein.

The same language, in substance, as to the situation of this shaft and its use and adaptability for draining the entire claim is found in the amended field notes and in the certificate of January, 1896.

The adaptability of this shaft for draining and otherwise aiding in the development of the claim as a whole, is controverted in affidavits filed by protestants. On the other hand, affidavits filed by the appli-

cants support the field notes and certificates of the surveyor-general. The evidence convinces the Department, however, of the good faith of the applicants. Whether this shaft shall aid in the development of the entire claim to the extent applicants now assert, or not, it is not denied that they have expended their money in sinking the shaft. Civil engineers and persons experienced in mining operations may honestly differ as to the probable results to be had from a plan of development, and these may be involved, as is often the case in such operations, in considerable uncertainty, but if money or labor is expended in good faith, in furtherance of the plan, the Department will not look beyond the fact of such expenditure.

It is shown affirmatively, in affidavits filed by the applicants, that silver ore assaying from three to twelve ounces per ton has been found in the discovery shafts of the various locations now comprising the said claims. This is sufficient upon that point, in the absence of any adverse claim or any claim by a party asserting the land to be of a different character from that under which applicants seek title thereto. See Tam *et al. v.* Story, 21 L. D., 440.

The general allegation in the protest that notices of location were not posted on the several locations embraced in the claim, is without corroboration in the affidavits filed in support thereof. Such notices, presumably required by the local laws or regulations, are among the initial steps in the location of a mining claim, and are at most for a temporary purpose only. While there is no showing on this point in the applicant's proof, still, it is not shown by protestants to be a matter of material importance in this case. In the absence of such latter showing it must be presumed that the local laws and regulations have been complied with.

Relative to annual expenditure or assessment work upon each of said locations prior to entry of the claim, applicant's proof shows that affidavits to the effect that such expenditure or work had been made or done by applicants or their grantors for the years 1889 and 1890 were duly filed, that such expenditure was made for each location save the Fryer Hill (the omission of that name from the affidavit being probably due to inadvertence) for the years 1891 and 1892, and that good faith notices, in lieu of annual expenditure, covering each location, for the years 1893 and 1894, were duly filed pursuant to the provisions of the acts of November 3, 1893 (28 Stat., 6), and July 18, 1894 (28 Stat., 114). These notices would seem to be sufficient, upon the question of annual expenditure, to have justified the allowance of the entry.

Among the affidavits filed by protestants subsequent to the decision of your office, is one tending to show that Albert J. Rupp, who, as the duly authorized attorney in fact of the applicants for patent, made the affidavit that plat and notice remained posted on the claim during the time required by law, was not in the State of Colorado during that time. It is not necessary to discuss at length here the effect of this

charge. It goes to a question not raised by the protest and not considered by your office. It furnishes no ground for a direction by the Department that a hearing be ordered. If you shall deem the affidavit of Rupp insufficient upon the point of continuous posting of notice, you will call upon the applicant for additional evidence in the premises. Applicant's proof satisfactorily shows that such notice was duly posted on September 1, 1891.

The affidavits filed by protestants have been carefully examined and considered. In the face of the strong affirmative proof made by the applicants covering all the points embraced in the protest, with the apparently immaterial exception aforesaid, the Department does not think the showing by the protestants justifies the ordering of a hearing. The Department is of the opinion that the applicants have in good faith complied with the essential requirements of the mining laws, and the protest is therefore dismissed. This conclusion renders it unnecessary to consider the appellant's motion to dismiss the appeal.

The decision of your office is affirmed.

COMMUTATION OF HOMESTEAD—ACT OF JUNE 3, 1896.

CIRCULAR.*

Acting Commissioner Best to Registers and Receivers, July 9, 1896.

GENTLEMEN:

Your attention is invited to the act of Congress, approved June 3, 1896 (29 Stat., 197), entitled "An act relating to commutations of homestead entries, and to confirm such entries when commutation proofs were received by local land officers prematurely," a copy of which is hereto annexed.

The first section of the act provides for the confirmation of cash entries based on commutation proofs made under section 2301, Revised Statutes, as amended by section 6 of the act of March 3, 1891 (26 Stat., 1095), where at least six months' actual residence prior to commutation has been shown and there is no objection to the entry except that fourteen months' compliance with the homestead law after the date of entry has not been shown.

The cases now pending in this office, coming under the provisions of the act, where the cash certificate has not been canceled, will be taken up for consideration without application by the parties in interest.

Where the cash certificate in a case coming within the provisions of the statute has been canceled, it will be necessary for the parties in interest, if they desire the reinstatement of the same and the confirmation of the entry, to file in the proper district land office an application for such action. You will forward the application to this office for con-

* Not heretofore reported.

sideration, accompanied by a full report as to the status of the tract of land embraced in the entry, the confirmation of which is desired.

The second section of the act modifies the provisions of section 2301, Revised Statutes, as amended by the act of March 3, 1891 (supra), so as to permit the commutation of homestead entries upon a showing of fourteen months' compliance with the homestead law after the date of *settlement*, instead of after the date of *entry*, as formerly required. Constructive residence from the date of the entry will be recognized where settlement is made and residence established within six months thereafter.

The provisions of said section 2 are not intended to change existing special laws which permit commutations in less than fourteen months, but are applicable only in cases where the commutation is made under the general homestead laws.

Approved:

HOKE SMITH,
Secretary.

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(PUBLIC—NO. 173.)

AN ACT relating to commutations of homestead entries, and to confirm such entries when commutation proofs were received by local land officers prematurely.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs, and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled when the lands made vacant by such cancellation have been reentered under the homestead act.

SEC. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement.

SEC. 3. That all acts and parts of acts in conflict with any of the provisions of this act are hereby repealed.

SEC. 4. That this act shall take effect and be in force from and after its passage and approval.

Approved June 3, 1896.

RAILROAD GRANT—WAGON ROAD GRANT—WITHDRAWAL.

OREGON AND CALIFORNIA R. R. CO. *v.* WILLAMETTE VALLEY AND CASCADE MT. WAGON ROAD CO.

A withdrawal of lands for indemnity purposes under the grant to the Oregon and California R. R. Co. is in violation of the statute making the grant to said company, and no bar to the subsequent withdrawal for the benefit of the wagon road grant made by the act of July 5, 1866, and during the existence of the latter withdrawal the lands embraced therein are not subject to selection under the railroad grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *April 21, 1898.* (E. F. B.)

The lands in controversy, to wit: the NW. ¼ of the NE. ¼ and the NE. ¼ of the NW. ¼ of Sec. 29, the N. ½ of the SE. ¼, the NE. ¼ of the SW. ¼ and the N. ½ of Sec. 35, T. 14 S., R. 1 E., Roseburg, Oregon, are within the indemnity limits of the grant to the Oregon and California Railroad Company, made by the act of July 25, 1866 (14 Stat., 239), and are included within the limits of a withdrawal ordered for the benefit of said company by letter of your office of April 7, 1870. They are also within the limits of the withdrawal for the benefit of the Willamette Valley and Cascade Mountain Wagon Road Company, under the grant made by the act of July 5, 1866 (14 Stat., 89), ordered by letter of your office of June 2, 1871.

Said lands were selected by the California and Oregon Railroad Company as indemnity, December 27, 1895, per list 56, and said selection was held for cancellation by your office by letter of April 14, 1896, upon the ground of conflict with the rights of the wagon road company, from which decision the railroad company appealed.

The controlling question in this case is as to the validity of the withdrawal of April 7, 1870, made for the benefit of the railroad company.

If the grant contains no prohibition against the right of withdrawal, the exercise of such right by the executive would have the effect to reserve the lands, although such withdrawal might not have been contemplated by the grant; but the Department has held that the sixth section of the act making the grant to the Northern Pacific Railroad prohibits the exercise of such authority, and a withdrawal made in violation of such statutory provision is without effect, except as notice of the limits within which the company may make its indemnity selec-

tions. Northern Pacific R. R. Co. *v.* Miller, 7 L. D., 100; same *v.* Jennie L. Davis, 19 L. D., 87.

The grant to the Oregon and California Railroad Company contains a provision similar to the grant to the Northern Pacific Railroad Company, and forbids the withdrawal of lands for indemnity purposes. Central Pacific R. R. Co. *v.* Engram, 7 L. D., 240; Central Pacific R. R. Co. *v.* Hawkins, 20 L. D., 123.

The withdrawal for the railroad company being unauthorized and without effect, said lands were, at the date of withdrawal for the benefit of the wagon road company, subject to such withdrawal, which took effect immediately upon receipt of notice at the local office, and reserved the lands for the benefit of the last named company.

It appears that the Willamette Valley and Cascade Mountain Wagon Road Company applied to select the NW. ¼ of the NE. ¼ and the NE. ¼ of the NW. ¼ of said Sec. 29, February 8, 1896, which application was rejected on account of conflict with said selection of the Oregon and California Railroad Company.

The decision of your office, holding for cancellation the selections made by the railroad company in said list 56, is affirmed as to all lands therein which were selected by the wagon road company prior to March 10, 1898 (Willamette Valley, etc. *v.* Bruner, 26 L. D., 356), when the withdrawal for the benefit of the wagon road company was revoked; but the selections by the railroad, of lands in list 56, not selected by the wagon road company prior to March 10, 1898, and not at that date embraced in pending applications to select by the wagon road company, will be examined without reference to the withdrawal for the wagon road company.

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

Motion for review of departmental decision of February 21, 1898, 26 L.D., 252, denied by Acting Secretary Ryan, April 21, 1898.

TIMBER CULTURE ENTRY—EQUITABLE ACTION.

ALVIN LAW.

A timber culture entry allowed prior to the expiration of the statutory period of cultivation, may be equitably confirmed, in the absence of any adverse claim, where it appears that after the issuance of final certificate the land was conveyed to another for value and without notice of the defect in the final proof, and subsequent compliance with the law in the matter of cultivation duly appears.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *April 21, 1898.* (L. L. B.)

Alvin Law has appealed from your office decision of March 30, 1896, denying his application to relieve from suspension the timber-culture

entry of Samuel Mason made May 25, 1885, for the SE. ¼ of Sec. 34, T. 9 S., R. 23 W., Colby, Kansas, upon which final proof was made and final certificate issued June 18, 1890, and praying that patent may issue for the land embraced therein.

The facts are clearly and concisely stated in your said office decision, and for convenience are here transcribed:

On May 23, 1885, Samuel Mason made timber-culture entry No. 10241, for the SE. ¼, Sec. 34, T. 9 S., R. 23 W.

On June 18, 1890, a little more than five years from date of entry, he made final proof (under the act of June 14, 1878), which proof was premature by about three years as proof cannot be made, under the act mentioned, in less than eight years from date of entry. However, final certificate No. 638 was erroneously issued thereupon by the local office June 20, 1890.

It was shown in the proof that the entryman did not plant any timber, but had cultivated, protected, and kept in a healthy growing condition up to the date of his proof, or for years five and twenty-seven days, 7,620 trees that had been planted on ten acres of said tract by a former entryman who had relinquished his rights in the tract just prior to the date of Mason's entry.

In view of the proof being prematurely made, this office (letter "C"), on September 23, 1890, rejected it and allowed said certificate to stand subject to new proof to be made at the proper time; of which action Mason was duly notified. As he did not appeal therefrom, the action of this office rejecting the proof, became final (letter "G") January 28, 1892. The final certificate, as before stated, was allowed to stand subject to new proof to be made at the proper time.

I am now in receipt of the application of Alvin Law (transmitted with the register's letter of January 25, 1896), who claims to be the owner of said tract, and asks that the entry be relieved from suspension and passed to patent.

Law sets up in his affidavit that he has been acquainted with said tract for the past sixteen years; that during the years 1890, 1891, 1892 and 1893, there was growing thereupon at least ten acres of living and thrifty trees; that there was growing upon each acre of said ten acres at least seven hundred and fifty living and thrifty trees, and that said trees had been growing at least eight years prior to May 23, 1893; that they were planted and cultivated in accordance with the timber-culture laws; that there are eighty acres of said tract under a good and excellent state of cultivation, seventy-two acres of which were cropped to corn during the year 1895; that there are, with other improvements thereupon, a good well, and a good one-story frame house with a kitchen attached; that after said Mason, the entryman, made his final proof, he conveyed the tract to one George W. Callison, on September 15, 1890, who afterwards conveyed it to Margaret J. Wormald, and she, subsequently, conveyed it to applicant, who claims to have had no knowledge at the time of his purchase thereof that said entry had been suspended; that he is ignorant of the whereabouts of the entryman, Mason, he "having left the country in the year 1891," and has not been seen or heard from since. Applicant asks that the entry, under the circumstances, be passed to patent.

By letter "G" of July 20, 1895, this office, in response to a letter of H. J. Harwi, who was then acting as attorney in the matter for applicant, held that the proof required can be furnished only by the entryman, his heirs, or legal representatives; that this office is not authorized by law to accept proof offered by the "transferee" of a timber-culture entry where compliance with the law was not shown by the entryman, as in this case; that the local officers had no authority to accept the proof offered by Mason, inasmuch as the act of June 14, 1878 (20 Stat., 113), provides that no final certificate shall be given, or patent issued, for the land so entered until the expiration of eight years from date of such entry, that Mason was not, therefore, in a position to transfer the land entered by him, and the "transferee"

gained nothing by the attempted transfer; that while Law may have acted in good faith, the records of the local office, and the provisions of the laws relating to timber-culture entries, were open to his inspection and should have put him on his guard; that the proof required must be furnished by the proper party as stated above.

From the foregoing it appears that the transferee and the government are the only parties in interest; that the requirements of the law as to the culture and growth of trees have at this date been fully complied with, and that the applicant is an innocent purchaser for value and without any actual notice of the defect in Mason's final proof; that all transfers of the claim were made after final certificate was issued, and, presumably, upon the evidence furnished by such certificate that the law had been complied with.

Rule 33, appertaining to the Board of Equitable Adjudication, provides that—

> All homestead and timber-culture entries in which good faith appears, and a substantial compliance with law, and in which there is no adverse claim, but in which full compliance with law was not effected, or final proof made, within the period prescribed, or residence established on the land, in homestead entries, within the time fixed therefor by statute, or official regulation based thereon, and in which such failure was caused by ignorance of the law, by accident or mistake, by sickness of the party or his family, or by any other obstacle which he could not control,

may be referred to the Board for equitable action.

The "good faith" of the petitioner is shown here and a "substantial compliance with law," although a "full compliance with law was not effected" when final certificate was issued, because the entryman had shown only five years' cultivation when eight years' was required, and "such failure was caused by ignorance of the law," or "by mistake," or both.

This Department is clearly of the opinion that the entry should be referred to the Board of Equitable Adjudication with the recommendation that it be passed to patent; which is accordingly done.

The decision appealed from is modified to this extent.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

PATRICK H. GUTHREY.

The right to make a second homestead entry under the act of December 29, 1894, will not be defeated by the fact that the entryman sold the improvements on the land covered by his first entry, and relinquished his claim thereto, where it appears that, on account of a protracted drought, such action was made necessary to secure the means of subsistence.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *April 21, 1898.* (H. G.)

Patrick H. Guthrey made homestead entry for the NE. ¼ of Sec. 18, T. 18 N., R. 3 E., I. M., August 9, 1889, which he relinquished Novem-

ber 22, 1889. He made application June 22, 1895, to enter the SW. ¼ of the SE. ¼ of Sec. 18, lots 1 and 2 of Sec. 19, and lot 4 of Sec. 20, T. 20 N., R. 9 E., as a second homestead entry, which was transmitted by the local office to your office.

On December 21, 1895, your office held that the reasons given in support of this application for a second entry and for relinquishing the first entry and abandoning the tract thereby covered, were insufficient, and rejected the application therefor. No appeal was taken from this decision and it was declared final and the case closed.

On January 23, 1896, Guthrey made application to enter as a homestead the S. ½ of the SW. ¼ of Sec. 17, and the NE. ¼ of the SW. ¼ of Sec. 17, and lot 4 in Sec. 20, T. 20 N., R. 9 E., within the limits of the land district at Perry, Oklahoma. This application was apparently intended as an application for a second entry, but makes no showing as to the former entry except that Guthrey had made a homestead entry in Payne county, Oklahoma, in 1889, but never perfected title to said tract, and that he was at the time of making such application an actual settler on the tract applied for as a second entry.

On March 13, 1896, this application was transmitted by the local office to your office, together with a number of subsequent applications to enter tracts embracing wholly or in part the tract which Guthrey had applied to enter and which were severally suspended to await action upon his prior application to enter.

On June 12, 1896, your office rejected this application, stating that Guthrey had made no showing whatever therein as to his former entry and also for the same reasons set forth in the former decision of your office of December 21, 1895, which rejected his first application to make second entry.

Upon appeal to this Department Guthrey for the first time presents a formal application to make second entry of the tract applied for by him.

This showing is made upon affidavits of himself and others, and it appears therefrom that his reasons for renewing his application for second entry are that the land embraced in his first application therefor was not properly described or covered therein and that he was advised by counsel to abandon his first application and not to appeal from the adverse decision of your office thereon but to make a second application correctly describing and embracing all the land that he desired to enter; that Guthrey is a resident upon the tract now applied for and has made valuable improvements thereon for the purpose of making it a home; that these improvements include a house, stable and hen-house, the breaking of twenty-five acres and the planting of twenty acres of corn and five acres of cotton; and that no other person has resided upon the tract or attempted to make improvements thereon except one James McCulver, who remained there only for a few weeks and made no improvements thereon.

Guthrey states that the tract which he originally entered, which is situated some distance from the tract now applied for, was settled upon, inhabited and improved by him for the period of about one year; that the improvements consisted of a good frame house of three rooms, the enclosure of a pasture containing about ten acres, the plowing and attempting to cultivate from eighteen to twenty acres, the planting of a number of fruit trees and the building of a pond for the purpose of securing water for live stock; that he made the entry in good faith for the purpose of securing a home, and not for trade or speculation; that during the year of entry and the following year his financial condition was extremely poor, and his only means of support came to him from his daily labor; that during those seasons a severe drought prevailed in that territory and that his condition and that of other people of the county wherein the land entered is situated was such as to compel them to accept the aid extended to them by the government; that he was without means with which to cultivate and improve the tract, without seed and the means of procuring it, and owing to the extreme poverty of the people in the vicinity he was unable to secure employment to support himself in that locality; that he had no friends or relatives in that vicinity to whom he could apply for aid or support; and owing to these circumstances, he sold his improvements at a considerable sacrifice and relinquished his homestead entry.

The application is made apparently under the act of December 29, 1894 (28 Stat., 599), which permits second entries in certain enumerated cases which, under the act of March 2, 1889 (25 Stat., 854), thereby amended, are made sufficient reasons for the granting of leaves of absence to settlers. These are where the settler by reason of a total or partial destruction or failure of crops, sickness or other unavoidable casualty, is unable to secure a support for himself or those dependent upon him, from the lands settled upon. The application for such entry is governed by the regulations contained in the departmental circular of March 23, 1895, (20 L. D., 432), wherein the method of procedure is minutely prescribed. It was not observed in this case, as the application should have been addressed to the local office, setting forth the reasons for making it, and following the form and method prescribed in the circular. The only application made was one for a homestead, which contained the statement that the applicant had made a former entry, but which did not furnish the data required by the departmental circular.

However, your office was advised of the fact of former entry by the papers in the case which contained the first application for a second entry, and which appears to have been orderly made, but which was rejected by your office and abandoned by the applicant, and this application sets forth substantially the grounds contained in the second and present application for a second entry. Under the circumstances, and as no prior adverse rights intervened at the time of the formal appli-

cation to enter the land which called attention to a former entry, the application will be considered, although not orderly presented.

The rule is under the general act of December 29, 1894, relating to second entries, that the right of second entry will not be accorded to one who relinquishes his prior entry "solely" on account of a money consideration or its equivalent (North Perry Townsite *et al. v.* Malone, 23 L. D., 87, 91); and it has been held that a right to make a second entry under such general act will not be allowed on account of the worthless character of the land covered by the first entry, if it was made without examination of the land (Alix Heipfner, 26 L. D., 23); but a right to a second entry has been recognized when the first was relinquished on account of the arid and unproductive character of the soil, successive drought for three years and the subsequent failure of the entryman to secure a crop from the land covered by the entry (Tonyes H. Linnemann, 20 L. D., 308).

In the case now under consideration, it appears that the applicant was compelled to sell his improvements at a sacrifice, and even part with his work stock in order to secure means of support during a period of protracted drought, and was compelled to seek labor in another locality as he could not obtain work in the vicinity of his homestead.

Although accompanied with a relinquishment, his parting with his right to the land was not voluntary but forced owing to unforeseen vicissitudes, and his relinquishment was not made for the purpose of gain but was made at a sacrifice to secure means of a livelihood.

The subsequent applications transmitted with the application of Guthrey for a second entry are not adverse rights, as they do not disclose priority of settlement or right to enter. Guthrey's application was filed at the time these subsequent applications were made, and although his showing as to a first entry was not as specifically made as it should have been under the terms of the departmental circular, his application discloses the fact that he made a former entry. His settlement and residence upon, and his improvement of the tract now applied for by him were prior in time and senior of right to those of one of the subsequent applicants who evidently has made no improvements of a substantial or permanent character upon the land. None of the other applicants appear to have attempted settlement or improvement of the tract.

The decision of your office is reversed and the application of Guthrey to enter the tract applied for by him as a second entry will be allowed, and the subsequent applications in so far as they conflict with his application will be rejected.

APPLICATION—ADVERSE CLAIMS—QUALIFICATIONS OF APPLICANT.

BRADLEY *v.* PERKINS.

In the case of an application to make entry, filed subject to prior adverse applications, the qualifications of such applicant should not be determined before an adjudication of the relative rights of the parties in interest.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *April 21, 1898.* (G. B. G.)

On September 22, 1891, one S. S. Price made homestead entry for the SE. ¼ of Sec. 18. T. 9 N., R. 4 E., Oklahoma City land district, Oklahoma. Said entry was contested by one H. D. Baker, and as a result thereof, on March 14, 1893, your office held said entry for cancellation.

On July 2, 1894, the Department affirmed said decision, and, on November 20, 1894, the case was closed and the entry canceled.

On June 2, 1894, and while that case was pending on appeal before the Department, the plaintiff herein, James H. Bradley, filed an affidavit of contest against Price's entry, charging the said Price with abandonment and his contestant, Baker, with soonerism. Said affidavit of contest was not considered; the entry which it attacked being canceled very soon afterwards on Baker's contest.

After the departmental decision of July 2, 1894, canceling Price's entry had been promulgated, but before the cancellation had been entered of record on November 20, 1894, applications to make homestead entries of said tract were filed, as follows:

(1) By Nathaniel Perkins, on October 3, 1894.
(2) By Robert P. McCornack, October 3, 1894.
(3) By John H. Surber, November 9, 1894.
(4) By James H. Bradley, November 13, 1894.

The first three applications were suspended and held to await the result of Baker's attempt to exercise his preference right. But Bradley's application was rejected by the local officers, "(1) because the applicant is disqualified, and (2) for conflict with suspended applications of Perkins, McCornack and Surber." From that decision Bradley appealed to your office.

On March 8, 1895, your office denied Baker's application to make entry in the exercise of his preference right, and on April 24, 1895, he waived his preference right, and his right of appeal from your said office decision.

On May 13, 1895, Bradley filed an application to have his homestead rights restored, and simultaneously a second application to make homestead entry of the tract in controversy. In his said application for a restoration of his homestead right, he alleged under oath that he made homestead entry for lots 1 and 2 and the S. ½ of the NE. ¼ of Sec. 3, T. 12 N., R. 2 W., at Guthrie, on April 29, 1889; that he settled on the land and made improvements thereon of the value of $400; that his

entry was contested because he was within the territory during the prohibited period; that the local officers decided against him, and that your office affirmed their decision; that thereafter, being without funds to further prosecute an appeal, "and believing that he would ultimately lose said tract by reason of his having entered the Oklahoma country during the prohibited period," he relinquished his entry without pay therefor.

Thereupon your office, on August 24, 1895, held:

> According to his own admission and according to the finding of this and the local office, Bradley is disqualified to make entry, and his application to enter is therefore rejected . . . . The applications of Perkins, McCornack, and Surber will be held to await the final disposition of Bradley's application.

Bradley has appealed to the Department, the whole of his contention being substantially embraced in his first specification of error, as follows:

> The Hon. Commissioner erred in refusing to restore the homestead rights of said James H. Bradley, for the reason that said Bradley had never had the benefit of the homestead laws of the United States.

Without passing on the questions raised by this appeal, it may be said that on the record before the Department Bradley would not be entitled to make an entry of the land applied for, assuming him to be in all respects qualified. He took nothing by his contest against Price's entry. That entry was canceled on the contest of Baker, and even if Baker was a sooner, as alleged, that fact did not affect his status as a contestant. Before Bradley filed his application to enter the land in controversy, three several applications were filed, as has been seen, by Perkins, McCornack and Surber. The presumption is that these parties are qualified applicants; at least there is nothing in the record to the contrary, and inasmuch as Bradley does not allege prior settlement, any one of these applications would have precedence over his application.

Your office therefore erred in passing on Bradley's qualifications in advance of an adjudication of the relative rights of the parties in interest. The conclusion reached was a correct one on the present record, without reference to the ground upon which it was put.

Inasmuch as an application to make a second entry will only be considered by the Department in connection with an application to enter a designated tract of land, to pass on Bradley's right in this regard would, in the present state of the record, be a decision on a moot case, and is not permitted under the rulings of the Department.

The decision of your office, in so far as it holds Bradley disqualified to enter the land applied for on account of soonerism, is hereby vacated, and the cause remanded for such proceedings as may be found necessary to determine the relative rights of the parties. Inasmuch as Surber has alleged under oath that he was a settler on the land prior to the date of any of the applications to enter the same, it may be found necessary to order a hearing. In such event Bradley will be heard

thereat in support of his application to enter, and if he shows himself otherwise entitled to the land, the question of the effect of his alleged soonerism will be hereafter adjudicated.

DAVIS *v.* EISBERT.

Motion for review of departmental decision of March 15, 1898, 26 L. D., 384, denied by Acting Secretary Ryan, April 21, 1898.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT—ASSIGNEE.

JOHN M. RANKIN.

On application for the recertification of a soldier's additional homestead right, for the benefit of an assignee under the act of August 18, 1894, and the regulations thereunder, the applicant should be required to make such a showing of the facts and circumstances attendant upon the transfer of the soldier's right, and applicant's alleged ownership thereof, as will establish the fact that said applicant is a bona fide purchaser for value of said right.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *April 21, 1898.* (W. M. W.)

By your office letter of February 18, 1898, you submitted the application of John M. Rankin for additional certification in his name, as assignee, under the act of August 18, 1894 (28 Stat., 397), and the regulations thereunder (19 L. D., 302), of a certificate of soldiers' additional homestead right, issued to John M. Hewlett, and requested instructions whether the evidence submitted by Mr. Rankin shall be regarded as satisfactorily establishing the fact that he is the owner and *bona fide* purchaser, for value, of said certificate, and entitled to such additional certification thereof.

Mr. Rankin filed with his application the original certificate, dated February 9, 1884, issued by the Commissioner of the General Land Office, certifying Hewlett's right to make an additional homestead entry of not exceeding eighty acres. In support of his application for additional certification Mr. Rankin submitted his own affidavit, stating:

That he is the true and lawful owner of the soldier's additional homestead certificate for eighty acres which was issued to one John M. Hewlett, on February 9, 1884.

Affiant says that he purchased the same in good faith and for a valuable consideration, and that if there is any fraud practiced upon the government in procuring the aforesaid certificate, he was not a party thereto and had no knowledge thereof.

The act of August 18, 1894, 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-two, 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.

The circular issued thereunder to registers and receivers, October 16, 1894, 19 L. D., 302, provides:

To enable assignees of these certificates to exercise in their own names the right of entry confirmed by this statute, it is directed that the certificate itself shall, in each instance, prior to any entry by the assignee, be presented to this office for examination and additional certification covering the fact of assignment. Holders of such certificates desiring to exercise a right of entry in their own names, must file such certificates in this office, together with satisfactory proof of ownership and of *bona fide* purchase for value. If, upon examination, the proof so filed is satisfactory, an additional certificate will be attached to the original authorizing the location thereof, or entry of land therewith, in the name of the assignee or his assigns. You will allow no entries in the names of assignees except upon presentation of such additional certificates issued by this office. When such additional certificates are presented, you will issue homestead papers and the final certificate and receipt, in the name of the transferee, referring to him in said papers as the "Assignee" of the soldier.

Under the said act and circular, all that a holder of one of these certificates is required to show to obtain an additional certification in his own name as assignee, is that he is a *bona fide* purchaser thereof for value.

The construction of this act has heretofore received consideration in several departmental decisions, and property rights have attached thereunder to such an extent as to forbid a re-examination of the conclusion announced in those decisions. The rulings have been that the act is remedial in character; that the purpose of Congress was to make valid and effective these certificates of soldiers' additional homestead rights when held by *bona fide* purchasers for value, irrespective of any irregularity in their procurement, and notwithstanding the then existing departmental rulings did not recognize transfers or sales thereof; and that one who, relying upon the action of your office in issuing the certificate, has made purchase thereof in good faith and for value, comes within the protection of the act. (John M. Rankin, on re-review, 21 L. D., 404; Henry N. Copp, 23 L. D., 123; John H. Howell, 24 L. D., 35; Robards *v.* Lakey et al., ibid, 291.)

Under this interpretation of the act, where the original certification was improvident or unauthorized, the burden of the injury and loss must be borne by the government whose agents committed the mistake, if the certificate is in the hands of a *bona fide* purchaser for value who purchased upon the assumption that the certificate was lawfully issued.

Whether in any stated case the applicant for additional certification is a *bona fide* purchaser for value, must be determined upon the facts

in that case. The possession of the original certificate by the applicant is strong evidence of his purchase but is not controlling or conclusive because, in exceptional instances, his possession may have been wrongfully obtained or may have been rightfully obtained but not by way of purchase. In the case presented by your office letter the applicant states under oath, as before shown, that he is the true and lawful owner of the certificate; that he purchased the same in good faith, for a valuable consideration and without knowledge of any wrong practiced upon the government in the procurement thereof. When the purchase was made, from whom made, for what consideration, and whether this or any preceding transfer is evidenced by a written assignment or memorandum signed by the soldier, are not stated. In other words, the applicant has given his own conclusions (and they may be correct) instead of stating the facts and permitting your office to determine therefrom the character of his alleged purchase. Your office letter states that it was formerly the custom, as is well known, to transfer or sell these certificates by delivering to the purchaser the original certificate, together with two powers of attorneys, one to locate land under the certificate and the other to sell the land when located, and that these powers of attorney were usually in blank, the name being supplied by the ultimate transferee who used the certificate in locating land. As a result of this manner of dealing in these certificates, cases may arise where the applicant for additional certification in his own name, as assignee, may be a remote transferee and a *bona fide* purchaser for value, although the soldier in parting with the certificate did not receive value therefor, or otherwise failed to protect his interests. Thus there may be cases where the certificate has been wrongfully obtained from the soldier or has been disposed of contrary to his direction, and yet the present holder may be a *bona fide* purchaser for value. If without fault upon the part of the soldier his certificate has passed into the hands of a *bona fide* purchaser for value, whose rights thereunder are protected by the act of August 18, *supra*, the government and not the soldier must bear the loss, because the additional homestead right is given by law and will not be defeated by the act of August 18, *supra*, in the absence of some action by the soldier calculated to have that effect.

Your office letter calls attention to the case of Henry N. Copp, *supra*, wherein Mr. Copp, claiming to be a *bona fide* purchaser for value of such a certificate, and alleging that the original certificate and the accompanying powers of attorney transferring it to him had been lost, made application for the issuance in his name of a duplicate of the original certificate, and wherein the Department, after directing the issuance of a duplicate certificate in the name of the soldier, in lieu of the lost certificate, said:

> The lost powers of attorney have nothing to do with the case. The Department was in no sense connected with them in their inception and can make no order respecting them. They originated between the soldier, Mitchell, and his attorney or attorneys, and all matters relating to them must be settled outside of the Department.

In view of the fact that in that case the relief asked and granted was the issuance of a duplicate of the original certificate, which of course must have been issued in the name of the soldier, and in view of the fact that no additional certification in the name of Mr. Copp, as assignee, was asked, the powers of attorney were immaterial and, as said, had nothing to do with the case, but if it had been intended thereby to hold that such powers of attorney could not be considered or examined in determining whether an applicant for additional certification in his own name is a *bona fide* purchaser for value, then the holding could not be reasonably sustained and would have to be revoked.

Where the soldier's transfer of the certificate is evidenced by powers of attorney or other written memorandum executed by him, the applicant for additional certification in his own name as assignee, should be required to produce such written evidence of the transfer, or to satisfactorily account for its non-production, and where evidence of a transfer in writing is not produced the applicant should be required to state the present address of the party from whom he purchased and of the soldier if known, in order that your office, if deemed best, may take steps to give the soldier an opportunity to be heard.

The application of Mr. Rankin which accompanied your office letter is herewith returned for appropriate action in harmony with the views herein expressed.

ALASKAN LAND—SURVEY—RIGHTS OF NATIVES—RAILROAD.

PACIFIC STEAM WHALING CO.

A survey of Alaskan land with a view to its purchase under section 12, act of March 3, 1891, will not be approved if it operates as an encroachment upon lands occupied by native villagers.

The provisions of the act of March 3, 1891, contain no authority for the purchase of Alaskan land to be used and occupied for railroad purposes.

A survey of Alaskan land is required by the law and regulations to be in a square form as near as practicable.

Secretary Bliss to the Commissioner of the General Land Office, April 22, 1898.

(W. V. D.) (W. M. B.)

I have considered the appeal of the Pacific Steam Whaling Company, an alleged corporation, from the decision of your office of May 8, 1895, wherein was suspended—subject to an emendation thereof—survey No. 101 (adjoining survey No. 100), executed by Albert Lascy, U. S. deputy surveyor, on August 4th and 6, 1892, which embraces a tract of land having an area of 30.67 acres; situate on the easterly shore of Prince William Sound, known as Orca Station, District of Alaska, and used, as alleged by Deputy Lascy, for cannery, fishing and trading purposes.

The survey was suspended upon the ground as stated in your said office decision, that

> The survey in its present form cannot be accepted by this office for the reason that the strips of land containing the railroad infringes upon the rights of the native villages surrounding, which is to be reserved for their use, and that the main body of the survey includes more land than appears to be in actual occupancy by the claimants.

The deputy states in his report that the estimated value of the improvements is $50,000, and that the same consist of the buildings necessary to constitute a complete cannery plant, and a railroad used in connection with the cannery business. What is designated by the deputy as a railroad appears to be only a tramway which is over one-half mile in length, and extends from the cannery building, fronting on Prince William Sound, to the wharf at the landing on Lake Eyak. That portion of the tract embraced within the lines of the survey lying between the main body of the land surveyed and the landing at the west end of Lake Eyak, and upon which the referred to tramway is located, is a long narrow strip of land more than one-fourth of a mile in length, being just wide enough to embrace or include the road bed of the said tramway.

This (No. 101) survey is to the south of and adjoins survey 100, which latter includes a tract of land claimed (as reported by Deputy Lascy—who also executed said survey), by the Pacific Packing Company. There is also located on the tract included in the last named survey a railroad or tramway extending westerly from the cannery building thereon to a wharf on the coast of Prince William Sound, and easterly from said cannery building to the landing at the west end of Lake Eyak.

A considerable portion of the tramway lying within the lines of survey No. 100 is also located on a long narrow strip of land extending from the main body of the tract included in this survey to the landing at the west end of Lake Eyak.

While the two tracts located by the claimant and alleged owners thereof, as marked off by the two surveys, front on Prince William Sound, a distance of 74.50 chs. (1639 yards), and while the distance across the narrow contiguous strips of land upon which the railroads or tramways are located is only 2.25 chs. (49.50 yards) at the point of smallest breadth, yet the two exterior lines within which is included said narrrow strips of land deflect and widen as they approach Lake Eyak sufficiently to cover the shore line of said lake a distance of 12.30 chs. (270.60 yards).

While the lines of the two surveys, within which are embraced the referred to narrow strips of land, were run so close together, for the purpose, presumably, of passing through the village of the natives to Lake Eyak without including within such lines any of the buildings or huts of the villagers, yet said lines pass so close to said huts—being

distant only a few feet from some of the same, as appears from the field notes and plats of the surveys—that the surveys can be regarded in no other light than an encroachment upon lands occupied by the natives for village purposes, which is a violation of the provisions of section 14 of the act of March 3, 1891 (26 Stat. 1095), which reserves from survey, purchase, and entry all lands "to which the natives of Alaska have prior rights by virtue of actual occupation."

Lake Eyak comes to a narrow head at its western extremity and the end lines of the said two surveys were extended around the same, in manner shown, for the apparent purpose of shutting off approach thereto by the natives and the public generally, save at the will or pleasure of the corporations which seek to purchase the land bordering upon the lake.

Though it appears from the plat and field notes that the survey (No. 101) under examination encroaches upon lands apparently occupied by native Alaskans, nevertheless inspector Swineford, in his report upon that subject, made subsequent to your office decision and filed with the papers in this matter of survey, expresses the opinion that such is not the case.

When an issue of this kind is made by the record submitted such question can only be determined at the time of submitting final proof under provision of subdivision 5 of paragraph 20 of the rules and regulations of June 3, 1891 (12 L. D., 583), or at a hearing specially ordered to consider and adjudicate such question.

The narrow strip of land included in survey No. 101 in its existing form, and occupied by the road bed of the tramway or so-called railroad bed, was surveyed with a view to the purchase and entry of the same by the claimants thereof, for railroad and tramway purposes, but it may here be observed that section 12 of the act of March 3, 1891, under which appellants ask to purchase, contains no provision for the purchase and entry of lands to be occupied and used for railroad purposes.

Furthermore, it may be observed, as becomes apparent from the facts herein related, that this survey was not executed conformably to law and regulations with respect to square form, and that if it was amended so as to include the cannery plant of appellants, and at the same time a body of land as near as practicable in a square form, the strip of land upon which is situate the tramway, as also the land occupied by the native villagers adjacent thereto, would be excluded from the lines of an amended survey executed as suggested in your office decision, whereby would be removed from the survey the objectionable features with respect to its nonconformity with law and regulations as to square form, and its conflict with the rights of native Alaskans to the use of certain lands, as herein pointed out, by reason of occupation thereof.

For the foregoing reasons the decision of your office suspending survey No. 101—subject to amendment in conformity with law and regulations—is hereby affirmed.

HOMESTEAD ENTRY—COMMUTATION—ACT OF JUNE 3, 1896.

KUEPPER *v.* TRIPP.

A homestead entry prematurely commuted is confirmed under the subsequent act of June 3, 1896, in the absence of any adverse claim arising prior to final proof, and where it appears that the entryman actually resided on the land for six months prior to commutation, and in good faith made his final proof.

Secretary Bliss to the Commissioner of the General Land Office, April 23, 1898.

(W. V. D.) (F. C. D.)

On April 22, 1891, Fred R. Tripp made homestead entry No. 6291, for the fractional NE¼ Sec. 10, T. 39 N., R. 6 E., Wausau, Wisconsin, land district; and on August 25, 1891, Tripp submitted commutation proof and final certificate issued thereon.

On November 22, 1894, your office held that the commutation proof was prematurely made and therefore canceled said cash certificate but the original homestead entry was allowed to remain intact, subject to future compliance with law.

On July 1, 1895, Harmon Kuepper filed an affidavit of contest against said entry alleging abandonment, change of residence and failure to settle on and cultivate the land.

After a hearing duly had, at which Tripp made default, the register and receiver rendered their decision finding that the entry had been abandoned and recommending cancellation of the same.

On July 20, 1896, upon appeal your office affirmed the decision of the local officers, and held the homestead entry of Tripp for cancellation, and from that decision Tripp has appealed to the Department, the same having been received in your office on September 22, 1896.

On November 2, 1896, a duly served application by Tripp, dated September 29, 1896, for a re-hearing, and for re-instatement and confirmation of his said cash entry, under act of Congress of June 3, 1896 (29 Stat., 197), entitled "An Act relating to commutations of homestead entries, and to confirm such entries when commutation proofs were received by local land officers prematurely," was received in your office, the same having been filed in the local office.

It is provided by the first section of said act of June 3, 1896—

that whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all

things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided*, that this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled when the lands made vacant by such cancellation have been re-entered under the homestead act.

On July 9, 1896 (26 L. D., 544), this Department approved a circular issued by your office construing said act of June 3, 1896, and it was further provided therein that

where the cash certificate in a case coming within the provisions of the statute has been canceled, it will be necessary for the parties in interest, if they desire the re-instatement of the same and the confirmation of the entry, to file in the proper district land office an application for such action.

With this requirement Tripp has complied. In his said application for re-instatement and confirmation of his cash entry, Tripp alleges that after having made final proof and receiving final certificate therefor, he sold said land to one S. M. Hutchinson. This fact affords no grounds for reversal of the decision holding the entry for cancellation. (Anders G. Hasselquist, 24 L. D., 351).

It appearing from the evidence herein, that Tripp submitted his final proof in good faith, showing settlement on the said land on December 20, 1890, and residence thereon from that date to time of making said proof; that the local officers erroneously received said proof and issued final certificate to the entryman; that no fraud is apparent in making said proof; that there are no adverse claims to the land in controversy that originated prior to final proof; that there is no other reason shown why title should not vest in the entryman "except that the commutation was made less than fourteen months from the date of homestead settlement;" and that the entryman in good faith actually resided six months on the land prior to commutation; it is apparent, therefore, that the said cash entry of Tripp is confirmed under the provisions of the said act of June 3, 1896, and the same should be re-instated and passed to patent, if otherwise satisfactory. It is so ordered. Your decision of July 20, 1896, is set aside. A re-hearing does not appear necessary. Although the said act of June 3, 1896, was in force at the date of said decision of your office, the case does not appear to have been considered thereunder.

INDIAN LANDS—PATENT—SECTION 2448 R. S.—CONVEYANCE.

OPINION.

In the case of a patent issued under a grant of land, made by a treaty in which no provision appears for the issuance of patent, the fact of the grantees' death prior to the issuance of patent is immaterial, for if title under said grant did not pass without patent, then the issuance thereof was in pursuance of law in the meaning of section 2448 R. S., and the title, under the provisions of said section, vested in the heirs, devisees, or assignees of the deceased patentee as if the patent had issued in his lifetime.

On application for the approval of deeds executed by alleged Indian heirs, proof of such heirship, and of the possessory right of the parties claiming under said conveyances to the land involved should be duly furnished before favorable action is warranted.

Assistant Attorney-General Van Devanter to the Secretary of the Interior
April 23, 1898.

By your reference of the 21st ultimo, I am in receipt of a communication from the Acting Commissioner of Indian Affairs, dated January 21, 1898, recommending approval by the President of certified copies of deeds executed by the claimed heirs of Angelique (a child of John Baptiste Pacquette, a Winnebago Indian), conveying to the grantees therein certain lands in Sec. 14, T. 9 N., R. 7 E., Mineral Point land district, Wisconsin. You request my opinion whether the sales evidenced by these certified copies of deeds should receive the approval of the President as recommended by the Indian Office.

It is claimed that section 14 was granted to Angelique by the United States under the fifth article of the treaty of August 1, 1829, (7 Stat., 323), with the Winnebago Indians. That article, so far as it is material to the present inquiry, is as follows:

And it is further agreed, that, from the land hereinbefore ceded, there shall be granted by the United States to the persons herein named, (being descendants of said Indians,) the quantity of land as follows, to be located without the mineral country, under the direction of the President of the United States that is to say: . . . . to John Baptiste, Pascal, Margaret, Angelique, Domitille, Therese, and Lisette, children of the late John Baptiste Pacquette, each one section; . . . . all which aforesaid grants are not to be leased or sold by said grantees to any person or persons whatever, without the permission of the President of the United States;

Pursuant to this provision of the treaty, section 14 was located as the land granted to Angelique, and, June 8, 1838, the selection was approved by the President. May 17, 1860, a patent was issued to Angelique wherein it is provided, following the terms of the treaty, that the land is "not to be leased or sold by the said grantee to any person or persons whatever without the permission of the President of the United States." The time of Angelique's death is not stated but it seems to have occurred a few years prior to the issuance of the patent. This fact, however, is not material and does not affect the present title to the land. At common law a patent issued in the name of a dead person was ineffectual to pass title and therefore inoperative and void (Davenport *v.* Lamb, 13 Wall., 418, 427), but by the act of May 20, 1836 (5 Stat., 31), now embodied in Section 2448 of the Revised Statutes, Congress modified the general rule by providing—

That in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall enure 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; and the provisions of this act shall be construed to extend to patents for lands within the Virginia Military District in the State of Ohio.

The treaty did not make express provision for the issuance of a patent and it may be that upon the location and identification, under the direction of the President, of the land granted, the grant became operative so as to vest in the grantee the full legal title to the section located. If, however, a patent was necessary for the transfer of the legal title, as is generally the case (Carter *v.* Ruddy, 166 U. S., 493), then one was issued in pursuance of law within the meaning of section 2448, and the patentee being dead at the date thereof the title to the land designated therein enured to and vested in the heirs, devisees, or assignees of the deceased patentee as if the patent had issued to her in her lifetime.

It appears by the papers submitted that two of the claimed heirs of Angelique (Amelia Legree and Joseph Legree), sold their respective interests in a portion of section 14, by deeds approved by the President September 21, 1865. Others of the claimed heirs appear to have made conveyances of their respective interests in portions of the section, but these conveyances do not appear to have ever received the President's approval, and certified copies thereof are now submitted for such approval.

There is no proof of the intestacy of Angelique nor of the heirship of those making these deeds nor of the possession and occupancy of the land under the deeds, by the guarantees therein. In the papers submitted it is suggested that probate or partition proceedings or both have been had in the local courts, wherein it was determined that Angelique died intestate and that the grantors in these deeds were her heirs, but certified or exemplified copies of these judicial determinations are not presented. If it were shown that Angelique died intestate, that the persons making the deeds, approval of which is now sought, were heirs at law of Angelique, and that those claiming under these deeds have been in the continuous and undisturbed possession and occupancy of the land, I am of the opinion that you should recommend the President's approval as requested. The papers now presented do not, however, justify that course. It is probable that the applicants for approval can supply further evidence upon the point suggested and I recommend that opportunity therefor be given them.

Approved,

C. N. BLISS,

Secretary.

CITIZENSHIP—NATURALIZATION—APPLICATION.

ANDREW J. BREZEE ET AL. *v.* HUTCHINSON'S HEIRS.

A presumption as to the continuity of alienage, when once shown, may be overcome, where no record of naturalization is found, by a presumption of citizenship growing out of a long continued exercise of the rights and duties of a citizen; and the son of an alien, in such case, is entitled to the benefit of such presumption of citizenship, where no record of the naturalization of the father during the minority of the son can be produced.

An applicant for the right to make homestead entry of a tract covered by a donation claim is not entitled, on appeal from the rejection of his application, to raise a question as to the citizenship of the donation claimant.

Secretary Bliss to the Commissioner of the General Land Office, April 23, 1898.

(W. V. D.) (H. G.)

Andrew J. Brezee and Thomas M. White severally appeal from the decision of your office of March 14, 1896, affirming that of the local office and rejecting the applications of said parties for homestead entries, covering the donation claim of William Hutchinson, now deceased, the application of Brezee being for fractional SW. ¼ of Sec. 4, and fractional W. ½ of Sec. 9, T. 7 N., R. 2 W., W. M., "or all the east half of (the) William Hutchinson donation claim," and the application of White being for the fractional SE. ¼ of Sec. 5, and the fractional E. ½ of Sec. 8, T. 7 N., R. 2 W., "or all the west half of (the) William Hutchinson donation claim," within the limits of the Vancouver, Washington, land district.

The specific ground of appeal in each case is that "William Hutchinson (now deceased) had not in his lifetime complied with the naturalization laws, as to becoming a citizen, or in declaring his intention to become a citizen," as the claimant stated in his donation notification for the tracts involved, that he was born in England in the year 1819, and as there is no record proof of any kind to show that the donation claimant had made any declaration to become a citizen of the United States, or had become a citizen thereof. It is further asserted that final proof has been made by the administrator of the estate of William Hutchinson, deceased, and therein no attempt is made to show that said decedent was ever a citizen or had declared his intention to become a citizen, and that it must be presumed, in the absence of such proof, that he was not a citizen. The appeals further severally state that a protest is now pending by the above applicants against the issuance of a patent for said donation claim.

The local office rejected said applications on the day each was presented, on account of their conflict with the donation claim of Hutchinson, and your office affirmed such action, but required supplementary proof as to the citizenship of Hutchinson.

In another case, that of Christopher Kalahan *v.* William Hutchinson, *et ux.*, deceased, decided by the Department February 25, 1896 (unreported), the decision of your office of January 7, 1895, was affirmed.

In that case, your office held that the charge of abandonment in the affidavit of contest was disproved, and that as to the charge of alienage of the donation claimant the contestant was not interested, and had no preference right of entry, nor any legal right to have said donation claim canceled, even if it should appear that Hutchinson was not qualified to make said entry, as the question of cancellation is one between the said donation claimants and the government alone. The case of Platt *v.* Vachon, 7 L. D., 408, is cited in support of this ruling. The Department held on affirmance that the allegation as to alienage had not been originally a ground of contest, and the contestant had no right to complain of that lack of qualification, as he had elected at the hearing to rest his rights upon his affidavit of contest.

As to the matter of citizenship in that case, it appeared that William Hutchinson, the claimant, was born in England in 1819, and when four years of age came to the United States, where his father settled at or near Elizabethtown, New Jersey, and subsequently, in about 1832, moved with his family to the State of Illinois, where he (the father) purchased and held real estate and continued to live until his death. He claimed to be a full citizen of the United States, and voted at all elections. His son, the donation claimant, continued to reside with his father until he arrived at his majority, when he purchased land in Wabash county, Illinois. He married thereafter, removed to Oregon, and from thence to Washington, and settled upon the tracts in controversy in 1855, remaining there for ten years, six years in excess of the time required for residence upon a donation claim, and then removed to Oregon, where he died in the year 1893. His first wife died, and he afterward married Amanda Hutchinson, who is now his widow. He voted at all elections, served as a member of the Territorial legislature of Washington in 1858, and in 1889 was county commissioner for Union county, Oregon, and died in the honest belief that he was a citizen of the United States, understanding that his father had been naturalized prior to his majority. His children are native citizens, and one of them is now acting as administrator of his estate. In the case of Hauenstein *v.* Lynham, 100 U. S., 483, it was remarked, in the course of the opinion, that where a citizen of Switzerland removed from his native country to the State of Virginia, where he lived and acquired property in controversy, which he had a right to hold under the terms of the treaty between the United States and Switzerland, and where there was no proof that he denationalized himself or ceased to be a citizen and subject of his native country, that his original citizenship was presumed to have continued. But in that case, except as to the acquisition of property, it does not appear that Hauenstein had exercised any of the duties of citizenship. In the case of Boyd *v.* Thayer, 143 U. S., 135, 180, where the facts in the case are somewhat similar to those of the case at bar, the court said:

> It is true that naturalization under the acts of Congress known as the naturalization laws can only be completed before a court, and that the usual proof of naturalization is a copy of the record of the court.

But it is equally true that where no record of the naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen.

It will therefore be seen that the presumption of continuity of alienage, when once shown, is overcome by the presumption of citizenship by the conduct of the father of the claimant in exercising for so many years the duties of citizenship, in case no record of his naturalization while the son was a minor can be found.

However, the applicants are in no position to contest the citizenship of the donation claimant, as at the time of their application there existed of record the donation notification of William Hutchinson, the decedent.

It is incumbent upon the heirs of the decedent and the administrator of his estate to show that the claimant was a duly naturalized citizen, or that his father was naturalized during the minority of the son, if such record can be produced. If it can not be obtained, owing to lapse of time, the destruction of the records, or the failure to preserve a record of such naturalization proceedings, or from any sufficent cause, the facts already established may be deemed sufficient to establish the presumption of the naturalization of the elder Hutchinson while his son, the claimant, was a minor. Some showing must be made, however, that the record of the naturalization of the elder Hutchinson, the father of the donation claimant, can not now be produced.

The heirs of the claimant do not appeal from the decision of your office requiring this supplementary final proof, and as to them the case must be considered final, particularly as the decision of your office calling for such proof is correct.

The decision of your office rejecting the applications of Brezee and White is affirmed.

COMMUTATION OF OKLAHOMA HOMESTEADS—ACT OF APRIL 11, 1898.

CIRCULAR.

Commissioner Hermann to Registers and Receivers, Guthrie and Oklahoma, Oklahoma, April 25, 1898.

Your attention is called to the provisions of the act of Congress, approved April 11, 1898 (Public No. 60), entitled "An Act extending the right of commutation to certain homestead settlers on lands in Oklahoma Territory, opened to settlement under the provisions of the Act entitled 'An Act to ratify and confirm the agreement with the Kickapoo Indians in Oklahoma Territory, and to make appropriations for carrying the same into effect.'"

Persons desiring to perfect their entries prior to the expiration of five years from date of their entries under the provisions of the above act, will be required to give notice of their intention so to do, the same

as in five year cases and, also, at time of making proof, file their applications to purchase (form 4–001). Such applications the register will retain in his office. See Sec. 2355 R. S.

A cash certificate and receipt (forms 4–189 and 4–131 respectively) will be issued, if the proof is satisfactory and the same will be reported on the regular monthly abstracts of lands sold. The proofs and final affidavits in such cases, will be made on the regular homestead blanks modified as the circumstances require, and in each case an affidavit (form 4–102 c), changed so as to refer to the above act, must be furnished.

Approved.

C. N. BLISS,
Secretary.

(PUBLIC—NO. 60.)

AN ACT Extending the right of commutation to certain homestead settlers on lands in Oklahoma Territory, opened to settlement under the provisions of the Act entitled "An Act to ratify and confirm the agreement with the Kickapoo Indians in Oklahoma Territory, and to make appropriations for carrying the same into effect."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of commutation is hereby extended to all bona fide homestead settlers on the lands in Oklahoma Territory, opened to settlement under the provisions of the Act of Congress entitled "An Act to ratify and confirm an agreement with the Kickapoo Indians in Oklahoma Territory, and to make appropriations for carrying the same into effect", approved March third, eighteen hundred and ninety-three, and the President's proclamation thereon, after fourteen months from the date of settlement, upon full payment for the lands at the price provided in said Act.

Approved, April 11, 1898.

ALASKAN LAND-SURVEY—IMPROVEMENT—OCCUPANCY.

G. P. HANSEN.

On the survey of a tract of Alaskan land with a view to the purchase thereof under section 12, act of March 3, 1891, articles of personal property should not be included in the estimated value of improvements on said land.

The occupancy of land solely for domiciliary purposes, by one who is engaged in the business of fishing, is not an occupation of the land for the purposes of "trade or manufactures" within the meaning of said act.

Secretary Bliss to the Commissioner of the General Land Office, April 26, 1898.
(W. V. D.) (W. M. B.)

Clinton Gurnee, as attorney for G. P. Hansen, claimant, appeals from your office decision of May 14, 1895, wherein was suspended—with suggestion of an emendation thereof as therein described—survey No. 62, executed June 14, 1894, by Clinton Gurnee, Jr., U. S. deputy surveyor, and which embraces a tract containing 97.49 acres, situate on Ugashek river, western shore of the Alaskan Peninsula; used and occupied by the claimant, according to the report of the deputy surveyor, as a fishing ground or station.

Your letter transmitting the papers in the matter of survey No. 62

gives the name of appellant as "H. P. Hansen," while it appears to be G. P. Hansen in the decision appealed from, as also from the field notes and plat returned by the deputy who was employed by appellant to make the survey. It will be presumed that the deputy gave the name correctly. At any rate, the survey can be considered and disposed of regardless of appellant's correct name, as his claim can be sufficiently identified by the number of the survey, the quantity and locality of the land embraced therein, and the deputy who did the work.

The survey was suspended by your office decision upon the ground that it was not executed conformably to law and regulation with respect to square form, and for the further reason that more land was included in the survey than was occupied by the claimant for his business.

An examination of the field notes and plat returned by the deputy shows that the survey embraced a parcel of land considerably longer than broad. It also appears that the front or shore line of the survey could have been shortened and the survey extended further inland and so executed as to embrace a tract of land more nearly in square form than the one included in the original or existing survey. That more land is claimed than is used or occupied by appellant for the purpose of the business engaged in is shown upon the face of the returns by the deputy.

If these were the only facts in the case your office would have committed no error in suspending the survey subject to emendation as suggested.

There are facts, however, disclosed by the record submitted which would appear to warrant an absolute rejection or suspension of the survey without the right, on the part of appellant, to an emendation thereof. The principal among these is the fact that the land included in the survey does not appear to be used and occupied for the purpose named in section 12 of the act of March 3, 1891 (26 Stat., 1100), under the provision of which appellant seeks to purchase and enter the land in question. Said section reads as follows:

SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre.

At the date of the passage of the said act of March 3, 1891, a number of individuals, associations and corporations were using and occupying certain public lands in Alaska for the purpose of trading with the natives and for manufacturing purposes. Trading posts and manufacturing plants had been established upon said lands by the erection thereon at large cost—said cost amounting in some instances to $50,000, $60,000 and $75,000—the necessary buildings and other improvements needed for the conduct of mercantile transactions, for the

salting and canning of salmon and other fish for export trade, and for the manufacture of fish oil, and other commodities. It was the purpose of Congress to enable those individuals, associations, and corporations who had, in good faith, improved any of the non-mineral public lands in Alaska, not reserved, or occupied by the natives of said territory, and who were using and occupying the same—or those who might thereafter be in possession and occupation of said lands—at such time for the purpose of "trade or manufactures," to acquire title thereto, and to that end the legislation set forth in section 12 of the said act of March 3, 1891, was enacted.

Whether the land claimed by the appellant, as embraced in survey No. 62, is used and occupied in good faith by appellant for the purpose prescribed by law must be determined by the facts disclosed by the record.

Before entering upon a consideration of that particular question, however, it may be well to observe at this place that the deputy states in his report, attached to his field notes, that this survey was executed in pursuance of a request of the claimant G. P. Hansen, made while they were upon the ground. Hence it follows that the said survey was not made in pursuance of an application to the ex officio surveyor-general, as is required by paragraph 1 of the rules and regulations of June 3, 1891 (General Land Office Circular, p. 104). A survey executed under such circumstances is made without the proper authority, and is not, therefore, a lawful survey. See case *in re* Alfred Packennen (26 L. D., 2 12).

In numerous instances, however, where surveys of this class have been made in the absence of the required application, and in contravention of law and regulations as to "square form," your office has *suspended* said surveys with recommendation, as in the present case, of an emendation thereof in conformity with the requirements of law, and such practice of your office has so far been sustained by this Department where the character and use made of the improvements located upon the land sought to be purchased bore evidence of the fact that the land was occupied for the particular purpose required by law.

The application, required to be verified by affidavit, not having been made for this survey, appellant's relation to the land surveyed at his verbal request was not shown prior to the execution of the survey; nor is there with the papers in the case any affidavit made by him subsequent to the survey which establishes his relation thereto, or which shows the "character, extent, and approximate value of the improvements" thereon.

Recurring to the subject respecting the purpose for which appellant occupies the land, and with regard to the improvements thereon, it may be stated that no evidence is found in relation thereto, save that furnished by the deputy's returns. In his report which constitutes a part of his said returns the deputy says:

He (Hansen) has improvements which I estimate did not cost less than $1500.00, being a frame lodging and store house filled up with bunks, stove and utensils,

piling for handling fish, boats, nets, etc.; he is engaged in catching salmon for the Bartlett Bay Packing Co., and employs a number of employees.

In his final oath, attached to his field notes, the deputy states that the claimant's improvements "consist of a house twelve by fourteen feet, nets, boats, etc." The plat of the survey shows the only improvement upon the land to be the small fishermen's cabin twelve by fourteen feet in dimensions.

As will be seen, the deputy states that he estimates the value of appellant's improvements to be not less than $1500.00. Boats, nets, piling, and other personal property, however, which the deputy regards as part of the improvements upon the land, and the value of which enter into his total estimate, can in nowise be considered as improvements upon the land included in the survey. The only improvement thereon, which can be regarded as such, consists of the referred to cabin, and structures of the dimensions of the said cabin have been erected at different points on the Alaskan coast, as shown by the returns of other surveys, at a cost of from one hundred to two hundred and fifty dollars.

All the material facts disclosed by the record have been fully set out herein and it does not appear therefrom, as seen, that a trading post or manufacturing plant has been established upon the land sought to be purchased and entered by appellant, or that there is upon the land any salting or canning establishment whereat salmon or other fish are prepared for domestic or export trade. It may be stated, in short, that no business of any kind is carried on upon the land.

The only business engaged in by appellant, according to the report of the deputy, consists in catching fish in waters in that vicinity for the Bartlett Bay Packing Company, while it appears that he uses and occupies the land in question for domiciliary purposes, and the storage, perhaps, of articles of personal property, in the way of nets and seines, in the small cabin used as a lodging place.

Engaging in the business of fishing for a livelihood or profit by one who seeks to purchase and enter land under the provision of section 12 of the act of March 3, 1891, where such land is used and occupied, as in the present case, only for the purpose of a domicile, will not be deemed an occupation of the land for the purpose of "trade or manufactures" within the meaning of said act.

In view of the facts and reasons herein contained survey No. 62 is rejected absolutely, and the decision of your office—wherein the same was suspended subject to emendation—is accordingly modified.

TELEGRAPH LINE—RAILROAD RIGHT OF WAY.

POSTAL TELEGRAPH CABLE CO.

All railroads in operation are by statutory provision "post roads," and as such their right of way is subject to the use of any telegraph company which accepts the provisions of the act of July 24, 1866, and desires to use such right of way for its line in such manner as will not interfere with the operation of the road.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, April 27, 1898. (G. B. G.)

By your reference of April 16, 1898, I am asked for an opinion as to the right of the Postal Telegraph-Cable Company of Texas to erect a telegraph line along the right of way of the Missouri, Kansas and Texas Railway Company, through the Indian Territory.

Sections 5263 and 5268 of the Revised Statutes are as follows:

SEC. 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

SEC. 5268. Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law.

I note, in the first place, that questions of administration, arising under procedure looking to the appropriation of the privileges conferred by section 5263, are by section 5268 brought within the jurisdiction of the Postmaster-General. There is therefore no question submitted as to the legality or regularity of the steps taken by said Postal Telegraph-Cable Company toward the establishment of said line.

The question here is as to the application of section 5263 to lands within the geographical limits of the Indian Territory, and more specifically to the lands covered by the right of way of said railroad company across said Territory.

Whether lands in the Indian Territory are part of the public domain of the United States within this section need not be discussed.

By section 3964 of the Revised Statutes "all railroads or parts of railroads which are now or hereafter may be put in operation" are established post-roads; and the right to maintain and operate lines of telegraph, "over and along any of the military or post roads of the United States," does not depend upon whether or not such road is upon the public domain.

The grant is not limited to such military and post-roads as are upon the public domain, but "evidently extends to the public domain, the military and post roads and the navigable waters of the United States. These are all within the domain of the national government, to the extent of the national powers, and are, therefore, subject to legitimate

congressional regulation." Pensacola Telegraph Company *v.* Western Union Telegraph Company (96 U. S., 1–11).

It can make no difference therefore whether the right of way of the Missouri, Kansas and Texas Railway Company across the Indian Territory is upon the public domain, nor is it material by what tenure it is held. If that road is in operation, it is a post-road, and as such its right of way is subject to the use of any telegraph company, duly incorporated, which accepts the provisions of the act of July 24, 1866, 14 Stat., 221 (Revised Statutes, sections 5263 to 5268, inclusive), and desires to use such right of way for its line in such manner as will not interfere with the operation of the road. See United States *v.* Union Pacific Railroad (160 U. S., 1–49).

I am therefore of opinion, if the telegraph company in question is entitled to the benefits of said act, it will have the right to make the necessary agreements with the railroad company for the construction of a telegraph line upon the right of way.

I express no opinion as to questions of condemnation and compensation, in the event such agreement can not be made. The federal law is paramount as to the location and right of way of telegraph lines, but the statute makes no provision for condemnation. In the case of Postal Telegraph Cable Company *v.* Morgan's, La., Co. (21 So. Rep. 183), it was held that State process might be resorted to for that purpose. See Gould and Tucker's notes on the Revised Statutes, Vol. 2, page 624.

This is essentially a question for the courts, and calls for no administrative action.

Approved,

C. N. BLISS,
Secretary.

MINING CLAIM—KNOWN LODE WITHIN PLACER—PROTEST.

ELDA MINING AND MILLING CO. *v.* MAYFLOWER GOLD MINING CO.

The protest of a lode claimant against a placer entry on the ground that said entry embraces lodes or veins known to exist at the date of the placer application, presents no question for departmental determination, where it appears that the protestant did not adverse said application, and that said application did not include any lodes or veins, for, under the terms of the statute, all lodes or veins known to exist at date of placer application, and not applied for at that time by the placer applicant, are excepted from the placer patent, and such exception is expressly recognized in the language of the patent; nor does a protest in such a case call for a determination as to the extent of the surface area that will be so excepted from said patent.

Secretary Bliss to the Commissioner of the General Land Office, April 27, 1898.
(W. V. D.)

Due consideration has been given to the appeal of the Elda Mining and Milling Company from your office decision of July 28, 1897, dis-

missing that company's protest against the inssuance of patent to the Mayflower Gold Mining Company for Beaver Springs placers Nos. 1 and 2, Cripple Creek mining district, Colorado.

Application for patent for both placers was made July 13, 1895, and mineral entry thereof (No. 697, Pueblo, Colorado,) allowed October 12, 1895. April 26, 1896, the Elda Company filed a protest against the issuance of patent upon the placer entry as allowed, alleging, substantially, that said company is the owner of the Jacob, Jr., Lizzie and Luck Sure lode mining claims, which conflict with said placer claims, and that at the time of the application for the placer patent each of said lode claims was duly located and recorded, and embraced a known lode or vein. The protestant asks that the placer entry be canceled to the extent of the conflict with these lode claims.

May 11, 1896, your office ordered a hearing, which resulted in a decision by the local officers recommending the dismissal of the protest, which, on appeal, was affirmed by your office July 28, 1897.

The placer claimant did not mention or claim either of said lodes or veins in its application for the placer patent, and the lode claimant did not adverse that application nor is it now making application for patent to the lode claims.

Lodes or veins known to exist within a placer claim at the date of the application for the placer patent, and which are not applied for at that time by the placer applicant, are by operation of law excepted from the placer patent, and a clause fully recognizing this exception is inserted in all placer patents without previous inquiry by the land department into the existence of any such lode or vein.

Whether this exception extends to the entire surface area of the protestant's said lode claims (see Pike's Peak Lode, 10 L. D., 200, 203), or whether by reason of protestant's failure to adverse the application for the placer patent the exception embraces only the known lodes or veins and twenty-five feet on each side thereof (see Shonbar Lode, 1 L. D., 551; Id., 3 L. D., 388; Becker *v.* Sears, on review, 1 L. D., 577), or only the known lodes or veins and so much of the adjoining surface area as is necessary to the occupation, use, operation and enjoyment of the lode claims by their owner (see Aurora Lode *v.* Bulger Hill and Nugget Gulch Placer, 23 L. D., 95–105), need not now be considered or determined because, if in fact such lodes or veins were known to exist at the time of the application for placer patent, the exception, whatever its extent, is embraced and included in the reservation which forms an essential part of the terms of a placer patent, both by operation of the statute making the exception and by the recognition of the exception in the express language of the patent.

The rights of the protestant as a lode claimant, whatever they may be, will not be affected by the issuance of a patent upon the placer entry as allowed, but will be preserved and protected as fully as if now determined and specifically excepted from the operation of that patent,

and the subsequent issuance of lode patents to the protestant covering its rights to the known lodes or veins, if there were such at the date of the placer application, will not be prevented or hindered by the placer patent. (South Star Lode, on review, 20 L. D., 204).

It is therefore unnecessary at this time to pass upon the matters alleged by protestant, and for the reasons herein given the dismissal of its protest by your office is affirmed.

WEISNER *v.* CLEM.

Motion for review of departmental decision of March 3, 1898, 26 L. D., 301, denied by Secretary Bliss, April 27, 1898.

SURVEY OF MINING CLAIM—COMPENSATION OF SURVEYOR.

RICHARD G. ANDERSON.

In case of an order made for an amended survey of a mining claim there is no authority for requiring the deputy mineral surveyor to execute such survey without further compensation.

Secretary Bliss to the Commissioner of the General Land Office, April 27, 1898.

(W. V. D.) (G. B. G.)

Richard G. Anderson, a deputy United States mineral surveyor, has appealed from your office decision of February 18, 1898, whereby he is required to make an amended survey, "without expense to the claimant," of the Rattler Lode claim No. 220, Huron, South Dakota, to describe its conflict with the excluded Chief of the Hills No. 2 lode claim, lot No. 221.

Counsel for James Milliken, claimant for said Rattler Lode Claim, has filed a paper with the case suggesting that if this appeal by the deputy mineral surveyor is proper practice, parties interested in the final adjustment of title to the property should not be subjected to the delays incident to the regular course of appeals from decisions of your office, and asks that the matter be disposed of at once.

This presents a proper case for immediate action, and the case will be considered as special.

The action of your office in ordering a resurvey of public lands is a matter of administration, with which the Department will not ordinarily interfere. There does not appear to have been any abuse of discretion in this regard in the present case. It is said in the decision appealed from that the corners of said Rattler Lode Claim have not by previous surveys been correctly ascertained, and that until this is done, the conflicts of the Rattler Lode with lot No. 221 can not be properly described. No sufficient reason is urged to cast doubt upon the correctness of this statement.

It is submitted, however, that if there are inaccuracies and lack of definiteness in the survey made by Anderson, such defects are not due to any fault of his, but to a previous erroneous survey made by another surveyor; that his instructions were carried out in a proper manner, and that he ought not to be required to make another survey without compensation.

The facts shown by the record are too meager to authorize a finding upon this contention.

It is believed, however, that the order of your office, in so far as it directs a resurvey to be made without cost to the mineral claimants, is without authority of law.

Section 2334 of the Revised Statutes provides that:

> The expenses of the survey of vein or lode claims * * * * 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 surveyor to make the survey.

Under this statute the mineral claimant may employ any deputy mineral surveyor to do his field work. He may also contract on the basis of such compensation as may be agreed upon between the contracting parties, subject only to the limitation of a maximum charge which is fixed by the Commissioner of the General Land Office. It therefore is a private contract between the parties. If the claimants have been injured by the incompetent or inaccurate work of Anderson, they are not without remedy on the contract. Inasmuch as he is an officer of the United States, proper administrative action on the part of your office would seem to be a due consideration of any charge of official misconduct which may be made against him in connection with this matter, and after giving him a full and fair opportunity to be heard thereon to make such recommendation to the Department as the circumstances of the case appear to warrant.

Your office decision is modified, in so far as it requires Anderson to make the survey in question without compensation, and the case remanded for proceedings consistent with the views hereinbefore expressed.

PRIVATE CLAIM—RELINQUISHMENT—ADJUSTMENT OF BOUNDARIES.

JOHN HOUSTON M. CLINCH.

In the adjustment of the interests of the government in a confirmed private claim, where a portion of said claim has been relinquished and other land taken in lieu thereof, the boundary lines of said grant, as judicially approved in the final decree of confirmation, should be recognized as determining the true extent of the grant, as between the grantee and the government.

The decision of July 13, 1896, 23 L. D., 130, modified.

Secretary Bliss to the Commissioner of the General Land Office, April 27, 1898.

(W. V. D.) (E. F. B.)

This is a petition, filed by John Houston M. Clinch, asking for a reconsideration and modification of the decision of the Department of July

13, 1896 (23 L. D., 130), which was re-affirmed on motion for review, July 12, 1897.

The decision complained of was rendered upon the appeal of said John Houston M. Clinch from the decision of your office of February 3, 1887, refusing to issue to him, as executor and heir of Duncan M. Clinch, assignee of George J. F. Clarke, a patent for a tract of land known as the mill grant of George J. F. Clarke, Gainesville land district, Florida, upon the ground of excess of area in the survey.

This grant was located and surveyed by Burgevin, the Spanish surveyor-general, in three parts—one of eight thousand acres on the west shore of the St. John's river, at the place named in the grant; one of five thousand acres at a place called Lang's Hammock; and one of three thousand acres at a place called Cone's Hammock.

The superior court for the eastern district of Florida, under the act of May 23, 1828 (4 Stat., 284), confirmed the grant according to the three separate surveys of Burgevin, but upon appeal the supreme court of the United States, while affirming so much of the decree as adjudged the claim of the petitioner to be valid, and so far as it confirmed the same to the extent and agreeable to the boundaries of the survey of Burgevin of the eight thousand acres, reversed it so far as it confirmed to the petitioner the lands embraced in the two other surveys, and directed the court below to cause the remaining eight thousand acres to be surveyed on vacant lands within the limits of the grant, and that the title to the land so surveyed be confirmed.

In conformity with this mandate, the superior court for the eastern district of Florida ordered that said eight thousand acres be surveyed by John Lee Williams on any land then vacant within the limits of the grant.

A survey was made in accordance with said order, and the plat of survey was returned to the July term, 1835, of said court, which was examined and approved, and thereupon the court, November 2, 1835, decreed:

> That the said tract of eight thousand acres is hereby confirmed to the said George J. F. Clarke, as part and parcel of the sixteeen thousand acres originally granted to him at that place.

The superior court of East Florida had ample and complete jurisdiction to ascertain and determine the validity, the locus and the extent of the grant, and having by its decree confirmed the same according to the survey of Williams made under its order, which upon examination was found to be correct and was approved, its action decreeing confirmation of the grant according to the boundaries of such survey was a final determination that the lands embraced within such limits were never public lands of the United States, and there is no authority to fix the limits of said grant by any other survey. Hence, the Department in said decision of July 13, 1896, held that it was the duty of the Department in 1835 to issue a patent for all the land included

within the boundaries of the Williams survey, "and such is yet the duty of this Department, unless that duty has been modified by subsequent events.

After the decision of the supreme court in said case, Duncan L. Clinch and John H. McIntosh purchased the interest of Clarke in the mill grant, and thereafter an act was passed by Congress, which was approved July 2, 1836 (6 Stat., 676), authorizing the said Duncan L. Clinch and John H. McIntosh, assignees of George J. F. Clarke, to purchase at the minimum price for which public lands are sold the three thousand acres in Cone's or Moody Hammock as surveyed by Burgevin, upon which they had made their settlements, in lieu of the *same quantity* of land confirmed to them by the decree of the supreme court.

The terms of the act having been complied with, Duncan L. Clinch, who had acquired all the right, title and interest of McIntosh, was allowed to purchase said tract of land, amounting to 3,008.34 acres, and received patent for the same, dated March 10, 1845, but the land relinquished to the United States in the mill grant was not at that time nor has it since been segregated and set apart. It was therefore held that the relinquishment by Clinch of three thousand and eight and thirty-four one-hundredths acres in the mill grant diminished the grant to that extent, and your office was directed to cause to be surveyed and cut off from said mill grant 3,008.34 acres, exclusive of the one thousand acre tract (another grant which had been included within the limits of the Williams survey), by locating and marking a line which appears upon the official maps as the southern boundary of said mill grant, and to cause the public surveys to be adjusted and closed upon the new line so located and marked.

In view of the fact that the government neglected to have said relinquished land segregated and set apart at the time the patent to Duncan L. Clinch was issued for the 3,008.34 acre tract, and closed the government surveys upon said grant without cutting it off, after holding the relinquishment for more than twelve years, the petitioner asks that the order of the Department may be so modified as not to include within the area to be segregated lands which he has sold and conveyed by warranty deeds.

If the relinquishment executed by Clinch did not designate a particular tract of land that could be identified, but merely relinquished his right, title, claim and interest in a quantity of land in the mill grant equal to the land purchased from the United States, such relinquishment would convey to the United States no title to any particular part of the mill grant, but it would only invest it with an equitable interest in the entire grant, to the extent of the land purchased by Clinch, under the act of July 2, 1836.

Under authority of an act of Congress, approved June 28, 1848 (9 Stat., 242), directing the surveys of private claims or grants in Florida

which had been duly confirmed, David H. Burr was appointed by the Commissioner of the General Land Office a deputy surveyor, and assigned to the survey of this grant. It was not contemplated that another survey should be made of this grant, except so far as to retrace the lines of the survey according to which it was confirmed, and for the purpose solely of closing the lines of the public surveys upon the grant. The Williams survey was a finality, and the government had no authority either to diminish or enlarge the grant by making a different survey.

Prior to the commencement of the surveys made under the authority of said act, notices were issued requesting all persons holding claims to any of said grants, or who may have knowledge of the lines and corners of their respective claims, to produce such title paper and evidence of locality as may be in their power to produce.

Acting under such notice, Williams, who made the survey of this grant under the order of the court, and who had since become the representative of Duncan L. Clinch, conferred with Burr, and pointed out the corners of his (Williams') survey. Burr objected to the line as run by Williams, and began a new line several degrees farther north, against the protest of Williams. The survey of Burr was, however, approved, and all the land lying south of and adjacent to the south line of the Burr survey has been disposed of as public land.

It seems to be unquestioned that Burr in making the survey of 1849, closing the lines of the public surveys upon this grant, did not retrace the lines of the Williams survey, and he had no authority to make any other survey.

In the decision of your office of February 3, 1887, it is said:

> The southerly line of this survey of 1849 runs from a place designated as "Narrow Bay" on a course north 72° west, 521 chains to Buckley Creek, or 36 chains shorter than Williams' south line.
>
> Commencing at the Narrow Bay, designated on the survey of 1849, and using the courses and distances given by said Williams' survey, I find that the north line S. 68° E. 510 chains, will not reach the St. Johns river by about 45 chains; and only barely touches the northeast corner of said 1000 acre tract; but if this north line is carried far enough south so as to cut the 1000 acre tract, as shown upon said Williams plat, and the other lines of Williams followed, the north line will be some distance south of Picolata; and the Narrow Bay found by Williams will lie much further south than the Narrow Bay shown by said survey of 1849.
>
> The field notes of the United States survey of the 1,000 acre tract show that Williams pointed out to the surveyor the northeast corner of the 1,000 acres as found by him; and the surveyor adopted this corner as his beginning corner, thus showing that he retraced the lines made by Williams of this tract; and if he had found Narrow Bay at the point where Williams located it, his survey would have included a much larger area than the present United States survey contains.

This fact was evidently known by the then owner of the mill grant at the time of the survey, when he, through Williams who represented him, objected to the line as located by Burr. But he acquiesced in it, and can not now be heard to deny the validity of the Burr survey, or

that it was a correct retracing of the Williams line, so far as it affects the right of the purchasers, or their transferees, of the lands disposed of by the government, south of said line, as public lands.

But while the petitioner would be estopped from denying that the survey of Burr in 1849 was a correct retracing of the Williams' line, so far as it might affect the right of purchasers from the government of lands lying south of said line, he would not he estopped from asserting his right to have the southern line of the Williams survey re established as the southern boundary of the grant, for the purpose of adjusting the right and interest of the government growing out of the relinquishment of Duncan L. Clinch to an interest in all the lands within the limits of the mill grant as surveyed by Williams, to the extent of 3,008.34 acres.

The embarrassing situation in which this petitioner is now placed is due in a great measure to the failure of the government to adjust its interest in the grant when the public surveys were closed upon it. He came into possession of this property after said survey, having purchased more than one half of it in 1880, over thirty years thereafter.

Upon further consideration of this application, the Department is satisfied that the decision of July 13, 1896, should be so far modified as to direct a different mode for the adjustment of the right and interest of the government in said grant by excluding all lands that may have been sold and which are within the limits of the original survey by Williams. To this end, a resurvey of the grant should be made, so far as may be necessary to locate the southern line as run by Williams, for the purpose of ascertaining what lands, if any, lying north of the southern line as surveyed by Williams, have already been disposed of by the United States as public lands, and after deducting such amount from the 3,008.34 acres, being the interest of the United States, the residue of said 3,008.34 acres will be cut off from said grant, taking in such limits as will include the full balance due, excluding therefrom all land which may have been sold and conveyed by said John M. Houston Clinch.

MINING CLAIM—PROTEST—LOCATION—EXPENDITURES.

AMERICAN CONSOLIDATED MINING AND MILLING CO. *v.* DE WITT.

A protestant, who fails to adverse an application for a lode patent, will not thereafter be heard on a charge that the claimed discovery of the lode applicant is in fact on land appropriated by the prior location of the protestant, or that the labor and improvements shown by said applicant should be credited to the protestant.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1898.

(W. V. D.) (P. J. C.)

November 7, 1894, E. G. De Witt made application for patent for the Maryland lode mining claim, survey No. 8875, Pueblo, Colorado, land district, and notice of the application was duly given by posting and

publication, but no adverse claim was filed during the period of publication. Mineral entry of the claim has not yet been allowed.

March 27, 1895, the American Consolidated Mining and Milling Company filed a protest alleging that the Maryland is not a valid mining location, in that the discovery therein was on the Orbit lode claim, a prior and subsisting location, and not upon unappropriated public land; that the Orbit vein is the only one discovered within the limits of the Maryland; that a large part of the improvements and labor upon the Maryland claim were placed there by lessees of the protestant under a lease of the Orbit, and were not placed there by the applicant for the Maryland patent nor by his grantors; and that a large part of the Maryland is within the Orbit, which is the property of the protestant under a prior location.

A hearing was had before the local officers, and they found the evidence not sufficient to warrant the rejection of the Maryland application. On appeal your office affirmed that decision, whereupon the protestant prosecutes this appeal, alleging, first, that five hundred dollars' worth of labor has not been expended, or improvements made, upon the Maryland by the applicant for patent thereto or by his grantors; and, second, that the Orbit was a valid and subsisting mining claim at the time of the location of the Maryland, and therefore the area in conflict was appropriated and was not subject to further location.

Whether the ground which includes the Maryland discovery is a part of the Maryland, or a part of the Orbit, and whether the Maryland is the superior claim to the ground in conflict, are questions which were open to determination by adverse proceedings in the local court and which are now determined adversely to protestant's contention, by reason of its failure to adverse the Maryland application (Section 2325, R. S.).

It appears that the Maryland claim and the Orbit claim were both leased and bonded to John P. Young, by their respective claimants, in April, 1894, the lease of the former antedating the lease of the latter by twelve days. These claims overlap, and the discovery shaft of the Maryland is in the ground in conflict. In his lease of the Maryland, Young agreed to "enter upon said mine and work and develop the same in good and workmanlike manner," and "to commence work thereon within fifteen days from the date hereof and to prosecute work diligently and continually during the term of this lease," and his lease of the Orbit provided that he should "work at least twenty shifts of two men each in the development and improvement of said property for each and every month during the term of this lease." The development work under these leases was done by Young, as lessee, in the Maryland shaft. This labor and improvement are credited to the Maryland by the surveyor-general's certificate and by your office decision, but the protestant insists that this was error. It being settled under the statute that the Maryland claim to the area in conflict is the bette

one, it follows that such expenditure in labor and improvements was made upon the Maryland by the lessee thereof, under a lease providing therefor, and that the owners of the Maryland and not the owners of the Orbit, are entitled to the credit thereof. Young, knowing of the conflicting claims to the land, took leases from both claimants to fully protect himself in the premises, but this will not deprive the Maryland claimants of the benefits of the labor and improvements which they had a right to exact under the terms of their lease.

Your office judgment is therefore affirmed.

RAILROAD GRANT—MINNESOTA ACT OF MARCH 1, 1877.

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

(On Review.)

The act of March 1, 1877, of the State legislature of Minnesota, providing that the railroad company taking the benefits thereof should not acquire any title or right to any land to which "legal and full title" had not theretofore been perfected, and to which there was an existing settlement claim, contemplated in the use of the words "legal and full title," a perfect or complete title which could not be successfully assailed; hence a conveyance of lands by the State to the company in excess of the amount to which the company was then entitled, and prior to the passage of said act, is no bar to the State's reconveyance to the United States of a tract embraced therein for the benefit of a settler as provided by said act.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1898.

(W. V. D.) (F. W. C.)

Consideration has been given to the motion forwarded with your office letter of November 12, 1895, filed on behalf of the St Paul, Minneapolis and Manitoba Railway Company, for review of departmental decision of September 28, 1895 (21 L. D., 254), in the case of Ole Ellingson *v.* St. Paul, Minneapolis and Manitoba Railway Company, involving the NW¼ of Sec. 15, T. 132 N., R. 39 W., St Cloud land district, Minnesota.

This tract is within the indemnity limits of the grant for the St Vincent Extension of the St Paul, Minneapolis and Manitoba Railway Company, under the act of March, 1871, (16 Stat., 588).

The line of the company's road was definitely located opposite this land December 19, 1871, but that section of road was not constructed until after the act of Minnesota of March 1, 1877, *infra* and was not certified as constructed until 1880.

The tract in question was selected by the company November 25, 1873, and was certified to the State April 30, 1874, and was patented by the United States to the State January 14, 1875.

During the year 1880 the governor of Minnesota relinquished the tract to the United States for the benefit of Ellingson, assuming the right to do so under the provisions of the act of the legislature of Minnesota of March 1, 1877 (Special Laws of Minnesota 1877, page 257).

Said act provides:

SEC. 10. The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid preemption or homestead filing or entry—not to exceed one hundred and sixty acres to any one actual settler; and the governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise, and upon the acceptance of the provisions of this act by said company, it shall be deemed by the governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands, the governor shall receive as *prima facie* evidence, of actual settlement on said lands, the testimony and evidence or copies thereof, heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

In the decision under review it was held that the act of 1877 took cognizance of the company's default in the construction of its road, and extended the time for such construction upon condition that existing settlement claims to lands within the grant and to which the company had not perfected "legal and full title" should be protected and saved; that to the extent of the land covered by such settlement claims the act operated as a *pro tanto* forfeiture in favor of the settlers, and that in this case the title was conveyed to the company in advance of construction and had not been earned at the date of the act of 1877, and hence was not a "legal and full title" and did not prevent the settler claiming the benefits of that act under the governor's relinquishment for his benefit.

In the motion for review it is urged that the tract in question is not within the scope of the act of 1877, for the reason that the act only saves and secures settlement claims to lands "to which legal and full title has not been perfected" in the company, and that before the date of that act the company had secured such title to this tract.

It is set up that on February 22, 1877, just prior to the passage of the act before referred to, the governor of the State of Minnesota conveyed the land in question to the St. Paul and Pacific Railroad Company, and it is urged that by reason thereof and of the patent previously issued by the United States to the State, legal and full title was perfected in the company prior to the passage of said act. In support thereof the decisions of this Department in the cases of St. Paul, Minneapolis and Manitoba Railway Co. *v.* Fogelberg (9 L. D., 509), and Rowe *v.* same company (12 L. D., 354), are referred to.

In the Rowe case the land was in the granted limits and was opposite road constructed in 1873, so that the facts in that case are not similar

to those presented herein. In the Fogelberg case, however, the land was in the indemnity limits and whether opposite constructed or unconstructed road at the date of the act of 1877 is not stated in the decision. In considering the contention of the company there made, which was similar to that made in the motion for review under consideration, it was held:

> If this deed was duly and regularly executed under proper authority it operated to pass to the grantee therein legal and full title to the land described therein, and such land was not affected by the act of the State legislature of March 1, 1877, being expressly excepted from the operation thereof by the phrase limiting said act to those tracts "to which legal and full title has not been perfected in said St. Paul and Pacific R. R. Co. or their successors or assigns."

The case was then returned to your office with direction that the settler be allowed an opportunity to show whether the deed from the State to the company was "duly and regularly executed under proper authority," so as to prevent the exercise of all further jurisdiction by the land department.

In the case at bar the company does not contend that the act of 1877 is not binding upon it, and in the case of said company against Greenalgh (139 U. S., 19), in construing said act it was held:

> 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 act of 1877, as hereinbefore quoted, provided that the company "taking the benefits" of that act, should not directly or indirectly, acquire any right, title, interest, claim or demand to any land to which "legal and full title" had not been theretofore perfected in the company, and to which there was an existing settlement claim. The words "legal and full title" were evidently employed as meaning a complete, or perfect title the right to which could not be successfully assailed. A naked legal title obtained and held without right would not be regarded as a "full title" or as beyond successful assault.

The construction of the road in stated sections was a condition precedent to the transfer to the company of the title to the granted lands lying opposite thereto and was the consideration for the passing of title.

When, therefore, the company obtained the State's deed in advance of construction it did so without right and in violation of law. A deed thus obtained certainly does not convey a full title, and under the rulings in Schulenberg *v.* Harriman, 21 Wall., 44–59; Farnsworth *v.* Minn. & Pac. R. R. Co., 92 U. S., 49-65; and New Orleans Pac. Ry. Co. *v.* United States, 124 U. S., 124, it is doubtful whether it conveyed any title at all. The deed to the company was at least subject to successful attack by either the State or the United States. Doubtless, performance of the condition, a delivery of the consideration before forfeiture was declared on account of the default in construction, would have perfected the title and rendered it full and unassailable, but here the default was taken advantage of by the act of 1877 to the extent of the lands covered by existing settlement claims, before the title to this tract was perfected, and by that act subsequent perfection of the title was prohibited as against the settler.

It is contended by the company that indemnity lands are in this respect upon a footing different from granted lands.

By the act of March 3, 1871, *supra*, the St. Paul and Pacific Railroad Company was authorized to change the location of its branch line, and on account of the altered line it was to have "the same proportional grant of lands to be taken in the same manner, along said altered lines, as is provided for the present lines of existing law."

The existing law here referred to is found in the acts of March 3, 1857 (11 Stat. 195); March 3, 1865 (13 Stat. 526); and July 13, 1866 (14 Stat. 97).

By the act of 1857 a grant was made to the Territory of Minnesota of six sections in width on each side of the roads therein provided for, the lands to be disposed of in the following manner:

> That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed as aforesaid, and included within a continuous length of twenty miles of each of said roads or branches, may be sold; and so from time to time until said roads and branches are completed.

It will be noted that the coterminous principle is here applied, the sections of road being of twenty miles each.

By the act of 1865 the grant of 1857 was increased from six sections per mile to ten sections per mile and the following mode of disposing of the land was provided for:

> When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, and the said secretary shall be satisfied that said State has complied in good faith with this requirement, the said secretary of the Interior shall issue to the said State patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite to and within a limit of twenty miles of the line of said section of road thus completed,

extending along the whole length of said completed section of ten miles of road, and no further. And when the governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section or with some other first class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and situated opposite to and within the limit of twenty miles of the length of said section, and no further, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment, and so, from time to time, until said roads and branches are completed.

By the act of July 13, 1866, *supra*, it was provided:

That all the lands heretofore granted to the Territory and State of Minnesota to aid in the construction of rail-roads, shall be certified to said State by the Secretary of the Interior, from time to time, whenever any of said roads shall be definitely located, and shall be disposed of by said State in the manner and upon the conditions provided in the particular act granting the same, as modified by the provisions of this act: *Provided*, That when the original quantity granted to aid in the construction of any road has been increased, the quantity authorized to be sold from time to time shall be increased correspondingly: *And provided, further*, That on the completion of any ten miles of road, the State may sell one-half the quantity of lands which said State is authorized to dispose of on the completion of twenty miles.

That the lands granted by any act of Congress to the State of Minnesota, to aid in the construction of railroads in said State, specifically, lying in place, on any division of ten miles of road, shall not be disposed of until the road shall be completed through and coterminous with the same: *Provided, however*, That this provision shall not extend to any lands authorized to be taken to make up deficiencies.

It is clear that the sixth section of the act of March 3, 1863, *supra*, under which this company claims, specifically limits the patenting of lands, to those which are coterminous with sections of constructed road.

It is urged, however, that the clause in section four of the act of July 13, 1866, *supra*, which reads—"This provision shall not extend to any lands authorized to be taken to make up deficiencies," permits the selection and patenting of indemnity lands opposite the unconstructed portion of the road.

This contention need not be ruled upon because if it be admitted, it is still necessary to determine whether the company had earned and was rightly entitled to the land in question prior to the State act of March 1, 1877, for, unless it was, it did not have "legal and full title" to the same.

During the year 1873 the governor certified to the construction of that portion of the St. Vincent Extension from East St. Cloud to Melrose, a distance of thirty-five miles, and from a point in section 35, township 135 north, range 46 west, and a point in section 7, township 154 north, range 47 west, a distance of one hundred and five miles.

No further report of construction was made until the year 1879. The distance between these constructed portions of road was more than one hundred miles.

Under the recent decision of the supreme court in the case of Sioux City and St. Paul Railroad Co. *v.* United States (159 U. S., 349), it was held that where a road is required to be completed in sections of ten miles, the State could not, without completing the entire road, demand patents on account of the construction of less than a section of ten consecutive miles; and that in ascertaining the extent of the grant, the United States is under no legal obligation to make good the loss occasioned by a fractional section of land coming within the limits granted, designated by an odd number.

Supposing, however, that within the limits of the grant now in question, there existed ten sections per mile and that each section contained six hundred and forty acres, the company by the building of three sections of road of ten miles each from East St. Cloud to Melrose, entitled itself to 192,000 acres of land on account of such construction.

Upon inquiry at your office it is found that in the list of selections of indemnity land filed by this company November 25, 1873, on account of the constructed road just referred to, and embracing the tract in question, 200,602.46 acres were selected.

January 5, 1874, two further lists of indemnity selections on account of the construction named, were also filed, aggregating more than seven thousand acres. Thus selections were made as indemnity on account of the construction between East St. Cloud and Melrose, far in excess of the total amount to which the company had entitled itself by the building of the road between those points.

It is further shown that within the primary limits opposite the road from East St. Cloud to Melrose, the company listed, during the years 1873 and 1874, more than twelve thousand acres, and has since listed more than five thousand acres.

It is clear, then, that selection was made by the company, on account of the construction between East St. Cloud and Melrose, of many thousand acres more than it was justly entitled to, upon the construction reported. Can it be said that by the approval and patenting of the lands listed and selected by the road, and the subsequent conveyance thereof by the State to the company, legal and full title was perfected in the company to all of said lands? Suppose no further construction had been reported, would the company have been entitled to hold all of said lands? Clearly not. The certifying and patenting of the lands in excess of the amount to which the company had entitled itself, was so clearly wrong that the company while thereby obtaining the legal title would have been compelled in equity to surrender the land upon the suit of the State or the United States. Any claim that it is impossible to separate the lands in excess, would fall in the light of the ruling in Sioux City and St. Paul Railroad Co. *v.* United States (*supra*), wherein it is said:

> It is unnecessary to inquire whether the particular lands here in dispute, should not have been assigned to the company, rather than other lands, containing a like number of acres, that were, in fact, transferred to it, and which can not now be recovered

by the United States, by reason of their having been disposed of by the company. If the company has received as much, in quantity, as should have been awarded to it, a court of equity will not recognize its claim to more, in whatever shape the claim is presented.

It is therefore held that the company had not "legal and full title" to all the lands certified and patented on its account prior to March 3, 1877, and as the provisions in favor of settlers in the State act of that date are binding upon the company, its receipt of the benefits of that act operated as a relinquishment of its claim to the lands occupied by settlers and to which the company had not perfected legal and full title. The governor was authorized to deed the land in question to the United States to the end that the settler might acquire the same under the homestead law.

The motion for review is accordingly denied.

HOMESTEAD APPLICATION—COMPLIANCE WITH LAW.

ALCORN ET AL. *v.* BARLOW.

Prior to the allowance of a homestead entry an applicant for such right, who relies on his application, is not bound to reside on the land, or to make any compliance with the requirements of the homestead law.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1898.

(W. V. D.) (C. W. P.)

This appeal is brought by Mary W. Alcorn from the decision of your office of July 14, 1896, affirming the action of the local officers in rejecting her homestead application to enter under the homestead law the NE. ¼ of Sec. 14, T. 20 N., R. 1 W., Perry land district, Oklahoma Territory, and allowing the homestead application of Lucian H. Barlow for said tract.

The record shows that on November 10, 1893, Lucian H. Barlow filed homestead application for said land, and that his application was suspended on account of the loss of his booth certificate; that on September 11, 1894, your office notified the local officers that said Barlow received booth certificate, No. 6500, but that owing to the fact that on November 16, 1893, Alexander House filed a protest, together with his soldier's declaratory statement, for said land, alleging prior settlement, and that said Mary W. Alcorn filed an application to enter said land under the homestead law on May 12, 1894, which was rejected, and from which rejection she appealed on June 14, 1894, a hearing was ordered to determine the rights of said parties.

The case was submitted upon the following agreed statement of facts:

1st. That said Barlow stands upon his H. A. No. 263, filed November 10th, 1893, and is also qualified as above stated, and that said House stands upon his S. D. S. No. 50 (suspended) filed Nov. 16, 1893. 2nd. On May 12th, 1894, Mary W. Alcorn

settled upon said land and had some three or four furrows plowed, and in June began the construction of a box house. 3rd. That during the fall of 1894, said Mary W. Alcorn had from fifteen to eighteen acres broken, eight enclosed, and put a plank roof on the house, the same costing $25.00. 4th. Said Mary W. Alcorn has never made her actual residence on said land, but has made improvement on the same, as above stated; has worked on the land and directed the labor of others all through the spring and summer of 1895. At the present time has about twenty-five acres under cultivation and some five acres broken that has no crop on it. 5th. That she now resides in the city of Perry and has resided there ever since September 16th, 1893.

The local officers recommended the rejection of the homestead application of Mary W. Alcorn and the soldier's declaratory statement of said House, and the allowance of said Barlow's application.

Mary W. Alcorn appealed. Your office said:

> Her contention seems to be that Barlow was legally bound to reside on the land pending the allowance of his application. To so hold would in many instances compel an applicant to do a vain thing, that is, reside on and improve land which he could not under the law enter,

and affirmed the decision of the local officers. Mary W. Alcorn appeals to the Department.

It is well settled that prior to the allowance of a homestead entry an applicant relying upon his application is not bound to reside upon the land, or to make any compliance with the homestead law, until his entry has been allowed. Fletcher *et al. v.* Brereton, 14 L. D., 554; Rice *v.* Lenzshek, 13 L. D., 154; Goodale *v.* Olney, 12 L. D., 324.

Your office decision is therefore affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—ASCERTAINED DEFICIENCY.

NORTHERN PACIFIC R. R. CO. *v.* STREIB.

The Northern Pacific is not entitled to invoke the protection of the order of May 28, 1883, waiving specification of loss, where it assigns an insufficient basis for a selection in the presence of a contest involving the right to enter the selected tract; nor can a subsequent assignment of a sufficient basis avail the company as against the right of the contestant in such a case.

There has been no departmental recognition of an ascertained deficiency in the Northern Pacific grant; nor has the company been relieved, on account of such deficiency, from the specification of losses in making indemnity selections.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1898.

(W. V. D.) (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of June 5, 1896, holding for cancellation its indemnity selection covering the NE. ¼ of Sec. 11, T. 15 N., R. 43 E., Walla Walla land district, Washington, with a view to the allowance of the homestead application of George Streib.

This tract was included in the company's list of selections filed December 17, 1883. Said list was unaccompanied by a designation of losses as bases for the selection, the same being made under departmental order of May 28, 1883 (12 L. D., 196), which exempted this company from the general requirement that indemnity lists should be accompanied by a designation of the losses on account of which indemnity is claimed.

On October 26, 1887, the company filed a list of losses on account of said selection list, the same being given in bulk and not arranged tract for tract with the selected lands; and on September 2, 1892, it filed supplementary lists arranging the lost lands tract for tract with the selected lands.

In the list of September 2, 1892, there was specified as a basis for the selection of the tract in controversy a part of Sec. 15, T. 7 N., R. 15 E., the same being unsurveyed land and supposed to be included in the Yakima Indian reservation.

It appears from your office decision that a recent survey of the western boundary of said Indian reservation evidences that the land specified as a basis for the tract under consideration is without the limits of said Indian reservation. Further, that it is also within the overlapping limits of the grants for the main and branch lines and opposite the unconstructed portion of the main line of said road, the grant for which was forfeited by the act of September 29, 1890 (26 Stat., 496); that under the provisions of the sixth section of said act of forfeiture the Northern Pacific Railroad Company was called upon to elect as to the alternate odd-numbered sections it would take in satisfaction of the moiety under its constructed branch line within the overlap above described; that acting upon this direction the company excluded said section 15, a portion of which was designated as a basis for the selection of the tract in dispute.

It also appears that since the survey of the western boundary of the Yakima Indian reservation, to wit, on January 25, 1896, the company filed another list, in which a new basis is assigned for the selection in question, the same being a part of Sec. 13, T. 11 N., R. 14 E.

Against the sufficiency of this latter designation there appears to be no objection.

The present case arose upon the application of George Streib to make homestead entry, tendered on October 29, 1887. The record made at the hearing ordered upon an allegation of prior settlement evidences that this land was in the possession and occupation of one Jacob Craft at the date of the original selection on December 17, 1883. This possession was transferred to different settlers until it came into the possession of the present claimant in 1885.

Your office decision holds that the loss assigned in the list of September 2, 1892, was not a good and sufficient basis for the selection in question, and as the application of Streib intervened prior to the sub-

stitution of the new basis on January 25, 1896, said selection was held for cancellation with a view to the allowance of Streib's application.

A motion was filed for review of said decision, which was denied by your office decision of August 3, 1896, and the company has prosecuted the case upon appeal to this Department.

In its appeal the company urges that even if the basis originally assigned for this tract was defective, the pendency of the selection prevented the attachment of any adverse right in Streib and entitled the company to file a supplemental list giving a proper basis. Further, that the former Commissioner of your office having certified that the grant to this company was over three and one-half million acres deficient, it was error to have held that the designation of any loss was necessary to support the selection.

While it is true that the original list of December 17, 1883, was protected by the order of May 28, 1883, relieving this company from the specification of losses at the time of making its indemnity selections, it nevertheless appears, that during the pendency of the proceedings in the local office upon Streib's application, the company, evidently acting under the requirement of the departmental circular of August 4, 1885 (4 L. D., 90), filed a list of losses as bases for the selection list which included the tract in question, and therein specified an insufficient basis for this tract.

Having given an insufficient basis, in the presence of a contest involving the right to enter said tract the company is not entitled to plead the protection of the order of May 28, 1883; nor can a subsequent assignment of a sufficient basis benefit it as against the right of the contestant, whose contest was pending at the time of the filing of the insufficient basis.

Relative to the certification of a deficiency in the grant to this company made by your predecessor, it is sufficient to say, that this Department has never given recognition to that certificate, nor has the company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant.

It is therefore held that the company's rights under its selection lists under consideration will not bar the completion of Streib's application.

Your office decision is accordingly affirmed, and upon completion of entry by Streib the company's selection will be canceled.

MITCHELL *v.* BACKES.

Motion for rehearing denied by Secretary Bliss April 30, 1898. See departmental decision of February 12, 1898, 26 L. D., 191.

RAILROAD GRANT—DEFINITE LOCATION—HOMESTEAD ENTRY.

OREGON CENTRAL R. R. CO. *v.* THOMPSON.

The grant to the Oregon Central by the act of May 4, 1870, is in the nature of a float, and does not take effect upon specific tracts until definite location; and a homestead entry made prior to such location excepts the land covered thereby from the operation of the grant, although no exception is made therein of lands thus appropriated.

The case of the United States *v.* Northern Pacific R. R. Co., 152 U. S., 284, cited and distinguished.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) *30, 1898.* (W. A. E.)

The land here involved, viz., lots 1, 2, and 3, and the N. ½ of the NW. ¼ of Sec. 3, T. 1 N., R. 1 W., Oregon City, Oregon, land district, is within the primary limits of the grant made by the act of May 4, 1870 (16 Stat., 94), to the Oregon Central Railroad Company, and is opposite the portion of the road definitely located May 17, 1871.

It is also within the primary limits of the grant made by the joint resolution of May 31, 1870 (16 Stat., 378), to the Northern Pacific Railroad Company.

May 13, 1870, Lewis Laucht made homestead entry for said land, and this entry was canceled September 2, 1871.

February 8, 1883, Reuben Thompson filed pre-emption declaratory statement for the land, alleging settlement February 7, 1883. Final proof and payment were made October 8, 1883.

November 17, 1894, your office considered the several claims to the land, and held that the tract in question was excepted from the operation of the grant to the Northern Pacific Railroad Company by the prior grant to the Oregon Central Railroad Company, and was excepted from the latter company's grant by the homestead entry of Laucht, existing at the date of the definite location of the road.

No action was taken by the Northern Pacific Railroad Company, but the Oregon Central Railroad Company filed a motion for review of your office decision, which was denied by your office letter of August 1, 1896, whereupon said company appealed to the Department.

The only question presented by the appeal is, when the right of the company under its grant attached—whether at the date of the passage of the act, or at the date of the filing of the map of definite location of the road.

This question was fully considered in the case of Oregon Central Railroad Company *v.* Jones, 14 L. D., 283, and it was there held that the grant of May 4, 1870, is in the nature of a float, and does not take effect upon specific tracts until definite location; and that a homestead entry made prior to such location excepts the land covered thereby from the operation of the grant, although no exception is made therein of lands thus appropriated.

This decision was rendered March 19, 1892, and has since been followed by the Department.

The company claims, however, that the decision of the United States supreme court in the case of United States *v.* Northern Pacific Railroad Company (152 U. S., 284), rendered March 5, 1894, overrules the Jones case on the point here in issue.

In the case cited the supreme court had before it the question as to which of these two companies had the superior right to lands within the common granted or primary limits. It was held to be well settled that as between parties claiming the same land under the different grants, priority of grant, not priority of location, determines the question of ownership. This ruling was in conformity with previous decisions of the court and does not affect the rights of parties claiming under the public land laws specific tracts within the primary limits of the grant.

In the Jones case it was well said:

> To sustain the contention made by the company would have, in effect, served to reserve all the lands in the northwestern part of the State of Oregon, as well as a large portion of the State of Washington, to await the pleasure of the company in the matter of the location of its road, for the grant would follow the location when made, and all settlers in that part of the country would be at the mercy of the company.
>
> This was clearly not the purpose of the act, for in providing for a reservation upon location, it, in effect, prohibited any reservation until location, and without reservation, rights could be acquired under the public land laws, the lands being otherwise subject thereto, which would operate to defeat any subsequent grant.

Your office decision is accordingly affirmed, and Thompson's final proof will be approved, if no further objection to it appears.

RAILROAD GRANT—ATTACHMENT OF RIGHTS—AMENDED LOCATIONS.

OREGON AND CALIFORNIA R. R. CO. *v.* KIRKENDALL.

A railroad company is not entitled to the benefit of two locations of the same portion of its road, and where the limits of the grant have been readjusted under an amended location, and the changed limits have been recognized by the company and the government, it must be held, as to the portion of the road so changed, that the right of the company attached as of the filing of the amended location.

Secretary Bliss to the Commissioner of the General Land Office, April 30, 1898.

(W. V. D.) (F. W. C.)

By your office decision of September 5, 1890, it was held that lots 4, 5, and 6, and the SE. ¼ of the NE. ¼ of Sec. 17, T. 29 S., R. 8 W., Roseburg land district, Oregon, were excepted from the grant made by the act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California railroad, by reason of the settlement claim of James A. Kirkendall.

Kirkendall filed pre-emption declaratory statement for this land on May 22, 1877, and on July 1, 1882, transmuted the same to homestead entry, upon which he made final proof and final certificate issued September 21, 1885. Your said office decision held that the company's right, by definite location, attached to land in the vicinity of that in question on April 8, 1882, and that Kirkendall's claim antedated such definite location and excepted the tract from the company's grant.

In its appeal the company assigned the following error:

The said company as grounds of appeal allege error in finding and holding that its right didn't attach until April 8, 1882, whereas its right attached by map of location filed March 7, 1871.

The only question in the case is, when did the railroad company's right attach? The map filed by said company March 7, 1871, located the road from the south line of Tp. 27 S., R. 6 W., to the south line of Sec. 30, Tp. 30 S., R. 5 W.

By an amended map of location filed Apl. 8, 1882, the above location was changed from station 1154 (centre of Sec. 28, T. 29 S., R. 5 W.) to station 1320x50 (Sec. 6, T. 30 S., R. 5 W.) but by an oversight, the decision appealed from, finds as a matter of fact, that the change was from some point further north than station 1154, which would bring the land in question within the changed line and location of 1882.

As, however, the line of the road, so far as this land is concerned, was located in 1871, and not thereafter changed, the settlement of said Kirkendall in 1879 was clearly illegal.

The appeal was considered in departmental decision of March 9, 1892 (unreported), in which it was held that—

This contention raises a question of fact as to the date when the map of definite location of that part of said road opposite this land was actually filed. An examination shows that the true date was in March, 1871. As Kirkendall did not settle upon the land until the fall of 1879, it was not excepted from said grant. Your office decision is reversed.

In compliance with departmental letter of May 1, 1895, the record was returned to the Department for reconsideration.

The facts relative to the location of the company's road in the neighborhood of the land in question are as follows:

With a letter from this Department received at your office March 2, 1871, was forwarded a map, filed by the Oregon and California Railroad Company, showing its line of definite location from the south line of township 27 S., range 6 W., to a point in section 30, T. 30 S., R. 5 W. The limits of the grant were then adjusted to this location. Thereafter, there was received at your office, on April 8, 1882, a map filed on behalf of said company showing what was denominated as an amended line of location from station 1154 in Sec. 28, T. 29 S., R. 5 W., to station 1320x50 in Sec. 6, T. 30 S., R. 5 W. Upon this amended location the limits of the grant were re-adjusted.

It is clear that the company can not claim the benefit of two locations of the same portion of its road.

Therefore, as to the portion of the road changed by the amended location, as the limits of the grant were re-adjusted to this amended line of location, and these amended limits have since been recognized both

by the company and the government in the adjustment of the grant and the determination of conflicting rights, it will be held that the right of the road attached as of the filing of the second map, April 8, 1882; and in order to separate the lands opposite the unchanged portion of the location of 1871 from those opposite the amended location of 1882, it is directed that you establish a terminal line at the point of divergence. The terminal line should be adjusted to the unchanged portion of the location of 1871, and will be recognized in determining the rights of the company in the neighborhood of the changed location.

The previous decision of the Department in this case is therefore recalled and vacated, and the papers are herewith returned that the case may be re-adjudicated in the light of the directions herein given.

RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

SOUTHERN PACIFIC R. R. CO. *v.* DAVIS.

The amendment of a list of indemnity selections by the designation of losses not assigned in the original, is, to the extent of such substitution, an abandonment of the prior list, and, to said extent, a new selection, and as such it will not bar the completion of a homestead entry made subject to the original selection.

Secretary Bliss to the Commissioner of the General Land Office, April 30, 1898.

(W. V. D.) (G. C. R.)

I have considered the appeal of the Southern Pacific Railroad Company from your office decision of January 10, 1896 (adhered to on review June 8, 1896), wherein you dismiss the company's protest against the final proof offered by Jesse Davis, August 13, 1895, upon his homestead entry made October 10, 1888, for the N. ½ of the NW. ¼ and the SW. ¼ of the NW. ¼ of Sec. 35, T. 16 S., R. 28 E., M. D. M., Visalia, California. Davis's entry also included the SE. ¼ of the NE. ¼ of Sec. 34, same township; but this tract is not in controversy.

The lands so described in said Sec. 35 are within the indemnity limits of the grant to the Southern Pacific Railroad Company, under the grant of July 27, 1866, and they were selected on behalf of the company July 21, 1885, per list No. 20. In this list the company failed to designate the lands in place lost to the company, in lieu of which the selections were made, and it was not until October 13, 1887, that said losses were designated.

On April 21, 1894, the company's amended list (No. 20) of selections was filed in your office, in which different lands were designated as the basis of the tracts so selected.

Your office, in disposing of the case, held that the first list of selections having been made without designation of the losses, and after the regulations of November 7, 1879, required such designations, was no bar to other disposition of the lands, and although losses were designated by the company for the particular tracts prior to their entry by

Davis, yet the substitution of other lands as a basis of selection, after the allowance of Davis's entry, operated as an abandonment of the first selection, and removed any objection that the company might make against Davis's entry by reason of such selection.

The principal question at issue is, whether the filing of the amended list (April 21, 1894), designating for "the particular tracts in question" a new basis, was an abandonment of the first selection. If so, it is plain that Davis's entry, admitting that it was improperly allowed at the time presented, may now be properly held intact.

As thus presented the case is controlled by the decision in the case of La Bar *v.* Northern Pacific R. R. Co. (17 L. D., 406), in which it was held that the substitution in an amended list of indemnity selections of a specification of losses different from that assigned in the first list must be treated as an abandonment of the first. Davis's entry when allowed was subject only to the selection made in 1885 as amended by the losses filed in 1887.

When, therefore, the company in 1894 filed an amended list with a loss designated as the basis for the selection in question not included in the list filed in 1887, it thereby abandoned the prior list, to this extent at least, and as to this tract the list of 1894 must be treated as a new selection. Such selection can not bar Davis's right to complete his entry by the offer of final proof therein, and your office decision overruling the company's protest against the acceptance of his final proof is affirmed, and the company's selection will be canceled.

PAYMENT—PRE-EMPTION ENTRY.

GERMAIN *v.* LUKE.

The failure of a receiver to account to the government for the purchase price of land paid at the time of final proof will not defeat the right of the entryman to receive patent without further payment.

Secretary Bliss to the Commissioner of the General Land Office, April 30, 1898.
(W.V. D.) (L. L. B.)

On September 2, 1890, W. Thomas Luke made pre-emption filing for the NE. ¼ of Sec. 7, T. 40 N., R. 30 W., Marquette, Michigan.

August 3, 1891, Prosper Germain made homestead entry for the same tract. September 17th following Luke submitted final proof, against which Germain protested, alleging failure on the part of Luke to comply with the requirements of the pre-emption law as to residence, improvements and cultivation, and charging that he had left land of his own to reside on the claim.

Hearing was had on the protest October 15, 1891, and the testimony filed November 19, 1891; and on April 10, 1894, the local officers sustained the proof. Germain appealed, and by your office decision of

January 9, 1895, the action of the register and receiver was affirmed and Luke given ninety days from notice of the decision in which to make payment and perfect his entry, and the local officers were directed to notify your office of such payment, should it be made, in order that Germain's homestead entry might be canceled.

Germain, although notified, did not appeal from this action of your office, and in August, 1895, Luke advised your office that some time during the progress of the hearing on Germain's protest, he (Luke) had made payment to Thomas D. Meads, the then receiver of the Marquette land office, that the said Meads had appropriated the money so paid, and asked that he might be allowed ninety days in which to re-tender the money.

By your office letter of September 23, 1895, the decision of your office of January 9, 1895, sustaining the final proof of Luke, was made final, and Luke was given sixty days in which to show payment of the money as alleged, or to tender payment again, and the register and receiver were directed to give him notice of said decision and that if at the end of sixty days he had not complied therewith his proof would stand rejected and the homestead entry of Germain would remain intact.

April 24, 1896, the register and receiver reported that Luke had been duly notified of this action of your office and had taken no action thereon; whereupon, by letter of May 9, 1896, the case was finally closed and the homestead entry of Germain held intact.

There was no formal appeal from this action, but on July 6, 1896, there was filed in this Department the petition of Luke, invoking the supervisory authority of the Secretary of the Interior, setting forth, in brief, the main facts of the previous history of the controversy over this tract, and asking that patent issue to him for the same. With the petition were filed as exhibits a certificate from the defaulting receiver, Meads, acknowledging receipt of two hundred dollars paid him by Luke at the time of offering his final proof, and a copy of the declaration in a suit pending in the United States circuit court for the western district of Michigan, duly certified by the clerk of said court, wherein the United States was plaintiff and said Meads and his official sureties were defendants, praying judgment against the defendants for $3,000, on account of money received by Meads in his official character as receiver of the Marquette, Michigan, land office, and appropriated to his own use. Among the amounts charged to have been so misappropriated was the $200 paid to him by Luke.

This was the status of the land and claimants therefor when, on October 1, 1896, the register and receiver issued notice of contest upon the affidavit of Andrew J. Hunting charging that Germain, the homestead entryman, had wholly abandoned his entry. Said notice directed that the testimony on Hunting's contest be taken at the office of the county clerk of Menominee county, Michigan, on the 13th day of November following.

At the time and place mentioned in the notice, Hunting appeared, and Germain making default the testimony was taken, and on November 23, 1896, the register and receiver recommended the cancellation of the entry, the evidence showing that the entryman had never resided on or cultivated the land.

There is also in the record a protest filed by Hunting in this Department on November 5, 1897, against granting the prayer of Luke for issue of patent, alleging his (Hunting's) interest in the land as shown in the foregoing statement and alleging that he has had no notice of this action on the part of Luke, and asking that he be given an opportunity to present his case after "being fully informed as to the nature and character of the application of Luke."

Neither the application of Luke nor the protest of Hunting against it purports to have been served upon any of the parties in interest, both papers having been sent direct to the Secretary.

The foregoing are all the material facts presented by the record now here for consideration.

From this it is seen that the petition of Luke for patent was presented here nearly three months prior to the initiation of Hunting's contest against Germain, so that it was not incumbent upon Luke to serve Hunting with notice of his petition, for at that time Hunting was not a party in interest. The fact that he afterwards became an interested party through his contest against Germain entitled him to notice of such proceedings only as were had after his interest attached. When he instituted his contest he was chargeable with notice of all the proceedings pertaining to the land in controversy had prior to that time. At the time his contest was filed the petition of Luke was here, awaiting action. His rights under his contest must, therefore, be held to await the determination of those of Luke as presented by the record.

Since the filing of the petition of Luke, asking that his proof be accepted and patent issued for the land, the case of the United States *v.* Meads and his sureties, heretofore noted, has been decided by the United States circuit court of appeals, holding, in effect, that the payment by Luke to Meads was payment to the government; that the money so paid to Meads was received by him not only *colore officii*, but in the due course of his employment as the officer and agent of the government. See said case, 81 Fed. Rep., page 684.

The relation of the officer to the government and to the claimant as well was considered at length in the case cited, and the court, quoting with approval the language of Judge Severns, who presided at the trial in the circuit court, says:

> Payment of the price by the entryman is part of the transaction whereby he is to acquire title to the land. Rules prescribed by the department to the local land offices are for convenience in the transaction of business. Such is a rule requiring payment before action on proofs by those officers,—a rule designed to prevent vain proceedings there resulting from a subsequent failure to pay the purchase price.

The money may properly be paid at any time while the proceedings for the purpose are *in fieri*, unless some statute or rule prohibits it, and none such has been shown to me. I have no doubt that if the money were not paid at the time of the application, but, upon notification from the land office that the proofs were held sufficient, it should then be paid, the proceeding would be perfectly valid, and the purchaser would have the right to a title. It is a matter of order only. The receiver is the agent of the government to make the sale. If an intending purchaser of land should, with his proposition to buy, pay the price asked by the owner to the agent of the latter appointed to make the sale, the agent would be accountable to his principal for the money, as between them. If the transaction should fail,—as, for instance, on account of defect in the owner's title,—the principal would be bound to make restitution. The agent would not be liable to the purchaser. It was known that he was acting as agent. He was not selling his own land, nor dealing with a matter of personal concern to himself. There are very cogent reasons for applying this rule of agency to such circumstances as these. My conclusion, therefore, is that, at whatever stage of the proceedings the money is paid by the applicant to the receiver upon his intended purchase, the receiver is bound to render an account thereof to the department. It is not his money. He does not receive it as the agent of the applicant. He has no such dual status. If the money was properly payable at the time of the application, it would make no difference whether the government exacted payment then, or was willing to waive payment until the proceeding should ripen.

In the case of S. W. Russell, Administrator (25 L. D., 188), this Department expressed similar views and held (quoting from syllabus) that:

the subsequent failure of said officer to account to the government for the purchase price of the land, so paid, will not defeat the right of the entryman to receive patent without further payment.

From this construction of the law in relation to payment to a defaulting officer of the government, it follows that at the time Luke was called upon to re-tender the money for his pre-emption purchase, he was not in default, but, on the contrary, was then entitled to receive final certificate.

By reference to the dates of the different proceedings heretofore mentioned, it will be seen that the hearing upon the protest of Germain against Luke's pre-emption proof was had October 15, 1891, and although the testimony submitted was filed in the local office November 16, following, the decision of the register and receiver rendered thereon was not made until April 10, 1894. The reason for this delay is not shown in the record, but the decision is signed by Rush Calvert as receiver, and the conclusion is almost irresistible that the decision was reserved through the influence of Meads until the end of his service as receiver, in order to avoid accounting for the money paid to him by Luke and so prevent a disclosure of his malfeasance during the term of his office.

But however that may be, it is apparent that from November, 1891, until some time subsequent to January 9, 1895 (the date of your first-mentioned office decision), Luke rested in security under the belief that he had complied with all the requirements of the law necessary to secure patent for his claim. He shows by his verified petition for patent, that

between the date of his payment to the receiver and your office letter requiring him to show payment, etc., all the witnesses by whose testimony he could establish the fact of such payment had disappeared, and he was unable to comply with this requirement until shortly before he forwarded his aforesaid petition containing the acknowledgment of such payment by Meads himself.

While it is true that he did not serve Germain with a copy of his petition, it clearly appears from the record that Germain had, previous thereto (the date of said petition, July 6, 1896), abandoned his entry and could not be found nor his whereabouts ascertained. He had rested under the decision of your office dismissing his protest, and his entry was held intact, not by reason of compliance with law upon his part, but only through the unavoidable failure of Luke to comply with the requirements of your office letter of September 23, 1895.

The Department is, therefore, of the opinion that the claim of Germain presents no equities that would prevent favorable action on the petition of Luke, and, as before said, whatever claims Hunting may have in virtue of his contest, they must yield to those of Luke under his petition, because at the date of presenting the same Hunting was a stranger to the record and was chargeable with notice of Luke's petition.

The entry of Germain will therefore be canceled, and you will direct that final certificate be issued to Luke for the tract in controversy. The action of your office is modified accordingly.

MINERAL LANDS—PHOSPHATE DEPOSITS—RAILROAD GRANT.

FLORIDA CENTRAL AND PENINSULAR R. R. CO.

Lands valuable for deposits of phosphates are mineral lands within the intent and meaning of the laws relating to the disposal of the public domain.

The act of May 17, 1856, making a grant of lands to the State of Florida to aid in the construction of railroads does not in express terms include mineral lands, nor are such lands expressly excluded therefrom, but in view of the uniform and settled policy of the government to reserve such lands from grants to States or corporations for any purpose, it is held that all such lands, whether valuable for phosphate or other mineral deposits, are excepted from the operation of said grant.

Secretary Bliss to the Commissioner of the General Land Office, April 30, 1898.

(W. V. D.) (E. B., Jr.)

The Department is in receipt of a communication, dated the 4th instant, from your office, wherein it appears that on March 28, 1898, your office sent to the local office at Gainesville, Florida, for publication in accordance with circular instructions of July 9, 1894 (19 L. D., 21), a list of lands in that State claimed by the Florida Central and Peninsular Railroad Company as present owner under the grant of

May 17, 1856 (11 Stat., 15), to the State of Florida to aid in the construction of certain railroads; that the said lands are within six miles of phosphate claims; that you are in doubt whether the decision of the Department in the case of the Pacific Coast Marble Company *v.* Northern Pacific Railroad Company *et al.* (25 L. D., 233) overrules that part of the decision in the case of Tucker *et al. v.* Florida Railway and Navigation Company (19 L. D., 414) which holds that lands containing phosphate deposits are not excepted from the said grant; and that you have directed the local office to suspend action on the said list until you shall receive instructions from the Department in the premises. The railroad company has submitted an argument which you transmit for consideration here.

In the Pacific Coast Marble Company case, *supra*, the Department held as follows (syllabus):

> Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.
>
> Lands valuable only on account of the marble deposit contained therein are subject to placer entry under the mining laws.
>
> Lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws, are "mineral lands" within the meaning of that term as used in the exception from the grant to the Northern Pacific Company for railroad purposes, and to the State for school purposes.
>
> The case of Tucker *v.* Florida Railway and Navigation Co., 19 L. D., 414, overruled.

A careful examination of the two decisions under consideration leads to the conclusion that what was expressly overruled in the Tucker case by the Marble Company case was the holding in the former that only "those lands containing valuable metals, such as gold, silver, cinnabar and copper," were excepted, as mineral lands, from the indemnity provisions of the act of June 22, 1874 (18 Stat., 194). In effect the decision in the Marble Company case holds that phosphate lands are to be classed as mineral lands. Not only do the definitions of the words "mineral" and "mineral lands" in that decision include phosphates and phosphate lands, respectively, but the case of Gary *v.* Todd (18 L. D., 58), which distinctly holds that lands chiefly valuable for phosphate deposits are mineral lands, is one of the authorities cited approvingly therein. See also in this connection the cases of Aldritt *v.* Northern Pacific Railroad Company, 25 L. D., 349; Union Oil Company (on review), ibid., 351; A System of Mineralogy—Dana, p. 747, *et seq.*, especially pp. 769 and 826; and definitions of "Phosphate" and "Phosphate deposits" in the Century, Standard, and Webster dictionaries. It would appear to be settled by these decisions and authorities that lands valuable for deposits of phosphates are mineral lands within the meaning of the laws relating to the disposal of the public domain. Since the decision in the Tucker case, as to the lands

claimed under the act of 1874, was based upon the view that phosphate lands were not mineral lands in any statutory sense, it would seem that it was in this respect that that case was overruled by the Marble Company case. This conclusion leaves open and undecided the question whether mineral lands and especially phosphate lands are excepted from the grant of May 17, 1856, *supra*. If they are, said list should be published pursuant to the said circular instructions; otherwise no such publication is necessary.

There is no express exception of mineral lands from the grant, nor, on the other hand, is there in its language any express inclusion of them. The only express reservation of any lands from the grant is in these words:

> *And provided further,* That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads or branch through such reserved lands; in which case the right of way only shall be granted subject to the approval of the President of the United States.

The grant in question is one among the earlier grants to aid in the construction of railroads. None of these earlier grants, so far as the Department is aware, contained any express exception therefrom of mineral lands. The grants to the Union Pacific, Central Pacific and other railroad companies, by the act of July 1, 1862 (12 Stat., 489), were the first grants to contain such an exception. From each of them all mineral lands, except iron and coal lands, were expressly reserved. Nearly all, if not all, subsequent grants to railroads in mineral regions uniformly contain a reservation of mineral lands.

On January 30, 1865, Congress passed a joint resolution (13 Stat., 567) which declares:

> That no act passed at the first session of the thirty-eighth congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

While this resolution refers in terms to grants made or extended (as to time) during the first session of the thirty-eighth Congress, it is believed the language thereof, that "mineral lands . . . . in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant," may properly be regarded as expressive of the sense of Congress that no grant of public lands to a State or corporation should be held to include mineral lands unless otherwise expressly provided, and as declarative of its uniform policy against such inclusion.

In the case of Mining Company *v.* Consolidated Mining Company

(102 U. S., 167) the supreme court held that the grant of the sixteenth and thirty-sixth sections of public lands to the State of California for the purposes of public schools by the act of March 3, 1853 (10 Stat., 246), which grant contained no express reservation therefrom of mineral lands, was, notwithstanding, not intended to cover such lands. It was said by Mr. Justice Miller, speaking for the court in that case (pp. 174–5),—

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the other grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

In the case of Keystone Lode and Mill Site *v.* State of Nevada (15 L. D., 259) the Department held that mineral lands were excepted from the grant of school lands by the act of March 21, 1864 (13 Stat., 30), to the State of Nevada, although "the grant made no exception of mineral lands," for the reason that—

it has been held in such grants that they will be construed as not granting mineral lands, because it is and has been the settled policy of the government to withhold mineral lands unless they are expressly granted.

In the comparatively recent case (decided May 26, 1894) of Barden *v.* Northern Pacific Railroad Company (154 U. S., 288) the supreme court said (pp. 317–318):

The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862, c. 120, 12 Stat., 489, and of July 2, 1864, c. 216, 13 Stat., 356, making grants to the Union and Central Pacific Companies; act of July 4, 1866, c. 165, 14 Stat., 83, making a grant to the Iron Mountain Railroad Company; act of July 13, 1866, c. 182, 14 Stat., 94, making a grant to the Placerville etc. Railroad; act of July 25, 1866, c. 242, 14 Stat., 239, making a grant to the California and Oregon Railroad, sections 2 and 10; act of July 27, 1866, c. 278, 14 Stat., 292, making a grant to the Atlantic and Pacific Railroad and to the Southern Pacific Railroad; act of March 2, 1867, c. 189, 14 Stat., 548, making a grant to the Stockton and Copperopolis Railroad; act of March 3, 1871, c. 122, 16 Stat., 573, making a grant to the Texas Pacific Railroad. In all of these cases, and in all grants of public lands in aid of railroads, minerals (except iron and coal) have uniformly been reserved, and in no instance has such a grant been held to pass them.

The Department, as already stated in substance, is unable to find in the act of May 17, 1856, any evidence of an intention to grant mineral lands, and, therefore, and for the further reason that the authorities above cited seem to be conclusive of a settled and uniform policy on the part of the government to reserve such lands from grants to States or corporations, for any purpose, is constrained to hold that all such

lands, whether valuable for phosphate or other mineral deposits, are excepted from the grant in question.

You will therefore direct the local office to proceed with the publication of said list pursuant to said circular instructions.

ADDITIONAL HOMESTEAD—SECTION 6, ACT OF MARCH 2, 1889.

CÆSAR *v.* SALES (ON REVIEW).

The right to make an additional homestead entry under section 6, act of March 2, 1889, can only be exercised by one who has made his final proof, and received the receiver's final receipt for the land embraced in his original entry.

Secretary Bliss to the Commissioner of the General Land Office, April 30, 1898.

(W. V. D.) (J. L. McC.)

The Department, on February 12, 1898 (26 L. D., 190), affirmed the decision of your office, dated May 6, 1896, rejecting the application of Porter T. Caesar to make homestead entry of Lots 9 and 10 and the S½ of the SW¼ of Sec. 15, T. 14 N., R. 3 E., Guthrie land district, O. T.

Said application was for an adjoining homestead entry under the act of February 10, 1894 (28 Stat., 37); and the decision was based mainly upon the ground that said act applied only in the case of persons whose claim to the land embraced in the original entry had been initiated prior to the approval of the act.

Caesar has filed a motion for review of said decision. The paper filed by him as such, however, does not allege that there was any error in the former decision, but is rather an abandonment of his claim under said act of February 10, 1894, and an application to enter under the sixth section of the act of March 2, 1889,—contending that his case comes within the provisions of said act, according to the departmental decision of August 10, 1897, in the case of Nancy A. Stinson (25 L. D., 113).

He fails to show, however, that he is qualified to make an additional entry under said act. The act provides for the entry of

> so much additional land as, added to the quantity previously so entered by him shall not exceed one hundred and sixty acres," [by any person]" who shall have made his final proof . . . . for a quantity of land less than one hundred and sixty acres, and received the receiver's final receipt therefor.

A careful examination of the tract-books and other records of your office fails to show that Caesar has ever made final proof and received the receiver's final receipt for the land originally entered by him.

The sixth section of said act of March 2, 1889, does not appear applicable to his case.

The motion for review discloses no reason why the departmental decision heretofore rendered should be disturbed. Said motion is therefore denied.

OAKES *v.* WEST RENO CITY.

Motion for review of departmental decision of February 17, 1898, 26 L. D., 213, denied by Secretary Bliss, May 3, 1898.

SWAMP GRANT—CHARACTER OF LAND GRANTED.

STATE OF ILLINOIS.

Lands covered by an apparently permanent body of water, and meandered as a lake, at the date of the swamp grant do not pass under said grant.

Secretary Bliss to the Commissioner of the General Land Office, May 3, 1898.
(W. V. D.) (C. J. G.)

The State of Illinois, through its agent, Isaac R. Hitt, has appealed from your office decision of June 17, 1896, addressed to the Auditor of State, holding for rejection its claim, under the swamp land act, to certain lands in Carroll county, sections 30, 31 and 32, township 24 north, range 4 east, in said State.

These lands are fully described, and their estimated area given, in your said office decision. They were included in a list of swamp land selections reported to your office by the U. S. surveyor-general October 29, 1853. The plat of survey of this township was approved April 18, 1842. It shows that practically all of said lands are covered by an apparently permanent body of water, meandered as a lake. April 22, 1854, your office called the attention of the surveyor-general to this fact, and May 5, 1854, he reported that said lands were that day stricken from the original list, for the reason that they had been erroneously included therein. The surveyor-general at the same time named a tract that had been substituted for the lands in question.

In the decision appealed from your office held that

as the descriptions in question were, on September 26, 1850, no doubt water as contradistinguished from land, it can not be held that they were granted to the State by the swamp land act of that date.

The conclusion of your office that these lands were not of the character contemplated by the swamp land act at date of said act, is based on the returns of the surveyor-general above referred to, and on evidence contained in certain letters, one of which, dated November 27, 1871, addressed to your office, is from the county surveyor and acting drainage commissioner of Carroll county. In said letter, after stating that the county had commenced the drainage of the lake in townships 23 and 24, range 4, the surveyor proceeded as follows:

On the 25th of this month the lake was tapped. We will be able to finish the drain within two weeks from this date unless the weather shall prove unfavorable. We will sink the surface of the lake about five feet when finished, which will leave but a few pond holes (as we confidently expect) in the bottom of the lake, etc.

In another letter, dated November 7, 1878, from the county surveyor and drainage commissioner of Carroll county, addressed to U. S. Attorney General Devens, it is stated that the county drained the lake in question at an expense of about $8000 and attempted to sell the lands; but that in injunction proceedings had relative to lands similarly situated in township 23 north, range 4 east, the courts of the State awarded said lands to the riparian owners.

Under date of November 6, 1896, Isaac R. Hitt, agent of the State, suggested that your office send an agent to examine these lands in the field and to afford the county an opportunity to show that said lands were not covered by a permanent body of water September 28, 1850. In the event of a denial of his request the agent asked that the papers in the case be transmitted to this Department as an appeal from your office decision of June 17, 1896.

November 17, 1896, your office declined to send an agent to examine these lands as requested, and adhered to its former decision in which was cited the case of Hardin *v.* Jordan, 140 U. S., 371. The papers in the case, however, were forwarded to this Department upon the request of the agent of the State that his paper be treated as an appeal.

It is set forth in the appeal that subsequently to the original survey of township 24 approved April 18, 1842, the lines were regularly extended over that portion of the lake lying in township 23, and the land laid out into lots. It is contended that the same thing should have been done in sections 30, 31 and 32, township 24, and it is therefore suggested that a survey be ordered and the lines closed up on said sections.

The plat of survey approved in 1842 shows that the lake in township 24 was meandered, while in township 23 it was not. But aside from this fact, the doctrine announced in Hardin *v.* Jordan, *supra*, precludes the ordering of the survey as suggested.

It is also contended in the appeal that the rule laid down in the case of State of Illinois, 21 L. D., 184, should govern this case. But the only survey of township 24 was that approved in 1842, the plat of which shows that nearly all the lands in question are within the meander line of the lake. Hence the case referred to is not applicable to the one under consideration.

Under the decisions of the Department the character of land at date of the swamp grant determines whether it inures to the State thereunder. From what has been set out herein it appears that there is sufficient evidence now before the Department upon which to base the conclusion that at the date of the swamp grant the lands in question were covered by an apparently permanent body of water meandered as a lake; and for that reason did not pass to the State of Illinois under said grant.

Your office decision is hereby affirmed.

ISOLATED TRACT—ACT OF FEBRUARY 26, 1895.

G. W. ALLEN.

The proviso added to section 2455 R. S., by the amendatory act of February 26, 1895, defining the conditions under which a tract of land may be treated as isolated, contemplates that the tract involved must have been subject to the application of any qualified person under the homestead law during the period specified in said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 4, 1898.* (G. B. G.)

G. W. Allen has appealed from your office decision of September 29, 1896, rejecting his application to have the SE. ¼ of the SE. ¼ of Sec. 4, T. 33 N., R. 1 W., Eau Claire land district, Wisconsin, ordered into market under section 2455 of the U. S. Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

The appellant makes no specific assignment of error, and the facts shown by the record are meager.

It appears, however, that Allen's said application was made August 26, 1896, wherein it is stated, under oath, that said land is principally valuable for agricultural purposes, contains no building stone or mineral of any kind, is uninhabited, and contains no improvements of any kind or description, that it is also valuable at the present time for the timber standing and growing thereon, and that

affiant desires to have said land ordered into market so that he may purchase the same for his own use for the purpose of agriculture, and for the timber standing and growing thereon . . . . . that said land is isolated from any other land subject to homestead entry, and that said land above described has been subject to homestead entry for more than three years.

By your office decision it is made to appear that the adjoining NE. ¼ of the SE. ¼ is covered by the homestead entry of one Samuel Campbell made August 2, 1893, and that one Lewis Kellogg made homestead entry for the land, which is the subject of Allen's application, on September 30, 1895, which was canceled by relinquishment August 26, 1896.

Section 2455 of the Revised Statutes, as amended by said act of February 26, 1895, is as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided,* That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided,* That not more than one hundred and sixty acres shall be sold to any one person.

It is not believed that the status of the land involved is such as authorizes its sale under said section, as amended. It does not appear

whether there are surrounding lands which have not yet been disposed of. But the lands here sought to be brought within the provisions of the law above quoted must "have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government." It must therefore have been subject to homestead entry for a period of three years from and after August 2, 1893, the date of the homestead entry of Campbell for the NE. ¼ of the SE. ¼ of the same section.

During the time the land involved was covered by the homestead entry of Kellogg, to wit, from September 30, 1895, to August 26, 1896, it was not "subject to homestead entry" within the meaning of the statute. It was of the *class* of lands subject to homestead entry, but it is thought that the statute means that the particular tract of land the subject of proceedings thereunder must have been subject to the application of any qualified person under the homestead laws. The policy of the law evidently was to offer at public sale only such isolated and disconnected tracts of land as were not wanted by home seekers, and it was directed that they should not be disposed of as such until they had been subject to entry under the homestead laws for a period of three years after the surrounding lands had been entered, filed upon, or sold by the government.

It is significant in the present case that Allen's application to have the land ordered into market as an isolated tract was made on the same day that Kellogg relinquished his entry thereof.

The land in question had not been, at the date of the application herein, subject to homestead entry for the time provided by statute.

Your office decision is therefore correct, and it is hereby affirmed.

MINING CLAIM—REINSTATEMENT—ADVERSE PROCEEDINGS.

JUANITA LODE.

Action on an application for the reinstatement of a canceled mineral entry should be suspended, where the applicant has filed an adverse claim against the application of a relocator for the land covered by said entry, and suit on said claim is pending in a court of competent jurisdiction.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 5, 1898.* (E. B., Jr.)

In the case of the Juanita lode claim, Las Cruces, New Mexico, mineral entry No. 120, made December 24, 1883, by Ethan W. Eaton, and now here on appeal by Thomas B. Catron, as transferee of Eaton, from your office decision of May 26, 1896, rejecting Catron's application to have the entry reinstated (the same having been canceled June 3, 1895), it appears that subsequent to such cancellation and prior to the filing, on June 1, 1896, of the application for reinstatement, the

land embraced in the said claim was relocated by H. J. Abernathy and John H. Lakin as the Mamie lode claim, and that on April 6, 1896, said Abernathy and Lakin filed their application, No. 635, for patent therefor.

It further appears that during the period of publication for the Mamie claim several adverse claims were filed, one of which was by said Catron as owner of the Juanita claim; also that on July 3, 1896, within the thirty days allowed by section 2326 Revised Statutes, said Catron commenced suit against the Mamie applicants in a court of competent jurisdiction to determine the question of the right of possession to the land in controversy. So far as appears, this suit is still pending.

Under these circumstances, the court having apparently obtained jurisdiction of the parties and of the subject-matter, the Department will suspend action upon the said appeal until final disposition shall have been made of the said suit. See case of S. H. Standart *et al.*, 25 L. D., 262. The papers will be retained here.

ACCOUNTS—SURVEY—SPECIAL INSTRUCTIONS.

ISAAC N. CHAPMAN ET AL.

Under the provisions of section 8, act of July 31, 1894, the acceptance of payment on the settlement of an account by an auditor precludes a revision of said account.

Special instructions issued by the surveyor-general, with respect to the execution of a contract for a public survey, become, under the act of October 1, 1890, a part of such contract if not in conflict with the manual of surveying instructions, or the instructions of the General Land Office.

Compensation should be allowed for the retracement of lines, though no provision therefor is made in the contract, but the instructions of the surveyor-general direct such re-surveys when absolutely essential, and the necessity for such action is fully disclosed by the field notes of survey.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 5, 1898.* (W. M. B.)

Isaac N. Chapman and Alfred Bannister, U. S. deputy surveyors, have appealed from the decision of your office of July 1, 1895, wherein their claim for compensation, amounting to $2,945.72, as per accounts rendered for surveys made in the State of California under contract No. 100—entered into and executed by the said contracting deputies on the one part and the surveyor-general on the other, on November 16, 1892, and approved by the Commissioner of the General Land Office on June 13, 1893—was reduced to the sum of $2,817.69; being a disallowance of $128.03 as charged in their said accounts.

The only items wholly rejected in said accounts and for which no rate of mileage whatever was allowed or paid either in whole or in part consist of two miles, forty-two chains, six links of retracement or

resurvey of the 8th standard line south. For the retracement of one mile, seventy-nine chains, ninety-seven links of that part of said standard line which forms the south boundary of sections 35 and 36 of township 32 south, range 34 east, the high rate $18.00 per mile was charged, and for the retracement of 42 chains, .09 links of that part of said standard line which forms the south boundary of the SW. ¼ of SW. ¼ of section 31, township 32 south, range 36 east, M.D.M., the minimum rate $9.00 per mile was charged, neither of which said rates was allowed or paid for the resurvey of either line, as stated, because of the rejection of said lines.

The total of the charge made and of compensation claimed for retracement of the above described rejected lines for which payment was disallowed amounts to $40.73, said rejection and disallowance being made upon the ground, as alleged, that such retracements or resurveys of said lines were not authorized by contract No. 100. Whether there was authority therefor under said contract and existing law will be considered later on.

A further reduction or disallowance of $87.30—which in addition to the stated disallowance of $40.73 makes up the aggregate disallowance of $128.03 which appellants now seek to recover by a revision of the settlement already made—was caused by the allowance only of the minimum rates of mileage—instead of the high rates as charged—for the survey of certain standard lines (other than those rejected as stated), township, exterior lines, and section or subdivision lines.

The action of your office in reducing the high rates charged by appellants for certain portions of the above named lines to low rates was based upon the ground that the lands, as shown by the field notes, over which said lines passed are not of that character which warrant the allowance and payment of high rates of mileage. The contracting deputies on the other hand, however, contend that the field notes show that they are entitled to the high mileage rates wherever charged in their accounts—by reason of the character of the land over which the lines of survey passed—for those lines and parts of lines for which the said high rates so charged were reduced to low rates.

Thus a direct issue is made as to what, as a matter of fact, the field notes actually show with regard to the character of the lands over which those lines passed which were put in the high rate column in said accounts and which were taken therefrom and put in the low rate column by your office.

On July 10, 1825, appellants received the sum of $2,817.69 from the Department of the Treasury in payment of total amount of compensation allowed them in a settlement with the Auditor for surveys executed under their contract.

Said amount of $2,817.69 includes payment of compensation for each and every item of mileage—either at high or low rates—for the different class of lines or parts of lines run and charged for in accounts rendered by appellants, save for the hereinbefore described rejected

standard lines for which no allowance or payment either in whole or in part was made.

The fact that the contracting deputies have already accepted payment of the low rates of mileage allowed by the Auditor in the settlement of their accounts in place of the high rates as therein charged—under provision of the act of July 31, 1894 (28 Stat., 208, Sec. 8, par. 3)—pretermits the consideration of the question as to whether the field notes show that the lands over which the lines passed and for which low rates were paid, in lieu of high rates as charged, are of the character which warrant the payment of such high rates, since the acceptance of payment under said settlement of low rates for the items of mileage in the accounts for which high rates were charged precludes appellants from obtaining a revision of the former settlement and additional compensation as to those items of mileage upon which they have accepted payment of any mileage rate whatever. See case ex-parte Gilbert M. Ward (22 L. D., 583).

Hence it appears that appellants, under the state of facts related, are barred by the terms of existing law from obtaining a revision of the former settlement for the purpose of procuring payment of the sum of $87.30, which was disallowed them by the Auditor for this Department, as also by your office, notwithstanding the fact that the stated disallowance was made upon the ground that the character of lands over which the lines of survey passed did not justify payment of high rates where low rates only were allowed and paid.

The only questions, therefore, which remain open for consideration and determination, are (1) whether the retracements of the rejected standard lines for which appellants claim the sum of $40.73 as compensation were authorized by their contract, and (2) if such retracements were so authorized what amount of compensation would the deputies be entitled to therefor.

Though it appears that such retracements were not specifically provided for in the contract under which the surveys were made, as was held by your office, the deputies, nevertheless, contend that since the said retracements were made by authority of special instructions of date November 16, 1892, issued under their contract, that they were therefore made by authority of the contract itself.

Whether the rejected retracements were authorized by contract No. 100, must depend, in the first place, upon the terms of the referred to special instructions, and, in the second place, upon the fact as to the absolute necessity for making the same, and without which the surveys contracted for could not have been completed with proper accuracy. That portion of the said instructions germane to the particular question now under consideration is in words following:

> You will make only such re-tracements and re-surveys of the line or lines of former approved official surveys as may be found by you to be absolutely essential to the proper completion of the new surveys as authorized, for which work you will be allowed the same rate as those named in your contract, and payable from the same appropriation.

The lines, if any, which are to be re-run and re-surveyed in order to re-establish your beginning and closing points must be specifically described in the field notes of the new surveys, and the necessity therefor clearly set forth, as also the fact that no evidences of former approved surveys were found and that the line or lines of alleged original official surveys as shown by the field notes and diagrams furnished you by this office are either fictitious or have been obliterated; also that a faithful search has been made therefor.

Great care must be exercised in order to prevent, if possible, needless retracements or re-surveys; hence the requirements providing for detailed statements of the necessity and search for lines in question; all of which information must be embodied in the field notes of the surveys provided for in your contract.

The foregoing instructions were issued by the surveyor-general and the provision of law enacted October 1, 1890 (Supl. Rev. Stat., 2 Ed. Vol. 1, 879), whereby the special instructions issued by said official under a contract become a part of such contract, is in words following:

The printed manual of surveying instructions for the survey of the public lands of the United States and private land claims, prepared at the General Land Office, bearing date December second, eighteen hundred and eighty-nine, the instructions of the Commissioner of the General Land Office and the special instructions of the surveyor-general, when not in conflict with such printed manual, or the instructions of said Commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States and private land claims.

Whereas it does not appear that the special instructions issued by the surveyor-general for California for the guidance of the contracting deputies in executing surveys under contract No. 100 were in any way in conflict with the provisions of the printed manual of surveying instructions, or the instructions of your office, it necessarily follows that the retracement made of the rejected standard lines were authorized by said contract, provided the same were "absolutely essential" to the completion of the surveys specifically named and provided for therein, and provided, further, the deputy surveyor making the retracements, in conformity with the requirements of special instructions, clearly set forth in the *field notes* of the new survey the necessity for making such retracements.

The object of the deputy in making the retracements for which payment was refused was for the alleged purpose of re-establishing that portion of the 8th standard line which forms the south boundary of township 32 south, range 35 east, M. D. M. in order to have a line upon which to close, and complete the survey of said township and range specifically provided for in appellants contract.

There being, as will be hereafter shown, no corner discoverable along the referred to portion of said standard line which, as stated, forms the south boundary of township 32 south, range 35 east—established almost forty years prior to the new surveys and retracements—from which to run and mark the same, the deputy who made the retracements went to the old corner to sections 34 and 35, township 32 south, range 34, east (1 mile, 79 chains, 97 links west of the locus of obliterated corner to township 32 south, ranges 34 and 35 east) pointed out to him

by the county surveyor, as the nearest discoverable corner from which to start and re-establish that part of the said 8th standard line to the south of township 32 south, range 35 east.

In order to re-establish said line the deputy retraced the 8th standard line between the old corner to sections 34 and 35, township 32 south, range 34 east, and the point ascertained by retracement to be the locus of quarter section corner of section 31, township 32 south, range 36 east, a distance a little over eight miles and a half, at which latter place was found a mound, with no post thereat, or any tree within 300 links thereof by which the old corner could be identified.

Whether the retracements along the entire length of the above described line were necessary or not for the re-establishment of that particular portion of the 8th standard line—6 miles, 2 chains, 55 links long—which extends along and forms the south boundary of township 32 south, range 35 east, must be determined, in the absence of any other evidence, solely by that disclosed by the transcript of field notes of said retracements, made in connection with the new surveys.

The field notes of said retracements show that there was no trace of an old corner at the *locus* of the corner to township 32 south, ranges 34 and 35 east, or at that of the corner to township 32 south, ranges 35 and 36 east, there being no mound or post, or the remains of either, at said points, or any tree within 300 links thereof, whereby said corner could be identified. The field notes further show that there was no trace of a corner found along the whole length of the standard line between the points above named, or any tree within three hundred links of where the old quarter-section and section corners were originally established, save at the *locus* of the old corner to sections 33 and 34, where only a mound was found, without post in place, or any tree within three hundred links of said mound, whereby the particular corner at which the mound was erected could be identified.

It further appears from the field notes that the nearest traces or marks which remained of old corners on the 8th standard line south, outside of township 32 south, range 35 east, were found—one to the west and the other to the east of said township and range—at the *locus* of what the retracements proved to be the quarter section corner of section 36, township 32 south, range 34 east, and at the *locus* of which was, in similar manner, shown to be the quarter-section corner of section 31, township 32 south, range 36 east, respectively, which consisted of the remains of a mound, without post in place, or any tree within three hundred links thereof, whereby either point could be identified as being the *locus* of a quarter-section or section corner.

A mound merely—such as was found by retracement to be the locus of the corner to sections 33 and 34, upon that part of the 8th standard line which forms the south boundary of township 32 south, range 35 east, without post in place, or any tree in vicinity thereof, whereby the particular corner at which the mound was found could be identified,

would not be considered as sufficient *indicia* to identify an old corner to be used as a starting point from which to run and re-establish said boundary or standard lines. Nor was there found at the point of the quarter-section corner of section 36, township 32 south, range 34 east, or at that of quarter-section corner of section 31, township 32 south, range 36 east, similarly marked—post being gone at each point, and no tree within three hundred links of mound—sufficient evidence of an old corner from which to start, run, mark, and relocate that portion of the referred to standard line to be used as a closing line.

There being no old corner discoverable or capable of being identified by search, as shown by the field notes, either at the point where the corner to township 32 south, ranges 34 and 35 east, or the corner to township 32 south, ranges 35 and 36 east should be, or at any point along the standard line between the points last named, or at the point where the nearest quarter-section corners should be on said line to the south of the adjoining townships and ranges, the deputy went to a known corner to sections 34 and 35 of township 32 south, range 34 east, (pointed out to him, as stated hereinbefore, by the county surveyor) on the same standard line—1 mile, 79 chains, 97 links west of the *locus* of the corner to township 32 south, ranges 34 and 35 east—for a starting point, or beginning corner, from which to run, retrace and relocate the standard line upon which the subdivisional lines of surveys on the south of township 32 south, range 35 east, were closed.

The facts in the case at bar differ from those in the case of ex-parte George W. Pearson, U. S. deputy surveyor (22 L. D., 471) wherein compensation was disallowed for certain retracements made by said deputy for the alleged purpose of finding the corners of former surveys from which to run and establish lines of the new surveys.

The terms of the special instructions under which the retracements were made by Pearson, and those by virtue of which the retracements in the case at bar were executed, are similar—if not identical in wording—in all essential particulars.

The disallowance of compensation for the retracements referred to and described in the cited case was made for the reasons, (1) that in certain instances Pearson unnecessarily retraced old lines for a considerable distance for the purpose, ostensibly, of finding old corners for starting points, which, as shown by the field notes returned by said deputy, were marked and identifiable by mounds, posts, and witness trees in place, and were therefore—with the aid of the diagram and field notes of the old survey—as easily discoverable by search, and without retracement, as were the corners from which the retracements were started, and (2) because in certain other instances where retracements were deemed necessary by the deputy and were accordingly made to find corners of former surveys to be used as beginning corners from which to run and establish lines in the new surveys, the deputy failed to set forth in his field notes the *necessity* for making such retracements as

was prescribed by the special instructions by authority of which he claimed the same were made.

The provision contained in special instructions, stipulating that retracements for the purpose of finding established corners of old surveys as starting points in new surveys, must not be made except upon the sole condition that the same are found to be "absolutely essential" for purpose stated, and the further provision that when such retracements are made for said purpose the *necessity* therefor must be "clearly set forth in the field notes," are material conditions of the contract under which the surveys are made, and as necessary to be discharged or performed by a contracting deputy surveyor, in the manner stipulated in special instructions, as any other condition imposed by the terms of contract, in order to entitle said deputy to compensation for work done by or under authority of such special instructions.

In other words the terms of a contract with regard to the above mentioned requirements or conditions must be strictly complied with, and the failure of a deputy to embody in the transcript of field notes returned by him information, as Pearson failed to do, which his contract expressly stipulated should be set forth therein, constitutes a defect in said field notes and a breach of the terms of the contract which cannot be supplied or cured by a supplemental statement—such as were shown in the Pearson case, *supra*, to have been made and filed for the purpose of showing the *necessity* for certain rejected retracements—which could not be incorporated into the field notes and thereby made to form a part thereof.

All field notes must conform strictly to the instructions under which surveys or resurveys are made and must be complete within themselves, as appear to be those returned by appellants in connection with the surveys and resurveys or retracements made by them and now under examination.

Where payment is authorized by special instructions for retracements only to find old corners for starting points in new surveys which cannot be discovered by search, and when a trace merely remains at the *locus* thereof which is insufficient, in connection with the assistance of a diagram and field notes of the former survey, for the identification of such corners, compensation should be allowed only for retracements absolutely necessary for locating the beginning corners, and for only so much of the line or lines, retraced and intervening between said starting points and the nearest discoverable corners.

Since it appears from the fact herein related, as disclosed by the field notes, that it was "absolutely essential" for the deputy to make the retracements herein described for the purpose already stated and for which no compensation was allowed—the deputy having started, as hereinbefore shown, from the nearest discoverable or known corner to township 32 south, range 35 east to re-establish the standard line on the south thereof—and since the necessity for making said retrace-

ments is clearly and fully set forth in the field notes, appellants are entitled, under the terms of their contract, to payment therefor.

It appears from the field notes that the retraced standard line, to the extent of 1 mile, 79 chains, 97 links, extended over land of a character for which payment of compensation at the rate of $18.00 per mile was authorized by contract, and that said standard line to the extent of 42 chains, .09 links passed over land of a character for which payment of $9.00 per mile was authorized, whereby appellants are entitled to $40.73 for said retracements made along said lines as claimed by them.

For reasons herein stated the decision of your office disallowing appellants the compensation claimed for said retracements is hereby reversed, and it is hereby ordered that you readjust the account of appellants as to the above described items amounting to $40.73, and certify said account for payment for said amount.

SETTLEMENT RIGHTS—DURESS.

KELSO *v.* HICKMAN.

The right of a settler on the public land must rest upon his personal and actual settlement alone, and neither the ownership of improvements, nor possession through an agent, constitute him a *bona fide* settler.

In determining whether a plea of duress, in excuse of absence from land, is good, the age and physical condition of the party setting up such plea may properly be considered.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 5, 1898.* (C. W. P.)

Cicero C. Hickman has appealed from the decision of your office of May 17, 1897, holding his homestead entry, No. 3235, of lots 3 and 4, and the E. ½ of the SW. ¼ of Sec. 19, T. 21, R. 8 E., Perry land district, Oklahoma Territory, subject to Charles M. Kelso's superior right to said land.

The record shows that said Kelso made an application, by mail, to enter said land as a homestead, which was received by the local officers on October 30, 1893; that on November 3, 1893, said Hickman was permitted to make homestead entry of the same; that on November 22, 1893, the local officers rejected Kelso's application for insufficient special affidavit, and conflict with Hickman's homestead entry; that Kelso appealed to your office, which affirmed the judgment of the local officers; that on a further appeal to the Department, your office decision was modified, and a hearing ordered to determine the rights of the parties. A hearing was had and a decision rendered in the case by the local officers on June 8, 1896, in which it was held that as Hickman made his entry long before Kelso established his residence on the land,

Hickman had the better right to the land, and they recommended that Kelso's contest be dismissed. Kelso appealed. Your office held that Kelso made a valid settlement on the land on October 23, and 24, 1893; and established residence thereon within a reasonable time; that Hickman's claim of settlement, prior to Kelso's settlement, was invalid, and that he must rely upon his entry alone for his right to hold the land; that Kelso had a good excuse for leaving the land on November 17, 1893, and that, even if he had not a valid excuse, he cured any laches of which he may have been guilty in that respect, by re-establishing his residence on March 29, 1894, which was within less than five months after he had moved away. Your office further held that, as Kelso's application to enter was executed before the Probate Judge and ex officio clerk of County Q, and received at the local office by mail on October 30, 1893, and was accompanied by his affidavit, alleging that he is prevented by a distance of fifty-five miles from appearing at the local land office at Perry to enter the land, and that he is physically unable to go to the land office to make his entry, and as said application was received by the local officers before Hickman's application was presented, Kelso had the prior right to the land.

From this decision Hickman appealed to the Department.

The evidence is correctly stated in your office decision.

If it be conceded that Hickman ate his dinner and cut and burned some brush on the land on October 17, 1893, and that Edwards, as his agent, but during Hickman's absence, raised the foundation which Edwards had placed upon the land on September 16, 1893, with his name written thereon, four logs higher, and did some plowing on October 23, 1893, yet they did not constitute evidence of settlement on the part of Hickman. The right of a settler on the public land must rest upon his personal and actual settlement alone, and neither the ownership of the improvements, nor possession by means of the improvement of the land by an agent, constitute him a *bona fide* settler. Culver *v.* McMillan, 17 L. D., 501; Esperance *v.* Ferry, 13 L. D., 142; Willis *v.* Parker, 8 L. D., 623; Knight *v.* Haucke, 2 L. D., 188. He must therefore rely solely on his homestead entry made on November 3, 1893, and as the testimony shows that Kelso performed valid acts of settlement on the land on October 23, and 24, 1893, before Hickman made his entry, and that he moved his family on the land on November 11, 1893, thereby establishing residence within a reasonable time, it seems to be clear that he has a valid claim to the land on the ground of priority of settlement.

For it is apparent from a consideration of the whole evidence that Hickman, accompanied by his uncle, Edwards, and three other men, one of whom was armed with a "six-shooter," and another with a "six-shooter" and a "Winchester rifle," went upon the land on November 14, 1893, with the purpose of intimidating Kelso and frightening him off the land, in which he was entirely successful, Kelso leaving the land

with his family. While the display of force testified to might not amount to duress with some men, when it is remembered that Kelso was advanced in years and in feeble health, the facts disclosed by the evidence were abundantly sufficient to fill the mind of such a man as Kelso with the belief that a refusal to leave the land would subject him and his family to personal injury—that he did not voluntarily abandon the land is shown by the fact that he re-established his residence within a little more than four months after he moved away.

For these reasons the decision of your office is affirmed.

HOMESTEAD ENTRY—ADJOINING FARM ENTRY.

CHARLES B. FRANCIS.

An application to change a homestead entry for one hundred and sixty acres into an adjoining farm entry, may be allowed on relinquishment of one subdivision embraced in the original entry, and the purchase of a tract adjacent to the remainder, and due showing of residence on the deeded land.

Secretary Bliss to the Commissioner of the General Land Office, May 6, 1898.

(W. V. D.) (C. J. W.)

July 12, 1895, Charles B. Francis made homestead entry for the SE. ¼ of the SW. ¼ of Sec. 27, and the NE. ¼ of the NW. ¼ and the W. ½ of the NE. ¼ of Sec. 34, T. 20 N., R. 20 W., Harrison land district, Arkansas.

On September 14, 1896, he tendered his relinquishment as to the SE. ¼ of the SW. ¼ of Sec. 27, T. 20 N., R. 20 W., included in his homestead entry of July 12, 1895, and on the same day filed application to change the character of his original homestead entry to that of an adjoining farm entry.

The basis of the application is a corroborated affidavit of said Charles B. Francis, in which he is identified as the person who made the homestead entry referred to, and avers that he still owns it and that it is unencumbered; that to obtain a more convenient building site and one nearer to water, he desires to relinquish the SE. ¼ of the SW. ¼ of Sec. 27, and have the character of his entry changed, having purchased forty acres adjoining said homestead; that he established residence on said homestead about December 1, 1895; has a small house, orchard of eighty fruit trees, one acre cleared, and five acres deadened—worth about eighty dollars. On the deeded land the improvements are worth three hundred and fifty dollars.

The relinquishment and application to change the character of the entry were forwarded to your office without recommendation by the local officers.

On October 25, 1896, your office rejected said application.

The applicant has appealed to the Department.

After your office rejected said application, on which date Francis still appeared to be residing upon the land embraced in his homestead entry, to wit, on November 13, 1896, he filed the usual adjoining farm homestead affidavit, which was transmitted with the record, and from which it appears that he was then residing upon the deeded land. As between him and the government there is no longer any good reason why his application should not be favorably considered, it only affecting land already covered by his homestead entry. Having shown that he is now residing upon deeded land which adjoins the three forties for which he desires to perfect entry under the last clause of section 2289 of the Revised Statutes, it would appear that his application is within the spirit of said clause.

Under this changed state of facts, your office decision is reversed and the relinquishment of the SE. ¼ of the SW. ¼ of Sec. 27 is accepted, and Francis's homestead entry canceled as to it, and his application to change the character of said homestead entry as to the three remaining forties covered by it, to that of adjoining farm homestead, is allowed.

MILLE LAC INDIAN LANDS—EQUITABLE ADJUDICATION.

ANDREW S. ANDERSON.

A homestead entry of Mille Lac Indian lands, made after the receipt at the local office of the departmental ruling of April 22, 1892, and hence not confirmed by the joint resolution of December 19, 1893, may be submitted for equitable action, after final proof, it appearing that the claim of the entryman was initiated and maintained in good faith by settlement and otherwise at a time when the lands were open to homestead entry, and no adverse claim exists.

Secretary Bliss to the Commissioner of the General Land Office, May 6, 1898.

(W. V. D.) (F. C. D.)

Andrew S. Anderson has appealed from the decision of your office, dated April 28, 1896, holding for cancellation his homestead entry for the SE. ¼ of Sec. 14, T. 42 N., R. 26 W., St. Cloud land district, Minnesota.

The ground of said decision was that the land described is embraced within the former Mille Lac Indian reservation, and is therefore subject to disposal only under the act of January 14, 1889 (25 Stat., 642; 14 L. D., 497); that said entry having been made since the receipt, by the district land office at Taylors Falls, of your office letter communicating to them the departmental decision of April 22, 1892 (14 L. D., 497, *supra*), is not confirmed by the joint resolution of December 19, 1893 (28 Stat., 576).

It appears that the applicant, Anderson, on February 18, 1891, contested the prior entry of one William Ryder for the land in question; that the contest was decided in favor of Anderson on April 14, 1891; that a re-hearing was ordered on the ground that the notice of contest,

addressed to Ryder, was defective; that the decision on re-hearing was also in favor of Anderson; that Ryder's entry was canceled by your office letter of May 25, 1894; and that on June 6, 1894, Anderson was permitted to make homestead entry of the land. Furthermore, that he has been residing on the land since 1887, and has made improvements thereon to the value of about one thousand dollars.

In his appeal Anderson alleges and contends that by his residence and improvements he has acquired a right to the land; that his entry would have been made in 1891, and therefore would have been confirmed by the joint resolution of December 19, 1893, *supra*, but for the mistake of the local officers in issuing a defective notice to Ryder; and that his right to make entry of the land was initiated by his application filed with his affidavit of contest of Ryder's entry.

The question whether he acquired any right by virtue of his application filed upon the initiation of his contest of Ryder's entry may be determined by reference to the language of said joint resolution of December 19, 1893 (28 Stat., 576); which provides: "that all *bona fide* pre emption or homestead filings or entries *allowed* for lands within the Mille Lac Indian reservation, in the State of Minnesota," between January 9, 1891, and the date of receipt of notice, by the local officers at Taylor's Falls, of the departmental decision of April 22, 1892, shall be confirmed. Notice of said decision was sent to the Taylors Falls office by your office letter of May 3, 1892; when it was received by the Taylors Falls office does not appear, but certainly long prior to the date of Anderson's entry (June 6, 1894, *supra*,).

Anderson's entry not having been allowed within the period specified by the joint resolution of December 19, 1893, was not confirmed thereby.

It therefore appears that no relief can be granted by this Department in the ordinary course of proceeding; but as it is shown that Anderson has been a settler upon this land for a number of years, has made valuable improvements, to the amount of about $1,000.00, has shown good faith in the matter of settlement and the prosecution of his contest, which was initiated during the period when entries were allowed upon the lands, and were afterwards confirmed by the said joint resolution above referred to, and that there is no adverse claim to the land, it seems that on principles of equity and justice Anderson should be allowed to perfect title to the land through action at the proper time by the Board of Equitable Adjudication; and with that action in view, and for that purpose, Anderson will be allowed a reasonable time within which to submit final proof on his entry. You will instruct the local officers to that effect, and further instruct them that upon submission of said proof, if the same appears regular in all other respects, they will issue final certificate thereon, which certificate will be held subject to the action of the Board, to which you will please forward the case under the "special" rule, upon receipt of the proof and papers in your office.

The decision of your office herein is so modified.

LORENZO D. CHANDLER.

Motion for review of departmental decision of September 3, 1897, 25 L. D., 205, denied by Secretary Bliss May 7, 1898.

RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

WILLIAM HICKEY.

Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such course advisable.

Secretary Bliss to the Commissioner of the General Land Office, May 7, 1898.
(W. V. D.) (F. W. C.)

With your office letter of April 23, 1898, was forwarded a motion, filed on behalf of William Hickey, for review of departmental decision of March 10, 1898 (not reported), in which this Department refused to recommend the institution of suit to recover the title conveyed by the patent issued to the Northern Pacific Railroad Company for the S. ½ of the SE. ¼, Sec. 3, T. 129 N., R. 35 W., St. Cloud land district, Minnesota.

This tract is within the indemnity limits of the grant for said company, was included in its list filed November 7, 1883, and was patented May 29, 1896.

On March 2, 1896, Hickey tendered a homestead application for this land, alleging settlement October 10, 1884, and a hearing was ordered upon said allegation of settlement prior to the issue of patent to the railroad, but notice of the same was not received at your office until after the issue of said patent.

The original selection of the company, which was prior to the settlement alleged by Hickey, was not accompanied by a designation of a loss as the basis therefor, and under the principle announced in the case of John O. Miller (11 L. D., 428) it was urged that said original selection was not protected by departmental order of May 28, 1883 (12 L. D., 196), and was therefore no bar to Hickey's settlement.

As stated in the previous decision, the company filed a list of losses in 1892, which were arranged tract for tract with the selected lands in the subsequent list of May 16, 1895.

This was all done before the tender of the application by Hickey, made the basis of the present contest.

Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such a course advisable.

In this instance the lists filed subsequently to November 7, 1883, were but supplemental to the list filed on that date, and the patenting of the land related as of the date of the filing of the original list, so far as intervening claims are concerned, the records appearing to be clear at the date of patent, and nothing occurring in the subsequent lists to work an abandonment of the original list.

The approval being under the supervision of the Secretary of the Interior, he might, upon the showing now made by Hickey, if it had been before him then, have refused approval of the company's list, but, as stated in the opinion now under review,

> Having been approved, however, and patent issued, the discretion vested in the Secretary of the Interior has been exercised, and it is not believed that the showing made warrants the recommendation of suit for the recovery of the title passed.

The motion is accordingly denied.

NEFF *v.* SNIDER.

Motion for review of departmental decision of March 15, 1898, 26 L. D., 389, denied by Secretary Bliss May 7, 1898.

MINING CLAIM—LODE WITHIN PLACER—LODE LOCATION.

CRIPPLE CREEK GOLD MINING CO. *v.* MT. ROSA MINING, MILLING AND LAND CO.

A lode location subsequent to, and in conflict with, a placer location, but made prior to application for placer patent, does not, when based alone on a discovery outside the limits of the placer claim, and at one side thereof only, establish the fact that the lode or vein thus claimed was known to exist within the boundaries of said placer at the date of application for patent thereto.

The burden of proof is with a lode claimant who assails a placer patent on the ground that it embraces lodes or veins known to exist at date of application for such patent, and avers that such lodes or veins were consequently excepted from the operation of the patent.

Secretary Bliss to the Commissioner of the General Land Office, May 7, 1898.

(W. V. D.) (P. J. C.)

The Mt. Rosa placer, survey No. 7407, Pueblo, Colorado, land district, was located September 19, 1891, application for patent thereto was made August 5, 1892, and patent was issued April 24, 1893. The placer application stated that certain veins or lodes were situate within the boundaries of the placer claim, some of which were included in, and others excluded from, the application, but it contained no mention of the Kohnyo vein or lode.

March 7, 1894, The Cripple Creek Gold Mining Company made application for patent for the Fortuna and Kohnyo lode mining claims, survey No. 8612. The Kohnyo claim was located October 2, 1891, after

the location of the placer claim and before the application for the placer patent and is intersected about its center by one corner of the placer which extends across the lode claim from one side line to the other, thus dividing the lode claim into two non-contiguous tracts. The Kohnyo claimant did not adverse the placer application.

August 10, 1895, the Kohnyo claimant filed in your office, in connection with the prosecution of its application for patent, a petition alleging that the Kohnyo vein or lode was, at the time of the placer application, known to exist within the boundaries of the placer and was therefore excepted and excluded from the placer patent, and asking that in the event of its establishing this allegation, it be permitted to obtain patent to the ground in conflict under the ruling of the South Star Lode (20 L. D., 204).

On consideration of this petition your office, by letter of September 16, 1895, held that if said vein or lode was known to exist when the placer application was made, August 5, 1892, the title thereto remained in the United States and could now be acquired under the laws relating to lode claims, and ordered a hearing to determine the truth of the lode claimant's allegations.

A hearing was had before the local officers, who held that no vein or lode was known to exist within the ground in conflict at the date of the placer application. On appeal, your office, October 22, 1897, affirmed this decision. The case is now before the Department on further appeal by the lode claimant, who alleges error in this finding of the local office and of your office and in a ruling requiring the lode claimant to assume the burden of proving the known existence of the vein or lode at the time of the placer application.

In 1891 a shaft was sunk in the Kohnyo location about ten and one-half feet deep, in which a vein or lode of mineral was discovered, and in 1892 a second shaft was sunk therein to a depth of twenty or twenty-five feet, prior to August 5, 1892, the date of the placer application. The work in this second shaft disclosed two or three small veins, but whether any of them was the vein disclosed in the first shaft was not known. Both shafts were outside of the placer boundaries and near the northerly end of the lode claim, being distant about two hundred feet from the intersection of the claimed vein with the placer boundary. These veins or lodes had not been shown at that time to possess minerals of sufficient quantity and quality to give them commercial value or to justify expenditure in their extraction. So far as disclosed the veins or lodes in the two shafts, appeared to take the general direction of the lode claim and their continuous existence in that direction for the full length of the claim, would have carried them through the conflicting portion of the placer, but their presence either within the placer boundaries or in the southerly end of the lode claim was not shown by any discovery or development before the application was made for the placer patent. During the years 1891 and 1892 some small holes were dug in the northerly and southerly ends of the lode

claim and outside of the placer boundaries, but they did not disclose the presence of any vein or lode. This is all that was done in the way of discovery and tracing of the vein in question prior to the date of the placer application. Much testimony was produced at the hearing respecting the subsequent discovery and tracing of a vein or veins across and through the ground in conflict, but since the rights of the placer patentee are to be determined by the conditions prevailing at the date of the placer application, evidence of subsequent discovery and development can not throw any light upon those conditions and should not be considered. Such subsequent discovery and development could not act retrospectively and change or affect the knowledge possessed by the placer claimant or others at the time of the application for placer patent. Upon this question it was said in United States *v.* Iron Silver Mining Co. (128 U. S., 673,683):

> Lodes and veins in quartz or other rock in place, bearing gold or silver or other metal, were not disclosed when the application for the patents was made. The subsequent discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

See also Sullivan *v.* Iron Silver Mining Co. (143 U. S., 431,434).

It is contended that the Kohnyo vein is shown to have outcropped throughout the length of the lode claim, including the conflict with the placer, to such an extent as to be visible to one making an examination of the surface, and that this charged the placer claimant with knowledge of its existence. The evidence on the part of the lode claimant upon this point is not convincing. While some of the witnesses say, in a general way, that the vein did so outcrop, the substance of their testimony is that "float," more or less stained with mineral, was found on the surface of the claim at different points, but that these indications could not be traced continuously through the claim or through the ground in conflict. One of these witnesses, an original locator of the Kohnyo, says: "We could not tell whether it was float from this vein or not."

The testimony on behalf of the placer patentee is to the effect that these so-called outcroppings consist of granite boulders not in a continuous line, and not having the appearance of a vein; that there is too much soil everywhere on the claim except on the summit of the ridges to see an outcrop and that in the gulch or ravine it was more than eight feet through the wash to solid formation.

That portion or section 2333 of the Revised Statutes which controls this case reads as follows:

> and where a vein or lode . . . . is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

The application for the placer patent did not include an application for the Kohuyo vein or lode, and it necessarily follows from the language of the statute that if that vein or lode was known to exist within the placer boundaries at the time of the placer application, the failure of the placer claimant to include therein an application for such vein or lode must be construed as a conclusive declaration that it had no right or claim thereto. Upon the other hand, if the existence of the vein or lode in the placer claim was not known at that time, by the terms of the statute it was embraced in the placer patent and conveyed to the patentee therein.

The questions therefore which arise upon the record and upon the lode claimant's appeal are: First, whether it is shown that this vein or lode was known to exist within the placer boundaries at the time of the placer application; and, second, whether the burden of proving such known existence was rightly placed upon the lode claimant.

It is contended that the location of the vein or lode, October 2, 1891, based upon a discovery made outside of the placer boundaries and about two hundred feet to the north thereof, gave it the status of a known vein or lode within the meaning of the statute even though the actual existence thereof had not been discovered either within or to the south of the placer claim. The existence of a vein or lode is necessary to the making of a lode location. The thing located is the mineral-bearing vein or lode and the surface ground which can be taken "along the vein or lode" is an incident thereto intended to facilitate the convenient and safe working of the mine. Where the existence of a vein or lode within a placer claim is otherwise unknown its existence is not made known by the mere inclusion of that ground within a lode location. The marking of a lode claim upon the ground and the recording of the location notice may actually or constructively extend to others the knowledge upon which the lode claimants based their location, but it can not make known a vein or lode the existence of which is otherwise altogether unknown. The fact that the surface area in conflict was claimed under the lode location prior to the placer application, is not in itself controlling, for if, in fact, the vein or lode was not known to exist within the placer boundaries at that time it was conveyed to the placer claimant by the placer patent. The statute so provides in clear and unambiguous terms. In Iron Silver Mining Co. *v.* Reynolds (124 U. S., 374, 382), the court said:

> The statute does not except veins or lodes "*claimed* or known to exist" but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent.

The supreme court has had frequent occasion to consider and determine what constitutes a known vein or lode. In United States *v.* Iron Silver Mining Co. (128 U. S., 673, 683), it was said:

> It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or

other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation.

In Dahl *v.* Raunheim (132 U. S., 260, 263), referring to the claimed existence of a known vein or lode within a placer claim at the time of the application for placer patent, the court said:

There was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

In Iron Silver Mining Co. *v.* Mike and Starr Co. (143 U. S., 394, 404), the court said:

It is undoubtedly true, that not every crevice in the rocks, nor every outcroppping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute.

In Sullivan *v.* Iron Silver Mining Co. (143 U. S., 431, 435), the court held:

And after that, defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of Iron Silver Mining Co. *v.* Reynolds, *supra*. Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was, so far as disclosed by this testimony, on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section. In the case referred to this court said: "There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute."

See also Migeon *et al. v.* Montana Central Ry. Co. (77 Fed. Rep., 249; 44 U. S. App., 724).

The rulings of the supreme court upon the exception of mining claims from townsite patents are also worthy of consideration in this connection. In Dower *v.* Richards (151 U. S., 658, 663) it was said:

It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify

expenditures for the purposes of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. Deffeback *v.* Hawke, 115 U. S., 392; Davis *v.* Weibbold, 139 U. S., 507.

Examined and considered in the light of these decisions the evidence in the case at bar, as hereinbefore summarized, does not show that any vein or lode was known to exist within the ground in conflict when the placer patent was applied for. This conclusion receives some support in the conduct of the lode claimant. If the lode location embraced a vein or lode the existence of which within the placer boundaries was then ascertained and known, an adverse claim duly filed and prosecuted would have resulted in the direct and special exclusion from the placer patent of such known vein or lode and the adjoining surface area rightfully incident thereto. While the exception of a known vein or lode not applied for by the placer claimant does not depend upon the filing and prosecution of an adverse claim, the fact remains that this course presents the most effectual means of obtaining a final and satisfactory determination and adjustment of the rights of the conflicting claimants. The lode claimant, however, did not adverse the placer application, but permitted the issuance of a patent for the area in conflict as placer ground, April 24, 1893. March 7, 1894, it made application for patent for the lode claim excluding therefrom and from the published and posted notices thereof the area in conflict, and mineral entry thereof, likewise excluding the conflict, was made March 6, 1895. It was not until after your office had ruled that the non-contiguous tracts upon either side of the intersecting placer claim could not be entered as one lode claim and had required the lode claimant to elect which of the two tracts it would take, that any right was asserted under the lode claim to the area in conflict. Under these circumstances it was that the existence of a vein or lode within the placer boundaries was alleged to have been known when the placer application was made. While this subsequent conduct of the lode claimant could not alter or change the conditions existing at the time of the placer application and by which the rights of the parties must be determined, it may properly be referred to and considered as tending to show the lode claimants' estimate and opinion of those conditions and of its rights thereunder.

The placer claimant has a government patent for the land in controversy, obtained upon a showing held by the land department to establish the placer character thereof, and the lode claimant has attacked that patent alleging that this land contained when the patent was applied for a known vein or lode and was therefore excepted from the operation of the patent. This allegation amounts to nothing if not sustained by proof. The placer patentee was certainly not called upon to support the title apparently conferred by the patent, simply because it was assailed by some one who found therein an obstacle to the

obtaining of title to the same ground. It was therefore incumbent upon the lode claimant to establish the truth of its allegations, and the burden of proving them was rightly placed upon it. Discovery Placer Claim *v.* Murry (25 L. D., 460, 463).

For the reasons stated your office decision is affirmed.

OLSON *v.* TRAVER ET AL.

Motion for review of departmental decision of March 10, 1898, 26 L. D., 350, denied by Secretary Bliss, May 7, 1898.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

FLORIDA CENTRAL AND PENINSULAR R. R. CO. *v.* MCDONALD.

A possessory claim to public land, not asserted under the public land laws but resting on the prior possession of another, does not operate to appropriate such land as against the right of a railroad company to select the same under the act of June 22, 1874.

Secretary Bliss to the Commissioner of the General Land Office, May 7, 1898.
(W. V. D.) (C. W. P.)

The Florida Central and Peninsular Railroad Company has appealed from your office decision of July 17, 1896, holding for cancellation the selection of said company of the NE. ¼ of the NE. ¼ of Sec. 4, T. 30 S., R. 21 E., Gainesville land district, Florida.

The record shows that this tract was selected by said company on May 2, 1887, the selection being made under the provisions of the act of June 22, 1874 (18 Stat., 194); that James K. McDonald, in 1893, applied to enter said tract as a homestead, alleging prior settlement and occupancy of the land. The company was notified of the said application and entered protest against its allowance, whereupon a hearing was had, and from the testimony of said McDonald (the only testimony adduced at the hearing) and the records of your office it appears that said tract was entered March 6, 1876, together with other tracts, by C. M. Johnston, as a homestead (No. 3154), and that this entry was amended February 19, 1880, by the substitution of another tract for the tract in controversy; that Johnston amended his said entry, for the reason that the district officers found it to be in conflict with the warrant location of one Pierce as to said tract, but that it was subsequently discovered that this location did not cover said land; that after this discovery was made Johnston, in order to save the improvements he had made on the tract in controversy, purchased from other parties (the nature of whose title is not disclosed) that portion of said tract upon which his improvements were located, containing ten acres,

and that Johnston died in the belief that he had good title thereto; that his widow rested in the same belief and continued to occupy and cultivate said land; that in March, 1887, said McDonald married Johnston's widow, since which time he has continued to occupy the land; but lived with his wife on an adjoining tract; that in February, 1890, an agent for the railroad company visited the land and asserted the company's claim thereto, whereupon McDonald corresponded with your office, and was informed that the land was subject to entry; that shortly thereafter, he applied to enter the land.

The local officers recommended the rejection of the homestead application of McDonald, who appealed. Your office reversed the judgment of the local officers.

The act under which this selection was made permits of a relinquishment by the company in favor of persons who had been allowed to enter or file for lands to which it would be entitled, and provides that the company shall upon making such relinquishment—

be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral, and within the limits of the grant, not otherwise appropriated at date of selection, to which they shall receive title the same as though originally granted.

The company's claim to the land depends upon the status of the land at the time of the presentation of its list, to wit, May 2, 1887, and it does not appear that the land had then been appropriated by a qualified settler under the settlement laws, for, by McDonald's own statements, he was holding the land in controversy not as a settler under the public land laws, but under Johnston's purchase of that portion of the land on which he had improvements.

The decision of your office is, therefore, reversed.

STATE SELECTION—CERTIFICATION—SECTION 2449 R. S.

SCOTT *v.* STATE OF NEVADA.

By the provisions of section 2449 R. S., the certification of a State selection, made under the act of June 16, 1880, of land embraced within the *bona fide* settlement claim of a qualified homesteader at the date of such selection, is wholly inoperative, and does not divest the Department of its jurisdiction over the land.

Secretary Bliss to the Commissioner of the General Land Office, May 9, 1898.

(W. V. D.) (W. A. E.)

November 7, 1891, Fred Scott made homestead entry for the W. ½ of the NE. ¼ and the S. ½ of the NW. ¼ of Sec. 19, T. 30 N., R. 57 E., Carson City, Nevada, land district.

May 26, 1896, he filed an application to amend said entry so as to omit the S. ½ of the NW. ¼ and the NW. ¼ of the NE. ¼, and include

instead thereof the N. ½ of the SW. ¼ and the NW. ¼ of the SE. ¼ of said Sec. 19. In a corroborated affidavit attached to said application he alleges that in 1874 he settled upon and began to improve a certain unsurveyed tract, in the Carson City land district; that he has since continuously resided there and has placed about twenty five hundred dollars worth of improvements on the land; that as soon as possible after the filing of the official plat of survey he made homestead entry for the W. ½ of the NE. ¼ and the S. ½ of the NW. ¼ of said Sec. 19, "verily believing, from information received from persons claiming to be well informed upon such matters, that the tract so described embraced his improvements and was the land he desired to enter as his homestead;" that in May, 1896, he employed a surveyor to determine the exact boundaries of the land occupied and improved by him, when it was discovered that all of his improvements were upon the N. ½ of the SW. ¼, the NW. ¼ of the SE. ¼ and the SW. ¼ of the NE. ¼ of said Sec. 19.

This application was duly forwarded to your office, and was denied by your office letter of June 15, 1896, for the reason that on February 3, 1892, the State of Nevada selected, under the act of Congress approved June 16, 1880 (21 Stat., 287), the N. ½ of the SW. ¼ and the NW. ¼ of the SE. ¼ of said Sec. 19 (the land that Scott is seeking to include in his entry), which selection was approved by the Secretary of the Interior July 22, 1895, and certified to the State September 4, 1895.

Scott's appeal from the action of your office brings the case before the Department.

The principal question involved in this case is whether the certification to the State has divested the Department of jurisdiction over the land in controversy.

This certification was under the act of August 3, 1854 (10 Stat., 346; Sec. 2449 Revised Statutes U. S.), which provided that where lands had been or should thereafter be granted to any one of the several States and Territories, and the law did not convey the fee simple title of such lands or require patents to be issued therefor, the lists of such lands which had been, or might thereafter be certified,

shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

For a long time it was held by the Department that under a grant, which does not require the issuance of patent, the certification of lands is equivalent to patent, and divests the Department of all jurisdiction over the lands, and that the validity of such certification can only be questioned in the courts. Baker *v.* State of California, 4 L. D., 137; Garriques *v.* Atchison, Topeka and Santa Fe R. R. Co., 6 L. D., 543;

State of California *v.* Boddy, 9 L. D., 636; Smith *et al. v.* Portage Lake and Lake Superior Ship Canal Company, 11 L. D., 475.

Recently, however, the Department has modified its former ruling in regard to the effect of certification under the act of August 3, 1854. In the case of English *v.* Leavenworth, Lawrence and Galveston R. R. Co. (23 L. D., 343), it was held that the certification of land under a railroad grant, in accordance with the provisions of the act of August 3, 1854, is of no operative effect if the land in fact was excepted from the grant. This decision was based upon the decision of the United States supreme court in the case of Weeks *v.* Bridgman (159 U. S., 541). In the latter case it appeared that at the date of the definite location of the St. Paul and Pacific Railroad, there was pending in your office on appeal from the action of the local officers rejecting the same, an application by one Brott to file a pre-emption declaratory statement under the act of March 3, 1855, for the land there involved. His right to make such filing was recognized by this Department in 1861, but notwithstanding the favorable action on his application, the land was certified to the State of Minnesota on October 25, 1864, as a part of the lands granted by the act of March 3, 1857, to aid in the construction of the St. Paul and Pacific Railroad. The court held that this particular land was excepted from the grant, and since it was so excepted, the action of the land department in including it within the lists certified on October 25, 1864, was ineffectual.

In the case of Edwin F. Frost *et al.* (24 L. D., 228), it was held that the inadvertent certification of State selections at a time when the lands covered thereby are included within an existing entry, and involved in proceedings then pending before the Department, is inoperative, and constitutes no obstacle to the issuance of patent in accordance with the final judgment in said proceedings; and in the still more recent case of St. Paul and Sioux City R. R. Company *v.* State of Minnesota (id., 364), it was held that a certification under the act of August 3, 1854, of lands on account of a railroad grant that were, at the date of the grant, embraced within a pending *prima facie* valid school indemnity selection, is no bar to the subsequent approval of such selection.

These later decisions of the Department (together with the decision in Weeks *v.* Bridgman) seem to authorize the ruling that certification under the act of August 3, 1854, is equivalent to patent, and divests the Department of jurisdiction only where the lands certified are of the character contemplated by the grant; and that where lands so certified are not of the character intended to be granted, the certification is null and void, and does not divest the Department of its jurisdiction over the land.

It is necessary, then, in the present case to determine whether the land here involved was, at the time when the State's claim attached, of the character intended to be granted by the act of June 16, 1880.

This act granted to the State of Nevada two million acres of land in

lieu of all the sixteenth and thirty-sixth sections within said State that had not been disposed of by the State prior to the passage of the act, and provided that:

> The lands herein granted shall be selected by the State authorities of said State from any unappropriated, non-mineral, public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act, the same shall be duly certified to said State by the Commissioner of the General Land Office and approved by the Secretary of the Interior.

Under this act the land which the State is authorized to select must be "unappropriated, non-mineral, public land." If it is "appropriated" at the date of the State selection, then it is not of the character contemplated by the grant, and a certification thereof to the State would be null and void, and would not divest the Department of its jurisdiction over the land.

In the case of Charles Culverwell (15 L. D., 99), it was held that the settlement right of a qualified homesteader excludes the land covered thereby from selection under the grant of June 16, 1880, to the State of Nevada. It was said in that case:

> If at the date the State selected the land in list No. 127, the applicant was then a settler on the land in question, having the qualifications of a homesteader, it can not be said that the tract so settled upon was "unappropriated" public land, and if not, the State was not authorized to select it as part of its two million acre grant.

Scott alleges that he settled upon the land here involved in 1874, long prior to the State's selection, and that he was living upon and claiming it at the date of said selection. It is true that at the time this selection was made Scott's entry covered adjoining land, but he claims that this was a mistake, that he intended to enter the land upon which he was residing and supposed he had done so. If the statements made in Scott's application are true, then the land upon which he was residing at the date of the State's selection was not "unappropriated" public land, and consequently was not of the character contemplated by the act of June 16, 1880, notwithstanding the fact that by mistake his entry was for different land.

Your office decision rejecting Scott's application is accordingly reversed, and you are directed to notify the local officers to order a hearing, of which both parties shall have due notice, to determine the facts in regard to Scott's settlement and entry, after which the case will be adjudicated in the light of the principles here laid down.

This decision is in place of departmental decision of April 29, 1898, which is hereby recalled and revoked.

RAILROAD LANDS—RIGHT OF PURCHASE—HOMESTEAD ENTRY.

JUSSILA *v.* CARRATT.

The act of January 23, 1896, dispensing with actual residence as a prerequisite to the right of purchase under section 3, act of September 29, 1890, where the lands applied for have been fenced, or otherwise improved, does not operate to create a right of purchase in one not having such right prior thereto, as against the adverse claim of a homesteader acquired under the original act, and the amendments thereto enacted prior to the statute of 1896.

Secretary Bliss to the Commissioner of the General Land Office, May 9, 1898.

(W. V. D.) (H. G.)

George Carratt appeals from the decision of your office of April 18, 1896, holding his homestead entry, made September 6, 1893, for the E. ½ of the NW. ¼ and lots 1 and 2 of Sec. 7, T. 3 N., R. 15 E., W. M., within the limits of the Vancouver, Washington, land district, subject to the right of purchase of John E. Jussila.

The tract involved lies on the line of the Northern Pacific Railroad Company, between Wallula, Washington and Portland, Oregon, and is included in the lands forfeited by section 1 of the act of September 29, 1890 (26 Stat., 496).

The application of John E. Jussila to purchase the said tract and also the NE. ¼ of the SW. ¼ of the same section, under section 3 of the act aforesaid, which is the only application transmitted with the papers, is dated January 16, 1893, and was filed in the local office September 11, 1893, five days after Carratt made homestead entry for the quarter section applied for by him.

Notice of the intention of Jussila to make final proof upon his application was published by the local office, as of date December 3, 1892, but no application appears in the record or accompanying papers prior to the one of January 16, 1893. He admits in his testimony that but one application was made, although his appeal from its rejection states that he made purchase application "long before the said homestead entry" of Carratt. This variance is, however, of no moment, as the right to make the purchase application in this case does not depend upon the time when it was made. His application to purchase was rejected, together with the final proof accompanying the same, because of its conflict with the uncanceled homestead entry of Carratt.

Jussila thereafter instituted a contest, alleging in his affidavit of contest that Carratt

has illegally entered said tract and fraudulently interfered with the right of said John E. Jussila to enter said tract under section 3 land grant forfeiture act of Sept. 29, 1890; that said John E. Jussila settled the said tract in (the) spring of 1886 and fenced the whole thereof that year and have (has) had peaceable possession thereof ever since (the) spring of 1886; that he held said tract in connection with the NE. ¼ of SW. ¼ of said section upon which he resided a portion of the years 1887 and 1888.

The testimony was taken November 23, 1893, before an officer appointed by the local office for that purpose, and upon consideration thereof, the local office held that the contestant was not entitled to purchase the tracts applied for under said act, because he did not have a contract or license to purchase the same from the Northern Pacific Railroad Company, and was not a settler within the meaning of the act, and recommended that his application and final proof be rejected and the homestead entry of Carratt be held intact.

Jussila appealed from the decision rejecting his application and final proof, but did not perfect his appeal in the contest case, as his notice of appeal did not specify the errors complained of and he did not furnish service of notice or file another appeal in conformity with the rules of practice. Your office held, however, that he protected his rights by his appeal from the rejection of his final proof, and that they were preserved by the act of Congress of January 31, 1893 (27 Stat., 427), extending the time within which persons were entitled to purchase lands forfeited by said act of September 29, 1890, to January 1, 1894, which was further extended by the acts of December 12, 1893 (28 Stat., 15), and January 23, 1896 (29 Stat., 4), to January 1, 1897, and because the last mentioned act provides that actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated or otherwise improved by such claimants, and limiting the right to purchase thereunder to an aggregate tract or tracts, whether contiguous or not, not exceeding three hundred and twenty acres.

The evidence considered at the hearing discloses that Jussila made no improvements upon the tract in dispute, except to construct a fence enclosing it with an adjoining forty acre tract which he also seeks to purchase, and that a house and other improvements thereon were located upon such adjoining tract. His period of residence was limited to about three months in each of the years 1887 and 1888, the fence having been built in 1886. He now resides in an adjoining township, and has always used the premises within the enclosure for a pasture. One of his witnesses stated that he (Jussila) had not lived in the "shanty" on the tract applied for by him for about five years, and this testimony is undisputed. Carratt had not, at the time of the hearing, which was had between two and three months after making his entry, settled upon the tract, but had hauled materials for a dwelling thereon, and desisted from further attempts to make settlement on account of the beginning of the contest against him, and because an attorney for Jussila had notified him, after the entry, not to locate upon or improve the tract.

Jussila testified that he made application to purchase the tract in June, 1891, but withdrew such application. He was confused in his statements upon this point, but finally admitted that he made but one application, the one now under consideration, which reached the local

office after Carratt's entry. He claims that he could not secure the amount required to meet the purchase price of the tract applied for by him, and it appears that he did not transmit his application and the final proof taken before a United States circuit court commissioner January 16, 1893, to the local office until September 11, 1893, the cause of the delay being that he needed the money for other purposes, and because the time for purchase had been extended one year. He did not claim under license, contract or conveyance with the Northern Pacific Railroad Company, the former grantee of the forfeited tract, for the purchase of the lands, prior to January 1, 1888, or at any time, although he insists that he "settled" upon the lands with the intention of purchasing them from said company.

It is apparent that Jussila had no rights as a settler to the tract he applied to purchase. His residence upon the tract during three months in each of the two consecutive years following his enclosure of the tract did not constitute a settlement of the tract, with the intent to purchase the same from the railroad company, as he abandoned his temporary occupancy thereof for five years prior to the hearing, and used it as a pasture, without making any attempt at cultivation. His improvements are estimated in his rejected final proof at two hundred dollars, but at the hearing they were estimated to be worth from four hundred to five hundred dollars.

It may be true that he had "peaceable possession" of the tract enclosed by him, from the time of such enclosure up to the time that Carratt entered the land and hauled building materials thereon, but such bare possession, without any "deed, written contract with, or license from" the railroad company grantee or its assigns did not bring him within the terms of the original forfeiture act or the acts amendatory thereof, existing at the time of his application and at the time of the hearing of his contest against Carratt. There can be no such thing as "settlement" disassociated with "residence." Although "settlement" may precede "residence," yet it must be with a view to residence. The going upon or improvement of land, otherwise than with a view to residence "within a reasonable time thereafter," may be "occupation," but not "settlement." This interpretation is adopted by subsequent amendatory legislation in the act of June 25, 1892 (27 Stat., 59), which permits extension of time only to purchasers "actually residing" upon the tract applied for. James C. Daly (on review), 18 L. D., 571, 572.

The second amendatory statute—that of January 31, 1893 (27 Stat., 427),—extended the time to persons "entitled" to purchase lands forfeited, to January 1, 1894, and the third amendatory statute—that of December 12, 1893 (28 Stat., 15),—further extended the time to the same class of persons to January 1, 1897, and contains the following proviso:

> That nothing herein contained shall be so construed as to interfere with any adverse claim that may have attached to the lands or any part thereof.

The statute of January 23, 1896 (29 Stat., 4), also extended the time to the same date, and dispensed with actual residence as a prerequisite to purchase, where the lands applied for have been fenced, cultivated or otherwise improved by the claimants, and the statute of February 18, 1897 (29 Stat., 535), further extended the time to purchase to January 1, 1899, and has a proviso identical to that of the act of December 12, 1893, protecting adverse claims that may have attached to any of the forfeited lands.

Prior, then, to the enactment of this statute of January 23, 1896, Jussila had no right whatever to purchase the tract applied for by him, as he did not fall within the classes of persons protected by the original statute forfeiting the lands and the supplementary legislation extending the time to purchase. He had not settled upon the lands with the intention, in good faith, to secure title to the same from the railroad company, and his acts subsequent to his enclosure of the tracts, show that he did not intend to become, and was not, an actual settler thereon. His possession was without any authority from the company, accepted by him, which made him a licensee, grantee or contractee with the company, as he does not show that he ever accepted any general permission to go upon the tracts, or had applied for permission to occupy the same or settle thereon. Ward's Heirs *v.* Laborraque, 22 L. D., 229, 232.

This proviso to the statute last mentioned dispenses with the necessity of establishing actual residence upon the lands applied for, and requires proof of cultivation, fencing or other improvement only of the tract applied for, and would permit the purchase of the tract applied for by Jussila, if there had not been in existence the valid and existing entry of Carratt at the time of the taking effect of the act. It can not be seriously contended that Congress by this latter legislation, particularly in view of the repeated legislation to protect adverse claims, intended to wipe out valid existing entries. It was held in the recent similar case of Cooper *v.* Scherrer, 26 L. D., 251:

> As Cooper did not have possession of said lands under a deed, written contract or license from the company, he did not come within the first class provided for by section 3 of said act, and as he had not established a residence on the land claimed by him, he did not come within the second class, provided for by said section. This was the law in force at the date of the rejection of his application and the allowance of the homestead entry of Scherrer. The amendment of said section made by the act of January 23, 1896, *supra*, which provided "that actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated or otherwise improved by such claimants," will not operate to divest the right acquired by the homestead settler under the act as originally passed and prior to said amendment.

See also Weidert *et al. v.* Kroll, 25 L. D., 522, 524; James C. Daly, 17 L. D., 498, 500.

This ruling seems decisive of the case at bar, as it appears that Jussila had not made a *bona fide* settlement upon the tract applied for by him, followed by residence thereafter maintained, had not applied to

purchase the same from the railroad company whose lands were forfeited by the act of September 29, 1890, and did not hold the lands under any license, contract, deed or other authority from said company at the time of Carratt's entry, or at the time of the hearing. The amendatory act mentioned, dispensing with actual residence on the land applied to be purchased, does not, therefore, operate to divest the right acquired by Carratt, under the original act and the supplementary acts amendatory thereof, as they existed at the time his right attached to the land.

If Carratt has not complied with the provisions of the homestead law since his entry, by making proper settlement and residence within apt time, or in other material respects, that matter may be determined by another contest between the parties. If at any such further hearing it should be found that he has not complied with the homestead laws, the application of Jussila to purchase the tract may be renewed. Cooper *v.* Scherrer, 26 L. D., 251, 252, *supra.*

The decision of your office is reversed. The final proof of John E. Jussila and his application to purchase will be rejected, and the homestead entry of George Carratt will remain intact.

TOWN LOT—ASSESSMENT—DEPOSIT TO PAY COST OF CONTEST.

JOHN S. SMITH.

An applicant for a deed to a town lot in Oklahoma is not entitled to receive credit for an unreturned deposit, due such applicant and made to defray the costs of a contest, as against the assessment levied on said lot by the town site trustees.

Secretary Bliss to the Commissioner of the General Land Office, May 10, 1898.

(W. V. D.) (G. B. G.)

With your letter of February 8, 1898, is transmitted to the Department the appeal of John S. Smith from the decision of your office of September 27, 1897, sustaining the action of townsite board No. 6, in refusing to issue deed to Smith for lot 27, in block 24, townsite of Perry, Oklahoma Territory, until the full amount of assessments levied thereon had been paid, and refusing to allow him credit on such assessment for money deposited by him with Amos B. Fitts, late disbursing agent of townsite board No. 8, at Perry, Oklahoma, to secure the payment of expenses of a contest case involving title to the same lot.

It appears that in the contest case of Lyman Hall *et al. v.* John S. Smith, before townsite board No. 8, in which was involved the lot in question, Smith deposited with Amos B. Fitts, then the disbursing agent of said board, the sum of $68.95; that Smith was the successful party in said proceeding, and that no part of said sum has been refunded to him; that the full amount of assessment against said lot is $151; that upon the tender of $82.05, the difference between $151, the

full amount of assessment on said lot, and $68.95, the amount of said deposit, the said sum of $82.05 was refused by the disbursing agent of said board No. 6; and that said board declined to issue deed until the full amount of assessments on said lot, $151, be paid.

No question is made of the legality of the assessment, but it is insisted that Smith should receive a credit on the amount due the United States, in that behalf, of the amount deposited as aforesaid.

Section 11 of the "Regulations provided by the Secretary of the Interior for the guidance of trustees in the execution of their trust," by authority of the act of Congress approved May 14, 1890 (26 Stat., 109), provides, among other things, that after setting apart to the parties entitled to receive the same lots, blocks, squares, or ground, and placing a valuation on the same as thereinbefore provided, said trustees

> will proceed to determine and assess upon such lots and blocks according to their value, such rate and sum as will be necessary to pay for the lands embraced in such townsite, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees, as provided for in said act.

Section 13 provides that whenever two or more claimants are found for the same lot, block, or parcel of land, said trustees shall proceed to hear and determine the controversy as therein specifically directed, and by section 20, "in order to secure the payment of costs," a deposit "with the disbursing officer of the board" is required, sufficient to cover and pay all "costs and expenses," and, further, "upon the final adjudication of a case, on appeal or otherwise, the sum deposited by the successful party shall be restored to him subject to the rules in such cases." (19 L. D., 334, *et seq.*)

Inasmuch as these regulations required the deposit in question to be made with "the disbursing officer of the board," such disbursing officer being an officer of the United States, and that officer having failed to restore the money, the contention of the appellant, that such sum should be set off against the amount of his indebtedness to the United States growing out of substantially the same proceeding, is not without force. However, no law or regulation is provided for the application of this money in payment for the land involved, but on the contrary it was deposited to cover costs and expenses of the contest and was to be returned by the officer directly to the claimant, in the event of his success in the contest.

The decision of April 21, 1898, herein is recalled and your office decision which was appealed from is affirmed.

PRACTICE—MOTION FOR REVIEW—APPEAL—SOLDIER'S FILING.

THRAILKILL *v.* LONG.

A motion for the review of a Commissioner's decision that adversely affects both parties to the litigation, filed in time by one of said parties, operates to suspend all action under said decision until the disposition of said motion, and during such period of suspension neither of the parties is required to appeal.

Schweitzer *v.* Hilliard, 19 L. D., 294, overruled.

A soldier's homestead declaratory statement does not operate to protect a prior settlement claim of the soldier to the land embraced within said filing.

Secretary Bliss to the Commissioner of the General Land Office, May 10, 1898.

(W. V. D.) (C. J. W.)

On April 20, 1892, Samuel L. Long filed soldier's declaratory statement for the NE. ¼ of Sec. 20, T. 17 N., R. 7 W., at Kingfisher, Oklahoma. On April 26, 1892, Milton R. Thrailkill made homestead entry for said tract. On October 17, 1892, Long made homestead entry.

Without calling on Thrailkill to show cause why his entry should not be canceled, on December 8, 1892, your office held his homestead entry for cancellation. On December 21, 1892, Thrailkill filed an affidavit in the local office alleging prior settlement and praying that the action of your office of December 8, 1892, be set aside and a hearing ordered on his allegation of prior settlement. February 8, 1893, Thrailkill filed an appeal from the action of your office of December 8, 1892, which was forwarded to the Department November 7, 1893.

A hearing was had on the grounds of contest charged by Thrailkill, which closed June 17, 1893, and which resulted in a decision of the local office finding Thrailkill to have been the first settler and awarding the land to him. Long appealed.

On June 20, 1894, the Department having under consideration Thrailkill's appeal from the action of your office of December 8, 1892, holding his entry for cancellation, found that the appeal presented only a preliminary question and that your office had rendered no decision on the merits of the case. The appeal, with the record, was returned to your office for consideration.

May 28, 1895, your office remanded the case to the local office and returned the record for further action on account of irregularities in the proceedings, and a further hearing was had, which closed October 30, 1895. The local office rendered a second decision, in which they found that plaintiff and defendant had made simultaneous settlement and recommended that each party take the eighty-acre tract upon which his improvements are located. From this decision both parties appealed.

On April 24, 1896, your office considered the case and affirmed the decision of the local office. Long moved for review of said decision, and on August 1, 1896, upon a review of your decision of April 24,

1896, a different conclusion was reached and so much of your said office decision as awarded to Long eighty acres of the tract in question was revoked, Long's entry held for cancellation, and Thrailkill's entry held intact.

The case is before the Department on the appeal of Long from your office decisions of April 24, 1896, and August 1, 1896.

The following are the grounds of error alleged:

1. In finding that contestant and defendant settled on said land simultaneously.
2. In not finding that Thrailkill had the burden of proof.
3. In not finding that Thrailkill made no settlement on this land until after Long's settlement.
4. In not holding that a party can not make settlement by simply riding a horse at full speed upon a tract of public land. (W. Reno City *v.* Snowden, 23 L. D., 74.)
5. In revoking the decision of April 24, 1896, so far as it awarded a part of the land to Long.
6. In overlooking the fact that said decision of April 24, 1896, had become final, so far as Thrailkill is concerned, by reason of his failure to appeal.
7. In holding that Long was in *laches* with his entry on said land.
8. In holding that Long was not protected by his soldier's filing.

The sixth ground of error is in the nature of a plea to the jurisdiction of your office to change the judgment in favor of Thrailkill in the decision of April 24, 1896, so as to enlarge his rights thereunder, when he had not appealed and when said decision had become final as to him.

For several reasons this proposition is not tenable. It assumes that a decision can become final pending a motion for its review filed in time, when the rules of practice provide expressly to the contrary. Rule 79 of Practice is as follows:

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

Long's motion for review covered the whole case and kept in issue the entire tract of land in dispute, and it was competent for your office, on review of the original decision, to make an entirely different disposition of the land from that made in the original decision. Thrailkill had a right to await action on Long's motion for review, without detriment to his right of appeal after it was disposed of, if he desired to do so. As your office set aside so much of the decision as was adverse to him, he found no cause for appeal. Your office, however, was not dependent upon the action of either of the parties for authority to correct any error in the original decision discovered before jurisdiction of the case was removed by appeal to the Department, but might do so *sua sponte*, as decided in the case of Littepage *v.* Johnson (19 L. D., 312), and other cases therein cited.

It is true that the Department in the case of Schweitzer *v.* Hilliard *et al.*, 19 L. D., 294, held that Rule of Practice 79 can only be invoked on behalf of a litigant who has himself filed a motion for review; that said rule is not for the benefit of parties who have no such motions

pending, but a re-examination of the question leads to the conclusion that such holding is not in accordance with the intent of the rule under consideration.

The operation of a motion for review is necessarily to suspend all action under the decision in question, and where said decision affects adversely the rights of two parties, and one applies in time for a review, it would serve no good purpose to require the other party to appeal. In such cases the Department had already held, substantially, before the case of Littlepage *v.* Johnson that where one has moved for a review and the other appealed, and both in time, your office retains jurisdiction of the case to dispose of the motion and render judgment on the merits of the case between the parties. Gray *v.* Ward *et al.*, 5 L. D., 410; Moore *v.* Pentecost, 18 L. D., 575.

The case, therefore, of Schweitzer *v.* Hilliard *et al.* must be, and it is hereby, overruled, in so far as it conflicts with the views herein expressed.

As your office had authority to dispose of the whole subject matter of controversy in the decision complained of, it remains to be considered whether it has been properly disposed of or not.

The seventh and eighth grounds of error present questions of law which were by your office considered conclusive of the rights of the parties. It was held that Long's soldier's declaratory statement did not relate to and protect his settlement made the day previous, so as to make such settlement the beginning and predicate of his claim, but that he must stand either upon his settlement or upon his declaratory statement. The position taken is supported by the cases of Pickard *v.* Cooley (19 L. D., 241), and Wood *v.* Tyler (22 L. D., 679).

In the supplemental brief filed by Long's counsel, the position is taken that the principle decided in the cases cited, *supra*, is contrary to the former rulings of the Department, and that the effect of your office decision is to abridge Long's rights under sections 2304 and 2305 of the Revised Statutes. Said sections are as follows:

SEC. 2304. Every private soldier and officer who has served in the army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteen, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the navy of the United States, or in the marine corps, during the rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter-section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

SEC. 2305. The time which the homestead settler has served in the army, navy, or marine corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of 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.

There is nothing to be found in these sections which was intended to, or does, relieve the soldier from his obligation to comply with the requirements of the act of May 14, 1880 (21 Stat., 140), where he makes settlement prior to filing soldier's declaratory statement, if he relies upon such settlement. The soldier's declaratory statement is no notice of prior settlement, but is notice of intention to settle and make entry within six months from date of filing. Long had a right on the opening of the Cheyenne and Arapahoe reservation to settlement—of which the land in question was a part—to compete with those who ran for it, and sought to initiate settlement right to it on the day of opening, and the fact that he availed himself of such right and made settlement on the day of opening neither abridged nor added to such right as he acquired by virtue of filing his soldier's declaratory statement.

The method of initiating a claim to the land by going upon it and performing some act of settlement on the day of opening is separate and distinct from that of initiating a claim by filing a soldier's declaratory statement. In the former case, the third section of the act of May 14, 1880, fixes the time within which notice of the claim is to be placed of record. Said section 3 is as follows:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

Failure to comply with the requirements of the section is fatal to the claim based on settlement.

The contention that the Department reversed a former rule and adopted a new one, in the case of Pickard *v.* Cooley, is not authorized by the authorities cited.

It is as much the duty of the soldier to put his settlement claim of record as it is the duty of any other settler. If it be suggested that Long was prevented from putting his settlement claim of record within ninety days by Thrailkill's homestead entry, made April 26, 1892, the reply is, that if Long relied upon his settlement, he should have filed contest against Thrailkill's entry within the like period.

In reference to Long's settlement claim, it is not only objected that it is barred by the act of May 14, 1880, but it is also insisted that Long could make no valid settlement, because of his entry into the Cheyenne

and Arapahoe country during the inhibited period. Long does not deny being in this territory on business not a great while before the opening, and it appears from the testimony that he passed within about sixty yards of the land in question. He obtained no advantage over Thrailkill or others by reason of it, as the land was in plain view from the border of old Oklahoma, from which the parties who ran for it made their start on the day of the opening. It is not necesary to go into the question as to how it may have affected his qualifications as between him and the government, nor is it deemed necessary to consider the evidence as to which of these parties actually reached the land first on the day of the opening. Long seems to have elected to stand on his filing, and Thrailkill's prior settlement being clearly proven, the finding in his favor was proper.

Your office decision is accordingly affirmed.

MINING CLAIM—ORDER OF CANCELLATION—REINSTATEMENT.

QUARTZITE LODE.

Where, by an order of the General Land Office, an amended survey of a mining claim is required within a specified period, the entry should not be canceled prior to a report from the surveyor-general's office; and an entry so canceled must be reinstated, if it subsequently appears that the mineral applicant had in fact, in due time, applied for and obtained from the surveyor-general an order for said survey.

Secretary Bliss to the Commissioner of the General Land Office, May 13, 1898.

(W. V. D.) (G. B. G.)

On December 30, 1884, John Harris, H. H. Metcalf, Emma E. Gruber, and the Humboldt Mining and Smelting Company made mineral entry 2401, for the Quartzite lode, Leadville, Colorado.

By your office letter of December 13, 1886, to the U. S. surveyor-general, at Denver, Colorado, that officer was directed to "notify the claimants that they should furnish amended plat and field notes showing, in accordance with existing regulations, the intersections with surveys Nos. 356 A., 377 A., 376 A., and 749 Humboldt lode claim."

It appears that claimants did not receive notice of this order.

By your office letter of November 6, 1894, the local officers at Leadville were directed to notify the claimants and allow them sixty days within which to file plat and field notes of an amended survey, as required by said letter of December 13, 1886, to the U. S. surveyor-general, or show cause why said entry should not be held for cancellation, and, again, by your office letter, dated March 16, 1895, said local officers were directed to allow the claimants sixty days within which to file said amended field notes of survey and plat, and to advise said entrymen that in event of their failure to do so, their said entry would, in the absence of appeal, be canceled without further notice to them.

It appears that all of the claimants were notified of the contents of said letter of March 16, 1895, by registered letters, addressed to them; that the one addressed to Metcalf was receipted for, but that the others were returned unclaimed.

By your office letter of July 18, 1895, to the local officers, said entry was held for cancellation, subject to the right of appeal. In that letter it was said:

> Considerable difficulty has been experienced in getting satisfactory evidence of service upon said entrymen.
>
> You should, if possible, ascertain the present post office address of each of these claimants, and notify them in accordance with existing regulations of the requirements contained in said letter of December 13, 1886, and that in case of their failure to furnish plat and field notes of the required amended survey, within sixty days from date of notice hereof, or to take an appeal, said mineral entry No. 2401 will be canceled without further notice from this office.

August 29, 1895, copies of this decision were mailed, registered, from the local office to each of the entrymen. The copies addressed to Metcalf and the Humboldt Mining and Smelting Company were received by them, but the others were returned unclaimed.

These facts were reported to your office, and upon the further report of the local officers that no action had been taken by the claimants, said entry was canceled by your office letter of November 30, 1895.

On March 20, 1896, said claimants made application for the reinstatement of said canceled entry.

On March 30, 1896, one John J. McGowan, by his attorney, filed a protest against the reinstatement of said entry, alleging a relocation of said Quartzite lode, and showing by a copy of a location notice that the ground had been, since the cancellation of said entry, relocated as the Congress lode.

By your office letter of April 25, 1896, the application for reinstatement was denied.

This application for reinstatement was renewed June 1, 1896, and a review and revocation of your said office decision of April 25, 1896, requested, but by your office decision of June 19, 1896, the motion for review was denied, and this second application to reinstate dismissed.

On June 27, 1896, the entrymen filed a motion for a re-review of the action of your office, and again requested that the action of your office be recalled and vacated.

On July 3, 1896, counsel for the said John J. McGowan filed a motion to dismiss the motion for re-review.

On September 3, 1896, your office reviewing the whole case reversed former action, and said:

> The motion to dismiss is overruled and the motion for re-review will be considered, as said motion for re-review presents one point not heretofore considered by this office.
>
> Without discussing all the specifications of error in said motion for re-review cited, it is sufficient to say that the question raised upon which the action of this office

hinges is one of jurisdiction. If at the time the order of cancellation was made this office had jurisdiction and authority of law to make the order, the entry cannot in view of the adverse claim of McGowan be reinstated.

If however said order was, through inadvertence or mistake, made without warrant of law, then and in that case it never was operative, or of any force in fact, but was a nullity from the beginning. It appears from the record that thirty-one days before your office reported that no action had been taken by the entrymen, and forty-five days before the order of cancellation was made, entrymen had initiated proceedings toward compliance with the order for an amended survey, and that four days prior to the date of the order of cancellation the required survey had been commenced.

Entrymen in taking steps toward compliance with the order of this office went to the right place, namely, to the U. S. surveyor-general, made their application for the amended survey, deposited the necessary fees for office work and obtained the order for the amended survey, all in apt time, and more than twenty days prior to the expiration of the period allowed them for appeal.

It is certain that if this had been known at this office at the time, the order of cancellation would not have been made. If the U. S. surveyor-general had been required to report prior to the final action of this office, these record facts would have been before me.

The U. S. surveyor-general is a constituent part of the Department, and the Department must take cognizance of his official acts. This being true, the fact that the entrymen applied to him in apt time for the amended survey, and that he in his official capacity issued the order for the amended survey, precluded this office from making a valid order of cancellation.

The order of cancellation, having been made without a report from the U. S. surveyor-general, and in the face of the record facts in relation to this case, was a mistake and an inadvertence, was made without jurisdiction or authority of law, and for that reason never was of any force or effect.

Said order of cancellation is therefore hereby vacated and set aside.

Should this decision become final, said mineral entry No. 2401 will be approved for patenting.

From this decision McGowan has appealed to the Department.

This appeal does not traverse any statement of fact made in the decision appealed from, and the eight specifications of error may be summarized, in the language of the appeal, as follows:

In view of the above, we submit that the Commissioner's decision was rendered without authority of law, and even had the Commissioner jurisdiction under the law and rules of practice to render a decision upon a motion for re-review, in the presence of appellants' motion to dismiss, said decision was erroneous in every conclusion. Wherefore we pray that the decision be reversed, and that the parties be left to settle the controversy as to their possessory rights before a proper tribunal, viz., a court of competent jurisdiction, as provided by law.

It is not thought necessary in this case to discuss the question of the jurisdiction of your office to render the decision appealed from, for it is not material whether that jurisdiction be affirmed or denied. If affirmed, it results that the proceedings are in all respects regular under the rules of practice, and if denied, it would still devolve upon the Department to render such judgment in the case as the law and equities thereof appear to warrant.

The case comes to the Department upon the appeal of McGowan, and by thus invoking the unquestioned and unquestionable jurisdiction of

the Secretary of the Interior, he avers a just cause, and must stand or fall by the merits of the case as shown by the whole record.

It is believed that the claimants were under the circumstances entitled to a reinstatement of their entry.

It is not necessary to inquire whether they received legal notice of the orders emanating from your office, December 13, 1886, November 6, 1894, and March 16, 1895, respectively. If jurisdiction of the parties was acquired under any of those orders, the right of the government to cancel the entry for non-compliance with the requirements thereof was waived by the issuance of the aforesaid subsequent order of July 18, 1895, wherein the entrymen were given sixty days from notice thereof to furnish plat and field notes of the required amended survey. The case was then one between the entrymen and the government, and so far as the present controversy is concerned its status is the same as though the government's proceedings against the entrymen had been initiated July 18, 1895.

Claimants were not served with notice of this order until August 29, 1895. Within the time allowed, they made application at the surveyor-general's office, and, on October 16, 1895, that officer, at the instance and request of said entrymen, issued an order for the amended survey required by your office. This order was issued thirteen days before the expiration of the time fixed by your said office order of July 18, 1895. The field work was not commenced until November 26, 1895, and the field notes were not approved by the surveyor-general until April 3, 1896, but when the entrymen had applied for and obtained the order of survey, the demands of the government had for the time being been satisfied, and the subsequent proceedings, being largely under the control of officers of the government, laches may not be imputed to the entrymen for the delay in making and approving said survey.

The action of your office canceling the entry, November 30, 1895, was taken without a report from the office of the surveyor-general, and was clearly a mistake, on account of which the claimants should not be permitted to suffer.

No sufficient reason appears for departmental interference with the action of your office in the premises, and the decision appealed from is affirmed.

In this connection it is thought proper to call the attention of your office to the misapprehension and resulting mistakes which have apparently grown out of a lack of information in your office of orders issued and action taken by the surveyor-general, and to suggest that such procedure be adopted as will prevent a recurrence thereof in future cases.

INDIAN LANDS—ACT OF JANUARY 14, 1889.

FRED. A. SILVER.

The right to make a second homestead entry accorded by the third proviso to section 6, act of January 14, 1889, extends only to persons whose first entry was made prior to said act.

The case of Hertzke *v.* Henermond, 25 L. D., 82, cited and followed.

Secretary Bliss to the Commissioner of the General Land Office, May 13, 1898.

(W. V. D.) (L. L. B.)

June 20, 1889, Fred. A. Silver made homestead entry for the NW. ¼ of Sec. 30, T. 3 N., R. 64 W., Denver, Colorado, which was canceled on his relinquishment January 29, 1892; and the same day Christian Bohlinder made homestead entry for the east half of said quarter section and lot one in said section 30.

May 15, 1896, Silver applied at the local office at Crookston, Minnesota, to make homestead entry for the S. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼, Sec. 22, and the NE. ¼ of the SE. ¼ and lot 4, Sec. 21, T. 149 N., R. 38 W., in said Crookston land district.

This application purports on its face to be made under the provisions of the act of January 14, 1889 (25 Stat., 642), but the applicant in his petition to be allowed to make the entry, asks that it be allowed under the act of March 2, 1889 (25 Stat., 854).

The register transmitted this application to your office, and by your office decision of July 3, 1896, the application was denied; from which action Silver appealed.

The land involved belonged to the Red Lake band of the Chippewa Indians and was ceded under the provisions of the said act of January 14, 1889.

The third proviso to the sixth section of said act is as follows:

Provided, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act. (25 Stat., top of page 645.)

The use of the word "heretofore" in said proviso renders construction unnecessary to show that the benefits of the proviso were designed to be extended to those entrymen only who had made entry prior to the passage of the act.

Without here deciding whether the petitioner comes within the remedy of the act of March 2, 1889 (the tract applied for being Chippewa land), it is sufficient to say, that the construction placed upon that act in the case of Hertzke *v.* Henermond (25 L. D., 82), still adhered to, would prevent the allowance of his application thereunder.

It is not necessary to discuss the authority of his attorney to act in the matter of his appeal from your office decision, nor the action of your predecessor thereon, for the application must be denied for the

second reason assigned in your said office decision, namely, that the law invoked does not authorize second entries where the first entry was made subsequent to the passage of the act.

With his appeal Silver forwarded an application for the "repayment of the purchase money paid on entry of the NW. ¼ of Sec. 30, T. 3, R. 64, as per certificate No. 14342, issued at Denver, Colorado, bearing date the 20th day of June, 1889."

As this application was made and transmitted subsequent to the decision of your office, and so was not considered by your predecessor, it is herewith returned for action thereon by your office.

The decision of your office, in so far as it denies the right of Silver to make entry of the land applied for, is affirmed.

ARID LANDS—RESERVOIR SITE—WITHDRAWAL—ENTRY.

MARIUS THORUP.

The act of August 30, 1890, repealed the act of October 2, 1888, in so far as said act operated to create a general withdrawal of lands susceptible of irrigation, hence a homestead entry of lands so released from such withdrawal, made at a time when they are subject to entry, though subsequently included within the limits of a reservoir site, may be carried to patent irrespective of the provisions of the act of March 3, 1891.

Secretary Bliss to the Commissioner of the General Land Office, May 13, 1898.

(W. V. D.) (C. J. G.)

May 8, 1891, Marius Thorup made homestead entry for the E. ½ of the NE. ¼ Sec. 9, and the W. ½ of the NW. ¼ Sec. 10, T. 6 S., R. 42 E., B. M., Blackfoot, Idaho.

January 20, 1897, this Department, upon the recommendation of the Director of the United States Geological Survey, directed that certain lands, including the tract described, be segregated for a reservoir site for the Fort Hall Indian Reservation, and that further entries or filings on the lands designated be refused in accordance with the act of October 2, 1888 (25 Stat., 526), as amended by the act of August 30, 1890 (26 Stat., 391). October 23, 1897, Thorup submitted his final proof, upon which final certificate issued the same day. It appears from said proof that he established actual residence on the land in question in April, 1891. He was therefore an actual settler on said land at the date the reservoir site was located and selected, which was in September, 1896.

April 26, 1898, your office transmitted Thorup's final papers to this Department, with request to be advised as to whether or not his entry should be approved and passed to patent. Reference was made in your office letter of transmittal to the case of Margaret D. Gillis, 25 L. D., 221.

In the departmental decision referred to by your office Mrs. Gillis was shown to have been an actual settler on the land claimed by her not only at the date of the location of the reservoir site, but a *bona fide* settler and occupant prior to the passage of the act of October 2, 1888; hence her rights thus secured were not impaired by the subsequent withdrawal of the land for a reservoir site, as said land was wholly excluded from reservoir purposes under said act. Thorup, however, made actual settlement subsequently to the passage of said act.

The act of October 2, 1888, contemplated a general withdrawal, including

> all the lands which may hereafter be designated or selected . . . . for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals.

Under the act of August 30, 1890, reservoir sites theretofore located and selected were to remain segregated and reserved from entry and settlement, but said act repealed so much of the act of October 2, 1888, as withdrew from entry, settlement and occupation "all lands made susceptible of irrigation by such reservoirs, ditches or canals," and allowed entry for and settlement upon said lands "in the same manner as if said law had not been enacted." The act of March 3, 1891 (26 Stat., 1095), further restricted reservoirs to only so much land as might be necessary for their construction and maintenance;

> excluding as far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

It is suggested in your office letter that as Thorup was an actual settler on the land in question at the date of the location of the reservoir site, said land appears to have been excluded, under the last mentioned act, from the site of the reservoir "so far as practicable." This is true, but such disposition of Thorup's case would make the completion of his entry for this land contingent upon whether or not said land shall be found actually necessary for the construction and maintenance of said reservoir. It will be observed that under the act of August 30, 1890, amending the act of October 2, 1888, Thorup made his entry at a time when the land was subject thereto; and the land embraced therein was from such time segregated from the public domain and excepted from the subsequent withdrawal for reservoir purposes. Hence, under said act, his said entry should be "recognized and may be perfected in the same manner as if the act of October 2, 1888, had not been enacted." Your office is accordingly advised that Thorup's entry should be approved and passed to patent without reference to the contingency provided for in the act of March 3, 1891.

MINING CLAIM—PLACER—SURVEYED LAND.

HOLMES PLACER.

A patent for a placer mining claim should describe with mathematical accuracy the land intended to be conveyed thereby; and where such a degree of accuracy cannot be obtained under an application that embraces lands theretofore surveyed and returned in irregular sub-divisions as "lots," an additional survey will be required.

Secretary Bliss to the Commissioner of the General Land Office, May 13, 1898.
(W. V. D.) (P. J. C.)

It appears that on December 28, 1895, Benjamin C. Currier *et al.* made mineral entry of the Holmes placer mining claim, Sacramento, California, land district, and the land included therein was described as follows: lot No. 5, the W. ½ of lot 1, the W. ½ of the E. ½ of lot 1, the W. ½ of the SE. ¼ of the NE. ¼, and the W. ½ of the E. ½ of the SE. ¼ of the NE. ¼, Sec. 3, T. 12 N., R. 10 E., M. D. M.

The township had been surveyed and divided into legal subdivisions, and lot 1—the NE. ¼ of the NE. ¼,—over which this controversy arises, was originally less than forty acres and was returned as a lot. Since the original survey a part of it has been patented as a lode claim, which cuts down its area still more.

By decision of September 4, 1896, your office conceded that where placer claims are located on surveyed land, and they are made to conform thereto, there is no necessity for a survey and plat, and that land thus located may be in subdivisions of ten acres. It was said therein that the practice of your office has been to treat as legal subdivisions portions of forty acre subdivisions made fractional by mineral entries, and designated as lots, and to allow placer entries therefor without plat and survey, but that no warrant is found for the entry of tracts of less than ten acres by legal subdivisions without survey or plat, except in the form of lots; that

The reason for this holding and for the refusal to allow entry for less than ten acre tracts (except as regularly designated) is obvious.

To allow entries by legal subdivisions (if such subdivisions can be called legal) would be to dot the public domain (in mineral localities) with tracts of irregularly shaped pieces of land not designated by any series of "lot" numbers, or by mineral survey numbers, and would tend to confusion and perhaps to mistakes in the disposal of the public lands.

On the other hand, if these tracts are surveyed and designated by a mineral survey number, their locus and boundaries are fixed, and they can be easily found and described.

Another objection to the entry by subdivisions of such tracts, for instance the NW. ¼ of a lot containing 19.9 acres, is the difficulty of fixing the area of the tract and the relative areas of the other fractional parts of the lot.

In view of these facts I am of the opinion that tracts of land containing a less area than ten acres (unless designated by the surveyor-general as "lots") and *fractional parts of lots* must be surveyed and platted as in case of placer claims on unsurveyed lands, before mineral (placer) entry can be allowed therefor.

In the case, therefore, under consideration, you will notify the claimants that they will be required to apply to the U. S. surveyor-general for a survey of the tracts described in the entry as follows, to wit: W. ½ of lot 1; W. ½ of E. ½ of lot 1.

From this decision the claimants have appealed, on the grounds (1) that it practically nullifies the intent of the mining laws as far as they apply to the location and patenting of lands which have been previously surveyed and designated as lots; (2) that your said office decision would impose unnecessary expense and hardship on placer mining applicants, and (3) that it is opposed to public policy in that it discourages the private ownership and improvement of mineral lands.

After an investigation of the question here involved it is believed that the ruling of your office is correct.

In addition to the reasons given in your office decision it may be said that in many township surveys there are fractional parts of land on the north and west sides of the townships. These may be more or less in area than the regular, or normal, legal subdivisions. When this occurs these fractional tracts are designated as "lots," and given a number, together with the exact acreage each contains. The designation of these irregular tracts is thereafter, in the records of the land department, known and described by their numbers, and not by what would be ordinarily their legal subdivision. For instance, the tract involved is technically known as lot 1 of section 3, and not as the NE. ¼ of the NE. ¼. When any part of the land included in this legal designation is disposed of by the government, its original identity, as to area, is lost. The surveyor-general, in such cases, changes the area of the original lot on the plats in his office, deducting the area segregated, and then records the exact acreage remaining.

A lot is necessarily an abnormally shaped tract, whether made by the original survey or caused by the segregation of a part thereof by a mineral entry. Hence to attempt to describe a part of it in the way that one would describe a legal subdivision, as is done in the case at bar, would necessarily cause confusion in the records as well as the possibility of raising doubt as to the exact area patented.

The uncertainty of this sort of description may be illustrated in this way: the description in the case at bar means, practically, the west three-fourths of lot 1. There are no monuments in connection with this entry on the ground by which its identity can be fixed, and the legal subdivision from which it is carved out being less than forty acres, it is not improbable that if patent were issued with this description, it might be insisted upon by the patentees, or their assigns, that this description was intended to mean the west three-fourths of the actual acreage of lot 1, and that *acreage* rather than a division by cardinal points was contemplated. In the case at bar there is a plat of the ground prepared by the applicants which shows that it is their intention to make the segregation by cardinal points, so that in this particular case such a question might not be raised. But this plat does not

necessarily become a part of the records of the office of the surveyor-general; hence there would be no official record in his office of the same.

There is some confusion in this case as to the acreage. For instance, the application is for 79.20 acres. Following the description given in the notice of application, in the published notice, and on those posted both on the land and in the local office, it is said that the tract contains 80.46 acres, while in the register's final certificate the entry is of 79.80 acres. Whether these discrepancies are caused by reason of doubt as to the acreage in lot 1, does not appear, as the area of each tract included in the entry is not given separately.

It is conceived to be the duty of the Department in issuing a patent to describe with mathematical accuracy the ground conveyed. It is apparent that this can not be done with the description that is insisted upon in the case at bar, and if such a degree of accuracy can not be obtained without an additional survey, it is incumbent on the applicant to have the ground so described as that its situs may be definitely fixed.

Your office judgment is therefore affirmed.

RAILROAD GRANT—JOINT RESOLUTION OF MAY 31, 1870.

CORLIS *v.* NORTHERN PACIFIC R. R. CO. (ON REVIEW).

The joint resolution of May 31, 1870, while making a new grant to the Northern Pacific between Portland and Puget Sound, and enlarging the limits along the Cascade branch within which indemnity might be taken, did not make a new grant for said branch, hence, as to lands within the place limits along said line their status under the grant of July 2, 1864, must determine the right of the company thereto.

The departmental decision herein of August 28, 1896, 23 L. D., 265, vacated.

Secretary Bliss to the Commissioner of the General Land Office, May 13, 1898.

(W. V. D.) (G. B. G.)

This is a motion for review of departmental decision of August 28, 1896 (23 L. D., 265), in the case of John H. Corlis *v.* Northern Pacific Railroad Company, involving the W. ½ of the SE. ¼ and lots 3 and 4 of Sec. 5, T. 23 N., R. 5 E., Seattle land district, Washington.

The land in controversy is within the place limits of the company's grant for what is known as the Cascade Branch of the Northern Pacific Railroad, and was listed by the company on September 21, 1888. The road along this line was definitely located on March 26, 1884.

The record shows that one Amos Hurst made homestead entry of this land on June 26, 1869, which entry was canceled February 11, 1871.

Subsequently, to wit, on January 27, 1894, the plaintiff herein, John H. Corlis, filed his application to make a homestead entry of the land, which was rejected by the local officers for conflict with the grant to

said company. Your office approved the action of the local officers, but on the appeal of Corlis to the Department the decision of your office was reversed, and it was here held that the tract in question was excepted from the company's grant and subject to the homestead application of Corlis.

It was said in the decision under review:

In determining what lands were passed to the altered main or branch line as provided for by the resolution of 1870, said resolution must be considered in the nature of a new grant, and that only such lands as were public lands at the date of the passage of said resolution were intended to be granted thereby.

As before stated, the records show that the tract here involved was entered under the homestead law June 26, 1869, which entry was of record uncanceled at the date of the passage of the joint resolution of May 31, 1870, and as against the grant made by said resolution was an appropriation of the land. I must therefore reverse your office decision and hold that the tract here in question was excepted from the company's grant on account of its branch line, and is subject to the application of Corlis.

The reasoning of the decision in support of the conclusion reached was, therefore, substantially that the joint resolution of 1870 (16 Stat., 378) was in the nature of a new grant to the company, that only such lands as were public lands at the date of the passage of said joint resolution were intended to be granted thereby, that at that date the tract in controversy was embraced in the homestead entry of Hurst, and therefore excepted from the grant. This being so, it followed that the land was public land, and subject to the application of Corlis when made.

The company's motion for review was duly entertained. In this motion it is urged that the decision aforesaid is manifestly erroneous, for the reason that the company took the lands along its Cascade Branch by virtue of its grant of July 2, 1864 (13 Stat., 365), and not under the joint resolution of 1870.

If the contention of the company in this behalf is sound, it would follow, the tract in controversy being free both at the date of the grant and the definite location of its road, that it passed to the company under its grant, and the decision complained of can not stand.

By the act of July 2, 1864, a grant was made to aid in the construction of a continuous line of railroad—

Beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible 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 Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus.

The joint resolution of 1870 provided, among other things,—

That the Northern Pacific Railroad Company be, and hereby is, authorized . . . . . to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on

Puget Sound, *via* the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four.

The effect of this legislation was to change the company's main line to the valley of the Columbia river, where it had been authorized by the act of 1864 to locate its branch line, and to change its branch line from the valley of the Columbia river to a line across the Cascade Mountains where it had been authorized by the act of 1864 to locate its main line. Under the act of 1864, however, one line was to stop at a point on Puget Sound and the other at a point at or near Portland, while by the terms of the joint resolution of 1870, both lines were to terminate on Puget Sound. For that part of the main line, therefore, extending from the original Columbia river line to Puget Sound, there was no grant of lands by the act of 1864, but the joint resolution of 1870 authorized the company to locate and construct this new line "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation" which was the act of 1864. Northern Pacific R. R. Co. *v.* McRae (6 L. D., 400); United States *v.* Northern Pacific R. R. Co. (152 U. S., 295).

So far, therefore, as said joint resolution relates to that part of the main line between the original Columbia river line and Puget Sound, it conferred a new and additional grant on the company, but it did not make a new grant for the Cascade Branch. It enlarged the limits within which deficiencies for losses might be satisfied, but in doing so referred to such enlarged limits as "beyond the limits prescribed" by the company's "charter," being the act of 1864. This was a distinct recognition of the grant of 1864 as a continuous one, and precludes the idea of a new grant along any of the lines authorized by that act, except as to the enlarged limits to satisfy deficiencies.

Moreover, this new grant of indemnity lands was in terms to make up deficiencies

to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four,

thus recognizing the continued existence of that grant and making further provision for its fruition.

In the case of Spaulding *v.* Northern Pacific Railroad Company (21 L. D., 57), it was held (syllabus):

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 therefore 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 main line of said road down the valley of the Columbia river was never built, and the question in the Spaulding case was, whether certain lands within the overlapping limits of the company's grant on account of the original Columbia river line and the grant on account of the line running north to Puget Sound, passed to the company on account of said last named line by virtue of the joint resolution of 1870, or whether they were granted to the company by the act of 1864 on account of said branch line, and, therefore, forfeited to the United States by the act of September 29, 1890 (26 Stat., 496).

It was held, as has been seen, that these lands came within the provisions of the forfeiture act (*supra*). To reach this conclusion it was necessary to hold, and was held, that these lands were granted to the company by the act of 1864, and were therefore not subject to the operation of the joint resolution of 1870.

This ruling is not in harmony with the ruling in the case at bar. If the company took its grant within the limits of the original Columbia river line by the act of 1864, there would seem to be no reason for applying a different rule to the Cascade Mountain line.

If it be suggested that it may be conceded that the company took the lands along its Cascade Branch under the grant of 1864, and that still by the joint resolution of 1870 a new condition was imposed excepting from the grant those lands disposed of between the passage of the act of 1864 and the joint resolution of 1870, the answer is that said joint resolution does not simply except lands disposed of between the passage of the act of 1864 and the joint resolution of 1870, in the sense that the status at the date of the joint resolution shall be controlling, but provides that

in the event of there not being . . . . *at the time of the final location thereof,* the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter [evidently meaning the act of 1864], ... then said company shall be entitled . . . . to receive so many sections . . . . as will make up such deficiency, on said main line or branch, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of *subsequent to the passage of the act of July two, eighteen hundred and sixty-four.*

The language, "subsequent to the passage of the act of July two, eighteen hundred and sixty-four" should be read in connection with the words "at the time of the final location thereof." When so read together it is clear that Congress intended that if it were found at the

time of the final location of the main or branch line any lands within the primary limits of the original grant were embraced in any subsisting disposition thereof of the character named, made since the act of 1864, the company would be entitled to take indemnity therefor, within the enlarged limits.

These views are not at variance with the ruling of the supreme court in the case of the United States *v.* Northern Pacific Railroad Company (152 U. S., 284), relied on in the decision under review in support of the conclusion reached therein. In that case it was said:

> By the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands within ten miles beyond those limits, other than mineral and other lands as excepted in the charter of the company 'to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of subsequent to the passage of the act of July 2, 1864.' It is therefore clear that no public land disposed of after the passage of the act of July, 1864, was intended to be embraced in the grant of May 31, 1870.

The lands involved in the case then before the court were along that portion of the road between the original Columbia river line and Puget Sound, and, were therefore not embraced in the grant of 1864, but were embraced in the grant of May 31, 1870, made by the resolution of that date. In that case the court also said at page 298:

> The lands in question had been disposed of by the United States prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road, and as they were embraced by the latter grant and *were not included in any other grant then existing*, they were not public lands within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company, and were consequently excepted out of that grant as having been previously disposed of by the United States.

The supreme court, therefore, when it said "that no public land disposed of after the passage of the act of July, 1864, was intended to be embraced in the grant of May 31, 1870," was not speaking of lands theretofore granted by the act of 1864, but of lands of which there had been no antecedent grant to this company.

The better opinion is that the decision under review is not sound. This land was granted to the company by the act of 1864, was free from adverse claim at the date of definite location and passed to the company at that date.

This case arose upon an application presented by Corlis to make homestead entry of the land, all rights under which he has since relinquished, as evidenced by the paper forwarded with your letter of April 9, 1898. It nevertheless remains the duty of this Department to adjust the grant and determine which of the lands within the limits passed thereby, and for this reason the motion has been considered notwithstanding the withdrawal by Corlis of his application.

The decision herein of August 28, 1896, *supra*, is vacated, and the company's listing of the tract will be approved, if otherwise regular.

CIRCULAR IN RELATION TO FEES FOR REDUCING TESTIMONY TO WRITING, ETC.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 22, 1898.

To Registers and Receivers:

GENTLEMEN: Your attention is called to the following provisions of law:

Registers and receivers are allowed, jointly, at the rate of fifteen cents per hundred words for testimony reduced by them to writing for claimants in establishing preemption and homestead rights. (Sec. 2238, subdivision 10, R. S.)

A like fee as provided in the preceding subdivision, when such writing is done in the land office in establishing claims for mineral lands. (Sec. 2238, subdivision 11, R. S.)

Registers and receivers in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, are each entitled to collect and receive fifty per centum on fees and commissions provided for in the first, third, and tenth subdivisions of this section. (Sec. 2238, subdivision 12, R. S.)

The register for any consolidated land district, in addition to the fees now allowed by law, shall be entitled to charge and receive for making transcripts for individuals or furnishing any other record information respecting public lands or land titles in his consolidated land district, such fees as are properly authorized by the tariff existing in the local courts of his district, and the receiver shall receive his equal share of such fees, and it shall be his duty to aid the register in the preparation of the transcript or giving the desired record information. (Sec. 2239, R. S.)

The register and receiver shall be entitled to the same fees for examining and approving testimony given before the judge or clerk of a court in final homestead cases as are now allowed by law for taking the same. (Act of Congress approved March 3, 1877, 19 Stats., 403.)

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, R. S., above mentioned.

Under the timber and stone land act of June 3, 1878, as amended by the act of August 4, 1892, registers and receivers are entitled jointly to a fee of fifteen cents or twenty-two and one-half cents per hundred words, as fixed by subdivisions ten and twelve respectively of section 2238, R. S., for testimony reduced to writing for claimants.

Section 1, act of March 3, 1891, provides as follows:

And registers and receivers shall be allowed the same fees and compensation for final proofs in timber-culture entries as are now allowed by law in homestead entries.

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, R. S., and act of March 3, 1877, which, by the act of March 3, 1891, are made general and applied in all cases where similar services are rendered by registers and receivers; that is, for reducing testimony to writing and examining and approving testimony, both in commuted and non-commuted homestead and timber-culture final proofs.

Your attention is called to the following act of Congress approved March 3, 1883:

AN ACT in relation to certain fees allowed registers and receivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fees allowed registers and receivers for testimony reduced by them to writing for claimants in establishing pre-emption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers.

SEC. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plats or diagrams at such rates as may be prescribed by the Commissioner of the General Land Office, and said officer shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not to exceed ten cents per entry; and the sums thus received for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.

Your attention is also called to the following extract from the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1887, approved August 4, 1886 (24 Stats., 239).

All fees collected by registers and receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each year, shall be covered into the Treasury, except only so much as may be necessary to pay actual cost of clerical services employed exclusively in contested cases, and they shall report quarterly, under oath, of all expenditures for such clerical services, with vouchers therefor.

In accordance with the act of Congress, as quoted, receivers will deposit to the credit of the Treasurer of the United States all moneys received for reducing testimony to writing, and all other fees which by the act of March 3, 1883, were authorized to be retained by registers and receivers (except the amount payable for clerk hire, in accordance with the terms of the law), as other public moneys of the United States received from fees and commissions are deposited. The First Comptroller of the Treasury in a decision (in case of Lambert, receiver at Pueblo, Colorado), dated July 14, 1891, and reaffirmed by letter of September 21, 1891, held that *no other fees can be legally appropriated to the payment of contest clerks than those which have been received for reducing testimony to writing in contest cases*, and that the measure of compensation to a clerk employed in any contest must be limited to the amount of the fee deposited for reducing testimony to writing in that particular contest. All such fees will be reported in detail on the receiver's monthly detailed account-current thereof (Form 4–146), and accounted for in their monthly and quarterly accounts. *But fees not earned (that is, deposits made for services to be rendered), are not to be deposited to the credit of the United States, but to the credit of the receiver and accounted*

for in his account of unearned fees and unofficial moneys (section 2234, R. S., as amended by the act approved January 27, 1898).

The register's cancellation fee of one dollar, authorized by the act of May 14, 1880 (modified by act of August 4, 1886), will be paid to the receiver, who will deposit it as other unearned fees and when the entry is cancelled and the notice given he will deposit the same to the credit of the United States as in the case of other fees earned. This fee of one dollar is exclusively a register's fee, of which the receiver is entitled to no portion in making up the maximum compensation of registers and receivers. Should the cancellation not take place, and no notice be given, the fee is to be returned to the depositor.

In computing the fees for reducing testimony to writing, only the words actually written by registers and receivers, or persons in their employ, must be charged for at the rates allowed by paragraphs 10, 11, and 12, of section 2238, R. S., and no charge is to be made for the printed words. The words actually written must be counted and charged for, and there can be no uniform fee of a specified sum applicable to every case of the same class of entries; that is, registers and receivers can not fix the fee at one dollar or more for each pre-emption, final homestead, or mineral entry.

Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats or diagrams, the fees for the same are hereby fixed as follows:

For a diagram showing entries only	$1.00
For a township plat showing entries, names of claimants, and character of entry	2.00
For a township plat showing entries, names of claimants, character of entry, and number	3.00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry; together with topography, etc	4.00

In no case are fees to be charged for examining and approving testimony given before the judge or clerk of a court except in commuted or non-commuted homestead and timber-culture final proofs.

The attention of registers and receivers is called to section 2242, R. S., which is as follows:

> No register or receiver shall receive any compensation out of the Treasury for past services who has charged or received illegal fees; and on satisfactory proof that either of such officers has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office.

You will be held to a strict compliance with the laws and regulations relating to the matter of fees in all cases.

Registers of land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salary, fees, and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the same to the receiver; and where parties address the register as to the cost of any service required,

he will refer the matter to the receiver for answer, as the latter is the proper officer to receive all public moneys.

In order to secure uniformity in the preparation of accounts of receivers relative to moneys received for reducing testimony to writing, and for clerical services rendered exclusively in contest cases under the act of August 4, 1886, the following method will be observed:

Receivers will credit the United States in their accounts as receivers with the gross amount of all fees earned, except such sums as are paid by them for clerk hire exclusively in contest cases, which sums must be deducted from the gross proceeds received, and should not be included in the amounts so credited. They will also debit the United States with the deposits of such receipts exclusive of the amounts for clerk hire referred to above. In the special disbursing accounts for clerical service exclusively in contest cases, they will credit the United States with the total amounts received from contestants in contest cases, and debit the United States with the amount paid for clerk hire in such cases and also debit the United States with balance, if any, deposited with the U. S. Treasurer, supporting the account with sworn statements and proper vouchers. This account should exactly balance.

The excess of receipts from fees over the expenses of clerical services must be reported in the receiver's weekly statements, monthly fee statements, and in their quarterly and monthly accounts-current.

Receivers will also report in detail on their receiver's monthly statements (Form 4–146) all cancellation fees earned and all receipts for reducing testimony to writing, and also enter on the same the expenses incurred for clerical service.

Whenever money is received from a party in payment of fees, the receipt thereof should be duly acknowledged. It is therefore directed that in cases where testimony, in establishing a pre-emption, homestead, or mineral claim, or the right to enter land as being valuable chiefly for timber or stone but unfit for cultivation under the act of June 3, 1878, has been submitted and an entry or location is allowed or final homestead papers issued on such testimony, and also where a fee is paid for allowing entries under the timber-lands act of June 3, 1878, the receiver shall indorse on both the original and duplicate receipt, or certificate of location where there is no receipt in the case, an acknowledgment of the amount of fees received for reducing testimony to writing, examining and approving the same, or other special account as the case may be; and that in contested cases where testimony is taken, as also in cases where transcripts of records are furnished under section 2239, R. S., or fees received under the act of March 3, 1883, he shall issue a receipt for the money to any party paying the same (it being the duty of the receiver to receive and receipt for the money in every case), but no duplicate of the special receipt so issued need be transmitted to this office.

This circular is designed to take the place of circulars "M," of July

20, 1883 (2 L. D., 662); August 18, 1886 (5 L. D., 569); November 6, 1886 (5 L. D., 245); March 15, 1887 (5 L. D., 577), and November 12, 1891.

BINGER HERMANN,
Commissioner.

Approved:
C. N. BLISS,
Secretary.

FINAL PROOF—EQUITABLE ACTION.

JOHN A. BALL.

A homesteader who is unable, through poverty and sickness, to submit formal final proof, or to execute his final affidavit in the land district where the land is situated, may be permitted to file such affidavit, made before a judge or clerk of a court of record, with a view to the issuance of final certificate and equitable action thereon, it appearing from the evidence in a contest against said entry, and otherwise, that he has in fact earned a patent to the land.

Secretary Bliss to the Commissioner of the General Land Office, May 16, 1898.
(W. V. D.) (L. L. B.)

The appeal of John A. Ball from your office decision of October 8, 1896, allowing him sixty days in which "to take the necessary steps toward making final proof" on his homestead entry for the SW. ¼ of the NE. ¼, Sec. 4, T. 6 S., R. 10 E., Huntsville, Alabama, is here and has been examined.

Ball made his entry August 2, 1887, resided upon, cultivated and improved the land until the latter part of 1891, and in December of that year advertised to make final proof on January 28, 1892. At the time he advertised to make final proof he was, and has ever since remained, an inmate of the Soldiers' Home in the city of Washington, D. C., he having been a Union soldier and entitled to a credit of three years on his residence and cultivation by reason of his military service in the war of the rebellion.

The record shows that at the time Ball advertised to make final proof he was unable, by reason of sickness and poverty, to appear at the place fixed by the published notice for taking the same, and it was his intention to take the testimony of his two witnesses at the time and place so fixed and have his own testimony and final affidavit taken before some officer in this city. Between the date of the notice and the time fixed therein for taking the proof, he informed his agent (one of his neighbors in Alabama) of his said intention, who, it seems, was advised that Ball's presence was necessary at the taking of the proof, and being informed that it was impossible for Ball to be present, he instructed the witnesses that their attendance would not be required. For this reason his final proof was not taken.

June 28, 1894, William N. Kirby filed an affidavit of contest against

Ball's entry, charging abandonment for more than six months. Testimony was taken according to the published notice, the defendant making default. The local officers recommended that the entry be canceled, the proof showing that Ball had abandoned the land and left the country more than three years prior to the date of the contest.

Ball was notified of the action of the local office, and he appealed; whereupon, by your office letter of March 19, 1895, the action of the local office was reversed and the contest dismissed, said letter finding that, including the credit he was entitled to for military service, he had, at the date of the contest, fully complied with the law as to residence, cultivation, and improvements, and had "earned his patent." The contestant did not appeal from this action of your predecessor, and the case was finally closed by your office letter "H" June 17, 1895.

November 12, 1895, final proof not having been submitted, and more than seven years having elapsed since the date of his entry, the local office reported the entry for cancellation for failure to make final proof within the lifetime of the entry. Accompanying this report was the affidavit of Ball showing his former attempt to submit his proof, and showing also that it has been impossible for him to go to Alabama to attend to it himself and that he is and has been for a long time unable to leave his bed except at short intervals, that he has no money and no way of getting any to pay the expense of publication and fees for taking the testimony of his final proof witnesses, etc.

By your office letter of January 25, 1896, he was advised that proof of residence and cultivation required by the homestead law must be submitted after due publication of notice, and he was allowed sixty days in which to submit the same.

August 25th following, he filed in your office the affidavits of three of his homestead neighbors, sworn to March 10, 1896, all of them alleging his residence and cultivation of his claim for three and one-half years subsequent to his entry.

This proof was rejected by your office, and he was advised that he must proceed as heretofore directed, but that he might submit his own final proof testimony and final affidavit before some judge or clerk of a court of record here in Washington, naming him in his final proof notice, and allowing him sixty days in which to take the necessary steps in this direction. Being unable to comply with this letter, he has appealed, and now asks that his entry may be referred to the Board of Equitable Adjudication for confirmation.

Such, in brief, is the situation of this unfortunate claimant, now appealing to the equity side of this Department for relief.

After careful research no parallel case is found in any of the reported departmental decisions, nor is it thought that any of the rules (thus far established) pertaining to the Board of Equitable Adjudication make express provision for exactly such a case. It is possible, even probable, that of the hundreds of thousands of entrymen whose claims

have been adjudicated by this Department, not one has presented conditions exactly similar to those surrounding the appellant herein. He has performed all the requirements of the law necessary to securing patent for the land covered by his entry except the formal submission of final proof. Evidence of such performance is not lacking, for your predecessor has already found that he "has earned his patent." Since that time affidavits of three reputable people have been filed showing a full compliance with the law in the matter of residence and cultivation, and he is in default only in the matter of not submitting his proof in a formal manner. He has shown that he is unable to do this. Must he lose his land after he has earned his patent and satisfied your office as to his compliance with the statute in relation to residence, cultivation and improvements? The only purpose for which final proof is required to be submitted is to show such compliance. The Department is fully convinced that he has complied with all these essential requirements and that he is unable to make formal proof of it.

Without designing or intending to establish a precedent, but in view of the unquestioned good faith of the entryman and his helplessness, you will direct that he be allowed to make his final affidavit of non-alienation before some judge or clerk of a court of record in the city of Washington, D. C. (Nancy J. Crews, 14 L. D., 687), and upon the receipt of the same by the local officers within ninety days from notice of this decision they will issue and forward to your office his final certificate for the land embraced in his entry, and upon receipt of the same you will refer his entry to the Board of Equitable Adjudication for action thereon. See General Circular 1896, p. 230.

Your office decision is accordingly modified.

HOMESTEAD—AMENDMENT OF ENTRY.

DANIEL L. HARTLEY.

A homesteader who makes entry of one hundred and twenty acres, and contests an entry embracing an adjacent forty acre tract, may, in the event of success, be permitted to so amend his entry as to include said forty acres, where by such action he secures the land originally intended to be entered.

Secretary Bliss to the Commissioner of the General Land Office, May 16,
(W. V. D.) *1898.* (G. B. G.)

On May 23, 1895, Daniel N. Hartley made homestead entry for the SW. ¼ of the SE. ¼ of Sec. 29 and the N. ½ of the NE. ¼ of Sec. 32, T. 24 N., R. 32 E., Clayton, New Mexico.

On February 6, 1896, the said Hartley applied at the local office to make an additional homestead entry for the SE. ¼ of the SE. ¼ of Sec. 29, T. 24 N., R. 32 E., which was rejected by the local officers, from which action he appealed.

On April 30, 1896, your office affirmed the action of the local officers, and the further appeal of Hartley brings the case to the Department.

It appears that Hartley, on May 23, 1895, presented at the local office his application to enter one hundred and sixty acres of land, which application embraced not only the land that day entered by him, but also the land now applied for. This application was rejected by the local officers, for the reason that the SE. ¼ of the SE. ¼ of Sec. 29, aforesaid, was at that time embraced in the homestead entry of one M. Sabino Gallegos, made June 22, 1892. Hartley then made entry for the balance of the land applied for, to wit, the SW. ¼ of the SE. ¼ of Sec. 29 and the N. ½ of the NE. ¼ of Sec. 32, containing one hundred and twenty acres, and on that day, May 23, 1895, filed a contest against the said entry of Gallegos.

Trial was had, the entry of Gallegos duly canceled, whereupon Hartley applied to make additional entry, as aforesaid.

The action of your office, in denying Hartley's application to make an additional entry, as such, was correct.

The case is not within the act of March 3, 1879 (20 Stat., 472), and the amendments thereto, authorizing additional entries in certain cases. Treating it as an application to make a second entry, it is not within the recent liberal rulings of the Department in the cases of Hertzke *v.* Henermond (25 L. D., 82,) and Nancy A. Stinson (id., 113), construing the act of March 2, 1889 (25 Stat., 854). The entry of Hartley was made since the passage of that act, and he has not complied with the conditions of the homestead law, in that he has not made his final proof and received the receiver's final receipt. Hence this case is not within either the second or sixth section of said act; nor is it within the fifth section thereof, for the reason that that section is without application, except in the case of a homestead settler who has before the passage of the act entered less than a quarter section of public land.

It is believed, however, that Hartley may be permitted to amend his entry so as to include the land applied for.

In the case of Hadley *v.* Walter (25 L. D., 276), it was held (syllabus):

A settler who makes entry for part of the land covered by his settlement claim, and contests a prior entry covering the remainder, may be permitted to amend his first entry so as to include the whole of his original claim, on the successful termination of his contest.

In that case it appeared that contestant Hadley, who was a settler on a quarter section of land therein described, presented his application at the local office to make homestead entry for said land, but found that he had been anticipated as to the N. ½ of the quarter section, which land had been entered by Walter. Acting upon the advice of counsel, Hadley made homestead entry for the S. ½ of the tract, and at the same time executed his affidavit of contest against Walter, alleging prior settlement. The Department, after finding the fact of priority of settlement in favor of Hadley, said:

The question recurs—Did the contestant exhaust his homestead right by making homestead entry of the S. ½ of the quarter section? I think, under the circum-

stances of this case, that the contestant can not be regarded as having elected to take only eighty acres of land, and thus waived his right to a larger quantity. He evidently intended to take the whole quarter section, and simply mistook his remedy. When he found that the contestee had made homestead entry of the N. ½, he should have applied to enter the whole quarter section and filed his contest against the contestee's entry of the N. ½.

There is no difference in principle in the case cited and the one under consideration. In the present case it does not appear that Hartley had made a settlement at the time he offered his application, but this difference is not thought important. The controlling question is, whether he exhausted his homestead right by making entry of less than one hundred and sixty acres of land, it appearing that it was his original intention to enter the whole quarter section, that intention having been defeated by the prior entry of another for part of the land. The course he took was not the proper one, but this is no evidence that he had abandoned his original intention to acquire title to the whole quarter section. On the contrary, it is clear that he has diligently pursued a course which it was believed by him would enable him to consummate that purpose.

The decision appealed from is modified to conform to these views, and case remanded, with directions to treat appellant's application to make additional homestead entry as an application to amend his original entry, and your office will allow the same, unless further objection appears.

RED LAKE INDIAN LANDS—SETTLEMENT RIGHTS.

HAMRE ET AL. *v.* CUNNINGHAM ET AL.

Settlement on Red Lake Indian lands, opened to entry under the act of January 14, 1889, prior to the time fixed therefor, does not, under the terms of said statute or the regulations issued thereunder, operate to disqualify the settler.

Secretary Bliss to the Commissioner of the General Land Office, May 16, 1898.

(W. V. D.) (G. C. R.)

On May 15, 1896, Jennie Cunningham made homestead entry No. 2 of lots 5 and 6, Sec. 34, and the S. ½ of the NW. ¼ of Sec. 35, T. 155 N., R. 43 W., Crookston, Minnesota. The register and receiver state that her entry was made at nine o'clock of said day. On the same day John G. Skomedal made homestead entry No. 585 for lots 4 and 5 of said Sec. 35, and lot 9 of Sec. 26, same township and range; and (as per the records of your office) Jens M. Adsero made homestead entry for the SW. ¼ of said Sec. 35.

On May 15, 1896, Louis L. Ramstad made homestead entry for lots 7 and 8 of said Sec. 34.

On May 26, 1896, Trond P. Hamre filed his affidavit of contest, alleging prior settlement upon lots 6, 7, and 8 of said Sec. 34, affecting Cunningham's entry as to lot 6 and Ramstad's entry as to lots 7 and 8.

On July 28, 1896, Grant R. Lee applied to enter lots 5 and 6 in Sec. 34, and lot 5 and the SW. ¼ of NW. ¼ of Sec. 35. His application was rejected, and he filed a contest alleging prior settlement, and asked to be made a party at the hearing. His claim conflicts with Cunningham's entry as to lots 5 and 6, Sec. 34, and the SW. ¼ of the NW. ¼ of Sec. 35, and with Skomedal's entry as to lot 5, Sec. 35.

On July 28, 1898, Fred E. McDermott applied to enter lots 7 and 8 in Sec. 34 and the W. ½ of the SW. ¼ of Sec. 35. His application was rejected, and he filed his contest alleging prior settlement, thus affecting Ramstad's entry and Hamre's claim as to lots 7 and 8 in Sec. 34, and Jens M. Adsero's entry as to the W. ½ of the SW. ¼ of Sec. 35.

The register and receiver found that, since Cunningham made entry just at nine o'clock of the opening day (May 15, 1896), and since that was the moment the lands in the reservation were opened to settlement, no claim could possibly attach prior to that time. The local officers for that reason recommended that Mrs. Cunningham's entry remain intact and the contests of Lee and Hamre, as to those portions of their claims which conflict with her entry, be dismissed.

Ramstad's entry for lots 7 and 8, in the SE. ¼ of Sec. 34, was made at 3:40 P. M., on the opening day. The register and receiver found that Hamre, who claimed those lots, together with lot 6 in the NE. ¼ of Sec. 34, made no improvements on either lots 7 or 8 until after May 15; that McDermott, "about fifteen minutes before nine o'clock, on the morning of May 15, 1896," went upon lot 8 with lumber, bedding, etc., and at once posted notices, readily observable at a distance of eighty rods, upon lots 7 and 8 in Sec. 34, and upon each of the two forty acre tracts comprising the W. ½ of the SW. ¼ of Sec. 35 (part of Adsero's entry); that his settlement was notorious; that he immediately commenced work; that his residence was thereafter continuous; that a part of his improvements was placed upon each subdivision claimed by him on the morning of the opening day; that since Hamre made no improvements on May 15, on any portion of lots 7 and 8, which is in the SE. ¼ of Sec. 34, his improvements on lot 6, which is in the NE. ¼ of Sec. 34, would not give him, on a simple claim of prior settlement, any rights in another quarter section where the first improvements were made by a competing claimant.

Under this state of facts the register and receiver recommended that McDermott, as a prior settler, be allowed to enter lots 7 and 8, but refused to pass upon his claim to the W. ½ of the SW. ¼ of Sec. 35, for the reason that the entryman (Adsero) was not made a party to the hearing. They recommended that Ramstad's entry be canceled, and Hamre's contest be dismissed.

From that action Lee and Hamre appealed, and your office, by decision dated August 14, 1897, affirmed the action of the register and receiver as to the action taken in respect to Ramstad's entry, as to lots 7 and 8 and in awarding the right of entry thereto to McDermott. Your office,

however, modified the action of the local officers as to a part of the lands entered by Mrs. Cunningham, holding that the settlements of Lee and Hamre were simultaneous with her entry, and for this reason they have the better right to such parts of the land covered by her entry as they may have settled upon at the moment of the opening. Your office held Mrs. Cunningham's entry for cancellation, in so far as it embraced lots 5 and 6 in Sec. 34, awarding to Lee said lot 5, because he was a settler thereon at nine o'clock of the opening day; you found that, as to lot 6 in Sec. 34, both Hamre and Lee settled thereon simultaneously, and that in the event both apply to enter it, the same will be awarded to the highest bidder as between the two.

It appears that Ramstad failed to appeal from the action of the local office, and for this reason your office closed the case as to him, in awarding the right of entry to McDermott.

Both Cunningham and Hamre have appealed from the judgment of your office.

Cunningham alleges error in the finding that contestants settled on the lands at nine o'clock of the opening day, or that they performed any "valid" act of settlement until after that time; that it was error to hold that where entry and settlement are simultaneously made, the settler's rights are superior.

The lands in controversy are in the Red Lake Indian reservation in Minnesota, and were opened to settlement under the provisions of the act of January 14, 1889, which made provision for obtaining the relinquishment and cession by the Chippewa Indians of certain portions of said reservation, and for the survey, examination and classification (pine and agricultural) of such lands. The act provided for the disposal of the lands "to actual settlers only," and directed that after their survey the Secretary of the Interior give thirty days' notice, at the expiration of which the lands so surveyed shall be disposed of to actual settlers only under the provisions of the homestead laws, (25 Stat., 642.)

In pursuance of this statute, lists were published descriptive of the lands, and your office, on March 27, 1896, formulated, and the Department approved, a circular of instructions to the registers and receivers at Crookston and St Paul opening up the lands. Those instructions read in part as follows:

> The surveys and examination of a portion of the ceded lands of the Red Lake Reservation have been completed, and it has been determined to open said lands to settlement and entry in accordance with the provisions of the statute.
>
> The hour of 9 o'clock a. m., Friday, May 15, 1896, has been fixed upon as the time *on and after which* these lands will be open to settlement and entry, and notices for publication, as required by statute, have been forwarded to the newspapers in which they are to be published.

The testimony has been carefully examined and the facts are found substantially as stated in the decision appealed from.

It is evident from the testimony that all the parties litigant who base their claims upon their settlement were in some doubt as to whether a settlement upon the lands before the hour of opening would, under the terms of the statute and the instructions thereunder, disqualify them from making entry of the lands. It appears in the cases of Lee and McDermott that both went upon the land a few minutes before the hour of opening, but did no work considered by them as improvements, until 9 o'clock, though both posted notices before that time. Hamre located on lot 6 of Sec. 34 just at 9 o'clock and at once began his improvements, so that all of these settlers were on the land as actual settlers when the hour of 9 o'clock arrived.

While the register and receiver state that Mrs. Cunningham's entry was made at 9 o'clock, yet it appears that her entry is No. 2; there must therefore have been an interval of time between 9 o'clock and the moment of her filing. During that interval Lee and Hamre were settlers on the lands (lots 5 and 6, section 34); being settlers at that time, and their subsequent acts showing their good faith, they have the better right; even where an entry of a tract is made by one at the same time that a settlement is made thereon by another, the settler has the superior right.

The fact that Lee, Hamre or McDermott may have settled on the land prior to the hour of opening did not disqualify them; for neither the statute nor the instructions thereunder imposed any penalty for premature settlement.

As to lots 7 and 8 in said section 34, it is sufficient to say that no valid reason appears for disturbing the action of your office and the local officers in awarding the lots to McDermott and not to appellant Hamre. The controversy between Lee and Skomedal over lot 5 in section 35, is not here on appeal from any action taken by your office; it appears that Lee is dissatisfied with the action of the local officers with respect to it. From the recitals in your said office decision, it appears that neither Adsero nor Skomedal was made a party to the contest; however this may be, you will take such action with respect to the lands entered by them as may be proper under the state of the records.

Since the appeals herein were filed Ramstad has relinquished his entry to said lots 7 and 8 and has applied for repayment of fees and commissions paid upon said entry. His application is herewith returned for appropriate action.

The decision appealed from is affirmed.

BARNES *v.* MAGEE.

Motions for review and rehearing denied by Secretary Bliss, May 16, 1898. See 26 L. D., 264.

SCHOOL INDEMNITY SELECTION—SETTLEMENT RIGHT.

STATE OF CALIFORNIA *v.* TURNER.

The right to select school indemnity extends only to "unappropriated" lands, and hence can not be recognized where at the date of selection the land applied for is embraced within a *bona fide* settlement claim of a qualified homesteader who has improved the land, and is residing thereon.

Secretary Bliss to the Commissioner of the General Land Office, May 16, 1898.

(W. V. D.) (P. J. C.)

The plat of survey of Tp. 11 N. R. 11 W., M. D. M., San Francisco, California, land district, was filed in the local office August 14, 1894, and on August 16 following the State of California filed application No. 11740 to select as school indemnity land the SW¼ of the NE¼ of Sec. 33 thereunder. September 13, following Wellington H. Turner made homestead entry of this tract, with others, alleging in his application settlement September 5, 1887, which was before the land was surveyed.

Turner gave notice of his intention to make final proof on July 25, 1895. Notice of this was served on the State, and on the day set all parties appeared. The final proof was submitted, the witnesses cross-examined by the State and testimony in behalf of the State introduced. The local officers found that Turner had not established and maintained a residence a sufficient length of time prior to the hearing to entitle him to the land under the homestead laws. They recommended that the proof be rejected.

On appeal your office not only affirmed the action of the local officers, but in addition held the entire entry for cancellation, whereupon Turner prosecutes this appeal. The appellant accepts the decision of your office "in so far as it refuses to allow said Turner to make final entry under his presented proofs," but alleges that it is error to deny his request "to withdraw his application for a patent, and to be permitted to reside upon and cultivate the land for such time as the homestead act requires in the securing of a homestead thereunder and in holding said Turner's entry for cancellation."

In view of the questions raised by the appeal, it is not deemed necessary to discuss at any length Turner's connection with the land prior to the year 1894. Whatever may be said about his residence before the date of the selection by the State, it is clear from the evidence that at that time, and for several months prior thereto, he was residing on the land and cultivating it. It is also shown that he was a qualified entryman, and, within the statutory period, he made his homestead entry.

By the act of Congress of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, the right of the

State to select lands in lieu of those lost in the sixteenth and thirty-sixth sections is restricted to "unappropriated" lands.

It is believed that the testimony in this case is sufficient to show that the tract in controversy was, in contemplation of the statute, appropriated by Turner, and that his settlement, residence and improvements were sufficient to defeat the right of the State to make selection thereof.

That part of your office judgment holding his entry for cancellation is therefore reversed; the State's application to select will be rejected, and Turner's homestead entry will remain intact subject to future compliance with law.

TIMBER CULTURE CONTEST—ACT OF MARCH 3, 1893.

PETTY *v.* RICHARDS.

A contest against a timber culture entry, initiated after the passage of the act of March 3, 1893, in which the charge is non-compliance with law, presents no cause of action, in the absence of an allegation of default on the part of the entryman occurring during the first eight years of the entry.

Secretary Bliss to the Commissioner of the General Land Office, May 17, 1898.
(W. V. D.) (G. C. R.)

On July 11, 1885, Owen R. Richards made timber culture entry for the NE. ¼ of Sec. 3, T. 8 S., R. 36 W., Colby, Kansas.

On January 29, 18 6, Purley Petty filed his affidavit of contest against the entry, alleging that Richards

has wholly failed to plow, plant, or cultivate, or to cause to be cultivated any portion of said tract to trees, seeds, or cuttings at any time since about July 1, 1893, and up to this date, viz., January 29, 1896; but has wholly abandoned said tract; that said tract is in an uncultivated condition and overgrown by grass and weeds, and barren of trees.

Notice was given by publication, and on the day of hearing (March 5, 1896,) the defendant demurred to the complaint, stating that the same does not state facts sufficient to constitute a cause of action or sufficient, if true, to warrant cancellation of the entry. The register and receiver sustained the demurrer and dismissed the contest. On appeal, your office, by decision dated June 24, 1896, sustained that action, and a further appeal brings the case here.

It is insisted in the appeal that the timber culture laws contemplate that the entryman must:

1. Make proof on his claim within a reasonable time after his right to make proof accrues; or

2. Failing to make such proof, he must continue the planting and cultivation of the land, or suffer the penalty of cancellation.

It is stated in argument that, if it be held that upon compliance with the timber culture law for eight years, the entryman has met the full requirements of the law, and may thereafter postpone making final

proof for five additional years, and during such period be excused from cultivation, planting, etc., such rule would operate to hold the title to all timber claims in abeyance, and the lands would for such period escape their just share of taxes, etc.

The timber culture act of June 14, 1878 (20 Stat., 113), provides that upon proof being made of the planting, cultivation and protection of the trees in the manner and upon the area specified for the period of eight years "from the date of such entry . . . . . or at any time within five years thereafter," patent will be issued.

The act approved March 3, 1891 (26 Stat., 1095), repealing the timber culture laws, provides, in its first section, that the period of cultivation shall run from the date of entry, if the necessary acts of cultivation were performed within the proper time; also that the preparation of the land and the planting of trees shall be construed as acts of cultivation, and that the time so employed in the work shall be computed as a part of the eight years of cultivation required by the statute.

The act of March 3, 1893 (27 Stat., 593), amended the act of March 3, 1891 (*supra*), by adding the following words to the fourth proviso thereof:

> That if trees, seeds, or cuttings were in good faith planted as provided by law and the same and the land upon which so planted were thereafter in good faith cultivated as provided by law for at least eight years by a person qualified to make entry and who has a subsisting entry under the timber culture laws, final proof may be made without regard to the number of trees that may have been then growing on the land.

Neither the act of 1891 nor that of 1893 changes or modifies the original act of 1878 in any respect as to the time when final proof may be made. This proof may therefore be made at the expiration of eight years after entry, or at any time within five years thereafter.

If, according to the act just quoted, the trees, seeds, or cuttings were in good faith planted according to the requirements, and the land upon which they were so planted was in good faith cultivated for eight years, in the manner prescribed, and the claimant was qualified to make entry and has a subsisting entry, upon proof of these facts being made patent will issue without regard to the number of trees that may be growing when the proof is submitted.

It follows that a contest against a timber culture entry, filed after March 3, 1893, which fails to allege a default on the part of the entryman which occurred during the first eight years of the entry must fail, for proof of full compliance with the law during that period is all that is now required; it is not even necessary to show the growth of the trees as a result of their proper planting or cultivation.

The possible postponement of making proof on timber culture entries to the end of the thirteenth year and the issuance of patent thereon may result in loss to the public revenue by failure to tax the lands; but this Department is charged with the duty of executing the laws—not in making them.

The decision appealed from is affirmed.

HOMESTEAD—RESIDENCE—MILITARY SERVICE.

OPINION.

Under existing legislation enlistment in the military service of the United States in the war with Spain will not excuse homestead claimants from complying with the law as to residence and improvements.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, May 13, 1898. (G. B. G.)

I am asked for an opinion whether there is any provision which would operate to excuse homestead claimants "who may enlist for military service in the war with Spain" from complying with the requirements of the law as to residence and improvements during their absence in such service.

Section 2308 of the Revised Statutes of the United States is as follows:

> Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. And if his entry has been canceled by reason of his absence from such tract while in the military or naval service of the United States, and such tract has not been disposed of, his entry shall be restored; but if such tract has been disposed of, the party may enter another tract subject to entry under the homestead laws, and his right to a patent therefor may be determined by the proofs touching his residence and cultivation of the first tract and his absence therefrom in such service.

In the case of Jeff C. Davis, under date of April 9, 1879 (26 L. and R., 342), it was said by Mr. Secretary Schurz, in reference to this section:

> I am of opinion that . . . section 2308 has reference only to entries made by persons before or after enlistment into the service during the war of the rebellion, and whose rights were sacrificed by reason of their absence in said service, and that section 2308 was not intended to include persons who have served in the regular army since the close of the rebellion, and that service can not be construed as equivalent to actual residence on a tract of land.

In the case of W. A. Jones, 1 L. D., 98, and again in the case of Owen *v.* Lutz, 14 L. D., 472, the ruling in the Davis case was cited with approval.

Sections 2304–2309 of the Revised Statutes were taken from the act of June 8, 1872 (17 Stat., 333), and while section 2308 is not by its own terms limited to persons who were enlisted or employed in the army or navy of the United States during the war of the rebellion, an examination of the other sections named, as well as of the original act, shows that this legislation was expressly confined to persons who served in the army, navy or marine corps "during the rebellion." In this connection it may be mentioned that there is now pending in Congress a measure extending the benefits of section 2308 and other sections to

persons serving in the army or navy of the United States during the present war with Spain and that this measure has received such favorable consideration as to justify a reasonable hope of its passage.

I am of opinion that under existing legislation enlistment in the military service of the United States in the war with Spain will not excuse homestead claimants from complying with the law as to residence and improvement.

Residence upon and improvement of lands taken under the homestead law are statutory requirements, proof of which can not be waived by the land department in the absence of legislative authority therefor.

Approved,

C. N. BLISS, *Secretary.*

REPAYMENT—DESERT LAND ENTRY.

BERNHARD NEUHAUS.

A desert land filing, made either under the Lassen county act, or the general act, and abandoned, exhausts the claimant's rights under the desert land laws.

Repayment of the first installment paid on a desert land entry can not be made where the declaratory statement is canceled on account of its fraudulent character.

Secretary Bliss to the Commissioner of the General Land Office, May 18, 1898.

(W. V. D.) (J. L. McC.)

Bernhard Neuhaus, on April 29, 1878, filed declaration under the desert-land act of March 3, 1877, upon the S. ½ of the SE. ¼ of Sec. 7, T. 31 N., R. 12 E., Susanville land district, California.

On August 15, 1883, your office canceled said declaration for the reason that an examination had been made by a special agent of your office, which disclosed the facts, (1) that the land was not desert in character; (2) that no attempt had been made to irrigate the land at the date of his examination (in the spring of 1883). Neuhaus was notified that sixty days would be allowed him within which to show cause why his declaration should be reinstated; but he made no response. Therefore the cancellation was made final on May 15, 1885.

Neuhaus applied for repayment of the purchase money paid by him upon said tract; but his application was refused by your office letter of August 27, 1896, on the grounds, as therein stated:

> First, because the proof showing the desert character of the land was false; and second, because the entryman made no effort to irrigate the land in compliance with the desert-land law.

Counsel for Neuhaus filed a motion for review, contending that the entry was "erroneously allowed," within the meaning of the repayment act, because Neuhaus had previously filed a declaration under the so-called "Lassen county desert act" of 1875.

Your office, on October 17, 1896, denied said motion for review, saying (*inter alia*):

> The point raised by you would not warrant any change in my former decision, as the desert filing made by Neuhaus under the Lassen county act of 1875 was made prior to the passage of the general desert act of 1877; hence he did not exhaust the right conferred by the act of 1877.

Neuhaus has appealed to the Department, alleging that your office erred—

> In holding that, because applicant's filing under the Lassen county desert law was made prior to March 3, 1877, his right to make an entry under the desert land laws was not thereby exhausted.

Your office was in error, in the particular statement referred to in the above allegation. A desert-land filing, made either under the Lassen county act or the general act, and abandoned, exhausts the claimant's rights under the desert-land laws. (Fannie D. Lake, 18 L. D., 580; Simeon D. Wyatt, 18 L. D., 99; same on review, 19 L. D., 247.)

It is proper to state, however, that the statement of counsel for the appellant, which your office decision apparently accepts without question, is not supported by the records of your office. Counsel's statement is:

> It is shown by the records that the applicant had entered the same lands under the Lassen county desert-land law, by declaratory statement No. 103, May 8, 1875. By departmental decisions in the case of Simeon D. Wyatt, p. 99, Vol. 18, and in the case of Fannie D. Lake, p. 580, same volume, it is held that a filing under the Lassen county act exhausts the right of entry under either the Lassen county act or the act of March 3, 1877. Consequently the second entry of the applicant was "erroneously allowed," and could not be confirmed; and the applicant is entitled to the repayment of the two hundred dollars under the act of June 16, 1880.

An examination of the records of your office discloses the fact that Lassen county desert land declaratory statement No. 103, of May 8, 1875, was made by Benjamin Neuhaus, and not by Bernhard Neuhaus.

In the case at bar, the controlling question is, Was the applicant's declaration and his action thereunder a fraud upon the government?

The government agent so reported. Your office so found, and canceled the entry. He was notified that opportunity was afforded him to show cause why his entry should not be canceled for the fraud so found, and he made no response. The decision adverse to him upon that issue became final.

The general circular of 1896, page 97, in defining the expression "erroneously allowed," as used in the repayment act, says:

> This can not be given an interpretation of such latitude *as would countenance fraud*. If the records of the land office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." But if a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was "erroneously allowed"; and in such case repayment would not be authorized.

In the case here under consideration, it is not the final proof (for that has never been made), but the initiatory declaration, that contains the statements which your office has found, and which the entryman does not deny, are untrue. Upon the showing made by Neuhaus and his witnesses in the declaration filed by him, it was the duty of the local officers to allow the entry. As was held by the Department in the case of George A. Stone, on review (25 L. D., 111, syllabus):

If the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of such character, and the allowance of the entry is procured by such representation, the entry in such case is wrongfully *procured*, and not "erroneously allowed," within the meaning of the repayment law.

In the case at bar, the judgment of your office, in so far as it holds that repayment can not legally and properly be made to the applicant therefor, is hereby affirmed.

LODE LOCATION—INTERSECTING MILL SITE.

MABEL LODE.

A lode location based on a discovery on one side of an intersecting mill site is not good as to the ground on the other side of said mill site, and an entry of such ground is therefore invalid.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (E. B., Jr.)

On August 24, 1896, your office held for cancellation Leadville, Colorado, mineral entry No. 4061, made June 15, 1896, by Thomas Officer for the Mabel lode claim, as to all that part of the claim which lies west of the Rob Roy Mill Site, survey No. 2643–B. This action was taken on the ground that the entry of a lode location divided into non-contiguous parts by a mill site was not permissible. Claimant appeals, contending that, inasmuch as entries of lode locations which are divided by cross lode locations are allowed, so, likewise, a lode location which is divided by a mill site may properly be entered.

In this case the said mill site, which lies on both sides of Eagle river, extends entirely across the lode location near its western end, and is excluded from the application and entry. Only non-mineral land can be taken under the mining law as a mill site (section 2337 R. S.). By excluding, as above, the Rob Roy mill site, the applicant practically admits the non-mineral character of the same (Michael Howard, 15 L. D., 504). The non-continuity of the vein or lode through the mill site is thus also admitted. The discovery shaft or cut of the Mabel lode is several hundred feet east of the easterly side line of the mill site. There is no evidence, direct or indirect, nor any presumption of the existence of the vein on the west side of the mill site within the lines of the Mabel location. For that reason alone a location based upon

the Mabel discovery would not be good as to the ground on the west side of the mill site, and the entry as to such ground would be invalid.

Where a lode or vein abuts upon non-mineral land, there is no authority of law for including in a location made on such lode or vein any ground beyond such abutment, and certainly not to embrace land lying entirely beyond the non-mineral tract. The reason for the cancellation of the entry as to the ground above indicated is, therefore, that the Mabel location is not valid as to that ground. See in connection Andromeda Lode, 13 L. D., 146; Bi-Metallic Mining Company, 15 L. D., 309; and Michael Howard, *supra*.

It is unnecessary in view of the foregoing to discuss the question of alleged similarity between the case at bar and the case of a lode location divided by a cross lode location.

The decision of your office is affirmed.

ISOLATED TRACT ACT OF FEBRUARY 26, 1895.

HAND *v.* DE REMER.

A tract of land is not "subject to homestead entry" within the meaning of the act of February 26, 1895, defining the period that must elapse prior to treating a tract as isolated, while covered by an unexpired pre-emption filing, or embraced within a homestead entry.

The action of the Commissioner of the General Land Office in ordering into market a tract for disposition under section 2455 R. S., is subject to revision by the Department on appeal.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (G. C. R.)

On November 11, 1895, James R. De Remer filed in the local land office, at Denver, Colorado, his petition stating that the W. ½ of the NE. ¼ of Sec. 10, T. 8 S., R. 64 W., in said land district, is an isolated or disconnected tract, being entirely surrounded by lands either patented or held under valid entries—having been so isolated for a period of more than three years; that the tract is prairie land, agricultural in character and chiefly valuable for grazing; that no part of the tract is occupied by any one having color of title; that he desires to purchase the same, and agrees to bid one dollar and twenty-five cents per acre, including all necessary expenses for advertising, etc. He therefore asked that the tract be sold under the provisions of section 2455 of the Revised Statutes, as amended by the act approved February 26, 1895 (28 Stat., 687), substantially complying with instructions of April 11, 1895 (20 L. D., 305).

On November 14, 1895, the register and receiver transmitted said petition, and your office on February 25, 1896, held that the application conforms to the requirements and authorized the sale asked for.

Due notice was given, fixing April 25, 1896 (at ten o'clock a. m.), for the date of sale.

On March 20, 1896, Jesse N. Hand made homestead application for the land, which was rejected, and Hand appealed. Your office by decision dated April 17, 1896, sustained that action.

On April 24, 1896, Hand filed a motion for review of said decision, together with his protest against the sale of the tracts, alleging substantially:

1. That he had applied to make entry of the tracts, and had appealed from the rejection of his application.

2. That the land had not been subject to homestead entry for three years next prior to the date on which it was ordered to be sold.

3. That at no time since September 7, 1887, has the land been free from a *prima facie* valid pre-emption filing or homestead entry for three consecutive years.

On August 19, 1896, your office denied Hand's motion for review—stating that his protest was based on substantially the same grounds as the appeal and motion.

Hand's appeal from said decisions brings the case here.

The land was sold on the day advertised, and certificate of location No. 416 B., act of June 2, 1858, for eighty acres of land, was tendered in payment.

In view of Hand's protest, the register and receiver declined to issue certificate of purchase.

It appears that a pre-emption declaratory statement was filed for the land in question on September 7, 1887, and also on February 12, 1889, and that both filings expired by limitation, no proof having been offered; also that on March 23, 1894, Herman M. Klagg made homestead entry for the land, which was canceled by relinquishment November 9, 1895, or two days before De Remer filed his petition asking that the same be sold as an isolated tract.

All the surrounding tracts have been disposed of—the last on April 29, 1890.

In your office decision of April 17, 1896, it was held that prior to Klagg's entry the tract had been subject to homestead entry for more than three years after the surrounding lands had been entered, and that it was therefore "isolated" within the meaning of the statute, and that the fact that Klagg's entry was made of the land March 23, 1894, and remained of record less than two years, did not remove such isolation.

It was further held that since Hand's application to make homestead entry was made subsequent to the order of your office directing the sale of the land, the same was not subject to entry—being segregated under rule laid down in Mather *et al. v.* Hackley's Heirs (19 L. D., 48). In the decision on motion for review, your office in answering the grounds of error set up held that, while the land, within three years

next preceding the application to sell as an isolated tract, had been covered by the *prima facie* valid preemption filing of one Edward Mercer, who lived upon and cultivated the land, still such filing was in no sense an entry, and did not, as would an entry, segregate the lands; that it conferred no rights as against the United States, and was therefore public land and open at any time to settlement and entry.

The appeal herein alleges error in the holdings:

1. That pre-emption filings do not prevent land from becoming isolated under section 2455 of the Revised Statutes, as amended.

2. In holding that Klagg's entry was no bar to the sale of the land under said section 2455.

3. In finding that the land had been subject to homestead entry for more than three years after the surrounding lands had been entered, and that Klagg's entry did not remove such isolation.

Section 2455 of the Revised Statutes, as amended by the act approved February 26, 1895 (28 Stat., 687), provides:

> It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided,* That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the Government: *Provided,* That not more than one hundred and sixty acres shall be sold to any one person.

The first question raised by this appeal is, whether the land in question was "subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government," and, second, whether the period of the existence of Klagg's entry, made March 23, 1894, and relinquished November 9, 1895, can be computed as a part of the required three years.

It appears that among the filings which were made on the land was the pre-emption filing of Edward Mercer, dated February 12, 1889, and expiring by limitation November 5, 1891, or less than three years before Klagg (March 23, 1894) made homestead entry.

It appears that Mercer built a house on the land, and had several acres fenced and under cultivation. All the surrounding lands had been "entered, filed upon, or sold by the government;" but the tract in question was settled upon by one, who, under section 2265, had declared his intention to claim the same under the pre-emption laws. For some reason not appearing of record, Mercer failed to make proof and payment for the land; it was, however, less than three years from the expiration of his filing before Klagg made his homestead entry. Had the required period of three years run when Klagg's entry was made? In other words, had the land at that date "been subject to homestead entry for a period of three years" within the meaning of the statute?

Isolated or disconnected tracts of less than one quarter section result from the disposal of the surrounding lands. It often happens that tracts of forty acres or eighty acres are thus left undisposed of and the homestead seeker preferring a greater quantity, refuses to take the smaller area, leaving it "isolated." When such a tract has been subject to homestead entry for a period of three years without being taken, the statute authorizes its sale.

While by the decisions of the Department a homestead entry may be allowed of lands embraced in a pre-emption filing, still the pre-emptor, if he complies with the law, may obtain patent for the land, and the homestead entry will be canceled.

In passing the act of February 26, 1895 (*supra*), amending section 2455 of the Revised Statutes, one of the changes made was that lands shall not be considered "isolated" until the same have been subject to homestead entry for three years after the contiguous tracts have been disposed of by the government. In other words, if three years pass after the surrounding lands have been disposed of, and during that period no one appropriates the tract by means of a homestead entry, the same may then be regarded as "isolated," that is undesirable as a homestead, and, after notice, may be sold. It was the intention of Congress to give ample time for the taking of the land under the homestead law, the favored method of disposing of public lands, rather than to hasten its disposal by sale, the exceptional method, and so the period of three years was named, during which the lands should be subject to homestead entry without being taken. While land covered by an unexpired pre-emption filing is subject to homestead entry, it is not subject thereto in the sense that one desiring a homestead has a full opportunity to acquire a certain title thereto under the homestead law. His opportunity is clouded and encumbered by the pre-emptor's right to complete title under the pre-emption law. Such a clouded and encumbered opportunity is not an inviting one and a failure to accept it does not indicate that the land is otherwise undesirable as a homestead. During the continuance of this pre-emption filing and prior to its expiration the land was not subject to homestead entry within the meaning of this statute. That filing was in existence April 29, 1890, when the last of the surrounding land was disposed of and three years did not intervene between its expiration November 5, 1891, and Klagg's homestead entry March 23, 1894.

Again, during Klagg's homestead entry, which continued to November 9, 1895, the land was not subject to homestead entry within the meaning of the statute, but segregated by that entry, and therefore not subject to another entry until its cancellation.

The tract had not been subject to homestead entry for the required period of three years when it was ordered sold.

Section 2455 of the Revised Statutes authorizes the Commissioner of the General Land Office to order into market and sell the isolated or

disconnected tracts referred to, and when his discretionary power thus conferred has been properly exercised the land ceases to be subject to entry. But if, as in the case at bar, the Commissioner has acted prematurely and without authority, his mistake will be corrected on appeal.

The decision appealed from is reversed, and Hand's application to make entry will be allowed.

RAILROAD GRANT—PRE-EMPTION FILING.

UNION PACIFIC RY. CO. *v.* HARTWICH.

By the express terms of section 14, act of September 4, 1841, failure to make final proof and payment under a pre-emption filing for unoffered land prior to the day fixed for the sale thereof, operates to extinguish all rights under said filing, and though not formally canceled of record such filing will not thereafter serve to defeat the attachment of a railroad grant on definite location.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (F. W. C.)

The Union Pacific Railway Company has appealed from your office decision of April 10, 1897, in the case of said company *v.* Herman F. Hartwich, involving the N. ½ of the SE. ¼ and the N. ½ of the SW. ¼ of Sec. 31, T. 6 S., R. 11 E., Topeka land district, Kansas.

This tract is within the limits of the grant for said company under the act of July 1, 1862 (12 Stat., 489), as adjusted to the map of definite location filed January 11, 1866.

It appears from your office decision that the records of your office show that the N. ½ of the SE. ¼ of said section is included in pre-emption declaratory statement No. 5562, filed by Gustav Sturback May 1, 1858, in which settlement was alleged April 20, 1858; that the N. ½ of the SW. ¼ of said section is included in pre-emption declaratory statement No. 5561, filed by Joseph Mather May 1, 1858, in which settlement was alleged April 22, 1858; and that both of said filings are still of record uncanceled.

It further appears that subsequently to the making of said pre-emption filings lands in township 6 south, range 11 east, were, in accordance with proclamation No. 636, offered at the land office at Kickapoo, commencing on the 19th of September, 1859. In the proclamation, which was dated March 22, 1859, a notice was given to pre-emptors requiring them to establish their claims to the satisfaction of the register and receiver at the proper land office and to make payment before the date appointed for the commencement of the public sale; otherwise their claims would be forfeited.

No action was ever taken by these pre-emptors to complete their filings, so far as shown by the record, nor were the lands sold at the public sale under the proclamation.

On June 21, 1881, the tract here involved was listed by the company on account of its grant, but patent for the same has not been issued. Notwithstanding the assertion of claim on account of the grant by reason of the listing, on November 20, 1896, the local officers permitted Herman F. Hartwich to make homestead entry for the land without notice to the company.

These facts were duly considered in your office decision of April 10, 1897, in which it was held that the pre-emption claims of Sturback and Mather being of record uncanceled at the date of the filing of definite location reserved the tracts covered thereby from the operation of the grant, and the listing of the tract by the company was held for cancellation. In support of the decision reference is made to the decision of the supreme court in the case of the Kansas Pacific Railway Co. *v.* Dunmeyer (113 U. S., 629) and Whitney *v.* Taylor (158 U. S., 85).

From said decision the company appealed to this Department; and as the question involved is an important one, controlling numerous other cases, the case was advanced for consideration and request for oral argument granted.

From the above recitation it appears that pre-emption filings were made for the land here involved in 1858, long prior to the grant, and when made the land had not been offered.

Under the law of September 4, 1841 (5 Stat., 453–7), by which provision was made for the right of pre-emption, no limitation was placed upon pre-emption filings made for lands that had not been offered, in the matter of the time when proof should be offered thereunder, otherwise than as contained in the 14th section of said act, by which it was provided:

> That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit before the day appointed for the commencement of the sales as aforesaid.

In the year following the making of these filings the lands in the township were, in accordance with the proclamation, offered for sale, and the 19th of September, 1859, fixed as the date for the commencement of the sale at the land office in the district in which the land in question was situated.

No action was taken by the pre-emptors before the date set for the commencement of the sale, as required both by the notice attached to the proclamation and the 14th section of the act of 1841, above quoted; nor is any claim now being asserted to the tract, so far as shown by the records, by, through or under said filings.

More than six years after offering of the lands at public sale in accordance with the terms of the proclamation the company filed its map showing the definite location of its road opposite this land, and the question for consideration is, What was the status of these filings at the time of the filing of the map of definite location?

In the case of Whitney *v.* Taylor, *supra*, referred to in your office decision, the court, after referring to several of its decisions, including the case of Kansas Pacific *v.* Dunmeyer, *supra*, involving the question as to the effect of claims existing at the date of the filing of the company's map of definite location, proceeds as follows:

> Although these cases are none of them exactly like the one before us, yet the principle 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.

It will thus be seen that in effect the court holds that if at the date of definite location there was of record an existing claim to the land the same served to defeat the operation of the grant

> 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 it clear, however, that the claim must have been in fact, and as shown by the records of the land department, an existing claim, and not a mere record without claim; that is, an erroneous record would not defeat the grant, nor would the failure to note an order of cancellation present such a claim by the record as would defeat the grant. The language of the court is, in referring to the claim, "has not been canceled or set aside." Again, "It was enough that the claim existed."

In the case of the St. Paul, Minneapolis and Manitoba Railway Co. (23 L. D., 539), after referring to the decision of the court in the case of Whitney *v.* Taylor, *supra*, it was held that (syllabus):

> A pre-emptor who makes homestead entry of a part of the land embraced within his filing thereby abandons all right under his pre-emption claim, and though the filing may not, at such time, be canceled on the record, it is thereafter not evidence of the existence of a pre-emption claim, and will therefore not defeat the operation of a railroad grant, as to the tract not included in the homestead entry.

In that case the record of the pre-emption remained uncanceled at the date of the filing of the map of definite location, but it was held that the record did not evidence an existing claim to the land.

Under the 14th section of the pre-emption act, before quoted, by the failure of Sturback and Mather to make proof and payment before the 19th day of September, 1859, their pre-emption right was at an end, and thereafter their claims could not be held to be existing claims, for under the terms of the act of 1841 the provisions of that act were no longer available to them. The formal cancellation of their filings upon

the record was not necessary to destroy or put to an end the pre-emptive right; such right was extinguished by operation of law.

In the case of Central Pacific Railroad Co. *v.* Edward L. Taylor (11 L. D., 445), the following history of the pre emption law and construction thereof was made:

> Prior to 1841 the settled policy of Congress was to dispose of the public lands by public and private sales in quantities to suit purchasers. The passage of the act of September 4, 1841, was the first legislative action in the direction of a change to the present beneficent policy of distributing the public domain among the people as homes for the homeless. This legislation was apparently only tentative, for while the public lands were thereafter to be thrown open to settlement and entry, the policy of selling them was adhered to; the settler was permitted to acquire, by his inhabitancy and improvements, only a preferred right to purchase the lands when sold. But this preferred right was not to interfere with the cherished policy of public sales at stated intervals. If any of the lands advertised for sale were occupied by settlers, unless they availed themselves before the day of sale of the right of pre-emption, acquired by settlement and improvement, it would be forever lost, and the lands would be offered first at public sale, and if not sold thereafter became subject to private sale.

In that case the tract was included in the land described in the proclamation of the President as land to be offered for sale at Marysville, California, on February 14, 1859, yet from the records of the General Land Office it appeared that the lands in the township in which such tract was located were withheld from sale, so that the lands were never offered; and in that case it was held that (syllabus):

> The pre-emptive right is not defeated by the failure of the settler to make proof and payment for the land covered by his claim prior to a day erroneously appointed for the public offering thereof, where such tract, on the discovery of the error, is subsequently withheld from sale.

From the reasoning and argument contained in said decision it is clear, however, that had the tract been regularly offered in accordance with the proclamation of the President, by the pre-emptor's failure to make proof and payment before the day appointed for the commencement of the sale, all rights under the pre-emption filing theretofore made "would be forever lost."

From a careful consideration of the entire matter it is the opinion of this Department that under the circumstances heretofore recited no right of pre-emption remained or was existing in and to the tracts here involved, under the filings of Starbuck and Mather, at the date of the filing of the company's map of definite location, and that upon the record herein made the tracts involved passed to the Union Pacific Railway Company upon the filing of its map of definite location. The allowance of the entry by Hartwich was therefore erroneous, and the same is directed to be canceled, and if otherwise regular the listing by the company should be submitted with a view to the issue of patent on account of the grant.

RAILROAD GRANT—MINERAL LANDS—CLASSIFICATION.

INSTRUCTIONS.

The act of February 26, 1895, does not contemplate the classification of even sections, and the character of said sections is only considered where the mineral or non-mineral character of the odd sections cannot be otherwise satisfactorily ascertained.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (E. F. B.)

I am in receipt of your letter of April 22, 1898, relative to school section 16, T. 57 N., R. 1 E., B. M., Cœur d'Alene, Idaho, which was classified as non-mineral land in April, 1897, by the commissioners appointed to examine and classify lands within the land grant limits of the Northern Pacific Railroad Company under the act of February 26, 1895 (28 Stat., 683).

It appears from your letter that the commissioners appointed for the Cœur d'Alene district in their report for the month of April, 1897, classified as non-mineral the unsurveyed portion of township 57 N., R. 1 E., B. M., which, when surveyed, would embrace, among other sections, all of Sec. 36, and that the report of the commissioners was approved by the Department August 27, 1897.

The approval by the Secretary of the classification of lands by the commissioners appointed under said act is final only so far as it affects the odd sections within the limits of the grant. It was not intended that the even sections should be classified, but should only be examined and considered with reference to their character as mineral or non-mineral lands where the mineral or non-mineral character of the odd sections could not be satisfactorily ascertained without resorting to an examination of the adjacent land.

The term "classification" should not, strictly speaking, be applied to such sections, as it was not intended that the character of such sections as reported by the commissioners should conclude any one seeking to acquire title to the land from showing its true character. There is, therefore, no necessity for noting the report of the commissioners upon such sections on the records of your office. Hence the Department, in the letter of November 30, 1897 (25 L. D., 446), advised your office that

a mineral return by the commissioners would not, therefore, prevent your office from making such disposition of the land as is proper upon a subsequent showing as to its character, but the classification should be considered as of the same effect as the return of mineral lands made by the government surveyor.

See also letter of March 23, 1898 (26 L. D., 423).

The approval by the Secretary of the report of the commissioners is operative upon, and final only, as to the odd sections, and it is not necessary to recall said approval in order to invest your office with jurisdiction to order a hearing to ascertain the character of the even sections upon a proper application made.

SWAMP GRANT—CONFLICTING GRANTS TO STATE.

STATE OF MICHIGAN.

A claim of the State under the swamp grant will not be recognized where the lands embraced therein have been certified to the State under other grants, and such certification has been accepted by the State and stood unquestioned for many years.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (E. F. B.)

By decision of December 5, 1895, your office rejected the claim of the State of Michigan, under the swamp land grant of September 28, 1850 (9 Stat., 519), to certain tracts of land therein described, amounting in the aggregate to about eighteen hundred acres, situated in the Grayling land district. Said claim was rejected for the reason that the title to said lands has already passed to the State under the provisions of the act of June 3, 1856 (11 Stat., 21), to aid in the construction of certain railroads, and the act of August 26, 1852 (10 Stat., 35), and other acts, to aid in the construction of canals.

From this decision the State has appealed, assigning the following grounds of error:

I. These lands having been erroneously certified to the State under the acts of Congress of June 8, 1856, and August 26, 1852, to aid in the construction of certain railroads and canals, it was error to hold that such certification could prevent the State from accepting a second certification under the swamp land grant.

II. The swamp land grant being prior to the grants to aid in constructing railroads, and the records showing the land to be swamp and overflowed, it was error not to have certified them to the State under its swamp grant.

III. It was error to have rejected the swamp claim of the State for any reason.

IV. It was error not to have notified Britton and Gray, the attorneys of record for the State of Michigan under its swamp land grant, of the office action of December 5, 1895.

The question involved in this case is, whether the State can be permitted to claim title under the swamp land grant to lands which have already been patented to it under another grant. This question was also involved in the cases of Chandler *v.* Calumet and Hecla Mining Company, 149 U. S., 79; McCormick *v.* Hayes, 159 U. S., 332; and Rogers Locomotive Works *v.* Emigrant Company, 164 U. S., 559.

In all of said cases the lands were claimed as swamp and overflowed land inuring to the State under the swamp land grant, but no selection had been made by the State of said lands under said grant prior to the issuance of patent, nor was any affirmative action taken directly by the Secretary of the Interior with respect to said lands, as swamp and overflowed land, under the grant of September 28, 1850. In each, the lands had been certified or patented to the State under the provisions of the several acts of Congress granting lands to aid in the construction of railroads.

In the case of McCormick *v.* Hayes (*supra*), the court said:

In the case now before us, the selection by Linn county, grantee of the State, prior to 1875, of swamp and overflowed lands in the very section of which the lands in dispute formed a part, without including the latter in such selection, together with the acquiescence in that selection by the Interior Department, and the selection by or under the direction of the Secretary of the Interior, and their certification to the State, first in 1858, and again in 1881, of the lands in dispute, as lands inuring, under the act of Congress of May 15, 1856, to the Cedar Rapids and Missouri River Railroad Company, and, therefore, not lands embraced by the act of 1850, constituted a determination, based on "observation and examination," that the lands here in dispute were not swamp and overflowed, and, therefore, had not been reserved or appropriated, prior to the date of the railroad land grant act, but passed, as the Secretary of the Interior certified, to the State, for the purposes named in the railroad act.

This view as to the effect of the action of the Secretary of the Interior in certifying or patenting the lands to the State under another grant was re-affirmed by the court in the case of Rogers Locomotive Works *v.* Emigrant Company (*supra*). In that case the court said:

But it is equally clear that when the Secretary of the Interior certified in 1858 that the lands in controversy inured to the State under the railroad act of 1856, he, in effect, decided that they were not embraced by the swamp land act of 1850. (Page 574.)

Again:

In 1858, the Secretary of the Interior decided that the lands in controversy inured to the State under the railroad act of 1856, and, if that decision was correct, then they were not reserved from the operation of that act by the swamp land act of 1850. The State was entitled to the lands either under the act of 1850 or under that of 1856. It was open to it, before accepting the lands under the railroad act, to insist that they passed, under the act of 1850, as swamp and overflowed lands. No such claim was made. The State—the party primarily interested, and with whom the Land Department directly dealt—accepted the lands under the act of 1856, and, therefore, not as inuring to it as swamp and overflowed lands within the meaning of the act of 1850, and, as just stated, has never repudiated its action of 1858, nor sought to have reopened the question necessarily involved in the action of the Secretary when he certified the lands to the State under the act of 1856.

* * * * * * *

The action of the Department in 1858 was intended to be final, as between the United States and the State, in respect of the lands then certified as railroad lands. If the State considered the lands to be covered by the swamp land act, its duty was to surrender the certificate issued to it under the railroad act. It could not take them under one act, and while holding them under that act pass to one of its counties the right to assert an interest in them under another and different act.

It is not intended to hold that the Department has no authority to accept from the State a reconveyance of these lands, if they were improperly certified or patented, and to certify and patent them to the State as swamp land if they are of that character, and the rights of others would not be thereby impaired. But as the State has accepted the lands under the grants of 1852 and 1856, and has never questioned the correctness of that certification, or sought to have the question reopened for re-examination until this late day, when other parties may have acquired rights that might be affected adversely by such action,

the changing of this title would not be a wise or judicious exercise of such authority, even if the State offered to reconvey the lands, which does not appear from the record. State of Arkansas *v.* St. Louis, Iron Mountain and Southern Railway Company, 10 L. D., 165.

The decision of your office is affirmed.

EQUITABLE ACTION—HOMESTEAD ENTRY.

INSTRUCTIONS.

Equitable action on homestead entries, where residence is not established within the prescribed period of six months, is not necessary, if final proof is made within the statutory life of the entry, and such proof shows continuous residence for five years next preceding the date thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (A. M.)

I have observed that among the suspended entries whereon you have adjudged that patents should be issued, and which you have submitted to the Board of Equitable Adjudication, from time to time, for consideration under sections 2450 and 2457 Revised Statutes as amended by the act of February 27, 1877 (19 Stat., 240), with a view to their confirmation, there have been certain homestead entries wherein the homesteader did not establish residence on the land involved within the prescribed period of six months, but where final proof was made within the statutory period, which proof showed a continuous residence on the land for five years next preceding the date thereof.

The class of entries referred to has been submitted under rules 25 and 33 of the rules adopted by the Board for your guidance and it is upon these rules, the strict letter of which would seem to warrant it, that the action of your office, as indicated, has been based.

It is a fact however that, where a similar entry is attacked by a contestant after the homesteader has actually established residence on the land, on the ground that such residence was not established till after six months from the date of entry, the Department uniformly holds, under its construction of the homestead law, that the establishment of residence prior to intervention of contest cures the laches of the homesteader and the contest has been dismissed. It is not the purpose of the Department to apply a stricter rule in cases in which the only parties in interest are the government and the claimant, than it does where there is a contestant.

It is therefore not considered necessary that entries of the class herein mentioned be referred to the Board for confirmation as a prerequisite to issuance of patents thereon.

In order therefore that there may be consistent action with reference to this class of entries I direct that hereafter, if otherwise regular,

they be approved for patenting in the usual way without being submitted to the Board for confirmatory action.

This method of procedure will relieve homesteaders of the needless trouble, expense and delay entailed in supplying the additional evidence required under the practice that has heretofore obtained.

CONFLICTING GRANTS—WITHDRAWAL—ATTACHMENT OF RIGHTS.

OREGON AND CALIFORNIA R. R. CO. *v.* WILLAMETTE VALLEY AND CASCADE MOUNTAIN WAGON ROAD CO.

The withdrawal made on behalf of the wagon road grant of July 5, 1866, operates to except the lands so reserved from the attachment of rights on definite location of the Oregon and California road under the grant of July 25, 1866.

Secretary Bliss to the Commissioner of the General Land Office, May 24, 1898.

(W. V. D.) (C. J. W.)

It appears from your office decision of March 24, 1896, that the NE. ¼ of the NE. ¼ of Sec. 23, T. 13 S., R. 1 W., Oregon City land district, Oregon, is within the limits of the withdrawal made August 12, 1868, on account of the grant made by the act of July 5, 1866 (14 Stat., 89), to aid in the construction of the Willamette Valley and Cascade Mountain Wagon Road, and that one Henry C. McBee had been permitted to make homestead entry for the same.

The tract is also within the primary limits of the grant made by the act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, adjusted to the map of definite location, filed March 26, 1870.

Your office decision held McBee's entry for cancellation, and that the withdrawal made on account of the prior grant for the wagon road served to defeat the grant made by the act of July 25, 1866, under which the railroad company claims.

The railroad company's appeal rests upon the allegation that there is no authority in the "wagon road grant for a withdrawal of lands for its benefit," and "an executive withdrawal, if made, would not be sustained by the grant, and would be inoperative as against a grant by Congress which in terms included the land."

McBee has not appealed, and the decision has become final as to him.

Your office decision is in harmony with the ruling of the Supreme Court and of the Department on similar questions.

In the recent decision of the Supreme Court in the case of Northern Pacific Railroad Co. *v.* Musser-Sauntry Company (168 U. S., 604), it was held that the withdrawal of lands within the indemnity belt of the grant made by the acts of June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66), to aid in the construction of the Chicago, St. Paul, Minneapolis and Omaha railroad, served to except such lands from the sub-

sequent grant made by the act of July 2, 1864 (13 Stat., 365), to aid in the construction of the Northern Pacific Railroad.

Neither the act of 1856 nor 1864 directed the withdrawal of the lands within the indemnity belt, but the court, on page 607 of the opinion, in referring to such withdrawal, said:

> The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation. Wolcott *v.* Des Moines Co., 5 Wall., 681; Wolsey *v.* Chapman, 101 U. S. 755, and cases cited in the opinion; Hamblin *v.* Western Land Company, 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. St. Paul and Pacific Railroad *v.* Northern Pacific Railroad, 139 U. S. 1, 17, 18; Wisconsin Central Railroad *v.* Forsythe, 159 U. S. 46, 54; Spencer *v.* McDougal, 159 U. S. 62.
>
> While it is true that the intent of Congress in respect to a land grant is to be determined by a consideration of all the provisions of the statute, and that the word "reserved" may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant, yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed to it in this grant the reasons therefor must be clear. The use of a word which has generally received a certain construction raises a presumption that Congress used it in this grant with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense.

The grant of July 5, 1866, *supra*, under which the wagon road claims, is of

> alternate sections of public land, designated by odd numbers, three sections per mile, to be selected within six miles of said road.

Relative to the withdrawal of lands on account of said grant, it was held in the case of Wagon Road Company *v.* Hagan (20 L. D., 259), that

> a withdrawal of lands by the Secretary, in the exercise of his authority, for the purpose of enabling the company to satisfy the grant by making selections in accordance with the granting act was equally as effective to withhold the lands from settlement and entry as if it had been provided by the act.

The withdrawal made for the benefit of the wagon road grant has the effect of excepting the land in question from the claim of the railroad company under its grant of later date.

The holding herein made is nowise in conflict with the decision of the court in the case of Wisconsin Central R. R. Co. *v.* Forsythe (159 U. S., 46), for the grants under consideration in that case were both made to the same grantee.

Your office decision is therefore affirmed.

TIMBER CULTURE ENTRY—COMPLIANCE WITH LAW.

UNITED STATES *v.* DAYTON (ON REVIEW).

A timber culture entry is subject to devise by will, and on due compliance with law the devisee is entitled to submit final proof and perfect the entry.

Failure to secure the requisite growth of trees calls for cancellation of a timber culture entry where the absence of good faith in the matter of planting and cultivation is apparent.

Departmental decision of July 7, 1896, 23 L. D., 54, recalled and vacated.

Secretary Bliss to the Commissioner of the General Land Office, May 24, 1898.

(W. V. D.) (H. G.)

J. H. Hauser, the entryman of record, has filed a motion for a review of the departmental decision of July 7, 1896 (23 L. D., 54), affirming the decision of your office of January 5, 1895, which directed the cancellation of his timber culture entry made March 18, 1889, Aberdeen, South Dakota, land district for the SE. ¼ of Sec. 2, T. 122 N., R. 64 W., and the reinstating of the timber culture entry of Lyman C. Dayton for the said tract made March 10, 1882, in what was then the Watertown, Dakota, land district. As originally filed, the motion is for a review of such departmental decision and will be treated as such although the accompanying affidavit presents a motion in the alternative, for a review or for a rehearing. The motion was entertained by the Department and each of the parties interested have filed arguments thereon.

It appears that Dayton died in the year 1895, prior to the departmental decision in his favor, and upon a report ordered by this Department, it was ascertained that he died testate, leaving a will, admitted to probate by competent authority, by the terms of which Miss Clara D. Boswell became the sole devisee, subject to the payment of an annuity charge upon the estate in favor of the mother of the decedent. The annuitant died in the year 1896, and by the terms of the will, Miss Boswell, who was theretofore married to Samuel D. Coyne, became the sole devisee or residuary legatee of the will, and now appears as the only party contesting the motion for review.

If the departmental decision sought to be reviewed is to become final, it is clear that this devisee is entitled to make final proof under Dayton's entry. A timber culture entry is subject to a devise by will, and if the executor of the will complies with the requirements of the law, he may make final proof, as the deceased entryman could have done if living and the statute so provides. Starkweather *et al. v.* Starkweather *et al.*, 15 L. D., 162, 166.

The record in the case is complicated and the testimony taken at the hearing is voluminous. Upon the report of a special agent for the government, Dayton was cited to show cause why his entry should not be canceled for non-compliance with the law, by order of your office of June 22, 1887. The local office having reported that Dayton had made

no response to this order, on March 12, 1889, your office canceled his entry and declared the tract covered thereby subject to entry by the first legal applicant. J. H. Hauser, now the movant, made his timber culture entry for the tract on March 18, 1889.

It afterwards transpired that Dayton, within the time allowed by your office in its order holding his entry for cancellation, had filed in the local office his response to such order, and applied for a hearing, and it was finally forwarded to your office June 1, 1891. Upon its receipt, your office held that Dayton was not in default when his entry was canceled and ordered a hearing "with a view of reinstating Dayton's entry, if found in all respects valid, and in the event of such finding to cancel that of Hauser." A hearing was had, commencing April 19, 1892, at which the government was represented by a special agent. Dayton appeared in person and was represented by counsel for a portion of the time, and Hauser appeared in person.

Owing to the complicated state of the record and the conflict in the opinions between the decision of your office and that of the local office, upon the consideration of the motion for review, the evidence adduced at the hearing has been carefully examined and analyzed.

In the departmental decision sought to be reviewed, it is held that after the cancellation of Dayton's entry and Hauser's subsequent entry, Dayton was not required to cultivate the land, "and it is not necessary to inquire whether anything was done by him upon the land or not." Dayton, however, testifies that he continued work upon the tract after Hauser's entry was allowed and for the year 1889, which, if there had been a previous compliance with the law since his entry March 10, 1882, would have completed the requisite eight years cultivation and planting of the tract. After 1889, Dayton admitted that he had not performed any labor upon the tract for the reason that he would have been a trespasser under the laws of the jurisdiction with the entry of Hauser in effect. This matter is also discussed in the decision of your office, but it is entirely immaterial in the case, as if there had been a substantial compliance with the law, in good faith on the part of Dayton, during each of the eight years from 1882 to 1889, inclusive, his entry would have been held intact after its re-instatement.

The clear preponderance of the evidence is to the effect that there was not a substantial compliance with the law on the part of Dayton. He entrusted the work to agents who did not properly perform their labors in the preparation of the soil, the cultivation of the area plowed, or in the planting and care of the trees. The region in the vicinity of the tract in dispute was visited by a severe drought for three seasons, yet during this period, other claims were successfully cultivated in the neighbourhood, although it appears that in the majority of cases the attempt to secure the required growth of trees was a failure. But the work done by the agents of Dayton was inefficiently and slovenly performed and under the most favorable climatic conditions would have

resulted in failure. One of those employed to plant tree seeds did not complete his labors because he stated that he had not been paid, and those employed for the purpose of preparing the ground for tree culture and of cultivating the young trees did not exercise ordinary care or attention in such work. The ground was plowed just before it became frozen and weeds and grass were allowed to accumulate to the detriment of the growing trees. The most primitive methods were resorted to in replanting the area where the tree seeds had failed to germinate, and the entire work done upon the tract was hurriedly performed and without system or skill. The ill-health of Dayton did not prevent the cultivation of the tract or the planting of trees, as the labor on the tract was never performed by him personally, but was done by his employes.

The expenditures made by Dayton upon the claim, referred to in your office decision, are lumped in his testimony with contest costs. He said:

> I have expended some seven or eight hundred dollars in working upon that tract to secure the growing of trees, and the expenses I have been forced to incur by reason of the contest of John H. Bryce against my entry—afterwards this entry was dismissed by Mr. Hauser and one of his own instituted in the place thereof.

Nowhere did Dayton state what his expenditures upon the claim actually were, and from what the witnesses state directly as the amount paid to them for such labors for one year, and inferentially from the amount of labor done, the outlay of Dayton was far below the amount stated in your office decision as the amount expended upon the claim.

The claim of Dayton that his young trees were maliciously pulled up is not sustained by any evidence except his own, but is satisfactorily refuted by direct testimony and by inferences to be drawn from the testimony.

A careful survey and review of all of the evidence at the hearing discloses that the local officers were correct in their views when they stated as a conclusion of fact:

> While no year up to the cancellation of his entry, has passed without Dayton making some show of cultivation on the land, yet nearly every act in that direction evidences a compliance with the letter rather than the spirit of the law. The breaking was done just as the ground was freezing for winter and barely in time to comply with the letter of the law. Whatever cultivation has been done seems to have been (performed) with a view of making a show upon the land rather than to produce results by the growth of trees.

The devisee of the will has filed the affidavit of another, which is corroborated, that Hauser has not now twenty-five trees growing upon the tract and that his cultivation and tree culture have been negligent and insufficient. This is a matter for subsequent investigation and does not form a part of this inquiry.

For the foregoing reasons, the departmental decision of July 7, 1896, is withdrawn and revoked, and the decision of your office of January 5, 1895, is reversed.

The entry of J. H. Hauser will be held intact. The motion for review, with the accompanying papers, are herewith transmitted for the files of your office, and the papers in the case are herewith returned.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

BULL *v.* NORTHERN PACIFIC R. R. CO.

The fact that by applying the rule of approximation a particular tract might be excluded from an indemnity selection, as in excess of the basis, will not affect the validity of such selection as to other tracts for which a sufficient basis is duly designated in a list wherein the losses fully support the selections.

Secretary Bliss to the Commissioner of the General Land Office, May 24, 1898.
(W. V. D.) (F. W. C.)

An appeal has been filed on behalf of Knud Bull from your office decision of April 2, 1895, sustaining the action of the local officers at Vancouver, Washington, in rejecting his application to make homestead entry of the SW. ¼ of the SW. ¼ of Sec. 5, T. 14 N., R. 9 W., for conflict with the selection made by the Northern Pacific Railroad Company.

This tract is within the indemnity limits of the grant for said company, and was included in its list of selections filed April 28, 1885. This list was not accompanied by a designation of losses as bases for the selection, the same being waived by departmental order of May 28, 1883.

On October 24, 1887, the company filed a list designating losses in place, and on August 20, 1892, an amendatory list was filed setting forth the selections and losses tract for tract.

On January 3, 1895, Bull tendered his homestead application, which was rejected for conflict with the company's selection. In his application he alleged settlement December, 1893, long subsequent to the filing of the company's selection list.

The appeal from your office decision questions the sufficiency of the designation of losses contained in the amendatory list of August 20, 1892. This list contains selections amounting to 3,635 acres, and the tracts designated as a basis for the list aggregate 3,636 acres, being one acre in excess of the total selection.

In the case of the Florida Central and Peninsular Railroad Co. (15 L. D., 529) it was held (syllabus):

In the preparation of railroad indemnity lists each loss should be separately specified, and the selection therefor designated. The difference in acreage that may exist in any case between the loss and selection should approximate the area of the smallest legal subdivision.

The loss stated in the list of August 20, 1892, on account of which the selection of the tract in question is made, is a part of the NW. ¼ of Sec. 5, T. 15 N., R. 1 W., included in the patented donation claim of P. D. Northcraft, the acreage of which is given as 124.06 acres.

The selections made on account of this loss are as follows:

	Acres.
SW. ¼ of SW. ¼, sec. 5, T. 14 N., R. 9 W.	40
Lot 1, sec. 17, T. 14 N., R. 9 W.	9.10
NE. ¼ of NE. ¼, sec. 29, T. 14 N., R. 9 W	40
NW. ¼ of NE. ¼, sec. 29, T. 14 N., R. 9 W.	40
Total	129.10

It is urged that your office decision erred in holding

that the basis of the selection was sufficient although it included lot 1, Sec. 17, T. 14, N. R. 9 W., containing 9.10 acres, upon the basis of a loss of 4.06 acres, and that this could be supplemented by other tracts not specifically designated in the lists of selection.

From the above statement of the selection on account of the loss included in Northcraft's donation claim, it appears that three forty-acre tracts, including the tract under consideration, were selected, together with lot 1 of section 17, embracing 9.10 acres. Totaled, the entire selection exceeds this particular loss by 5.04 acres.

If this one selection constituted the entire list it might be held, following the rule of approximation, that by excluding said lot 1 the deficiency between the selection and loss would be less than the excess area including it. This might result in the exclusion of said lot 1 on account of insufficiency of the basis, but it could in no wise invalidate the selection of the remaining three forty-acre tracts, among which is the tract in question. As before stated, however, the total amount of selections included in the list is 3635 acres, and the total losses given exceed the selections; so that, as a whole, the list is fully supported.

From a careful examination of the matter it is clear that the selection, as to the SW. ¼ of the SW. ¼ of Sec. 5, T. 14 N., R. 9 W., the tract here involved, the loss given is sufficient, and the list as filed is a substantial compliance with the regulations governing the selection of indemnity lands.

Your office decision is accordingly affirmed. Bull's application will stand rejected, and the company's selection, if otherwise regular, will be submitted for approval as the basis for patent.

RAILROAD GRANT—SUIT TO VACATE PATENT.

OLE SANAKER.

A suit to vacate a patent issued to a railroad company under an indemnity selection, on the ground that a proper basis therefor was not designated, will not be advised, in the absence of adverse superior equities, if it appears that the indemnity lands are not sufficient to satisfy the losses in place.

Secretary Bliss to the Commissioner of the General Land Office, May 24, 1898.

(W. V. D.) (J. I. P.)

On March 15th last, the Department referred to your office for report, a letter from one Charles L. Shelly, of Morris, Minnesota, relative to

the claim of one Ole Sanaker to the NE. ¼ of Sec. 3, T. 123 N., R. 44 W., in the Marshall land district in said state, which it was alleged had been erroneously approved to the St. Paul, Minneapolis and Manitoba Railway Company. It was stated that said company had brought suit to eject Sanaker from said tract on which he had lived continuously since 1888, and on which he had made valuable improvements, and it was asked that the matter be investigated by the Attorney General and the proper action instituted by the United States to compel the railway company to relinquish this land, or to set aside the approval of it on account of inadvertence, etc.

Your report, dated March 29, last, shows the status of this land, so far as the railroad grant is concerned, to be as follows:

> This land is within the twenty mile indemnity limits of the grant for the St. Paul, Minneapolis and Manitoba Railway, main line, under the act of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), and was embraced in the withdrawal of May 25, 1869, which remained in force until May 22, 1891 (12 L. D., 541); and reserved the land from disposal under the public land laws (12 L. D., 27 and 228).
>
> The records of this office show that this land was selected by the St. Paul, Minneapolis and Manitoba Railway Company, main line, October 16, 1883, list No. 4; that the same was approved March 2, 1889; and patent issued thereon March 7, 1889.
>
> The basis designated by the company for the said tract was for land in section 9, T. 138 N., R. 48 W., within the primary limits of the grant for the St. Vincent Extension, St. Paul, Minneapolis and Manitoba Railway.

Said report then goes on to give the history of Sanaker's connection with said tract, which need not be here repeated, the point to which your attention is called being that, as shown by the records of your office, this tract was selected by said company October 16, 1883, as indemnity lands within the twenty mile indemnity limits of the grant for the St. Paul, Minneapolis and Manitoba Railway, main line, and that the basis designated by the company for said tract was for land within the primary limits of the grant for the St. Vincent Extension of said railway company.

On February 26, 1889, in the case of the St. Paul, Minneapolis and Manitoba Railway Company (8 L. D., 255), Secretary Vilas, following a decision, in reference to the adjustment of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, rendered by Secretary Chandler December 2, 1875, held—(Syllabus)

> The grant to the State of Minnesota in aid of a railroad 'from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North' is in effect an entirety and indivisible.
>
> If the indemnity lands provided for one of such lines or branches shall prove insufficient to make up the losses sustained along such line or branch, then the deficiency may be supplied from the indemnity limits of the other lines or branches.

On the 10th of June 1891, in the case of the St. Paul, Minneapolis and Manitoba and the St. Paul and Northern Pacific Railroad Company (13 L. D., 349), Acting Secretary Chandler, following the decision of

the supreme court in the case of the St. Paul and Pacific Railroad company *v.* Northern Pacific Railroad Company (139 U. S., 1), modified the decision of Secretary Vilas as follows: (Syllabus)

The St. Paul and Pacific Company had no grant from Crow Wing to St. Vincent, until the act of March 3, 1865, as changed by the act of 1871, conferred a new grant between these points, and it therefore follows that the grant for this part of the road cannot be adjusted in connection with the earlier grants to said company as an entirety.

and on October 1, 1891, Secretary Noble, on review of the decision last mentioned, adhered to said decision (13 L. D., 353) and held as follows: (Syllabus)

The grant to the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Ry, is a new grant, made by an act of Congress subsequent in date to those by which the original grant was made for the main line, and it therefore follows that the grant for said extension should not be adjusted in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later, and wherever the latter conflicts with the older grant, priority of right must be accorded the prior grant.

The separate adjustment of the grants for the main and branch lines precludes the right of indemnity selection by the older grant along the line of the younger, and *vice versa*.

In the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Hastings and Dakota Railroad Company (13 L. D. 440) it is held

A specification of losses on the line of the St. Vicent Extension cannot be accepted as the basis for selections on the main line of the St. Paul, Minneapolis and Manitoba Railway Company.

It would seem from the foregoing that the basis on which the selection of this tract was made was an erroneous one. But the rule requiring that every selection should be based on a designated loss may be and has been waived by the Department, and it is not improbable that it was waived in this case. If it should appear that the grant to the St. Paul, Minneapolis and Manitoba Railway Company is deficient, that there is not enough indemnity lands to satisfy the losses in place, then in the opinion of the Department, a suit should not be brought to vacate the patent for said tract issued to said company, especially in view of the absence of superior equities in the claim of Sanaker. You are directed, however, to note in the adjustment of the grant to said company, whether or not there has been patented to it lands in excess of its grant. If you find such to be the case, you will prepare a list of such lands and submit the same to the Department with your recommendations in the premises.

RAILROAD LANDS—ORDER OF RESTORATION.

INSTRUCTIONS.

Commissioner Hermann to the Register and Receiver at Los Angeles, California, April 13, 1898.

The supreme court of the United States has finally decided that the lands lying within the overlapping limits of the grant by act of Congress of March 3, 1871 (16 Stat., 573) to the Southern Pacific Railroad Company, branch line, and the forfeited portion of the grant by act of July 27, 1866 (14 Stat., 592) to the Atlantic and Pacific Railroad Company, are public lands and that the Southern Pacific Railroad Company has no right therein under said grant of 1871, Southern Pacific Rail- Co. *et al v.* United States (168 U. S., 1); and the Secretary of the Interior by letters of January 18 and 28, 1898 (26 L. D., 48 and 97), has directed that the restoration to entry of the lands which had been directed to be restored by departmental letter of July 15, 1893, but was suspended by Departmental letter of November 8, 1893, because of the pendency of the suit now decided, be proceeded with, certain lands being excepted.

Therefore, in order to carry the restoration into effect, you will cause to be published for the period of thirty (30) days in some newspaper of general circulation in your district, and in the vicinity of the lands, a notice that all lands lying within the overlapping limits of the Atlantic and Pacific Company's grant by act of July 27, 1866, and the Southern Pacific Branch Line grant by act of March 3, 1871, and not within the twenty mile primary limits of the grant by the former act to the Southern Pacific Company for its main line, heretofore reserved from entry for the Southern Pacific Company, are restored to the public domain, with the exceptions and additions to be noted further on, and will be subject to entry on a day to be fixed by the notice which shall not be less than thirty (30) days from the date of the first publication thereof.

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

That all said applicants, however, may have ample opportunity to present new applications when the lands may be opened to entry, I enclose herewith a list of such of them as have applications pending in this office, giving their post office addresses, and have to direct that

you at once specially notify said parties and any others shown by your records to have applications pending, of the rejection thereof, of the date of the restoration and of the necessity of presenting new applications for the protection of their rights.

The exceptions from the restoration are the lands involved in the suit recently decided by the supreme court (168 U. S., 1) which were claimed by defendants other than the Southern Pacific Railroad Company, and the trustees in the mortgage executed by that company, a list of which is enclosed marked "A," and the lands lying within the San Gabriel timber land reserve. While the lands within said timber reserve are generally excluded from the restoration, any claims therein initiated prior to its creation, which was by proclamation of the President of December 20, 1892, will upon presentation receive due consideration.

The south half of sections 7, 9 and 11 and all of sections 13, 15 and 17 in township 7 north, ranges 9, 10, 11, 12 and 13 west, though within the twenty mile primary limits of the Southern Pacific main line grant, were involved in the suit aforesaid and are also to be included in the restoration.

I transmit a diagram showing the limits of the said grants as they overlap the lands to be restored, and in explanation thereof will say that under the decision of the court the restoration will embrace all the public lands within the thirty (30) mile limits of the forfeited Atlantic and Pacific grant to the extent it is overlapped by the Southern Pacific branch line grant (both twenty and thirty mile limits) outside the twenty mile primary limits of the Southern Pacific main line grant, and also the tracts above described within said latter limits as being involved in the suit recently decided, with the exceptions noted.

The lands outside the primary limits of the Southern Pacific main line grant, and within the limits of its branch line grant, are of four classes, as follows: Lands within the common granted limits of the Atlantic and Pacific grant and the Southern Pacific grant of 1871; lands within the granted limits of said Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the granted limits of the Atlantic and Pacific grant and within the indemnity limits of the Southern Pacific grant, and lands within the common indemnity limits of both grants. The San Gabriel reservation is noted on the diagram and colored pink.

All applications to select and all selections by the Southern Pacific Railroad Company on account of its branch line of the lands to be restored, are rejected and canceled, respectively, and you will so note upon your records.

Any entries of lands which may have been allowed, will be permitted to stand, and if no superior adverse claims to the tracts covered by them are presented they may be perfected. In all cases of conflicting claims you will proceed in accordance with the rules of practice in similar cases.

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

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

Approved, May 3, 1898:

C. N. BLISS, *Secretary.*

ISOLATED TRACT—PRICE WITHIN RAILROAD LIMITS.

CHARLES TYLER.

Section 2455 R. S., as amended by the act of February 26, 1895, operates to reduce the minimum price of isolated and disconnected tracts in alternate reserved sections within the limits of a railroad grant from two dollars and fifty cents to one dollar and twenty-five cents per acre.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 23, 1898.* (E. B., Jr.)

This is an appeal by Charles Tyler from the decision of your office dated January 1, 1896, holding that the tract of public land described as the NE. ¼ of the NE. ¼ and the S. ½ of the NE. ¼ of Sec. 30, T. 44 N., R. 2 W., Ashland, Wisconsin, land district, being part of an alternate reserved section within the primary limits of a railroad grant, is therefore double minimum land, and that to entitle him to patent for the same he must pay, as the price thereof, one dollar and twenty-five cents per acre additional to the one dollar and twenty-five cents already paid; that is, a total of two dollars and fifty cents per acre.

The land was sold to him at public sale September 21, 1895, for one dollar and twenty-five cents per acre, as an isolated or disconnected tract, under section 2455 Revised Statutes, as amended February 26, 1895 (28 Stat., 687). The contention of the appeal, briefly stated, is, that this amended section authorizes the Commissioner of the General Land Office to order into market and sell any such isolated or disconnected tract or parcel of public land, whether part of an alternate reserved section or not, for not less than one dollar and twenty-five cents per acre, upon the conditions therein named.

This tract is within the primary limits of the grant of May 5, 1864 (13 Stat., 66), to the State of Wisconsin, to aid in the construction of certain railroads (which grant inured to the benefit of the Wisconsin Central Railroad Company) and is one of the alternate even numbered sections reserved to the United States, the price and sale of which were regulated by section four of such granting act as follows:

> 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; nor shall any of the said reserved lands become subject to private entry until the same have been first offered at public sale at the increased price.

Most, if not all, of the railroad land grants, contain similar provision as to the price of the alternate reserved sections.

The act of March 3, 1853 (10 Stat.; 244), extended existing pre-emption laws to alternate reserved sections, and fixed the price thereof to pre-emptors, as follows:

> That the pre-emption laws of the United States, as they now exist, be and they are hereby extended over the alternate sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of Congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver, or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction. . . . *And provided further*, That the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law, or may be fixed upon lands hereafter granted;

The general policy of fixing the minimum price of reserved lands within the limits of railroad land grants at double minimum, or two dollars and fifty cents per acre, as manifested in the several granting acts and in the act of March 3, 1853 (*supra*), is expressed in a proviso to section 2357 of the Revised Statutes. That section is made up from former statutes regulating the price of all public lands and is as follows:

> The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: *Provided*, That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

Section five of the act of August 3, 1846 (9 Stat., 51), brought into the Revised Statutes, substantially unchanged, as section 2455, gave authority for ordering into market, for public or private sale, any isolated or disconnected tract of public land, but made no provision as to the price thereof, leaving that to be determined by other statutes.

The act of March 2, 1889 (25 Stat., 854), prohibited the *private* sale of any public lands, except those in the State of Missouri. Section nine of the act of March 3, 1891 (26 Stat., 1095–1099) prohibited any future *public* sale of public lands, but made express exception, among others, of "isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes." The public sale of isolated or disconnected tracts was not affected by either of these acts, but thereafter they were not subject to private sale, unless in Missouri, and were only saved from the prohibition against public sale by the express exception in the latter act of isolated or disconnected tracts.

As amended by the act of February 26, 1895, section 2455 reads:

> It shall be lawful for the Commissioner of the General Land Office to order into market and sell *for not less than one dollar and twenty-five cents per acre* any isolated or disconnected tract or parcel of the public domain less than one quarter section, which in his judgment it would be proper to expose to sale, after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the Government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

As it stands since the amendment, that section, according to its plainly expressed language, if unaffected by other legislation, unquestionably authorizes the sale of isolated or disconnected tracts or parcels of the public domain, whether within the limits of any railroad grant or elsewhere, at a price of not less than one dollar and twenty-five cents per acre. They may be sold as much higher than the minimum as any one is willing to bid, but cannot be sold for less than that sum.

Section four of the granting act, hereinbefore quoted, and the proviso to section 2357, control the price of alternate reserved sections, within the limits of this grant, unless the amended section 2455, works a partial repeal thereof to the extent of excepting isolated or disconnected tracts from the operation thereof. The question then is: Do section four of the granting act and the proviso to section 2357, continue, unimpaired, to fix the minimum price of all isolated or disconnected fractions of alternate reserved sections, or did section 2455, as amended, operate to reduce the *minimum* price of isolated or disconnected tracts in such reserved sections, from two dollars and fifty cents to one dollar and twenty-five cents per acre?

These sections are plainly irreconcilable as to the price of such tracts, giving to the language of each its general and ordinary meaning. They can not both be administered as to price in respect to these tracts. The amended section is not restricted or confined to lands lying outside of railroad or other land grants. Its language is: "Any isolated or disconnected tract or parcel of the public domain." These words are broad and comprehensive enough to include the particular class of lands therein defined, wherever found. The statute is special in that it only applies to such isolated or disconnected tracts but it is of equal application to all of them. As the section stood before the amendment, such tracts when located within an alternate reserved section were clearly within its meaning and application, but at that time the section was silent as to price, that matter being determined by other statutes which made the minimum price depend upon location, that is, land within alternate reserved sections was two dollars and fifty cents an acre, and land located elsewhere was one dollar and twenty-five cents an acre.

Had Congress intended that the price of isolated and disconnected tracts of public land should remain as then fixed, it was not necessary

to have enacted any new legislation as to the *price* thereof. Such legislation only became necessary in pursuance of an intention to make some change, and Congress having, under these circumstances, legislated with respect to the price of such tracts in the amendatory act, and having placed no limit or restriction on such new legislation, the Department believes that it was the intention to cover the whole field of price and not to leave a portion of the field to other legislation fixing a different price. This view seems to be strengthened when we consider the history of the act of February 26, 1895, by which section 2455 was so amended. The bill was known as H. R. 4952, and when it was introduced into and passed the House of Representatives, its language and terms were identically those of the present act excepting that the words "one dollar and twenty-five cents per acre" where they now occur, then read "two dollars and fifty cents per acre." In the Senate the bill was amended by striking out the words "two dollars and fifty" and by inserting "one dollar and twenty-five" in lieu thereof. As so amended the bill passed the Senate and the amendment was concurred in by the House of Representatives. The difference in opinion thus manifested was not as to whether this act should fix the price but was as to what the minimum price should be. The Department is of opinion that Congress intended to establish a uniform minimum price for all isolated or disconnected tracts.

As before stated, the provision as to price of lands in alternate reserved sections in the fourth section of this grant is common to nearly all, if not to all, grants in aid of the building of railroads, and Congress was well aware of these provisions when the amended section in question was enacted. It was also aware of the provisions of section 2357 Revised Statutes, fixing one dollar and twenty-five cents an acre as the general minimum price of public lands and fixing two dollars and fifty cents an acre as the price of alternate reserved lands within the limits of railroad grants, so that unless the provision as to price in the amended section 2455 was inserted with the intention of thereby covering the whole subject to the exclusion of prior statutes, it was idly inserted, has no meaning, and adds nothing to the section. A statute should be so construed as to give effect to every part thereof, and it will be presumed that every part was intentionally and deliberately enacted.

Certain it is that any lands coming within the kind or class described in the amended section may be sold thereunder. As to kind or class, the terms and words of description are—

> *Any* isolated or disconnected tract or parcel of the public domain less than one quarter section. . . . . *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold, by the government.

This language clearly embraces such tracts wherever located, those within the limits of alternate reserved sections in railroad grants as

well as those elsewhere. If a tract or parcel of land is embraced in any of the provisions of the amended section, it is equally embraced in all of them, that as to price as well as others. If the amended section does not embrace isolated or disconnected tracts or parcels when within the alternate reserved sections of a railroad grant, then there is no existing provision for their sale, since the section as it stood at the time of its amendment was the only law which authorized the sale of such tracts, and there has been no other legislation in the premises. They were included in the section as it stood before the amendment and the inserting of the provision as to price was not sufficient in itself to exclude them from it.

The isolated or disconnected tracts or parcels so authorized to be sold, must have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold, so they have necessarily proved to be not desirable as homesteads. Many of them can not be sold for as much as two dollars and fifty cents per acre, and Congress was aware of this when the amendatory legislation in question was enacted. On the other hand, where there remain valuable tracts of the kind or class defined, the government's interests are amply safeguarded by the discretion with which the Commissioner is clothed in determining whether a sale shall be ordered, and by the published invitation for competition in price at any authorized sale.

It is believed that the case of United States *v.* Healey (160 U. S., 136), does not control the question here discussed and does not require a different conclusion from that here announced. After full and careful consideration, the Department has reached the conclusion that it was intended to provide in section 2455, as amended, a simple comprehensive and exclusive plan for the public sale of such isolated or disconnected tracts or parcels of public lands and to subject all tracts or parcels coming within the definition there given, to the same condition as to price. The tract sold to Tyler was sold at public sale at a price authorized by the section as amended. If the sale was otherwise regular, it should be approved by your office and patent should issue thereunder.

The decision of your office is accordingly reversed.

CONTEST—INTERVENING CONTESTANT—ORDER FOR HEARING.

MURPHY *v.* MURPHY ET AL., TAYLOR AND ALLEN INTERVENORS.

An affidavit of contest filed during the pendency of a prior contest, charging fraud and collusion as against the parties to the pending suit, should be held to await the final disposition of said suit.

Secretary Bliss to the Commissioner of the General Land Office, May 26, (W. V. D.) *1898.* (F. C. D.)

Charles M. Taylor has appealed from your decision of April 4, 1896, wherein you dismissed the contest of Will Murphy, and held the con-

test and intervention of Taylor until the final determination of Murphy's contest.

The land involved herein is the NE. ¼ of Sec. 20, T. 15 N., R. 2 E., Guthrie, Oklahoma, land district.

On December 14, 1892, Alexander McDonnell made homestead entry for the said land, and on March 3, 1893, the entryman died, leaving his widow, Mary McDonnell, above named, as his only heir.

On December 10, 1894, Will Murphy, above named, filed affidavit of contest against said entry, charging abandonment of said land by said Mary McDonnell. No notice issued.

On January 19, 1895, Charles M. Taylor, above named, filed an affidavit of contest against said entry, alleging, in substance, that said Mary McDonnell had executed a relinquishment for said land and was holding said land for sale and speculation only.

On February 14, 1895, the relinquishment of Mary McDonnell was filed, and Jordan W. Murphy immediately made homestead entry for said land.

April 11, 1895, Will Murphy filed an amended affidavit, alleging, in effect, that the said relinquishment of Mary McDonnell was the result of his contest and that therefore he was entitled to preference right of entry, and asked that Jordan W. Murphy be cited to show cause why his entry should not be canceled, which application was granted and notice issued thereon.

On April 12, 1895, Charles M. Taylor, above named, filed an amended affidavit of contest, alleging, in effect, fraudulent collusion between Will Murphy, Jordan W. Murphy and Mary McDonnell, and asked to be allowed to "intervene" and to prove the collusion and fraud as alleged.

No notice appears to have been issued either on the original or amended affidavit of Taylor, or was served on any of the said parties, until the day of trial, when a notice was served on Will Murphy and Jordan W. Murphy.

On May 28, 1895, the day set for the hearing on the contest of Will Murphy, an agreed statement of facts was filed by the Murphys. After the case was closed, Taylor requested them to take the witness stand and testify in his behalf, which they declined to do. Thereupon Taylor submitted the testimony of one witness in support of his allegations.

On June 20, 1895, the register and receiver rendered their joint decision in favor of Taylor and recommended the cancellation of said entry of Jordan W. Murphy; from which decision the entryman and Will Murphy appealed to your office.

Will Murphy has not appealed from your said decision; therefore, as far as his rights are concerned, your decision has become final.

As Taylor's said affidavit of contest charging fraud and collusion against the Murphys was filed while the contest of Will Murphy was pending, no notice should have issued on Taylor's said affidavit, but it

should have been held for the final disposition of the prior contest. Melcher *v.* Clark, 4 L. D., 504; Ludwig *v.* Faulkner *et al.*, 11 L. D., 315; and Gregg *et al. v.* Lakey, 17 L. D., 60.

The holding of your office to that effect is correct and is affirmed.

On November 21, 1896, your office transmitted to the Department an affidavit of contest filed by one Thomas Allen, in the local office, on August 29, 1895, against the entry of Jordan W. Murphy, alleging fraud and collusion between the said Jordan W. Murphy, Will Murphy and Charles M. Taylor, which affidavit is accompanied by, and is attached to, a motion by said Allen, asking to be allowed to intervene herein and have a hearing on his said affidavit. But as Taylor's contest was pending when Allen filed his said affidavit, the latter must be held to await the final determination of said contest.

Taylor's contest has now matured, and you will therefore order a hearing therein, causing due notice thereof to be given both Taylor and Jordan W. Murphy.

The decision of your office is modified in accordance herewith.

RAILROAD LANDS—WITHDRAWAL—ACT OF MARCH 2, 1896.

UNION PACIFIC R. R. CO.

Under the provisions of section 1, act of March 2, 1896, suit will not lie to vacate patents issued under the act of June 22, 1874, in lieu of lands lost or relinquished in consequence of the failure of the government to withdraw said lands from sale or entry.

Secretary Bliss to the Commissioner of the General Land Office, May 26, 1898.

(W. V. D.) (F. W. C.)

I have the honor to acknowledge receipt of letter from your Department dated May 2, 1898, enclosing

a copy of an opinion by the circuit court for the district of Utah in one of several suits in Utah and other jurisdictions brought against the Union Pacific Railroad Company to recover lieu lands.

In said letter it is stated that—

The suits were recommended by your Department in 1892. The court holds that the company lost or relinquished its land in consequence of the failure of the government or its officers to withdraw the same from sale or entry, within the meaning of the proviso of the act of March 2, 1896. I desire to know whether your Department so understands the proviso and the facts, and whether the facts are the same as to company's lands in other jurisdictions.

Said letter was duly referred to the Commissioner of the General Land Office, and from his report made thereon it appears that the patent sought to be vacated was issued to the company under the provisions of the act of June 22, 1874 (18 Stat., 194), in lieu of certain tracts within the limits of the grant relinquished by the company.

From the statement of facts made in the opinion, copy of which is enclosed, it appears—

that certain filings were permitted to be made on land that was within the original grant to the company, but before the withdrawal of the land from entry and before the filing of the map of definite location, but after the filing of the map of general location and after the land should have been withdrawn. Under the act of Congress of 1874, and at the suggestion of the Department of the Interior, the defendant company released its claim on the lands so filed on, and applied for land in lieu thereof, which application was granted and the patent in question issued. It is now sought to set aside said patent on the ground of mistake and inadvertence in the Department in issuing the same. No fraud is alleged.

The Commissioner reports that the company filed a map of the proposed route of its road from a point one hundred miles west of Omaha to Salt Lake City, on June 28, 1865, and that the road was definitely located April 28, 1869.

The operation of the public land laws was not extended to the Territory of Utah until July 16, 1868, and a land office at Salt Lake City was not established until March 9, 1869. No formal order of withdrawal was made on account of this grant until May 15, 1869, which order was acknowledged as received at the local office May 24, 1869.

By the terms of section 7 of the act of July 1, 1862 (12 Stat., 489), making the grant for said company, it was provided that the Secretary of the Interior should upon the filing of the map of *general route*, cause the lands within fifteen miles of said designated route to be withdrawn from pre-emption, private entry and sale. By the amendatory act of July 2, 1864 (13 Stat., 356), the limit of the withdrawal upon the map of general or designated route was extended to twenty-five miles.

It will thus be seen that it becomes the duty of the Secretary of the Interior, upon the filing of the map of general route, which in this instance was June 28, 1865, to withdraw the lands falling within twenty-five miles of said route.

At this time, as before stated, a land office had not been established in the Territory of Utah nor had the operation of the general land laws been extended to that Territory, but there was nothing in this which necessarily prevented the Secretary from complying with the statutory direction to make a withdrawal or reservation in aid of the grant. His authority therefor was found in the granting act and was not dependent upon a subsequent extension of the public land laws. During the period that preceded the extension of the public land laws to Utah no harm could result to the company from the failure to make the withdrawal directed by the statute to be made upon the filing of the map of general route, but during the period intervening between such extension of the public land laws and the order of withdrawal on definite location, the failure to make withdrawal on general route, permitted many persons who settled after the filing of the map of general route but prior to the order of withdrawal on definite location, to carry their settlement into entries and filings. In order to relieve such claimants from loss, it appears from the records of this Department that on

February 25, 1875, the land commissioner for this company executed a general relinquishment of all tracts within the twenty-five mile limit established upon the line shown upon the map filed June 28, 1865, which had been proved up and entered by *bona fide* settlers under the pre-emption and homestead laws, where such claims were based on settlements or entries made subsequently to the filing of the map of general route and prior to the definite location of the road.

In transmitting said relinquishment to the Commissioner of the General Land Office, it was held that the company's rights under the map of general route took effect from the date of the filing of the same, June 28, 1865, in effect, recognizing the withdrawal authorized by the statute upon filing map of general route, as a legislative withdrawal, and it was evidently under this decision (February 27, 1875), that the company made the selection which was afterwards patented, which patent was sought to be set aside by the suit under consideration.

In the case of the Kansas Pacific Railway Company *v.* Dunmeyer (113 U. S., 629) the court had under consideration the question as to the effect of a withdrawal upon the filing of the map of general route. It was urged in that case that until an executive order issued withdrawing the lands, they remained open to entry unaffected by the map of general route. It was held in said opinion, however:

> But we are of opinion that the duty of filing this map, as required by the act, like that of the line of definite location, is performed by filing it in the General Land Office, which is filing it with the Secretary of the Interior, and that whatever rights accrue to the company from the act of filing it accrue from filing it there.

The court does not attempt to determine what those rights are, nor what would be the effect of the failure of the Secretary to withdraw the land, or of his act in allowing an entry before definite location after the withdrawal of the land.

In that case the entry, allowed after the filing of the map of general route and before definite location, was recognized under the peculiar terms of the law of July 3, 1866, which related specifically to the Kansas Pacific Railway Company, and not to the portion of the road opposite the land in suit.

It is clear that if the company lost the lands by reason of claims initiated after the filing of the map of general route and before definite location, it was because of the failure of the government or its officers to withdraw the same from sale or entry.

In section 1 of the act of March 2, 1896 (29 Stat., 42), it is provided:

> That no suit shall be brought or maintained, nor shall recovery be had, for lands, or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry.

This provision is applied by the court to the case under consideration; and in view thereof decree was entered dismissing the bill. In the opinion of this Department the provision is properly applied by the court.

Relative to the question "whether the facts are the same as to company's lands in other jurisdictions," it would be impossible to make a definite answer without a description of the lands included in each specific case.

JORDAN *v.* SMITH.

Motion for review of departmental decision of April 15, 1898, 26 L. D., 527, denied by Acting Secretary Ryan, May 28, 1898.

HOMESTEAD ENTRY—ALIENATION—RESCISSION OF CONTRACT.

CRAWFORD *v.* STUDY.

A homestead entry must be canceled as in violation of law, where it appears that prior to making such entry the homesteader verbally agreed to enter the land for townsite purposes, and after making entry executed a written agreement to the same effect, and the rescission of said agreement prior to contest will not operate to relieve the entry of its illegal character.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 28, 1898.* (C. J. G.)

October 31, 1893, Leonard Study made homestead entry for the NE. ¼ of Sec. 34, T. 29 N., R. 2 W., Perry land district, Oklahoma.

April 27, 1894, Albert B. Crawford filed affidavit of contest against said entry, alleging:

That said Leonard Study, as affiant is informed and believes, is holding said land in violation of his homestead affidavit by holding it for speculative purposes and not in good faith for a homestead; that on or about the 20th day of November, 1893, the said Study entered into a contract with the Wichita Townsite and Homestead Company to enter the land for townsite purposes and when he secured the title to said land that he would convey said title to them to about 350 lots; that in accordance with said contract the said company did dispose of said lots by lottery schemes and drawings and in addition thereto did sell forty lots to different individuals under the agreement to deliver deed to said lots when he secured title thereto, the land having been surveyed into lots; that said tract is used for the purposes of trade and business and that said Study is not holding said tract in good faith as a homestead but for the purpose of speculation.

November 9, 1895, upon the evidence submitted, consisting of testimony taken by depositions and orally, the local office rendered decision in favor of Crawford, recommending cancellation of Study's entry.

It appears that Study settled upon the land in controversy September 16, 1893, and having erected a cabin thereon moved his family to said land September 28, 1893, where they have resided continuously ever since. The defendant testifies that he endeavored several times to make entry, but was unable to place his entry of record until October 31, 1893, as heretofore stated.

The evidence further shows that November 21, 1893, the defendant and his wife entered into a written agreement with the Wichita Town-

site and Homestead Company to enter the land in question for townsite purposes and, having so entered it, to convey the same by warranty deed to said company, with the exception of certain reservations therein described; that about January 20, 1894, the defendant informed said company of his desire to rescind said contract; that the rescission was completed about April 7, 1894, after he had seen the members of the company and informed them of his repudiation of the contract and demanded its return. It seems that defendant's rescission was acquiesced in by the company but the contract was never returned to him.

The decision of the local office is based on the ground that defendant had agreed with the company to enter this land for townsite purposes, prior to his entry, and that therefore said entry was not made solely for his benefit. Defendant denies any such prior verbal contract, but it was held that the evidence shows that there was such an understanding.

July 25, 1896, your office, upon Study's appeal, concluded as follows:

> It is true that defendant settled upon the land in good faith; that he only perfected his contract with said company after being convinced of its legality; that said contract was rescinded before contest was filed; that whatever contracts were made by other parties with said company for lots of said land appear to have been abandoned and whatever amounts paid by them to said company returned; that it is possible that defendant did not intend to evade the requirements of the homestead law. But all this does not relieve the defendant of the consequences of his acts. (Tagg *v.* Jensen, 16 L. D., 113: Palmer *v.* Stillman, 18 L. D., 196).

The defendant has now appealed to this Department.

The evidence in this case leads fairly to the conclusion that Study had verbally agreed with the Wichita Townsite and Homestead Company to enter the land in controversy for townsite purposes, prior to the date of his entry. The law, however, forbidding the entering into an agreement, or making any contract, to convey the land embraced in a homestead entry, covers the whole period prior to submission of final proof. In his affidavit filed at the time he applied to make homestead entry of this land Study swore among other things to the following:

> That I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatever by which the title which I might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself.

This is the form of affidavit prescribed under section 2290 of the Revised Statutes, as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095), which was before the time Study made his entry. As was said in the case of Walker *v.* Clayton, 24 L. D., 79, which is in some respects similar to the one under consideration:

> It was evidently implied, if not expressed, in his contract with the United States, that he would continue to hold, reside upon and cultivate the land for his exclusive use and benefit until the time should arrive, when, after the submission of final proof as required by law, he had earned his right to receive patent therefor.

Much stress is laid in the appeal upon the fact that the defendant had rescinded the contract in question prior to the date of the contest. The force of this recission on the part of the defendant may be gathered from his testimony wherein he admits that he meant to carry out the contract just as it was; which in the light of surrounding circumstances may fairly be interpreted to mean that if the townsite scheme had proven a success the defendant stood ready to comply with his agreement. It is also urged that defendant was led to believe that after he had secured his entry such a contract would not be illegal; and finding that it was probably illegal he immediately took steps to repudiate it. It is furthermore contended that the main question in issue is as to whether defendant was holding the land in violation of his homestead affidavit and for speculation at the time the contest was filed. On the contrary, this being a matter between the government and the entryman, the main question is whether the defendant has at any time violated the terms of his homestead affidavit. As was said in the case of Walker *v.* Clayton, *supra:*

> Neither is it any sufficient answer that by its terms the agreement had come to an end long before contest was initiated. . . . . If when threatened with exposure of bad faith a homesteader could in each instance avoid the consequences by simply repudiating his contract to convey, the sanction of the law would be overthrown.

Your said office decision is hereby affirmed.

WEISNER *v.* CLEM.

Motion for rehearing in the cause above entitled denied by Acting Secretary Ryan May 28, 1898. See departmental decisions of March 3, 1898, 26 L. D., 300, and April 27, 1898, id., 575.

HENRY WILD.

Motion for review of departmental decision of February 25, 1898, 26 L. D., 267, denied by Secretary Bliss, May 31, 1898.

RULES OF PRACTICE AMENDED.

Commissioner Herman to Registers and Receivers U. S. Land Offices, May 26, 1898.

Rules 11, 14 and 17 of practice are hereby amended so as to read as follows:

Rule 11.—Notice may be given by publication only when it is shown by affidavit presented on behalf 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 can not be made. The affi-

davit must also state the present post-office address of the person intended to be served, if it is known to the affiant, and must show what effort has been made to obtain personal service.

Rule 14.—Where notice is given by publication a copy thereof shall, at least thirty days before the date for the hearing, be mailed, by registered letter, to each person to be so notified at the last address, if any, given by him as shown by the record, and to him at his present address named in the affidavit for publication required by Rule 11, if such present address is stated in such affidavit and is different from his record address. If there be no such record address and if no present address is named in the affidavit for publication, then a copy of the notice shall be so mailed to him at the post-office nearest to the land. A copy of the notice shall also be posted in the register's office for a period of at least thirty days before the date for the hearing and still another copy thereof shall be posted in a conspicuous place upon the land for at least two weeks prior to the date set for the hearing. When notice of proceedings commenced by the government against timber and stone entries is given by publication the posting of notices upon the land will not be required.

Rule 17.—Notice of interlocutory motions, proceedings, orders, and decisions, shall be in writing and may be served personally or by registered letter mailed to the last address, if any, given by or on behalf of the party to be notified, as shown by the record, and if there be no such record address, then to the post office nearest the land; and in all those contest cases where notice of contest is given by registered mail under Rule 14, and the return registered receipt shows such notice to have been received by the contestee, the address at which the notice was so received shall be considered as an address given by the contestee, within the meaning of this rule.

The aforesaid rules as amended shall take effect on the 1st day of July, 1898, and be applied to all cases initiated after that date.

Approved:

C. N. BLISS,
Secretary.

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* For the word "Territories," in the second line from the bottom of page 537, read *corporations.*

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